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Maritime Jurisdiction and the Secession of States: The Case of Quebec

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ABSTRACT

In this Article, Professor Charney discusses the maritime boundary delimitation issues that result from the creation of a new state through secession. While the author uses Quebec's maritime boundary concerns as an exemplar, the issues discussed are not unique to Quebec. The author notes that one cannot predict the ultimate resolution of maritime boundary disputes precisely, but certain factors will often affect the outcome. These factors include the geographical configuration of the disputed area, the viability of pre-secession boundaries, historic water claims, the doctrine of uti possidetis, *and basic equity. The author concludes that maritime boundaries are so vital to a nascent state that boundary disputes should be settled by negotiation prior to secession.*

TABLE OF CONTENTS

I. INTRODUCTION 344
II. THE LEGAL SETTING 346
III. LIMITS TO THE TERRITORIAL SOLUTION 359

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IV. INTERNATIONAL LAW RULES FOR MARITIME BOUNDARY DELIMINTATION 365
A. *The Baseline* 365
B. *The Territorial Sea, Contiguous Zone, Exclusive Economic Zone, and Continental Shelf* 371
C. *Maritime Boundaries Between Opposite and Adjacent States* 372
1. The Norm in General 372
2. The Equidistant Line as a Rule of Law .. 376
a. The 1958 Conventions and Subsequent Cases 376
b. The 1982 Convention on the Law of the Sea 378
c. Equidistance in Modern Cases and Practice 378
3. Nongeographic Considerations 380
4. Tacit Agreement, Estoppel, Acquiescence, and *Modus Vivendi* Line Considerations ... 381
5. Proportionality 382
V. THE DELIMITATION OF QUÉBEC'S MARITIME ZONE . 383
A. *The Gulf of Saint Lawrence* 383
1. Description of the Québec Boundary 383
2. Legal Status of the Gulf of Saint Lawrence 384
a. The Normal Baseline 384
b. Historic Water Status 386
3. Martime Boundaries in the Gulf 397
a. The 1964 Interprovincial Boundary Agreement 397
b. Maritime Boundaries in the Gulf 399
B. *Hudson Bay* 401
1. The Legal Status of Hudson Bay 401
2. Maritime Boundaries in Hudson Bay 417
C. *Hudson Strait* 419
1. The Legal Status of Hudson Strait 419
2. Maritime Boundaries in Hudson Strait 424
VI. CONCLUSION 425

I. INTRODUCTION

The consolidation and disintegration of states and empires are recurring themes in international relations. Most observers expected a period of stability after the widespread decolonization of the 1970s and 1980s. Surprisingly, however, the Soviet empire collapsed shortly thereafter,

leading to the independence of the Soviet Republics and the break up of Yugoslavia. Some consolidation has occurred, for example, through the absorption of the German Democratic Republic by the Federal Republic of Germany. Canada may experience disintegration as Québec continues its push for independence. Negotiations within Canada face an uncertain future.[1]

The establishment of a new state from a portion of a larger state's territory raises a variety of legal, political, economic, and security issues. Often the territorial boundaries of the new state are of central importance. These boundaries may be located on land and in the adjacent waters.

A seceding state might face a number of maritime boundary issues. First, the state must determine under the domestic law of the mother state the location of its boundaries on the adjacent waters. Second, the state must determine the legal status under international law of waters adjacent to its territory. Rights in those waters under domestic law often reflect the peculiarities of domestic legal, economic, and political circumstances that may be incompatible with independence or international law. Once maritime zones are identified, questions then arise regarding the actual delimitation of maritime boundaries between the new and the old state similar to those issues that have arisen for coastal states worldwide. The seceding state may find itself in conflict with the mother state on maritime boundary questions as a consequence of its independence. In distancing itself from the status quo, a new state may wish to replace boundary descriptions adopted for domestic purposes. Whether the pre-independence boundaries remain viable for the newly independent state that previously had been part of a larger integrated political union is one of the many practical problems seceding states must face. Such states may even wish to raise historic claims previously suppressed as a consequence of inclusion in the mother state. Issues concerning straight baseline systems may arise and the new state may invoke the doctrine of *uti possidetis*.

This Article will examine the issues relating to the maritime jurisdiction of a state seceding from a larger territorial unit. Specifically, it will

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1. A recent Brookings Institution publication predicts ultimate secession by Québec and the possibility that over the long term the entire Canadian Confederation would disintegrate. *See* THE COLLAPSE OF CANADA? (R. Kent Weaver ed., 1992). As this article went to press negotiations on amendments to the Canadian Constitution were concluded and plans were in motion to hold a nationwide referendum. Hopes were high that the amendments would be approved and that Québec would not secede. *Canada Sets the Date for Its Vote on Unity*, N.Y. TIMES, Sept. 4, 1992, at A4.

analyze the questions that an independent nation-state of Québec would face were it to secede from the Canadian Confederation. The Article does not take a position, however, on the political question of whether Québec should become independent. The analysis of the issues is divided into four substantive sections that address, in turn, the legal setting, the limits to the territorial solution, the international law rules for hypothetical maritime boundary delimitation, and the delimitation of Québec's maritime zones.

II. THE LEGAL SETTING

Québec is presently a province of Canada. As a sovereign state, Canada has legal authority over the maritime areas adjacent to its land territories. International law defines this authority and provides for a number of zones in which the coastal state may exercise jurisdiction. These zones include internal waters, territorial sea, contiguous zone, fishery zone/exclusive economic zone, and continental shelf. International law also defines the extent of these zones and the nature of the authority held by the coastal state. 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 those water areas landward of its baseline as defined by international law. That baseline is the mean low-water line along the shore, closing lines of twenty-four nautical mile bays (juridical bays) and river mouths, the limits of historic waters and bays, and systems of straight baselines. Canada has claimed a twelve nautical mile territorial sea[2] and has established systems of straight baselines on portions of its coasts (but not on Québec's coast).[3] Canada has also claimed continental shelf sovereign rights up to the depth of two hundred meters and the depth of exploitation,[4] fishing zones in certain waters, and a two hun-

2. An Act to amend the Territorial Sea and Fishing Zones Act, R.S.C., ch. 45, § 3(1) (1970).

3. Territorial Sea and Fishing Zones Geographical Coordinates (Areas 1, 2 & 3) Order (Oct. 26, 1967), P.C. 1967-2025, SOR/67-543, 101-21 C. Gaz. 1967, *reprinted in* U.N. ST/LEG/SER. B/15, at 54; Territorial Sea and Fishing Zones Geographical Coordinates (Areas 4, 5 & 6) Order of 1969, P.C. 1969-1109, SOR/69-278, 103-11 C. Gaz. 1969, *reprinted in* U.N. ST/LEG/SER. B/16, at 6. These straight baselines were revised in 1972. Territorial Sea Geographical Coordinates Order, P.C. 1972-966, 106-10 C. Gaz. 1972 (Areas 1 & 6); Territorial Sea Geographical Coordinates, Order, P.C. 1985-2739, 119-20 C. Gaz. 1985 (Area 7). These boundaries are illustrated in ATLAS OF THE STRAIGHT BASELINES 93-98 (Tullio Scovazzi et al. eds., 1989).

4. Oil and Gas Production and Conservation Act, R.S.C., ch. 0-4, § 3(b) (1969).

dred nautical mile zone in the Atlantic, Pacific, and Arctic.[5] The territorial-sea boundary between Canada and France (St.-Pierre and Miquelon) was settled by treaty.[6] The dispute over the seaward boundary in that area was recently resolved by international arbitration.[7] Canada's continental shelf boundary with Denmark (Greenland) has been settled by treaty[8] and its maritime boundary with the United States in the Gulf of Maine was established by a judgment of the International Court of Justice (the I.C.J.).[9]

The international law for identifying the baseline used to delimit internal waters and the territorial sea has changed substantially over the past one hundred years. Although international law still uses a baseline approximating the mean low-water line, other rules have moved the baseline seaward. Thus, early international law limited juridical bay closing lines to six nautical miles. The current limit, however, is twenty-four nautical miles. Other liberalizations have occurred. Coastal states may establish systems of straight baselines along deeply indented or island fringed coasts and mid-ocean archipelagic states may now establish archipelagic baselines under certain circumstances.[10] International law also permits coastal states to establish extraordinary jurisdiction over waters based upon the maturation of historic water claims.

Canada, as a nation-state, has some international legal authority 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 territorial sea baseline (the mean low-water line, twenty-four nautical mile bay closing lines, and river closing lines). Although a twelve

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5. P.C. 1971-366 (Zones 1, 2 & 3) (Order Prescribing Zones Within the Bay of Fundy, Gulf of St. Lawrence, Queen Charlotte Sound, Dixon Entrance, and Hecate Strait); P.C. 1977-1, 111-1 C. Gaz. 1977 (Zones 4 & 5); P.C. 1977-379, 111-5 C. Gaz. 1977 (Zone 6).

6. Agreement between Canada and France on Their Mutual Fishing Relations, Mar. 27, 1972, *in* INTERNATIONAL MARITIME BOUNDARIES, Report Number 1-2 (JONATHAN I. CHARNEY & LEWIS M. ALEXANDER eds., forthcoming 1992) [hereinafter INTERNATIONAL MARITIME BOUNDARIES].

7. Case Concerning the Delimitation of Maritime Areas Between Canada and the French Republic, Court of Arbitration Decision of June 10, 1992. *See* Ted L. McDorman, *The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon*, 84 AM. J. INT'L L. 157 (1990).

8. INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, at Report Number 1-1.

9. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, at Report Number 1-3.

10. United Nations Convention on the Law of the Sea, arts. 3-14, 47, U.N. Doc. A/Conf.62/122 (1982), 21 I.L.M. 1261 [hereinafter 1982 LOS Convention].

nautical mile territorial sea measured from this baseline would not encompass all these waters, the two hundred nautical mile limit of the exclusive economic zone would do so. This is true even in the extremely large Hudson Bay, where two hundred nautical mile arcs drawn from the mean low-water line along the mainland and all the islands would completely overlap. As a maximum claim, Canada could assert that the entire water areas of Hudson Bay, Hudson Strait, the Gulf of Saint Lawrence, and subsidiary water bodies are included in its internal waters pursuant to historic water status or established systems of straight baselines.[11]

In theory, there are substantial differences between the various zones of coastal state jurisdiction in maritime areas. In many respects, however, the substantive differences are rather small. Thus, regardless of whether the maritime areas are internal waters, territorial seas, or exclusive economic zones, the coastal state virtually has complete control over economic development and scientific research within those areas. The coastal state also has substantial authority with regard to environmental protection.[12] 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 significant authority over environmental protection 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 rules applicable to navigation in offshore areas.[13]

Because 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, Canada may decide whether to allocate this authority to Québec. Canadian domestic law determines the allocation of authority over these maritime areas between the Canadian government and the provinces. This allocation, however, is not completely settled. Canadian courts have rendered judgments in four important cases on this matter, none of which directly bind Québec.[14]

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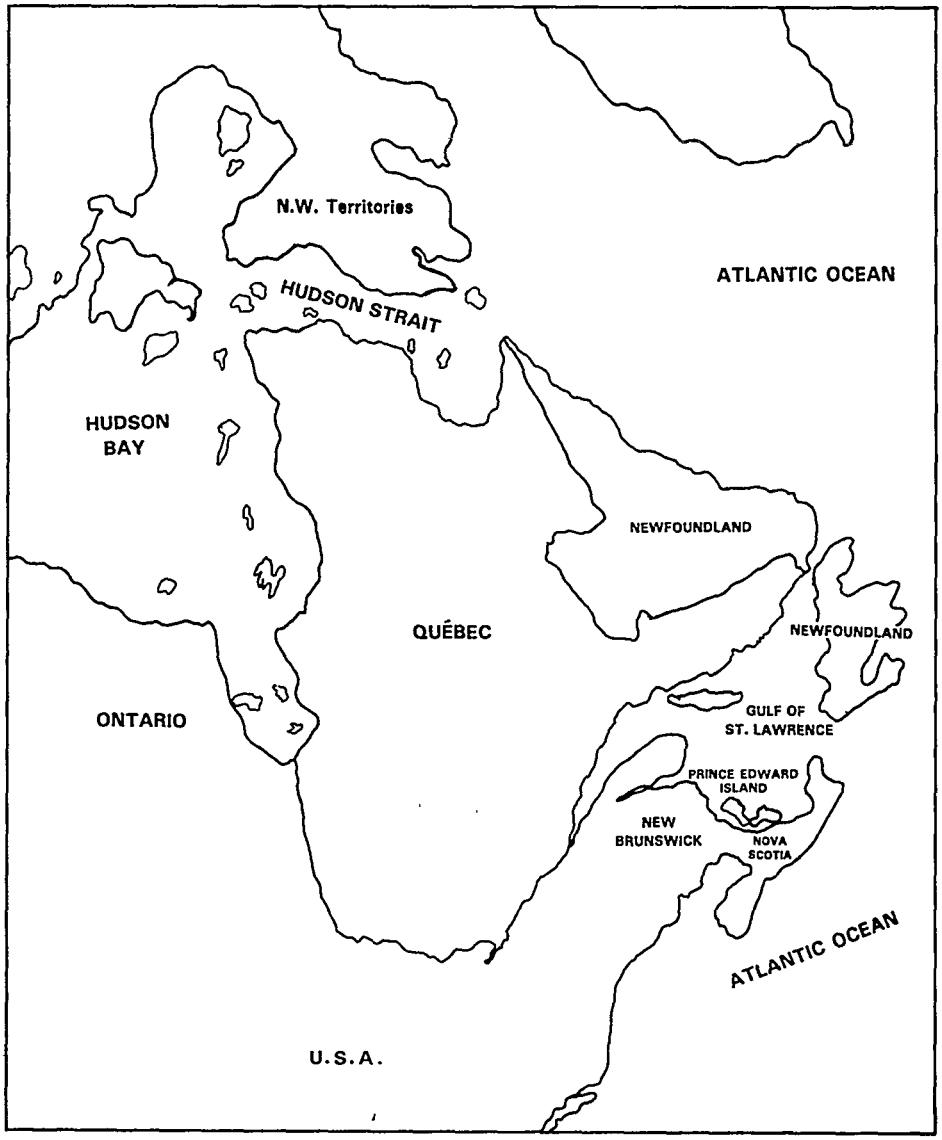
11. *See* Map 1.

12. 1982 LOS Convention, *supra* note 10, arts. 2, 55-59, 77, 21 I.L.M. at 1272, 1280, 1285.

13. *Id.*, arts. 17-32, 34-45, 52, 58-59, 78, 21 I.L.M. at 1273-80, 1285.

14. *In re* Ownership of the Bed of the Strait of Georgia, 1984 S.C.R. 388 (Can.); *In re* Offshore Mineral Rights of British Columbia, 1967 S.C.R. 792, 62 W.W.R. 21 (1967) (Can.); *In re* the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, 5 D.L.R. 4th 385 (1984) (Can.); *In re* Mineral and Other Natural Resources of the Continental Shelf, 145 D.L.R.3d 9 (Nfld. Ct. App. 1983).

MAP 1


N.W. Territories
ATLANTIC OCEAN
HUDSON STRAIT
HUDSON BAY
NEWFOUNDLAND
QUÉBEC
NEWFOUNDLAND
ONTARIO
GULF OF ST. LAWRENCE
PRINCE EDWARD ISLAND
NEW BRUNSWICK
NOVA SCOTIA
ATLANTIC OCEAN
U.S.A.

These cases generally establish that the federal government of Canada holds the territorial sea and continental shelf of Canada, as defined by international law, as a function of its external sovereignty. The provinces hold the land territory included in their boundary descriptions and all waters included within inland waters as defined by the common law.[15] Under the common law, the realm ended at the low-water mark and the closing lines of bays and rivers within the body of the land, including those bays that were *inter fauces terrae* and those that were a part of the realm as a result of historical usage. The federal government of Canada has retained jurisdiction over the waters and submerged lands seaward of the line drawn by the common law. 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 these areas and retained those rights by the terms of the union.[16] A province may also obtain rights in such areas through a legislative grant from the Canadian government.

Where do these cases leave Québec? Although Québec is not bound by them, the opinions provide a legal context for an analysis of Québec's maritime areas. Based on the preceding cases, Québec apparently held no rights in the territorial sea, continental shelf, or exclusive economic zone prior to joining Canada, nor does an agreement exist that specially preserves those areas for Québec. Furthermore, none of the boundary descriptions of Québec expressly grant it extraordinary maritime jurisdiction beyond the common-law line. The description of the boundaries in Hudson Bay and Hudson Strait expressly state that the boundaries run along the shore. The description of the boundaries in the Gulf of Saint Lawrence does not suggest a different result.[17]

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

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15. R. v. Keyn, 2 Ex. C.R. 63 (1876).

16. 1983 Newfoundland Continental Shelf and Territorial Sea Reference, 145 D.L.R.3d at 9. The Newfoundland appellate court recognized this special status regarding the territorial sea adjacent to Newfoundland. Prior to joining Canada, Newfoundland held, as an independent state, a territorial sea that was preserved upon joinder. Québec might make similar exceptional arguments based on its French origins. Unlike the common law, French law may have recognized its colonies' rights to the territorial sea and, therefore, Québec may have retained this right. *See* Francois Loriot, Le Régime Juridique de la Région du Golfe St-Laurent et la théorie des eaux historiques, 169-70 (1971) (unpublished doctoral thesis, Université de Droit, d'Economie et des Sciences Societes de Paris).

17. Potentially, if the kind of detailed examination given by Canadian law experts to the descriptions of the British Columbia boundaries in the 1984 Strait of Georgia Reference, *supra* note 14, was made of the Québec boundary descriptions, different conclusions might be reached.

common-law definition. That definition includes waters made a part of the realm through historic usage. On this basis, Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence might qualify for inclusion within provincial boundaries. Québec would have difficulty arguing 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, because the description of the Québec boundary in these areas calls for it to run along the shore.[18] In the Gulf of Saint Lawrence, the boundary is not as restrictive, but the historic usage argument is particularly weak.[19]

We now reach the question of 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 belong to Québec while it is within the Confederation, they would probably remain Québec's after 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. Because 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. What if, however, 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 those maritime areas adjacent to Québec now held by Canada?

In theory, all coastal states have the inherent right to territorial seas, contiguous zones, exclusive economic zones, and continental shelves. This is generally recognized by international law[20] and the Canadian courts.[21] Québec, as an independent state, presumably would have these rights. The question arises, however, whether Québec's special geographical circumstances would prevent it from exercising some or all of these rights in water areas adjacent to its land territories. Thus, Québec's geographi-

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18. An Act respecting the north-western, northern and north-eastern boundaries of the Province of Québec, 61 Vict. ch. 3 (1898) (U.K.); An Act to extend the boundaries of the Province of Québec (1912) 2 Geo. 5 ch. 45 (U.K.). Certain real property authorities, however, would support the view that such boundary descriptions would include the adjacent waters to their middle or thalweg. *See* G.W. WARVELLE, 1 A TREATISE ON THE AMERICAN LAW OF VENDOR AND PURCHASER OF REAL PROPERTY 463 (1902).

19. *See infra* Parts V(A)(2)(b), V(B)(2), and V(C)(2).

20. *See* 1982 LOS Convention, *supra* note 10, arts. 2, 55, 77, 21 I.L.M. at 1271-72, 1280, 1285.

21. *See* 1967 Offshore Reference, 1967 S.C.R. at 817, 821; 1984 Newfoundland Continental Shelf Reference, 5 D.L.R. 4th at 396, 405.

cal description may limit its seaward extent to the low-water line and the limits of internal waters *inter fauces terrae*.[22] All the waters outside of those lines could be considered Canadian and might remain so even upon the independence of Québec. Québec might retain only that territory presently within the Province of Québec. This demarcation could exclude the waters of Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence.

A finding that these waters are internal waters of Canada would strengthen arguments for that conclusion. International law presumes that boundary states share internal waters that are located between their land territories. Thus, the boundary normally would run through the geographical middle of the water body (the equidistant line) or, if a navigable channel exists, it would run along the middle of the principal channel (the thalweg).[23] The boundary may, however, take a different course, such as the shoreline or specially constructed lines. States have complete sovereignty over their internal waters, just as they do for dry lands. If a new state has an established boundary that runs along the shore and that excludes the adjacent internal waters, the new state could not claim rights in the internal waters beyond that boundary.[24] If, however, some or all of these adjacent waters are territorial sea, exclusive economic zone, or continental shelf, the seceding territory is presumed to hold rights in those areas, absent a knowing, voluntary, and express agreement made at or after secession relinquishing those rights.

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22. For example, in the Hudson Bay and Hudson Strait, the 1912 boundary of Québec is described as running along the shore. Since ten mile bays were closed by that date, one may presume that the line crosses ten mile bays and river mouths. At the time of R. v. Keyn, 2 Ex. C.R. 63 (1876), only three mile bays were closed. Québec has argued for a ten mile rule. *See* Note Attached to Letter from René Dussault, Deputy Minister of Justice, Government of Québec, to Roger Tassé, Deputy Attorney of Canada (Dec. 21, 1977) [hereinafter Letter from René Dussault]. No agreement with Canada on the question exists.

23. C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA 191, 195-96 (1967).

24. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 184 (1984); J.W. BOGGS, INTERNATIONAL BOUNDARIES 177-78 (1940). Masot argues that the Gulf of Venezuela is an historic internal water bay of Venezuela. Thus, Colombia, which arguably fronts on a portion of the bay, has no legal right to any maritime area in the bay. He marshals evidence of historic claims and actions by Venezuela to support the historic bay status. OSCAR VILA MASOT, THE GULF OF VENEZUELA 135-68 (1991). Colombia is reported to have "refrained from presenting any claim or argument in opposition to Venezuela's position that it had full sovereignty and domain over" the Gulf. *Id.* at 168. He concludes that, by acknowledging the status of the Gulf as Venezuelan internal waters, Colombia has no maritime rights in the waters seaward of its shoreline on the Gulf. *Id.*; *see also id.* at 13, 14, 26.

An agreement of secession might expressly delimit Québec's boundaries by allocating to Canada the maritime areas. The agreement 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, a strong presumption would arise under international law that a new, independent state with a coastline has the normal complement of maritime zones.[25]

Even if all of the maritime areas adjacent to Canada are Canadian, the maritime areas adjacent to Québec may automatically be transferred to Québec upon independence absent an agreement to the contrary. Québec has a strong argument that the government of Canada acquired these areas under international law on behalf of all the provinces of Canada.[26] The acquisition was a manifestation of external sovereignty on behalf of the provinces.[27] In particular, the acquisition of these maritime areas was and continues to be attributable to the authority of Canada over the adjacent land territory. The Canadian government retains undivided authority over these areas so long as Canada remains unified.

Secession of any particular province changes the situation. If Canada loses any of its land territory, Canada also loses the foundation for its maritime authority over the adjacent maritime areas. As an attribute of the adjacent land territory, the maritime zones would run with the land and become an attribute of the newly independent nation state of Québec. This argument is particularly strong for normal zones of maritime jurisdiction that are based upon distances measured from the territorial sea baseline, such as the territorial sea and the exclusive economic zone. The same is true for the continental shelf, which has been historically classified as a projection of the adjacent land territory.[28] Just as British colonies obtained rights to their offshore areas upon independence, the

25. An argument could be made that these zones are inalienable. The I.C.J. has described the coastal states' rights over the continental shelf as existing ipso facto and ab initio. North Sea Continental Shelf Cases, (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3, 22 (Feb. 20, 1967). The greater rights held in nearer shore zones would be even more strongly protected from alienation. The author's research has yielded no case in which a coastal state has surrendered all its maritime zones to another state, but states often transfer minor portions, especially 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 an essentially landlocked coastal state.

26. *See* 1967 Offshore Reference, 62 W.W.R. at 44, 45, 50; 1984 Newfoundland Continental Shelf Reference, 5 D.L.R. 4th at 396, 405.

27. *See* 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.4th at 398-99.

28. North Sea Continental Shelf Cases, 1969 I.C.J. at 22.

independence of a Canadian province may produce the same result.[29]

A similar argument supports the transfer of authority over historic internal waters, which might include Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence. Authority over these waters is not as expressly linked to the adjacent land territory. Sovereignty over the adjacent land territory is a sine qua non for the historic water status. The claiming state must also exercise the necessary degree of authority over those waters by undertaking activities that as a practical matter 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. Under this view, 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 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, Canada retained the islands for external relations reasons.[30] Interestingly, the relevant statutes specifically exclude the waters of Hudson Bay and Hudson Strait, including those of James and Ungava Bays, from the territory of Québec and the Northwest Territories. They are federal waters only.[31] These water areas, however, are within Canada and held for the benefit of the nation as a whole. Secession by

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29. *See* 1984 Newfoundland Continental Shelf Reference, 5 D.L.R.4th at 399-400.

30. Nicholson explains why the boundary ran along the shore even though Québec sought to have the offshore islands included within its boundaries. He wrote that "[n]o 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 defense." NORMAN L. NICHOLSON, THE BOUNDARIES OF THE CANADIAN CONFEDERATION 144-45 (1979) (citing House of Commons Debates (Can.), col. 5270 (1912)).

31. The Northwest Territories Act, 1952 R.S.C. ch. 331, defines the Territories in section 2 as follows:

> '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 Québec.

Id. Because 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.

one province may provide a legal basis for it to take away a share of that common area.

Even if the Québec boundary description does not include the islands of Hudson Bay and Hudson Strait, Québec territory may still include some land areas that are technically islands because they are surrounded by water at high tide. Those islands may be *inter fauces terrae* under the common-law definition as tightly interwoven islands fringing the true mainland shore. They may be considered to be so integrated into the land domain that they must be considered a part thereof.[32]

The strength of these arguments becomes clear if one imagines that all the provinces of the Canadian Confederation were to become independent, as recently occurred in the Soviet Union. Clearly, rights over water areas held by the central government would not remain in that disembodied government, separated from the authority over the adjacent land territory. Rather, those rights would run with the land. If portions of the Canadian Confederation were to secede, the 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. Arguments based upon equity and the normal assumption that a coastal state has authority under international law over adjacent maritime zones could further support this conclusion.

On the other hand, unlike the case of the Soviet Union, secession of Québec may not be tied to the disintegration of the entire Canadian Confederation.[33] Canada probably would continue to exist as a state and retain much of its land and maritime jurisdiction. A seceding province may have no right to areas held by the Canadian government because the nation will endure and benefit from those areas. The Canadian government could also argue that the acquisition of maritime zones has been

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

One might further argue that offshore islands held by the Government of Canada outside the territory of any province are also held for the benefit of the provinces as an element of external sovereignty. The adjacent islands might transfer to the province as it gains independence. This argument could support the inclusion in the territory of an independent Québec of some islands in subsidiary water bodies and perhaps islands in Hudson Bay and Hudson Strait. The latter are now within the Northwest Territories and not part of any province. This may change in the future if a new province of Nunavut is established. *See* Clyde H. Farnsworth, *Canada to Divide its Northern Land*, N.Y. TIMES, May 6, 1992, at A7.

33. *But see* THE COLLAPSE OF CANADA?, *supra* note 1.

the result of Canadian federal efforts[34] and that equity requires the fruits of those efforts to remain with Canada. The conclusion that the waters in question are internal waters under international law and not territorial sea, exclusive economic zone, or the like further supports this view.[35] Internal waters are the subject of complete state sovereignty. They are 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.[36] As sovereign territory of Canada, these internal waters would remain with Canada upon Québec's secession 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 the defined boundaries of Québec. At present, those boundaries do not expressly include the areas in question in Québec.

Finally, the doctrine of *uti possidetis* must be considered. This doctrine became important during the decolonization of the Spanish colonies in South America. In that instance, those new states accepted the application of the doctrine. *Uti possidetis* calls for new states that succeed to the territory of the colonies to accept the comparable colonial boundaries of new neighboring states that replace other former colonies.[37] As such, the doctrine maintains stability and prevents disputes. This doctrine has both affirmative and negative elements. States recognize a new state's territorial boundaries, but the new state cannot assert new territorial claims against other states inconsistent with the colonial boundaries. In a more recent instance, the Organization of African Unity accepted the application of this doctrine in the decolonization of Africa. The scope of the doctrine was expanded in that context because it became applicable

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34. 1967 Offshore Reference, 62 W.W.R. at 44, 45, 50.

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

36. A.O. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW 45-49, 67-70 (1967).

37. CHARLES CHENEY HYDE, 1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 498-510 (1945); ALVAREZ, LE DROIT INTERNATIONAL AMÉRICAIN 65 (1910); Colombia-Venezuela Boundary Arbitration, 1 R.I.L.A. AWARDS 223 (1922); Beagle Channel Arbitration, Award of Apr. 18, 1977, 17 I.L.M. 633 (1978); 2 Whiteman DIGEST 1078-80, 1086-88 (1963); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 134-35 (1990); 1 DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW 426-27 (1970); GEORG SCHWARZENBERGER, *Title to Territory: Response to a Challenge*, *in* INTERNATIONAL LAW IN THE TWENTIETH CENTURY 287, 299-300 (Leo Gross ed., 1969).

to former colonies of multiple metropolitan states.[38] The doctrine has also been applied in Asia.[39] Respect for previously established borders at secession appears to be the expected norm in the most recent cases of the new states established out of the former Soviet Republic[40] and those created out of the former Yugoslavia, although in the latter case the situation remains very unsettled.[41] When the Federal Republic of Germany absorbed the German Democratic Republic, it agreed to respect previously established boundaries. This matter was particularly salient with regard to its boundary with Poland.[42] Finally, in the Frontier Dispute case a chamber of the ICJ declared that the doctrine is binding on all states as general international law.[43] This history supports the conclusion that *uti possidetis* is customary international law binding on newly

38. The Solemn Declaration of the Meeting of the Heads of States of the Governments of the Organization of African Unity, July 21, 1964, OAU Document AHG/Res. 16 (I); Saadia Touval, *The Organization of African Unity and African Borders*, 21 INT'L ORG. 102 (1967); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565-67, 568, 586-87; Award of the Tribunal in the Guinea/Guinea-Bissau Maritime Delimitation Case, 77 Int'l L. Rep. 636, 657 (Elihu Lauterpacht ed., 1988); Arbitral Tribunal for the Determination of the Maritime Frontier of Guinea-Bissau/Senegal (unpublished decision July 31, 1989). The procedural validity of this Award was upheld by the International Court of Justice in an Arbitral Award, 1991 I.C.J. 53 (July 31).

39. *See* Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 4, 15 (Sept. 30); Rann of Kutch Arbitration, 50 Int'l L. Rep. 2, 27-30, 80-89 (Elihu Lauterpacht ed., 1976).

40. *See* Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, 31 I.L.M. 143 (1992); Alma Ata Declaration, Dec. 21, 1991, 31 I.L.M. 148 (1992); *CIS Republics Overtake Switzerland*, IZVESTIA, at 1, 5 (Mar. 3, 1992).

41. During the break up of Yugoslavia in 1992, some groups attempted to change by force the boundaries of the former republics that made up Yugoslavia. The United States and the European Community put international pressure on the region to accept the boundaries of the prior Yugoslav republics. They conditioned their recognition and aid on that basis. *See U.S. Recognition of Former Yugoslavian Republics*, April 7, 1992, WEEKLY COMP. PRES. DOCS. 601 (Apr. 7, 1992); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 587-97, 602 (1992); *Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia*, N.Y. TIMES, Apr. 28, 1992, at A1.

42. Wladyslaw Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 AM. J. INT'L L. 163 (1992).

43. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565. The Convention on the Succession of States provides that boundary treaties are expected to remain in force. Vienna Convention on Succession of States In Respect of Treaties, *opened for signature* Aug. 23, 1978, art. 8, U.N. Doc. A/Conf. 80/31 (1978) (not yet in force); *Panel on State Succession and Relations with Federal States*, 86th Annual Meeting of the American Society of International Law, Apr. 1, 1992, PROC. AM. SOC. INT'L L. (forthcoming 1992).

emerging states absent a mutual agreement to the contrary.[44]

As applied to Québec, *uti possidetis* could limit the Québec territory and associated maritime areas to the current boundaries of the Province of Québec. Thus, Québec possibly may be foreclosed from any maritime zones if the applicable Canadian law places all maritime zones in the hands of the federal government. On the other hand, this rigid application of the doctrine fails to take account of the legal context within which Québec functions as a part of the Canadian Confederation. To use the doctrine to separate a territory from all related maritime areas seems inequitable and destabilizing. This use of the doctrine also runs afoul of the international law presumptions regarding the maritime zones attributable to coastal states. These considerations might strengthen arguments against the rule as a norm of international law, therefore requiring mutual agreement before it is applicable. These considerations may also support a view that *uti possidetis* does not apply to maritime zones.[45]

While *uti possidetis* is designed to promote peace and stability, it has been invoked as a sword. For example, Argentina invoked the doctrine to justify its attack on the British-held Falklands/Malvinas Islands, arguing that the islands were historically part of the colony now comprising Argentina. Argentina, therefore, used the doctrine to invoke historic claims and to change a situation that had been stable for many years.[46] If this application is permissible, Québec might assert rights based upon historic French territorial claims in the area. Of course, the United Kingdom reacted swiftly and decisively to the Argentine behavior by using armed force and attracting the support of many states. Other states in the region tactfully abstained from lending support to Argentina. Consequently, Argentina was isolated and paid dearly for its use of force. Its claim remains unsatisfied and more questionable as a result. The doctrine of *uti possidetis* thus may not be usefully employed to define the maritime areas attributable to a newly independent Québec.

In conclusion, neither general international law nor Canadian domestic law readily provide definitive answers to questions regarding the mar-

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44. *See* Frontier Dispute, 1986 I.C.J. at 565-67; BROWNLIE, *supra* note 37, at 135.

45. Masot argues that the legal but voluntary doctrine of *uti possidetis* is applicable to maritime boundaries previously established by the law. MASOT, *supra* note 24, at 51-55.

46. British Foreign and Commonwealth Office, *The Falkland Islands* (1982) (leaflet); British and Foreign Commonwealth Office, *The Falkland Islands: The Facts* (1982) (pamphlet). *See* David A. Soley, Comment, *Hunt v. Galleri: A Hypothetical Scenario for Holding International Aggressors Civilly Liable in American Courts*, 33 EMORY L.J. 211, 213 n.10 (1984); Brian M. Mueller, Note, *The Falkland Islands: Will the Real Owner Please Stand Up*, 58 NOTRE DAME L. REV. 616, 626-29 (1983).

itime boundaries of an independent Québec. Certainly, Québec would have sovereignty over internal waters included within its defined boundaries, but the limits of those internal waters remain unsettled. Québec could make strong legal and equitable arguments for other maritime jurisdiction in waters seaward to the opposite and adjacent boundaries generated from the remaining Canadian land territories. While Québec and Canada could litigate these boundary issues, they might also settle the matter by agreement. As the next section of this Article argues, a settlement may be preferable.

III. Limits to the Territorial Solution

The previous section of this Article has discussed, in general terms, the legal context within which a resolution of the maritime zones of Québec must be considered. Sufficient domestic and international law exists to determine which waters adjacent to Québec would appertain to an independent state of Québec, but the outcome of an adjudication of such matters would be uncertain. That uncertainty and the important interests involved strongly suggest serious consideration of a negotiated resolution to this matter. The political situation in Canada may make a resolution of these issues by agreement difficult. 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 assumes that, excluding the high seas and perhaps Antarctica, the globe is divided among separate territorial entities called states. Boundaries delimit these territories and the domain in which the sovereign nations may exercise their authority. International law provides rules for delimiting maritime boundaries, although the rules are not detailed or easily applied. Nevertheless, these boundaries could be drawn, even in the waters adjacent to Québec. Experience has shown, however, that the delimitation of maritime boundaries rarely solves all important problems.

Particularly in areas adjacent to Québec, the delimitation of maritime boundaries would fail to resolve many important matters. 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, but interests in these water areas are not so easily divisible. Fish are not immobile and are likely to traverse maritime boundaries. Québec and Canada will need to coordinate fisheries management to maintain these resources. While hard mineral resources might not move, liquid mineral resources, such as hydrocarbons, do migrate. Experience shows that boundary areas such as this often require unitization or joint

development arrangements.[47] Even the exploitation of hard minerals may require the development of large areas that would only be economically feasible through the establishment of transboundary sites. Due to the fluidity of water, the protection of the marine environment definitely requires the cooperation of the states bordering on closed waters. A negotiated settlement of the maritime jurisdiction issues would most likely establish structures necessary for appropriate coordination.[48]

Québec's navigation interests will offer a strong incentive for a negotiated settlement with Canada. An independent Québec will want to engage in substantial international transportation of cargo and passengers. If, however, Hudson Bay, Hudson Strait, the Gulf of Saint Lawrence, and associated subsidiary waters are internal waters of Canada, Québec will be a landlocked state. Therefore, Québec 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 flying over 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, Canada's reaction was extremely adverse, leading to a serious controversy between the two countries and new, expanded claims of Canadian authority in the area.[49] Even though innocent passage applies in the territorial sea, Canada sought to maximize its control over foreign traffic in that zone.[50] To avoid any adjudication of its

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47. *See* Rainer Lagoni, *Oil and Gas Deposits Across National Frontiers*, 73 AM. J. INT'L L. 215 (1979).

48. For a full discussion of the value of functional solutions to maritime boundary questions, see DOUGLAS M. JOHNSTON, THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING (1988).

49. *See* DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW (1988).

50. Thus, Mr. J. Alan 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 in 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

claimed rights to the Arctic waters and the Northwest Passage, Canada withdrew its consent to the International Court of Justice's jurisdiction over such matters when it established a system of straight baselines in the area.[51] 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 landlocked states have certain rights of transit under international law, the exercise of these rights is not fully protected. It depends on international agreements with the state that must be transited for access to the open sea. The early writings of Grotius express the view that landlocked states have a right of transit.[52] Modern scholars maintain that such a right exists but it is imperfect and unenforceable.[53]

Multilateral conventions provide support for this view. The Covenant of the League of Nations contained a general provision on transit and communication.[54] The Barcelona Convention provided state parties with the right of freedom of rail and waterway transit in international trade.[55]

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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 strait.

Standing Committee on External Affairs and National Defense, House of Commons, 28th Parl., 2d Sess., at 25:19 (Apr. 29, 1970) (statement of Mr. J. Alan Beesley).

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." Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defense, House of Commons, 30th Parl., 1st Sess., Issue No. 24, at 24:6 (May 22, 1975) (statement of Secretary MacEachen).

51. House of Commons Debate, 33rd Parliament, 1st Sess., 34 Eliz. 2, vol. V, at 6464 (Sept. 10, 1985) (statement of Mr. Joe Clark, Secretary of State for External Affairs).

52. HUGO GROTIUS, THE FREEDOM OF THE SEAS 9-10 (Ralph Van Deman Mangoffin trans., 1916).

53. Elihu Lauterpacht, *Freedom of Transit in International Law*, *in* TRANSACTIONS OF THE GROTIUS SOCIETY 311, 320-23 (1957); JOHN HENRY MERRYMAN & EDGAR ACKERMAN, INTERNATIONAL LAW, DEVELOPMENT AND THE TRANSIT TRADE OF LANDLOCKED STATES: THE CASE OF BOLIVIA 54 (1969); Ibrahim J. 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).

54. LEAGUE OF NATIONS COVENANT, art. 23(e), *reprinted in* GEORGE GRAFTON WILSON, THE FIRST YEAR OF THE LEAGUE OF NATIONS 57 (1921).

55. Convention and Statute on Freedom of Transit, Apr. 20, 1921, art. 2, 7 L.N.T.S.

The limitations, however, left that right far from perfect, permitting the denial of transit rights for almost any reason and suspension to protect legitimate national interests.[56] The General Agreement on Tariffs and Trade (GATT) protects members' rights of freedom of transit passage for goods (including baggage) and for vessels and aircraft carrying such items. Noncommercial items and passengers may not be so protected.[57] States may impose certain regulations and charges provided that they do not exceed national treatment. An interpretive note in the Havana Charter, the first convention that specifically addressed the rights of landlocked states, permitted states to make exceptional arrangements (free of most-favored-nation or national treatment) for transit by landlocked states.[58]

Beginning in the 1950s, the Law of the Sea Conferences began considering the right of transit by landlocked states to and through maritime zones. The 1958 Convention on the High Seas provides that landlocked states "should have free access to the sea."[59] This access is to be accomplished by agreement "on the basis of reciprocity."[60] Only in the 1965 Convention on Transit Trade of Landlocked States is transit by landlocked states denominated as a right.[61] The exercise of that right, however, is to be accomplished by agreement between the landlocked and transited states.[62] The Convention also requires the facilitation of this transit.[63] Nevertheless, the transit state may proscribe transit by certain persons or goods "on grounds of public morals, public health or security,

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11, 27.

56. "[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.* at arts. 5, 7, 7 L.N.T.S. at 27. *See* A. Mpazi 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).

57. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. V, 61 STAT. A3, 55 U.N.T.S. 187 (1950) [hereinafter GATT].

58. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, FINAL ACT AND RELATED DOCUMENTS, art. 33, para. 6, U.N. Doc. A/Conf.2/78, Annex P (Interpretive Notes). *See* Sinjela, *supra* note 56, at 38.

59. 1958 Convention on the High Seas, Apr. 29, 1958, art. 1, 13 U.S.T. 2313, 450 U.N.T.S. 82 (1958).

60. *Id.* art. 5, 450 U.N.T.S. at 82.

61. Convention on Transit Trade of Landlocked States, July 8, 1965, pmbl., art. 2, 597 U.N.T.S. 42, 44.

62. *Id.* pmbl., principle III, 597 U.N.T.S. at 42. *See* Wani, *supra* note 53, at 634.

63. Convention on Transit Trade of Landlocked States, *supra* note 61, arts. 4, 7, 597 U.N.T.S. at 50, 42.

or as a precaution against diseases of animals or plants or against pests."[64] Few states are parties to this convention.[65]

The 1982 Convention on the Law of the Sea (1982 LOS Convention), although not yet in force, is the most recent international agreement to address the issue of transit rights for landlocked states. Article 125 of the 1982 LOS Convention states that "[l]and-locked States shall have the right of access to and from the sea . . . [t]o this end, landlocked States shall enjoy freedom of transit through the territory of transit States by all means of transport." This right arguably remains imperfect because agreement between the landlocked state and the transited state shall determine the "terms and modalities for exercising freedom of transit."[66] 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 1982 LOS Convention, the imperfect nature of the right gives the landlocked states little solace. History shows that transit states often use their favorable position against the interests of the landlocked state.[67]

If the GATT remains in force and Québec becomes a party to the agreement, Québec will be guaranteed transit for its commercial merchandise. Even under that regime, Québec's transit rights would be subject to certain Canadian regulations potentially more intrusive than under the regime of the high seas or even of 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, resolution of these issues at an earlier stage may be preferable. Obstacles to transit in the early days of an independent Québec could be critical.

Of course, Québec might not become a landlocked state. If, as this Article concludes below, the Gulf of Saint Lawrence is not internal waters, Québec would have access to international ocean navigation through the eastern portion of the Gulf and Cabot Strait. If the territorial sea in the Gulf is limited to the normal distance of twelve nautical miles from

64. *Id.* art. 11(1), 597 U.N.T.S. at 54.

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

66. 1982 LOS Convention, *supra* note 10, art. 125(1), 21 I.L.M. at 1282.

67. *See* MARTIN IRA GLASSNER, ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES 132 (1970); MERRYMAN & ACKERMAN, *supra* note 53, at 63; Sinjela, *supra* note 56, at 31.

the normal baseline, there would be areas beyond the territorial sea in the Gulf open to free navigation and overflight. If the area beyond Québec waters were Canadian territorial sea, the rights of innocent passage would guarantee the right to navigation to and from the high seas. Overflight through the Canadian territorial sea outside of the straits used for international navigation would require Canadian permission. The Cabot Strait could also 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 those territorial sea straits used for international navigation. Passage through the territorial sea of another state, particularly in straits, however, places some burdens on the transiting state not found where the high seas freedom of navigation exists.[68]

Although far less desirable, the Hudson Strait area may provide an alternative passage. As will be discussed below, Canada has a stronger argument to claim the Strait, rather than the Gulf, as internal waters on the basis of an historic water claim and the adoption of a system of straight baselines.[69] Québec's independence, however, may weaken claims to the Hudson Strait. Québec may obtain navigation rights through the Strait. But due to the northern location of these waters, this route to the high seas would provide only limited value to Québec.

These circumstances support the view that Québec should take a conservative approach to the rights of states to establish extraordinary maritime claims. Québec's position vis-a-vis Canada may be strengthened if no extraordinary Canadian maritime jurisdiction exists in Hudson Bay, Hudson Strait, and the Gulf of Saint Lawrence. It would follow that normal maritime regimes generated by coastal geography would attract offshore jurisdiction to Québec unencumbered by Canada's historic water claims. Furthermore, the more limited the Canadian jurisdiction in these waters, the greater would be the rights of Québec to navigate and overfly those areas. 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.

Because control over economic development of resources in these waters is in the coastal states regardless of the legal regime, the special historic status for these waters provides Québec with little real additional

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68. *See* 1982 LOS Convention, *supra* note 10, arts. 18-32, 39-42, 21 I.L.M. at 1273-77.

69. *See infra* section V(C)(1).

value. On the other hand, if special status were combined with a permanently binding agreement between Canada and Québec giving 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.

IV. International Law Rules for Maritime Boundary Delimitation

This section reviews the international law regarding maritime boundaries between independent and sovereign nation states. An application of those rules follows in Part V.

A. *The Baseline*

As mentioned above, many of the maritime zones of states are measured seaward from a baseline. The 1982 Convention on the Law of Sea codifies the customary international law rules for drawing that baseline.[70] Basically, the baseline uses the line of mean low-water along the shore of the mainland and islands and closing lines of juridical bays that can be closed by a line or lines totaling twenty-four nautical miles. The baseline also includes closing lines at river mouths, and low-tide elevations within twelve nautical miles of the previously described baseline.

A juridical bay is closed by a line drawn between its natural entrance points.[71] Such a bay must be a well-marked indentation containing land-

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70. 1982 LOS Convention, *supra* note 10, arts. 3-15, 21 I.L.M. 1272-73.

71. In determining the precise location of the closing lines for rivers and juridical bays, one must locate the natural entrance points to the internal waters between which the closing line is drawn. These entrance points are usually based upon an examination of the nautical charts of the areas in question. *See* A. Shallowitz, 1 Shore and Sea Boundaries 218-25 (1962); 4 Whiteman Digest § 5, at 209-13 (1965). The entry into the geographical area must be determined. One objective test that is particularly attractive and helpful is the so-called 45 degree test. It identifies the point on the shore where the general trend of the coastline faces more on the interior water body than the exterior waters. The test

> requires that two opposing . . . headland points be selected and a closing line be 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 measurement is repeated until both . . . headlands pass the test.

United States v. Maine, 469 U.S. 504, 522 n.14 (1985). *See* P. Beasley, Maritime Limits and Baselines: A Guide To Their Delineation 16-17 (The Hydrographic Society Special Publication No. 2, 1977); Robert Hodgson & Lewis M. Alexander, Towards An Objective Analysis of Special Circumstances 10 (Law of the Sea

locked waters, meet the semicircle test, and be able to be closed by a line or series of lines not exceeding twenty-four nautical miles in length.[72] The codifications of this law found in the 1982 LOS Convention 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."[73] The codification appears to be a comprehensive treatment of the baseline rules and does not permit the automatic closure of multiple state bays. The only exceptions allowed are in regard to historic bays and systems of straight baselines.[74] 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 twenty-four nautical miles, a twenty-four mile baseline may be delimited in the bay to enclose a maximum area of waters.[75] This line is sometimes called the "fall-back line."

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 islands.[76]

The doctrine of historic waters is another method for establishing a baseline. If a state can establish the historic internal-water status of an area, its territorial sea will be measured seaward from the line that delimits the water body. This doctrine permits a coastal state to establish as internal waters, a water body that would not satisfy the normal requirements for internal water status. 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

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Institute Occasional Paper No. 13, 1972). The author conceived of this test while working on the United States Baseline Committee delimitation of the United States baselines and territorial sea in the early 1970s. Dr. Robert Hodgson, geographer of the United States State Department, put it to practice for this exercise.

72. 1982 LOS Convention, *supra* note 10, art. 10, 21 I.L.M. at 1272.

73. *Id.*; 1958 Convention on the Territorial Sea and the Contiguous Zone, *opened for signature*, Apr. 29, 1958, art. 7.1, 15 U.S.T. 1606, 516 U.N.T.S. 205.

74. 1982 LOS Convention, *supra* note 10, art. 10(6), 21 I.L.M. at 1272. Nevertheless, Bouchez has argued in favor of juridical bay status for multi-state bays. LEO J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 198 (1964). He admits, however, that the majority of commentators are opposed to this status. *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 view attracted no attention when revisited during the negotiations leading to the 1982 LOS Convention. MITCHELL P. STROHL, THE INTERNATIONAL LAW OF BAYS 405 (1963).

75. 1982 LOS Convention, *supra* note 10, art. 10, 21 I.L.M. at 1272.

76. *Id.* art. 7, at 1272.

the acquiescence or tolerance of the claim by the international community of states. A state may alternatively establish historic waters as territorial sea, rather than internal waters. In internal waters, foreign states must obtain permission to navigate; however, in territorial seas, the right of innocent passage applies.[77] The nature of the claim and the jurisdiction exercised pursuant to that claim determines whether the historic waters are territorial sea or internal waters.[78]

Although a juridical bay may be closed only if it is within the coasts of a single state, whether such a limitation exists for historic waters remains unclear. Virtually all such waters are found along the coasts of single states, but the award in the case of the Gulf of Fonseca, which was heard before the Central American Court, upheld the historic territorial sea status of the Gulf of Fonseca even though it lies within the coasts of El Salvador, Honduras, and Nicaragua; this conclusion was recently reaffirmed by the International Court of Justice.[79] Because few determinations by international tribunals on historic waters have been

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77. *See* House of Commons Debates, 28th Parl., 1st Sess., 17 Eliz. 2, vol. VI, at 6339 (Mar. 7, 1969) (statement of Mr. Trudeau).

78. The literature on historic bays and waters is extensive. *See Juridical Regime of Historic Waters including Historic Bays*, 2 Y.B. INT'L L. COMMISSION 1 (1962), U.N. Doc. A/CN.4/143 (1962); N. Barrie, *Historic Bays*, 6 COMP. & INT'L L. J. S. AFR. 39 (1973); L.F.E. Goldie, *Historic Bays in International Law*, 11 SYRACUSE J. INT'L L. & COM. 211 (1984); STROHL, *supra* note 74; BOUCHEZ, *supra* note 74; *Historic Bays, Memorandum by the Secretariate of the United Nations*, 1 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1-30, U.N.Doc. A/Conf.13/1 (1957). Some of this literature includes lists of historic waters. *Id.* at 3-8. *See* STROHL, *supra* note 74, at 253-68; BOUCHEZ, *supra* note 74, at 215-37; Whiteman DIGEST, *supra* note 71, at 233-58. Prescott has argued that these lists are not useful. J.R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 61 (1985).

Judicial opinions on historic waters include: Direct United States Cable Co. v. Anglo-American Telegraph 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); Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18) (Norwegian straight baselines); United States v. Alaska, 422 U.S. 184, (1975) (Cook Inlet); Stetson v. United States (The Alleganean) (Second Court of Commissioners for Alabama Claims, 1882), *reprinted in* J.B. MOORE, 4 A HISTORY AND DIGEST OF THE INT'L ARBS. TO WHICH THE U.S. HAS BEEN A PARTY 4332 (1898) (Chesapeake Bay); United States v. Louisiana, 470 U.S. 93 (1985) (Mississippi Sound).

79. El Salvador v. Nicaragua, 11 AM. J. INT'L L. 674, 700-717 (Cent. Am. Ct. of Justice 1917). This finding may have been unnecessary. *See* YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 308, 309 (1965); Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua Intervening); 1992 I.C.J. ___ (Sept. 11); *World Court Rules on Land Feud Between Salvador and Honduras*, N.Y. TIMES, Sept. 12, 1992, at A4.

made, this situation is particularly salient.[80] Spain originally held the entire area surrounding the Gulf of Fonseca and established the basis for its historic water status. Thereafter, the Federal Republic of the Center of America held the Gulf of Fonseca. When the Republic was divided, the historic rights were implicitly transferred to the resulting three states as a community beyond a three mile marginal belt. Despite Nicaragua's unilateral attempt to change this legal relationship by granting the United States the right to establish a naval base on its portion of the Gulf, the Central American Court affirmed the co-ownership of the three states, thus requiring their consent to effectuate any changes.[81]

There appears to be no inherent reason why all states with shores on an enclosed water body not leading to any other state should be foreclosed from establishing historic waters if a single state in a similar geographical situation could do so. Such a title should, however, be founded upon the agreement of all the littoral states. This agreement would appear necessary because historic internal waters or territorial sea status could infringe on the navigation, overflight, and other maritime rights and interests of the littoral states. Because a change in the status of historic waters would directly and significantly affect the littoral states, they should be actively associated with the changes and not bound simply on the basis of acquiescence or other legal presumptions.

The doctrine may be difficult to apply in the case of the secession of a state on the coast of a previously established historic water area. One might presume the existence of the prior consent of the seceding state as a consequence of its previous association. At secession, the practical situation changes dramatically. Special historic status of the waters may very well present obstacles to the newly emerging state in regard to navigation, overflight, fisheries, and other resource development. Accordingly, the new state ought to have a right to ratify or terminate the historic status of the waters.[82] Of course, the right of termination might produce

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80. Arguments that the 1917 case is an anomaly have been made. GIDEL, *Le droit international public de la mere, le temps de paix*, t.3/II, Librarie Edouard Duchermin 626, 627 (1981).

81. For a brief analysis of the 1917 case, see BOUCHEZ, *supra* note 74, at 209-13; STROHL, *supra* note 74, at 376-80; Whiteman DIGEST, *supra* note 71, at 235-36.

82. Columbos takes the position that a landlocked sea, belonging to two or more states, partakes of the regimes of the territorial sea and high seas in which all the coastal states would have navigation and fishing rights. His reference to the Black Sea, which was was originally entirely bounded by Turkish territory and eventually became bounded by the shores of several states, is particularly relevent. This change resulted in establishing freedom of navigation in the Black Sea. As is the case for all of the examples relied upon by Colombos, a treaty established this freedom of navigation right in the

a negotiated settlement resulting in an acceptable arrangement that protects the interests of both the old and the new states. On the other hand, a more doctrinal view supports the position that the waters are historic, internal, or territorial sea waters of the old state, established through its own efforts. Therefore, the new state must be bound by the situation as are all other states.

Historic water status is a form of international prescription, and the proponent of such an exceptional status carries a heavy burden of proof. The putative international commons is displaced by the coastal state jurisdiction through the establishment of a new status quo 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, a presumption existed that the United Kingdom knew of the Norwegian system of straight baselines based upon the international notoriety of the claims.[83] In order to establish the new status quo and to communicate effectively its claim to the international community, the coastal state must exercise appropriate authority over the water area that is the subject of an historic water claim.[84] Even though no specific time period has been fixed, the length of time must be historic and substantial. Strohl wrote in 1963 that the claim to historic water status of Peter the Great Bay was the shortest length of time that had been credibly alleged. That assertion dated back to 1872.[85] 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 some-

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Black Sea. Thus, it is unclear whether there is a compelling rule of international law, other than the obligation of states on the landlocked waters to agree on its disposition. COLOMBOS, *supra* note 23, at 191-93. Starke cannot conclude that international law protects the freedom of navigation of all coastal states on a landlocked sea. STARKE, *supra* note 24, at 184.

Masot argues that historic bays may be established by a single state and then transfered to multiple states in condominium in the case of a break up of the original state. MASOT, *supra* note 24, at 123-24. He recognizes that a dispute exists over whether bays surrounded by the coasts of two or more states could be historic bays. *Id.* at 124-25.

83. Fisheries Case, 1951 I.C.J. at 134, 138-39.

84. *See Juridical Regime of Historic Waters, supra* note 78, at paras. 85-86; BOUCHEZ, *supra* note 74, at 214.

85. STROHL, *supra* note 74, at 392-93.

what shorter period of time in stronger cases.[86]

Effective protest by members of the international community prevents an historic water claim from being perfected. Some commentators have argued that mere paper objections are insufficient and that all available means must be brought to bear to prevent perfection.[87] This rule would encourage physical conflict; general international law, however, discourages, if not forbids, such behavior.[88] Nevertheless, the communication of a protest followed, if necessary, by conduct consistent with the protest would be effective even if it avoids actual conflict.[89] 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 status.[90]

Some also view the geographical configuration of the water area as a relevant factor. Thus, in *North Atlantic Coast Fisheries*, Dr. Drago argued in dissent that when "particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension," a country may assert sovereignty over a bay.[91]

Furthermore, the United States Supreme Court considered the geographical location and configuration of the Mississippi Sound decision to support historic bay status.[92] However, in the previous Cook Inlet deci-

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86. BOUCHEZ, *supra* note 74, at 256-57.

87. Donat Pharand, *Canada's Claim to Sovereignty over the Arctic, in* CONFLICT RESOLUTION AND THE FUTURE OF NATO: THE CANADA-UNITED STATES EXPERIENCE 41, 43-44 (Dorinda G. Dallmayer ed., 1989).

88. U.N. CHARTER, arts. 2.3, 2.4, 33, 59 STAT. 1031, T.S. 993. *See Report of the Special Working Committee on Disputed Maritime Claims, in* NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS (ASIL Studies in Transnational Legal Policy No. 22, 1991).

89. BOUCHEZ, *supra* note 74, at 278.

90. John M. 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); *Juridical Regime of Historic Waters*, *supra* note 78, para. 140; MAURICE BOURQUIN, LES BAIES HISTORIQUES 151 (1952); PHARAND, *supra* note 49, at 103. *But cf.* Francesco Francioni, *The Status of the Gulf of Sirte in International Law*, 11 SYRACUSE J. INT'L L. & COM. 311, 322-34 (1984).

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

92. United States v. Louisiana, 470 U.S. at 102. In this case, the Court noted that:

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

Id.

sion, the cul de sac nature of Cook Inlet did not lead to the conclusion that Cook Inlet was an historic bay.[93]

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 historic water status.[94]

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

Extending 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 that may extend seaward from the baseline to a maximum of twelve nautical miles. The coastal state has sovereignty within this zone,[95] but foreign vessels maintain the right of navigation by innocent passage in this territorial sea.[96] A territorial sea strait will be subject to innocent passage through straits.[97] A strait used for international navigation will be subject to transit passage according to articles 37-44 of the 1982 Law of the Sea Convention. Questions exist, however, as to whether transit passage is a rule of customary international law outside of the 1982 LOS Convention.[98] As discussed above, a state may have a greater area of territorial sea in a water body by establishing the area as historic territorial sea.

Beyond its territorial sea, a coastal state also may claim a contiguous zone reaching seaward to a maximum of twenty-four nautical miles from the baseline. Within that zone, a coastal state may enforce laws and regulations to protect its customs, fiscal, immigration, and sanitary interests.[99]

A coastal state may also claim an exclusive economic zone (or fisheries zone), beyond the territorial sea, which may reach seaward to a maximum of two hundred nautical miles from the baseline. Within that zone, the coastal state has jurisdiction over all resource development activities and scientific research; it may take actions to protect the environment in

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93. United States v. Alaska, 422 U.S. 184 (1975).
94. Fisheries Case, 1951 I.C.J. at 133.
95. 1982 LOS Convention, *supra* note 10, arts. 2 & 3, 2 I.L.M. at 1272.
96. *Id.* arts. 17-26, at 1273-75.
97. *Id.* art. 45, at 1278.
98. *See* Jonathan I. 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).
99. 1982 LOS Convention, *supra* note 10, art. 33, 21 I.L.M. at 1276.

the area. Foreign vessels and aircraft have rights of navigation and overflight in the exclusive economic zone as found on the high seas.[100] 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 two hundred mile limit, whichever is further.[101]

C. *Maritime Boundaries Between Opposite and Adjacent States*

1. The Norm in General

Because states are not isolated and their 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. International law calls for states to settle their maritime boundaries through agreement. In the absence of an agreement, international law will determine the location of the line, but states often disagree about the rules governing such allocations.

Theoretically, all maritime boundaries already exist and must only be located.[102] In fact, in the absence of an existing delimitation, the decision-maker must construct a boundary for the first time. The 1958 and 1982 Law of the Sea Conventions provide the general rules for the delimitation of maritime boundaries in the territorial sea, exclusive economic zone, and continental shelf.[103] These texts offer only limited assis-

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100. *Id.* arts. 55-75, at 1279-84.

101. *Id.* arts. 76-85, at 1284-87.

102. *See* North Sea Continental Shelf, (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 22 (Feb. 20); Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic, SR. 1. A.A.3, para. 18, at 4849 (Decisions of June 30, 1977 and Mar. 14, 1978) [hereinafter Continental Shelf Arbitration]. The instant section of this article is an abbreviated and updated version of Jonathan I. Charney, *The Delimitation of Ocean Boundaries*, 18 OCEAN DEV. & INT'L L. 497 (1987).

103. The 1958 Convention on the Territorial Sea 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 provision.

1958 Convention on the Territorial Sea, *supra* note 73, art. 12, U.S.T. at 1610, 515

tance in maritime boundary delimitation because the rules are

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U.N.T.S. at 12. Canada is not a party to this convention.

The 1958 Convention on the Continental Shelf specifies rules for the delimitation of maritime boundaries over the continental shelf:

> 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 land.

Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, art. 6, 15 U.S.T. 472, 474, 449 U.N.T.S. 311, 315 (into force June 10, 1964).

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 law. North Sea Continental Shelf, 1969 I.C.J. at 45.

The 1982 Convention on the Law of the Sea is the most modern effort to codify the maritime boundary law in an international agreement, but the Convention is not yet in force. Canada signed that Convention on December 10, 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 sea 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

indeterminate and do not necessarily reflect the binding customary law.

Coastal states often litigate maritime boundary delimitation questions before international tribunals. For example, Canada was a party to the *Gulf of Maine* case before the International Court of Justice and the St. Pierre and Miquelon dispute before an ad hoc tribunal.[104] While a considerable quantity of literature on maritime boundary law exists, the law is extremely fact intensive and provides limited guidance for those seek-

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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.

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.

1982 LOS Convention, *supra* note 10, arts. 15, 74, 83, 21 I.L.M. at 1272, 1285, 1286.

104. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); Delimitation of Maritime Areas Between Canada and the French Republic, Court of Arbitration Decision of June 10, 1992. The other modern international law cases pertinent to maritime boundaries include: North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20); Continental Shelf Arbitration, *supra* note 102; Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18 (Feb. 24); Application for Revision and Interpretation of the Judgment of Feb. 24, 1982 in the Case Concerning the Continental Shelf (Tunis. v. Libya), 1985 I.C.J. 192 (Dec. 10); Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, 19 R.I.A.A. 149 (ad hoc trib. 1988), *translated in* 25 I.L.M. 252 (1986) [hereinafter Maritime Boundary Arbitration Between Guinea and Guinea-Bissau]; Arbitration Tribunal Award for the Determination of the Maritime Frontier of Guinea-Bissau/Senegal, *supra* note 38.

ing to delimit such boundaries.[105]

A brief, nontechnical statement of the modern maritime boundary law might be as follows: International law does not require states to delimit maritime boundaries in accordance with any particular method. Rather, it requires that boundaries be delimited equitably, taking into account all of the relevant circumstances of the situation to produce an equitable result.[106] The equitable principles of modern maritime ocean boundary law are indeterminate, and the relevant circumstances are theoretically unlimited.[107]

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105. Much of that literature is listed in TED L. MCDORMAN ET AL., MARITIME BOUNDARY DELIMITATION (1983). *See also* PROSPER WEIL, THE LAW OF MARITIME DELIMINTATION—REFLECTIONS (1989); INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6. Writings on this subject by the instant author include: *The Delimitation of Ocean Boundaries*, 18 OCEAN DEV. & INT'L L. 497 (1987), *reprinted in* RIGHTS TO OCEANIC RESOURCES 25 (Dorinda G. Dallmeyer & Louis De Vorsey, Jr. eds., 1989); *Ocean Boundaries Between Nations: A Theory for Progress*, 78 AM. J. 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), *reprinted in* THE LAW OF THE SEA AND OCEAN INDUSTRY: NEW OPPORTUNITIES AND RESTRAINTS 426 (Douglas Johnston & Norman G. Letalik eds., 1984); *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AM. J. INT'L L. 28 (1981).

106. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 59-60 (Feb. 20); Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 293, 299-300, 339. Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, *supra* note 104, para. 8, at 289; Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 38-40 (June 3).

107. The International Court of Justice expressly described the indeterminacy of this rule in the result-oriented words in the Continental Shelf case:

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

Continental Shelf (Libya v. Malta), 1982 I.C.J. at 59. *See also* Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 290, 312-13.

In a subsequent ruling in the Continental Shelf litigation between Libya and Malta, the I.C.J. 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.

The I.C.J., however, has developed a pattern in the treatment of maritime boundary cases, regardless of whether they involve the delimitation of a continental shelf boundary or the delimitation of a single boundary for the two hundred mile zone and the continental shelf.[108] First, the tribunal describes generally the area in which the boundary dispute arises. Second, the tribunal searches the record to determine whether the parties have agreed to a specific boundary, either in a binding international agreement or in practice. If this step fails, the tribunal proceeds to the third step, which is to state the rule of law for maritime boundary delimitations when there is no agreed delimitation. That rule is described variously as requiring the boundary to be delimited by practical methods in accordance with equitable principles (or criteria) by 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 which relevant circumstances should be considered. At this point, the tribunal inevitably finds that all circumstances other than the geography of the shoreline are irrelevant.

Having limited the analysis to relevant geographical circumstances, the tribunal proceeds to the fifth step, in which it simplifies the geographical circumstances and produces a geometric construct of the area and 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. Finally, the tribunal checks that line against the many circumstances that were initially rejected and against the rule of proportionality to ascertain whether the proposed line is equitable. Small islands or the proportionality test might give rise to some mathematically computed adjustments of the line.[109] Other nongeographic factors will not mandate an adjustment.

2. The Equidistant Line as a Rule of Law

a. The 1958 Conventions and Subsequent Cases

Nothing requires that a boundary be delimited in accordance with the rule of equidistance. States often assume that the 1958 Conventions require a preference for the equidistant line.[110] States often ignore this

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1985 I.C.J. at 39.

108. *See* Continental Shelf (Libya v. Malta), 1985 I.C.J. at 46; Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 326.

109. *See* Continental Shelf Arbitration, *supra* note 102, at 115-16.

110. *See* North Sea Continental Shelf, 1969 I.C.J. at 20, 24-25, 28-45; Continental Shelf (Tunis. v. Libya), 1982 I.C.J. at 78-79; Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 300-03.

principle, however, particularly when both parties are not bound by the 1958 Conventions. The international tribunals have been very resistant to statements of the rule preferring equidistance. Thus, in the *North Sea Continental Shelf* decision, the I.C.J. found that the equidistant rule of the 1958 Conventions had not emerged as customary international law.[111] It declared that, in the instant case, the boundary might appropriately diverge from that line.[112] In the Continental Shelf arbitration, the tribunal found that the 1958 Conventions were binding for most of the boundary, but it applied a unified equidistance/special circumstance rule that gave no particular preference to equidistance.[113] In the *Libya/Tunisia* case, the I.C.J. took special pains to disparage the equidistant rule.[114] In *Gulf of Maine,* the chamber of the I.C.J. opined that proximity, which is at the foundation of equidistance, should not be preferred as a basis for delimitation.[115]

The principal problem with the equidistant line is that geographical circumstances may exist in which proximity to the coastline may create inequities (or special circumstances). Such a situation exists when a small offshore island or protrusion on the coast of one state causes the equidistant line to curve substantially in one direction to the great disadvantage of the other state.[116] In another common situation, the coastline is generally concave such that the maritime area of the state in the middle of the concavity becomes squeezed by the convergence of equidistant maritime boundaries drawn between the state in the middle and the states on each side. As a result, the state in the middle will find itself with little or no offshore area.[117] Other geographical situations can also demonstrate the inequities of the equidistant line.[118]

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111. North Sea Continental Shelf, 1969 I.C.J. at 45.

112. *Id.* at 49-54.

113. Continental Shelf Arbitration, *supra* note 102, para. 65-9, at 43-45.

114. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. at 78-79.

115. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 296-300.

116. Continental Shelf Arbitration, *supra* note 102, at 113-18, para. 243-63; Continental Shelf (Libya v. Malta), 1985 I.C.J. at 48, 50-53; Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, *supra* note 104, para. 98.

117. North Sea Continental Shelf, 1969 I.C.J. at 49. *See also* Continental Shelf (Libya v. Malta), 1985 I.C.J. at 44.

118. *See* Prosper Weil, *Geographical Considerations in Maritime Delimitation, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6; D.W. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations, Maritime Boundary Delimitations, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6.

b. The 1982 Convention on the Law of the Sea

The text of the 1982 Convention on the Law of the Sea exemplifies the movement away from the equidistance principle. If the maritime boundary provisions in that Convention are compared to those found in the 1958 Conventions, one will note that the equidistance principle is 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 omits the principle in the provisions concerning the boundaries in the exclusive economic zone and continental shelf. Pressure from a significant group of states hostile to the equidistant line led to this change. References in the text of the 1982 LOS Convention to rules of international law may, however, neutralize the provision and provide a reference back to the equidistance principle.

c. 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: (1) areas close to the coasts of states; and (2) boundaries between opposite states. In the narrow territorial sea, the equidistant line allocates to the coastal states the areas most proximate to their land territory. In these narrow zones, the equidistant line is not as prone to great distortions caused by some small geographical projection of one state.[119] 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 provides each state with the greatest relative distance.[120]

Recent cases have strengthened the viewpoint that the equidistant line is appropriate if the disputing states' coastlines are opposite rather than adjacent.[121] 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 ultimate boundary was somewhat modified.[122] No clear rule

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119. *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 302.

120. Continental Shelf (Libya v. Malta), 1985 I.C.J. at 52-55; Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, *supra* note 104, para. 124, at 302.

121. North Sea Continental Shelf, 1969 I.C.J. at 45.

122. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 325, 333-337; Continental Shelf (Libya v. Malta), 1985 I.C.J. at 47, 51, 55. *See also* Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, *supra* note 104,

exists to distinguish between opposite and adjacent coasts, but in specific cases the courts have used this classification.[123]

Recently, in the *Libya/Malta* case, the I.C.J. enhanced the appropriateness of equidistance by suggesting that proximity (equidistance) is particularly appropriate when a distance less than four hundred nautical miles separates contesting states. In those areas, the coastal state derives its authority from the regime of the exclusive economic zone that is based strictly upon the distance criteria.[124]

As the distance from land increases and the boundary area appears based more on adjacency than oppositeness, greater risk exists that the equidistant line would create an inequitable result, especially when the coastline is irregular due to convexities, concavities, offshore islands, or offshore low tide elevations. Accordingly, decision makers are less willing to articulate any preference for equidistance in such circumstances. The objectivity of equidistance, the value of a division in accordance with proximity, and the relatively equal sharing of the areas, however, often make the use of equidistance or an approximation thereof a particularly appropriate solution.[125] When difficult circumstances are present, the decision makers have used other methods of construction or have modified the equidistant line to diminish the effect of the circumstance. Thus, the effects of islands have been halved,[126] fictitious coastlines have been constructed, and boundaries delimited on the basis of this construction.[127]

International practice appears to support the use of the equidistant line. The I.C.J. pointed out in its 1969 *North Sea Continental Shelf* judgment that most ocean boundary agreements use the equidistant line.[128] Some tribunals have determined that the equidistant line predominates; others have found it on the wane. None, however, have found that state practice has established the equidistant line as the norm.[129]

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para. 91, at 290.

123. Continental Shelf Arbitration, *supra* note 102, para. 204, at 96-99; Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 325, 331.

124. 1985 I.C.J. at 46-47.

125. *See* Continental Shelf Arbitration, *supra* note 102, para. 196-202, 248-49 at 93-95, 115-16. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 333, 329-30, 335-39.

126. Continental Shelf Arbitration, *supra* note 102, para. 251, at 117; Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 336-37.

127. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 88-90; Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 333-34; Continental Shelf (Libya v. Malta), 1985 I.C.J. at 51-52.

128. North Sea Continental Shelf, 1969 I.C.J. at 43-45.

129. Continental Shelf Arbitration, *supra* note 102, para. 85, at 51-52; Continental Shelf (Libya v. Malta), 1985 I.C.J. at 38.

A recent and comprehensive collection of international ocean boundary agreements confirms that international law does not mandate the use of the equidistant line.[130] The study demonstrates, however, that the quantitative predominance of equidistance has continued.

3. Nongeographic Considerations

In the first modern maritime boundary case, the I.C.J. declared that many facts should be considered in a maritime boundary delimitation.[131] In the *North Sea* cases, the Court identified a number of specific considerations including the geology of the shelf;[132] the geographical configuration of the coastline;[133] the need for unity of deposits;[134] and a reasonable degree of proportionality between a state's coastline and the extent of the continental shelf appertaining to it.[135]

This open-ended list of relevant circumstances led litigants to devote considerable attention to nongeographic factors.[136] While these argu-

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130. *See* Jonathan I. Charney, *Introduction and Conclusions, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6; Leonard H. Legault & Blair Hankey, *Method, Oppositeness and Adjacency, and Proportionality in Maritime Delimitation, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6.

131. The Court stated:

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

North Sea Continental Shelf, 1969 I.C.J. at 50. *See also* Continental Shelf Arbitration, *supra* note 102, para. 70, at 421.

132. This should be considered "in order to find out whether the direction taken by certain configurational features should influence 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." North Sea Continental Shelf, 1969 I.C.J. at 51.

133. *Id.* In particular, the use of the equidistant 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." *Id.* at 49.

134. *Id.* at 51-52. The unity of deposits is needed to avoid uncoordinated exploitation of the continental shelf resources by two states. *Id.*

135. *Id.* at 52.

136. Litigants in the Continental Shelf Arbitration made arguments on the basis of a seabed trench and navigation for military and economic purposes, *supra* note 102, paras. 106-09, 161-66, 171, 185, 188, 197-202, at 398, 428, 437-39, 442, 444-45. In the Continental Shelf case, the litigants devoted much attention to geological and geomorphological arguments, as well as the to history of fishing and petroleum development in the area. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. at 50-58, 73-74. In the *Gulf of Maine* case, the United States relied heavily on geomorphological arguments, fishing resources

ments may have played some role in the I.C.J.'s judgments, a review of all the cases shows that the decision makers did not admit to the usefulness of the nongeographic circumstances and in some cases disregarded them totally.

No judgment completely forecloses these arguments from being potentially relevant in some future case. Advocates, however, may have to carry the burden of proving that a boundary based on geographic facts is "radically inequitable."[137] Nongeographic factors may be completely irrelevant in all cases of boundary delimitations within two hundred nautical miles from the coastline.[138] Nevertheless, parties still make arguments regarding factors to enhance a case for the equity of their position, but not as a primary basis for the delimitation.

One study has established that no pattern or practice in the negotiated maritime boundary agreements requires the use of any nongeographic factor as a matter of law.[139] A commentator, however, demonstrates that these factors do, in fact, perform a useful role in some circumstances.[140]

4. Tacit Agreement, Estoppel, Acquiescence, and *Modus Vivendi* Line Considerations

The *Libya/Tunisia* judgment emphasized the significance of the contesting state's past behavior. In this case, the I.C.J. relied heavily on a so-called *modus vivendi* line found in the history of the boundary dispute. The Court identified a long series of actions by the sovereigns that seemed to establish an unofficial boundary. The I.C.J. 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 identi-

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and environmental facts, while Canada focused on economic arguments. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 273-74, 276-78, 327, 329, 340-44. Economic, geologic, and security interests were presented without success in the Continental Shelf litigation between Libya and Malta. Continental Shelf (Libya v. Malta), 1985 I.C.J. at 34, 40-42. The same is true in the Maritime Boundary Arbitration Between Guinea and Guinea-Bissau, *supra* note 104, paras. 89, 115, 122, 124, at 252, 289-90, 299-300, 302.

137. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 342.

138. Continental Shelf (Libya v. Malta), 1985 I.C.J. at 55.

139. Jonathan I. Charney, *Introduction and Conclusions, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6.

140. Barbara Kwiatkowska, *Economic and Environmental Considerations in Maritime Boundary Delimitations, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6.

fied a circumstance showing an equitable location of the line.[141] Even when Tunisia returned to the court to show that it had been mistaken about the locations of some of the historically used lines, the Court refused to modify its decision on the ground that the general implication of all the relevant lines showed the equity of its delimitation.[142]

Canada made a similar argument in the *Gulf of Maine* case based upon the statements and actions of some United States government officials and private companies exploring the area. This argument was unsuccessful largely because the circumstances relied upon were short lived and occurred before the litigation.[143]

5. Proportionality

The "proportionality test" is often a factor in maritime boundary delimitations. This test traditionally compares the ratios of the water areas allocated to the contesting states by a potential maritime boundary to the ratios of the relevant states' coastlines in the boundary area. If the ratios are not comparable, the potential maritime boundary may be suspect, and alternative boundaries more closely satisfying proportionality may be given further consideration.[144]

Courts have used a variant on the traditional proportionality rule in recent decisions. After calculating the ratio of the relevant coastlines, they used linear measurements to measure the appropriateness of the division. Thus, in the *Libya/Malta* case, the I.C.J. based the linear measure on a line drawn between the coastline of the two opposite states and the point at which the potential boundary crossed that line. The Court used the lack of proportionality as a justification for a shift in the boundary line.[145] Similarly, in the *Gulf of Maine* case, the I.C.J. drew a construction line between the headlands of the Gulf and identified the point at which the equidistant line crossed that line. The lack of appropriate proportionality justified a shift in the boundary line calculated on the basis of the construction line.[146]

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141. Continental Shelf (Tunis. v. Libya), 1982 I.C.J. at 65-77, 83-86.

142. Application for Revision and Interpretation of the Continental Shelf Judgment of February 24, 1982, (Tunis. v. Libya), 1985 I.C.J. at 192 (Dec. 10).

143. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J. at 280-88, 303-312.

144. North Sea Continental Shelf, 1969 I.C.J. at 52; Continental Shelf (Tunis. v. Libya), 1982 I.C.J. at 91; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. at 322, 323, 334-337; Continental Shelf (Libya v. Malta), 1985 I.C.J. at 44-45, 49.

145. Continental Shelf (Libya v. Malta), 1985 I.C.J. at 52.

146. Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I.C.J.

V. The Delimitation of Québec's Maritime Zones

If an independent Québec would have a right to maritime spaces adjacent to its coasts, those areas would have to be delimited. Since Québec faces upon three relatively closed water bodies, it probably could not realize an exclusive economic zone to the maximum two hundred nautical mile distance, much less to a continental shelf beyond. Québec could, however, obtain a full twelve nautical mile territorial sea and twenty-four nautical mile contiguous zone along much of its coast. All such zones would be bounded by maritime boundaries with the remainder of Canada. This section addresses the geographical extent of the potential maritime boundaries of Québec for the three regions in which Québec may have maritime jurisdiction: the Gulf of Saint Lawrence, Hudson Bay, and Hudson Strait. The discussion of each area begins with the description of the current boundary of Québec in that area and proceeds to consider the status of the waters (particularly the question of historic waters). Finally, the Article discusses the potential location of the maritime boundary between Québec and the remainder of Canada.

A. *The Gulf of Saint Lawrence*

1. Description of the Québec Boundary

No clear statutory description of Québec's boundary in the Gulf of Saint Lawrence exists. The Royal Proclamation of October 7, 1763 proclaims that the boundary of Québec in this area closes the mouth of the Saint Lawrence River on the western side of Anticosti Island with a line of two segments of approximately seventy-five nautical miles in length. The Gulf of Saint Lawrence is east of those closing lines.[147]

The 1851 Act of the Imperial Parliament delimiting the boundary of Québec in the Bay of Chaleurs area described the boundary[148] as run-

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at 335-36.

147. This boundary passes along the High Lands which divide the Rivers that empty themselves into the said St. Lawerence 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.

Royal Proclamation by King Geroge, Oct. 7, 1763. *See* W.P.M. Kennedy, Documents of the Canadian Constitution 1759-1915, at 18 (1918); Nicholson, *supra* note 30, at 21.

148. The boundary runs 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

ning through the middle of the Bay of Chaleurs and stopping at its mouth before entering the Gulf of Saint Lawrence. A line of approximately twenty-five nautical miles would close the Bay. Québec would receive the northern half of the Bay. The Gulf is outside the Bay to the east.[149]

The Act of June 13, 1898 respecting the northwestern, northern, and northeastern boundaries of the province of Québec 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. . . ."[150] The Islands of Anticosti and Magdalen are within the Province of Québec.[151]

2. Legal Status of the Gulf of Saint Lawrence

a. The Normal Baseline

The Gulf of Saint Lawrence is too large to be enclosed by the normal baseline. A river closing line would be drawn at the mouth of the Saint Lawrence River. Similarly, small juridical bays exist along the shore of Québec that may be closed by lines of twenty-four nautical miles or less. One might conceive of the Gulf as an over-large bay, permitting the coastal state to place a fall-back line of twenty-four miles to enclose additional waters.[152] Canada has not drawn a system of straight baselines along any shore of the Gulf. Modern international law would not permit

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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.*

An Act for Settlement of the Boundaries Between the Provinces of Canada and New Brunswick, 1851, 14 & 15 Vict., ch. 63 (Eng.); A.F.N. Poole, *The Boundaries of Canada*, 42 CANADIAN B. REV. 100, 127 (1964); NICHOLSON, *supra* note 30, at 94.

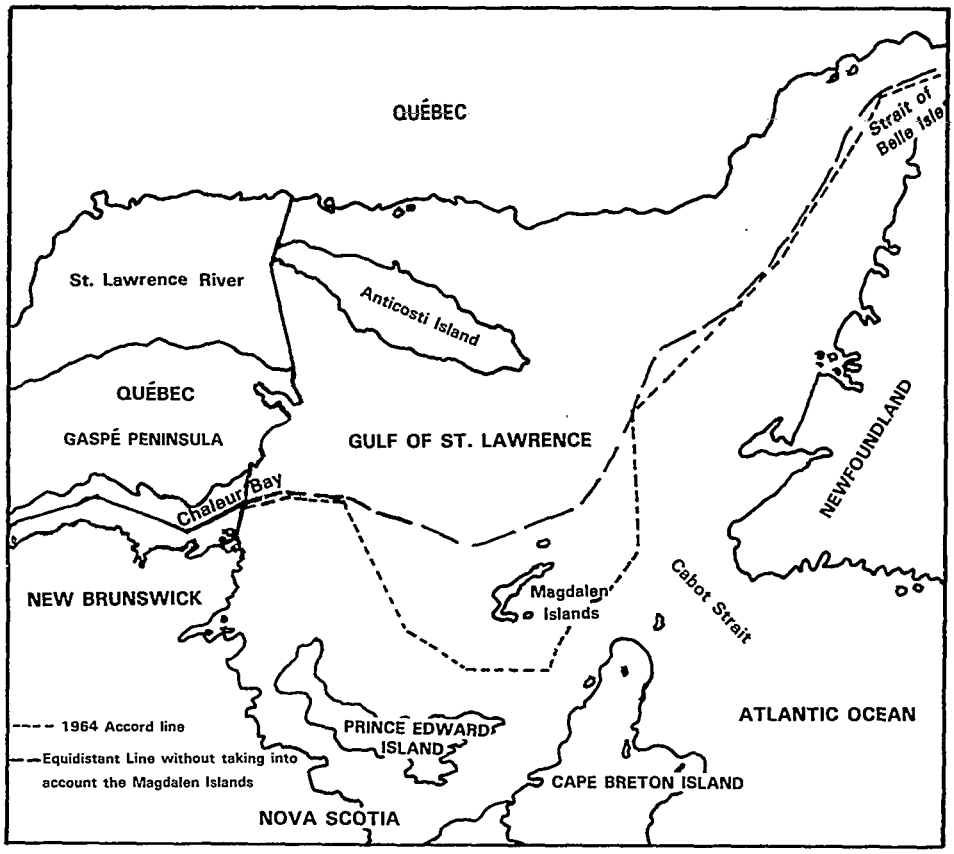
149. *See* Map 2.

150. An Act Respecting the north-western, northern and north-eastern Boundaries of the Province of Quebec, 1898, 61 Vict. ch. 3 (Eng.).

151. An 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, 1809, 49 Geo. 3, ch. 27 (Eng.); An Act to provide for extension of Feudal and Seignorial Rights and Burthens on Lands, sec. IX, 1925, 6 Geo. 4, ch. 59 (Eng.).

152. *See generally* 1982 LOS Convention, *supra* note 10, art. 10(5), 21 I.L.M. at 1272.

MAP 2


QUÉBEC
Strait of Belle Isle
St. Lawrence River
Anticosti Island
QUÉBEC
GASPÉ PENINSULA
GULF OF ST. LAWRENCE
NEWFOUNDLAND
Chaleur Bay
NEW BRUNSWICK
Magdalen Islands
Cabot Strait
ATLANTIC OCEAN
1964 Accord line
Equidistant Line without taking into account the Magdalen Islands
PRINCE EDWARD ISLAND
CAPE BRETON ISLAND
NOVA SCOTIA

Canada to draw such lines because the coastline is not deeply indented or fringed by islands.[153] The normal baselines, including bay closing lines, would be applied to the mainland shore as well as to islands in the Gulf, including the Magdalen Islands.

Unless Canada could establish historic water status for the Gulf of Saint Lawrence, 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 four hundred nautical miles, the two hundred mile economic zone would include the entire Gulf beyond the territorial sea. Maritime boundaries would be required to divide the areas regardless of whether the Court sustains the historic water claim.

b. Historic Water Status

A review of the historic data and literature on the subject suggests that historic water status for the Gulf of Saint Lawrence could not be established. The early history of the Gulf does not support an historic water status. In the 1713 Treaty of Utrecht, France relinquished Hudson Bay, Hudson Strait, and Newfoundland to England.[154] While the agreement specifically purports to transfer rights over the waters of Hudson Bay and Hudson Strait, it makes no reference 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.

Article V of the Treaty of Paris between the United Kingdom and France of 1763 renews the rights found in Article XIII of the Treaty of Utrecht. The treaty also asserts British jurisdiction over the waters of the Gulf to three leagues from the coasts and islands in the Gulf belonging to Britain. The French were free to fish in the substantial waters beyond.[155] Accordingly, Britain did not claim the waters of the Gulf at this time. Article VI of the Treaty of Versailles of 1783 maintained the French rights found in Article V of the Treaty of Paris to fish in the Gulf of Saint Lawrence.[156] In Article III of the Treaty of Paris of 1783, Britain "agreed that the people of the United States shall continue to

153. *See* 1982 LOS Convention, *supra* note 10, art. 7, 21 I.L.M. at 1272. Some coastal states have, however, abused the rule and drawn baselines in areas such as this. *See* Robert W. Smith, *Global Maritime Claims*, 20 OCEAN DEV. & INT'L L. 83, 87-90 (1989).

154. DOCUMENTS ILLUSTRATIVE OF THE CANADIAN CONSTITUTION 3 (William Houston ed., 1891).

155. *Id.* at 61.

156. *Id.* at 267.

enjoy unmolested the right to take fish . . . in the gul[f] of St. Lawrence. . . . [They] also . . . shall have liberty to take fish . . . on the coasts, bays, and creeks of all other of his Britannic Majesty dominions in America . . . ."[157]

Article I of the Convention of London of 1818 between the United Kingdom and the United States also recognized the right of United States inhabitants to fish in these waters to "within Three Marine Miles of any Coasts, Bays, Creeks, or Harbours."[158]

In 1906, when Newfoundland asserted authority over the Gulf of Saint Lawrence beyond three nautical miles, the United States expressly protested.[159] The 1910 award of the North Atlantic Coast Fisheries 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. The court delimited closing lines for bays within the Gulf of Saint Lawrence (Chaleurs Bay, Egmont Bay, and Miramichi Bay) but it did not close the Gulf as a whole.[160]

Some commentators argue that this early history should be viewed as a period in which the coastal authorities in the Gulf granted rights to foreign nations, but maintained exclusive control.[161] This position, though not without merit, 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 government amended the Customs Act to state specifically that "Canadian waters shall not extend beyond the limits of exclusion recommended in the North Atlantic Fisheries Award answer to question V . . . ."[162] An Order-in-Council of 1937 defined the Canadian

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157. *Id.* at 267, 268.

158. *Id.* at 285, 286. The authority of Britain within the three marine mile limit was enacted into law and made applicable to all foreign ships. An Act to Enable His Majesty to Make Regulations, 1819, 59 Geo. 3, ch. 38 (Eng.).

159. Morrissette, *Le Statute du Golfe du Saint-Laurent en droit international et en droit intern*, 16 REV. GEN. DE DROIT 273, 298-99 (1985); Loriot, *supra* note 16, at 239-40.

160. North Atlantic Coast Fisheries (Gr. Brit. v. U.S.), Hague Ct. Rep. (Scott) 141, 186 (Perm. Ct. Arb. 1910); BOUCHEZ, *supra* note 74, 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 3, at 21.

161. Rigaldies, *Le statut du Golfe en droit international public,* 23 ANNALS CAN. DE DROIT INT'L 80 (1985).

162. An Act to amend the Customs Act, 1936, 1 Edw. 8, ch. 30 (Eng.). It established an additional nine mile Canadian Customs Waters that appears to be consistent with international law. *Id.* It also provided authority to plot the baselines on a map or chart to

Customs Waters as running seaward from Canadian waters. It specified numerous closures of bays and other water bodies, including Hudson Strait, but it drew the closing line for the Gulf of Saint Lawrence in the interior at Anticosti Island. Thus, this Order may support claims of Canadian waters in other areas, but it will not substantiate such claims in the Gulf.[163]

Westlake expressed the opinion in 1910 that the Gulf of Saint Lawrence was an open sea.[164] Balch wrote in 1912 that "the freedom of the Gulf of St. Lawrence and the right of American 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."[165]

The 1956 case of *Gavin v. The Queen*[166] supports 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, Chief Judge Campbell noted that the Gulf was "external sea" and not a body of water "which might fall within the doctrines relating to waters '*inter fauces terrae.*' "[167] He went on to discuss *R. v. Keyn*[168] 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."[169]

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 referred to a 1949 statement in which the then prime minister expressed a wish to establish the Gulf of Saint Lawrence as "territorial waters."[170] This response contrasts sharply with the af-

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be approved by the Governor in Council as conclusive evidence of their location. *Id.* Apparently, these maps were never prepared for this area due to the onset of World War II. *See* Jaquesyuan 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 ANNALS CAN. DE DROIT INT'L 158, 166, 183-84 (1970).

163. P.C. 1937-3139, C. Gaz., Dec. 18, 1937.

164. *See* JOHN WESTLAKE, INTERNATIONAL LAW 187-92 (2d ed. 1910).

165. Thomas W. Balch, *Is Hudson Bay a Closed or Open Sea?*, 6 AM. J. INT'L L. 409, 457 (1912).

166. 115 Can. Crim. Cases 315 (1956). This case was decided by the Prince Edward Island Supreme Court.

167. *Id.* at 321.

168. R. v. Keyn, 2 Ex. C.R. 63 (1876). *See also* note 15 and accompanying text.

169. 115 Can. Crim. Cases at 322-23.

170. House of Commons Debates, 23d Parliament, 6 Eliz. 2, vol. II, at 1169 (1957-58). On February 8, 1949, just prior to the union of Newfoundland with Canada, the

firmative declarations that Hudson Bay and Strait are historic inland waters of Canada.[171] In 1963 and 1969, United States government officials took exception to Canadian views that the Gulf was closed.[172]

In 1964, responding to complaints regarding alleged butchering of baby seals in the Gulf of Saint Lawrence and off the Magdalen Islands, 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."[173]

In the same year, the Secretary of State for External Affairs Martin, 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 twelve miles, 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."[174] He was reporting on international negotiations regarding straight baselines that would close the Gulf of Saint Lawrence, as well as Hudson Strait and Bay.[175] Mr. MacLean, a member of the opposition, opined that Canada had good legal ground to support the view that these waters were national waters belonging to Canada.[176] Mr. Crouse, another member of the opposition, argued that closing the Gulf of Saint Lawrence to foreign fishing would benefit the living resources of the area.[177] At hearings before the Standing Committee on Marine and Fisheries on June 11, 1964, the view was again expressed that a system of straight baselines should close the Gulf of Saint

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Prime Minister had stated:

> 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 status; it is governed by the comity of nations. It is our hope that it will be recognized as a valid contention.

Id. The Minister of Northern Affairs and Natural Resources saw no reason for departing from the principle enunciated in this statement. *Id.*

171. *See infra* Sections V(B)(2) and V(C)(2).

172. LA PRESSE, (Montréal), March 6, 1963, at 1; THE GLOBE AND MAIL, (Toronto), June 6, 1969, at B-5.

173. House of Commons Debates, 26th Parl., 2d Sess., 13 Eliz. 2, vol. II, at 1248 (1964).

174. House of Commons Debates, 26th Parl., 2d Sess., 13 Eliz. 2, vol. IV, at 3409 (1964).

175. *Id.* at 3412.

176. *Id.* at 3415.

177. *Id.* at 3654.

Lawrence and designate the Gulf as internal waters of Canada.[178] Despite urgings from the opposition, the government did not take a clear position on the matter.

A letter dated September 30, 1969 to Francois Loriot, Legal Advisor to the Commission d'étude sur l'intégrité due territoire du Québec, from Mr. Bernard H. Oxman of the United States Department of State Office of the Legal Advisor, reported that the United States considered "that the Gulf of St. Lawrence comprises high seas beyond three nautical miles from the baselines from which the territorial sea is measured."[179]

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 that the Gulf of Saint Lawrence and the Bay of Fundy "are not Canadian territorial waters."[180] He referred to the rights of United States fishermen to fish in these waters and stated that the government had "been somewhat deterred by the inadvisability of drawing baselines . . . in the Gulf of St. Lawrence" in order to prevent prejudice of future potential claims.[181] While Canada delimited systems of straight baselines on the eastern coasts of Newfoundland, Labrador, and Nova Scotia, none of those lines closed any entrance to the Gulf of Saint Lawrence, nor have they been delimited within the Gulf.

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178. *Id.* at 198. Undersecretary of State for External Affairs Wershof took the position that closing lines of the Gulf must be promulgated before they could become internal waters of Canada. *Id.*; *see also* Statement of the Minister of External Affairs of May 7, 1964, Proceedings of the Standing Committee on Banking and Commerce, vol. no. 1, at 20 (1964).

179. Commission d'étude sur l'intégrité due territoire du Québec, Rapport, La frontié dans le Golfe du St-Laurent, 7.3.4., bk. 1, Feb. 1972, at 677.

180. He stated that if Canada "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. . . ." Standing Committee on Fisheries and Forestry, House of Commons, 28th Parl., 2d Sess., at 16:12-13 (Apr. 21, 1970).

181. *Id. at* 16:26; *see also* House of Commons Debates, 28th Parl., 19 Eliz. 2, vol. VI, at 5954 (1970).

Arguments in favor of the internal water status of the Gulf of Saint Lawrence include Morin, *supra* note 162, at 158-248, 173-83, and Loriot, *supra* note 16; Morrissette, *supra* note 159. Both authors take 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. In 1985, one writer concluded that under international law the Gulf is internal waters of Canada. Rigaldies, *supra* note 161. Rigaldies' conclusions are not unqualified. While he marshalled historic evidence of claims and control, he reported two significant gaps. This includes the substantial period 1867-1949 and the period subsequent to 1970. Rigaldies called for a clear formal claim of internal water status, but recognized that the functional regimes of fisheries, pollution, navigation, and overflight probably have protected the Canadian interests.

In 1971, Canada established a fishing zone with closing lines for the Gulf of Saint Lawrence.[182] 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) delimited the outer limit of the Fishing Zone in the Gulf.[183] The Canadian government issued maps depicting these closing lines as the first implementation of the objective stated in 1949 to make the Gulf Canadian waters.[184] The very act of including the Gulf in the Canadian Fishing Zone, however, appears to have excluded that area from Canadian territory. The legislation applies this zone to regions of the sea outside the territorial sea of Canada.[185]

During this same period, Canada issued maps depicting the baseline for measurement of the territorial sea, including bay and river closing lines, and the outer limit of the territorial sea. The depiction of these lines stopped at points seaward of the entrances to the Gulf of Saint Lawrence. The maps did not show baselines across the seaward entrances to the Gulf.[186]

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182. P.C. 1971-366, (Zone 1) 363 C. Gaz. 1971. *See* Appendix, Promulgation of Fisheries Closing Lines, House of Commons Debates, 28th Parl., 3d Sess., 19 Eliz. 2, vol. II, at 2244-45 (1970).

183. *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.

184. Standing Committee on Fisheries and Forestry, 28th Parl., 4th Sess., Issue No. 7, at 7:5 (May 4, 1972). At the time of its enactment, 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 seaward to 200 nautical miles from the coastline. By the mid-1970s, international law established a 200 mile exclusive fishery zone (or exclusive economic zone). 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 water status of the Gulf.

185. Law Concerning the Territorial Sea and the Fishery Zones of Canada, R.S.C. ch. 22, §§ 4 & 5. *See* Debates of the House of Commons, vol. VI, at 6016 (Apr. 17, 1970) (statement of Secretary of State for Exterior Affairs Sharp); Sharp, House of Commons, Standing Committee on Fisheries and Forests § 16, at 18 (Apr. 21, 1970) (same); Loriot, *supra* note 16, at 194-96.

186. *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 1972, the Legal Adviser to the Department of External Affairs, Mr. J. A. Beesley, testified before the House of Commons Standing Committee on Fisheries and Forestry. He reported that a number of states had protested the Canadian plans to close the Gulf by a system of straight baselines and admitted that the Canadian position was controversial.[187]

A letter dated December 17, 1973 from the Canadian Bureau of Legal Affairs listed the bays that, 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, it denied the internal water status of the Gulf. The letter suggested that Canada intended to establish the Gulf as an inland sea.[188]

On March 6, 1975, the Department of External Affairs made a clear statement that the government considers the Gulf historic internal waters.[189] Secretary of State for External Affairs MacEachen repeated this opinion on March 7, 1975.[190] On March 8, 1979, however, 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

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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); 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; 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.

187. He identified the United States, France, Britain, Denmark, and Norway because they had been conducting fishing operations in the Gulf. Canada had begun negotiations with those states. Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry, House of Commons, 28th Parl., 4th Sess., at 7:4-7 (May 4, 1972).

188. *Canadian Practice in International Law During 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs,* 12 CAN. Y.B. INT'L L. 272, 277-78 (1974).

189. *Canadian Practice in International Law During 1975 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs,* 14 CAN. Y.B. INT'L L. 323-24 (1976).

190. House of Commons Debates, 30th Parl., 1st Sess., 24 Eliz. 2, vol. IV, at 3884 (1975).

sailing on the Gulf of St. Lawrence or in other areas in the 200-mile zone."[191]

In 1978, shipping regulations were made applicable to the Gulf. As a consequence, some have argued that Canada may control navigation in the Gulf as internal waters, but not as territorial sea or high seas because these regulations deny innocent passage in the Gulf.[192] A denial of innocent passage significantly supports an historic internal water claim. On the other hand, the argument for controlling passage presents some difficulties. First, it is unlikely that such navigation is regulated since the regulations may apply to Canadian fishing zones beyond the internal waters of Canada where the freedom to navigate is unquestioned. Second, Canada has never actually denied innocent passage through the Gulf. Third, this alleged claim of authority is relatively recent for historic water purposes.

Canadian air control regulations also apply to the Gulf.[193] The assertion of control over overflight is a necessary element in proving 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 water arguments. A published map shows that Canada applies its airspace regulations under discussion to areas clearly on the high seas; therefore, they may not reflect sovereign claims of exclusive authority. The airspace regulations, thus, provide ambiguous support for special status to the Gulf.

The Act to Amend the Canada Shipping Act of 1970 provides that regulations adopted pursuant to the Act may apply to the Gulf of Saint Lawrence as a Canadian fishing zone.[194] The Act authorizes a wide variety of regulations relating to navigation, operations, equipment discharges, and personnel of ships in these areas.[195]

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191. House of Commons Debates, 30th Parl., 4th Sess., 28 Eliz. 2, vol. IV, at 3943 (1979).

192. Rigaldies, *supra* note 161, at 131-37.

193. *Id.* at 140-143.

194. *See* R.S.C. 1970, ch. 27, § 727(2)(C) (2d Supp.).

195. 1958 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 73, art. 24, permitted the establishment of a contiguous zone out to the 12 mile limit for, among other reasons, sanitary regulations. In the early 1970s, the right of coastal states to take actions beyond the territorial sea and contiguous zone to protect the environment was in dispute. Coastal states made a variety of claims to take such actions. 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 in the exclusive economic zone permitted by the 1982 LOS Convention. To the extent that it does exceed such authority this act may support some extraordinary jurisdiction in the Gulf.

The legal status of the Gulf of Saint Lawrence has remained in question after the 1987 decision by the Supreme Court of Québec in the case of *R. v. Pezwick*.[196] Pezwick was a United States 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 Secretary of External Affairs MacEachen in which he had 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."[197]

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. On the basis of 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. The court also determined that the Canadian government would require legislative authority before it could establish the internal water status of the Gulf, which 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 of Canada, in or above the continental shelf, or within the exclusive economic zone of Canada.[198] On August 16, 1991, pursuant to a narcotics prosecution, the Canadian government issued the first certificate declaring that the waters of the Gulf of Saint Lawrence are internal waters of Canada.[199] The issuance of this certificate is the clearest official assertion of a claim to the Gulf to date, but it is less than the direct legislative claim that may

196. R. v. Pezwick, 110-38-000001-849, Supreme Court (Mar. 11, 1987) (appeal discontinued).

197. *Id.* at 18.

198. An Act to Apply Federal Laws and Provincial Laws to Offshore Areas and to Amend Certain Acts in Consequence Thereof, 39 Eliz. 2, ch. 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 § 10 (Aug. 16, 1991).

199. This certificate was issued on August 16, 1991 by the Director of the Legal Advisory Division of External Affairs and International Trade, Donald W. Smith, and has not yet been published in the Canadian Gazette. *See* Letter from D.W. Smith to M. Louise Villemure (Aug. 16, 1991) (on file with author).

be necessary. The claim was not even 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 itself.[200] The Shipping Act applies pollution control regulations in Canadian fishing zones, which include the Gulf of Saint Lawrence.[201] The definition of "inland waters" may suggest that the limit of internal waters of Canada for international law purposes stops at that line also. As the Supreme Court of Canada pointed out in its 1984 *Strait of Georgia Reference*, the definition uses these terms interchangeably.[202] This definition may also be relevant to the limits of Québec under Canadian law. 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 Canada."[203] In 1990, the Canadian government amended this act 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."[204] Thus, the statutes treat "inland waters" and "internal waters" differently.

There has been significant international navigation in the Gulf. Records of this history have not been fully examined. United States government vessels navigated through the Gulf of Saint Lawrence in 1948 on their way to or from Hudson Strait[205] without requesting or obtaining consent from the Canadian government. Most navigation in the Gulf would be to and from Canadian ports or waters (such as the Saint Lawrence River) and would require the consent of Canada. Through the 1970s, many foreign nationals fished in the Gulf pursuant to historic treaties. Most viewed these treaties as recognizing the freedom to fish in those waters, although they could be construed as a grant by the coastal

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200. Can. Shipping Act, R.S.C. ch. 5-9 §§ 1, 2 (1990).

201. *Id.* at § 655(1).

202. Ownership of the Bed of the Strait of Georgia, 1 R.C.S. 396-97 (1984).

203. Territorial Sea and Fishing Zones Act, R.S.C., ch. T-7, § 1; R.S. 1964-65, ch. 22, § 1., § 3(2).

204. Territorial Sea and Fishing Zone Act, R.S., ch. T-8 (1990).

205. Fax from Cdr. Stu Marsh, Ice Operations Division, US Coast Guard, G-N10 to Jonathan I. Charney, Vanderbilt Law School (Feb. 21, 1992) (on file with author). The contents of the fax to the author contained: Report of Task Force Eighty, Summer Arctic Operation 1948, CTF 80/A4-3/A9/rs, Serial 025 (Nov. 12, 1948) Annex 1-(c) at 1; The USCGC Eastwind on July 16-18, 1948, *id.* Annex 1-(d) at 1; The USCGC Eastwind on Sept. 16-18, 1948, *id.* Annex 1-(d) at 9.

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 exclusive two hundred nautical mile economic zone under international law.

The evidence to date suggests that, as a matter of current international law, the Gulf of Saint Lawrence is not historic waters completely within the internal waters or territorial sea of Canada. Prior to the union of Canada and Newfoundland in 1949, the two states held the shores of the Gulf. 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. No evidence exists after 1949 to support a clear claim in international affairs to the waters of the Gulf. In fact, the Secretary of State for External Affairs publicly testified in 1970 that the Gulf was not Canadian. No system of straight baselines or other territorial baselines have been established to close the Gulf. The various domestic statutes asserting elements of jurisdiction 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.[206] All but two of these assertions were made before domestic legislative bodies. One was made in litigation and was rejected by the court.[207] The other was made very recently for the purpose of a domestic prosecution pursuant to general legislative authority and has not yet been published. Foreign ships have navigated and fished in these waters under claims of rights incompatible with historic water status. Furthermore, recent Canadian court decisions have rejected the claims to unusual status of these waters. As a consequence, the normal baseline should apply to the Gulf. Beyond the normal baseline exists a twelve mile territorial sea. Seaward of that territorial sea is the Canadian exclusive fishery zone.

Cabot Strait and the Strait of Belle Isle provide exits from the Gulf of Saint Lawrence to the open ocean. Cabot Strait is sixty nautical miles wide with St. Paul Island located fourteen nautical miles off of the southern shore. Bands of twelve mile territorial seas would not close the Strait. Thus, the high sea rights to navigate and overfly the Strait would exist. It serves as the prime navigation route to the open ocean from 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, international law would permit the right of innocent passage

206. *See supra* note 189 and accompanying text.

207. R. v. Pezwick 110-38-000001-849, Supreme Court (Mar. 11, 1987) (appeal discontinued).

through Belle Isle Strait and perhaps the right of transit passage.

3. Maritime Boundaries in the Gulf

a. The 1964 Interprovincial Boundary Agreement

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 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. They have debated the issue of seaward jurisdiction of the provinces for some time. In 1964 the premiers of the four maritime provinces and the Prime Minister of Canada held a conference in which the maritime premiers sought federal recognition of their provinces' offshore jurisdiction. The provinces submitted an agreement that delimited their maritime boundaries in the areas of the Bay of Fundy, the Gulf of Saint Lawrence, and adjacent waters.[208] Québec communicated its adherence by telegram to the chairman of the maritime premiers' conference. While the submission called for federal legislation implementing this agreement, none was forthcoming.

The Canadian government made a subsequent effort to resolve the federal/provincial dispute 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 Agreement's maritime boundary lines for these purposes.[209] The provinces expected that this understanding would ultimately form the basis for legislative action.[210] This legislation never occurred.[211]

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208. 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, Oct. 1964. Telegram from Jean Lesage to Hon. R.L. Standfield, Premier of Nova Scotia (No. RAA 268-BA XA208 46) (date appears to be June 7, 1964).

209. *See* Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces (Feb. 1, 1977).

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

211. Whether or not the provinces could establish new boundaries on their own is

On March 2, 1982, Canada and Nova Scotia entered into an Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing. Schedule I, a small map which shows boundary lines between Nova Scotia, Prince Edward Island, and portions of Québec and Newfoundland, defined the area covered by the Agreement. This line appears to be identical to the 1964 Interprovincial Agreement line. Québec has consistently pursued its claims by citing the 1964 Agreement and depicting this boundary line on official maps of Québec.[212]

The prior discussion leads to three conclusions. First, the maritime provinces and Québec appear to agree generally on the location of the boundaries between their maritime claims in the Gulf of Saint Lawrence area. Second, this agreement has questionable legal status because Canada has never legislatively implemented the agreement. Furthermore, the Canadian government denies these provinces jurisdiction over most, if not all, of the area of interest. Third, because 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.

The text of the 1964 Agreement sets out the four principles used as a basis for the delimitations described in the text.[213] It appears, however,

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questionable. Nicholson writes:

> [O]nce 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 30, 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.

212. *See* Le Québec, Réalisé par le Service de la cartographie, Diffusé par le Centre d'information géographique et foncire Ministre de l'énergie et des Ressources (terres) Québec 1987. *See also* RAPPORT DE LA COMMISSION D'ÉTUDE SUR L'INTEGRITÉ DU TERRITOIRE DU QUÉBEC, *La Frontier dans le Golfe du Saint-Laurent*, ch. 7.1, para. 29 (Mar. 1972).

213. The four suggested princples may be outlined as follows:

1. Mineral deposits under shelf waters between Provinces pertain to one or another Province.
2. Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas.
3. Mineral right boundaries are so drawn to join median points between prominent landmarks selected so far as possible along parallel shores.
4. 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

that the 1964 lines were primarily based upon selective equidistance, which utilized only particular islands and headlands. For much of their distance, they closely track the true equidistant line. Such a simplified equidistant line is quite common in international practice.[214]

b. Maritime Boundaries in the Gulf

As discussed above, the international law of maritime boundaries takes numerous factors into consideration. Prime among them is coastal geography. Accordingly, the following discussion focuses 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 small, the distances between the coastlines in question are substantially less than four hundred nautical miles. No geological or geomorphological factors appear to be present that would influence the boundary location.

For the purposes of this analysis, this Article assumes 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 Magdalen Islands). This coastline begins at the north below the Strait of Belle Isle and runs southwesterly along the northeastern 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 reaching the middle and then runs through the middle of the bay as described in the 1851 Act. On the Magdalen Islands, 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. Newfoundland is on the east, and New Brunswick, Nova Scotia, and Prince Edward Island are on the south. Québec's coastline comprises roughly forty percent of the shore of the Gulf. Newfoundland holds another thirty percent with the remaining thirty percent divided among New Brunswick, Nova Scotia, and Prince Edward Island.

Due to the configuration, the small area, and the nature of the coast-

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point definable from the considerations in paragraph 3 above to the conflicting boundary.

214. *See* Legault & Hankey, *supra* note 130; *see also* Map 2.

lines, the equidistant line would be appropriate. It could be argued that the equidistant line or an adjustment thereof should not be used because of the presence of three islands in the Gulf: Québec's islands of Anticosti and Magdalen, and Prince Edward Island. However, 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 countervailed by Anticosti Island near the Québec shore.

The Magdalen Islands present a more serious situation. They are small islands that are located relatively far from the coastline. Significantly, 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 located.[215] Relative to the mainland of Québec, the islands are clearly located on the far side of the line.

Arguably, the use of these islands as a baseline for the generation of the equidistant line attracts a maritime area in excess of the island's geographical significance. The influence of the Magdalen Islands on the equidistant line is very substantial. Thus, it can be argued that giving these islands full effect in delimiting the boundary line by equidistance would be inequitable to the other territories facing the Gulf. Québec, however, could argue that the integrated relationship of the Magdalen Islands to the rest of Québec calls for giving the islands full effect. Giving these islands full effect would also compensate Québec for the lack of an open shore on the Atlantic Ocean that is held by Nova Scotia and Newfoundland. While there is no comparable situation, a number of existing maritime boundary agreements would support some diminution of the effect of islands in roughly comparable situations.[216] Others support the opposite result.[217] Some agreements support coastal state access to

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215. *See* Bowett, *supra* note 118.

216. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, including Kenya-Tanzania Maritime Boundary, Report No. 4-5; Burma-India Maritime Boundary, Report No. 6-3; Qatar-U.A.E. (Abu Dhabi) Maritime Boundary, Report No. 7-9; Libya-Malta Continental Shelf Boundary, Report No. 8-8; Libya-Tunisia Continental Shelf Boundary, Report No. 8-9; France-United Kingdom Continental Shelf Boundary, Report No. 9-3(a); Iceland-Norway Maritime Boundary, Report No. 9-4.

217. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, including Italy-Spain Continental Shelf Boundary, Report No. 8-5. *See generally* Bowett, *supra* note 118.

the middle of a water body in a concave situation.[218] The 1964 Interprovincial Agreement uses all islands in the Gulf, including the Magdalen Islands, to generate the simplified equidistant line. This agreement may support the view that usage based upon the equidistant line identifies an equitable solution. On the other hand, it may merely be evidence of a political effort on the part of the maritime provinces to obtain Québec's support in their challenge to the Canadian government. Unlike the other provinces, Québec accepted the 1964 boundary agreement of the maritime premiers by telegram delivered at the eve of the meeting with Canadian officials.

If the Magdalen Islands are not given full effect in generating the maritime boundary line, many alternative delimitation lines are possible. One possible solution might be to delimit the boundary by an equidistant line that does not utilize these islands. Then one would delimit an enclave around the Magdalen Islands at a fixed distance from the coastline of the islands (such as twelve nautical miles). This boundary line would also be limited by the location of the equidistant lines drawn between the islands and the Newfoundland, Nova Scotia, and Prince Edward Island shores. As a consequence, an area between the Magdalen Islands and Anticosti Island would not be within Québec's maritime jurisdiction.[219] This solution finds precedence in the treatment of the Channel Islands by the award in the 1979 Anglo/French arbitration.[220]

B. *Hudson Bay*

1. The Legal Status of Hudson Bay

The 1912 boundary extension of Québec describes the boundary in the Hudson Bay and Hudson Strait as running along the shore.[221] As

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218. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, including France-Monaco Territorial Sea and Maritime Boundary, Report No. 8-3; Denmark-Federal Republic of Germany Continental Shelf Boundary, Report No. 9-8; Denmark-United Kingdom Continental Shelf Boundary, Report No. 9-10; Federal Republic of Germany-United Kingdom Continental Shelf Boundary, Report No. 9-12.

219. *See* Map 2.

220. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf, Decision of June 30, 1977, 18 I.L.M. 398, 88-97 (paras. 180-203) (1979).

221. The boundary was described in 1912 as follows:

> [C]ommencing at the point at the mouth of the East Maine 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

with the Gulf of Saint Lawrence, in order to determine the legal status of these waters one must apply the normal situation 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 with a depth (north/south) of 780 nautical miles, including James Bay, and 570 nautical miles, not including James Bay. Hudson Bay has a width (east/west) of approximately 520 nautical miles. The normal baseline follows the mean low-water line of the mainland and islands, closing lines at river mouths, twenty-four mile juridical bays, and low-tide elevations within twelve nautical miles of that baseline.

Geographically, the entrance to Hudson Bay would be approximately delimited by closing lines drawn between the mainland and the southwestern tip of Southampton Island, between the eastern tip of that Island at Seahorse Point to the northern tip of Nottingham Island, and between the southern tip of Nottingham Island to Cape Wolstenholme on the mainland. Their combined length would be approximately 116 nautical miles.[222] Some commentators maintain, however, that the entrance to Hudson Bay is actually located at the eastern entrance to Hudson Strait that can be closed by lines totaling fifty-four nautical miles.[223]

Hudson Bay does not qualify as a juridical bay because its mouth cannot be closed completely by a line or series of lines totaling twenty-four nautical miles or less. The Bay does not qualify even though it is a well-marked indentation containing landlocked waters satisfying the semicircle test established in article 10 of the 1982 LOS Convention, and its coasts belong to a single state. Hudson Bay, as an over-large bay, is due a twenty-four mile fall-back line as provided by article 10.5 of the 1982 LOS Convention. Smaller bays within it, however, qualify for juridical bay status. James Bay, located at the southeastern corner of Hudson Bay, has a mouth approximately ninety nautical miles wide between Long Island and Cape Henrietta Maria.[224] As an over-large bay, James

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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.

NICHOLSON, *supra* note 30, at 145 (citing 2 Geo. 5, 1912, ch. 40, § 2 (Eng.)).

222. The specific location of these closing lines may be determined by using the 45 degree test discussed above. *See generally supra* note 71.

223. *See* Morin, *supra* note 162, at 183; Letter from the Bureau of Legal Affairs of December 17, 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 *infra* subpart V(C) below.

224. The 45 degree test would locate that closing line more exactly. *See supra* note

Bay also is due a twenty-four nautical mile fall-back line. In addition, subsidiary bays qualifying for juridical bay status (e.g., Rupert Bay) and certain river mouths could be closed. The fall-back line would not be available in Hudson Bay and James Bay if Québec became an independent state. These bays would then have coasts belonging to more than one state.[225] Hudson Bay does not form part of a navigation route between parts of the high seas or exclusive economic zones. Historically, navigation in the waters of Hudson Bay has been limited to a maximum of four months per year due to ice.[226]

Some commentators have argued that the entire Hudson Bay and Hudson Strait have historic bay status. Others have disagreed. Balch made the most complete review of the arguments against historic water status in the early part of this century.[227] He listed and quoted numerous writers, including Vattel and Phillimore, who expressed the view that Hudson Bay was open sea.[228] Twenty years later, Johnston put forward equally vehement arguments in favor of historic water status.[229] Strohl devoted an entire chapter of his book to a study of the Hudson Bay and Hudson Strait claim.[230]

After recounting the history of discovery, Strohl found that the first purported claim to these areas was made in the British Charter to the Hudson's Bay Company in 1670.[231] The Treaty of Utrecht of 1718 states that Great Britain shall possess Hudson Bay and Hudson Strait along with all of the surrounding lands, seas, coasts, and rivers.[232]

A 1857 map illustrating the extent of the territory placed under the

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225. 1982 LOS Convention, *supra* note 10, art. 10(1), 21 I.L.M. at 1272.

226. STROHL, *supra* note 74, at 233; PHARAND, *supra* note 49, at 199.

227. Balch, *supra* note 165; Thomas W. Balch, *The Hudsonian Sea Is a Great Open Sea*, 7 AM. J. INT'L L. 546 (1913).

228. Balch, *supra* note 227, at 550-51 (citing EMMERRICH DE VATTEL, 1 LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE 142 (1775)); SIR ROBERT PHILLIMORE, 1 INTERNATIONAL LAW 284 (3d ed. 1879).

229. V. Kenneth Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, 15 BRIT. Y.B. INT'L L. 1 (1934).

230. STROHL, *supra* note 74, at 233-250.

231. The British Charter included "all waters, lands &c., within the entrance to Hudson Strait, not possessed by any other British company or colony." STROHL, *supra* note 74, at 237; *accord* WILLIAM MANNING, 4 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES-CANADIAN RELATIONS 1849-1860, at 402-08 (1945).

232. The treaty states that Great Britain shall possess "the bay and streights of Hudson, together with all lands, seas, sea-coasts, rivers and places situate in the said bay and streights." DOCUMENTS ILLUSTRATIVE OF THE CANADIAN CONSTITUTION, *supra* note 154, at 3.

authority of the Hudson's Bay Company covers the entire Hudson Bay.[233] This grant of authority continued until 1870, and Strohl believes that during this period England claimed complete sovereignty over these waters and exercised it through the Hudson Bay Company.[234] France had disputed this claim but ceded its claim in 1713 to the territory to England.[235] In his classic treatise of 1758, Vattel argued that Hudson's Bay could not become property of any nation.[236]

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 identified numerous writers publishing in the latter part of the nineteenth century supporting strict limits and declared Hudson Bay to be open waters. The treaty of 1818 between the United States and England recognized the right of United States citizens to fish "within three marine miles of any of the coasts, bays, creeks, or harbors of His Britanic Majesty's Dominions in America." This right, however, was granted "without prejudice to the exclusive rights of the Hudson Bay Company."[237] The United States negotiators explained that this provision only applies to areas within the normal three mile limit in Hudson Bay.[238]

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233. *See* NICHOLSON, *supra* note 30, at 58.

234. STROHL, *supra* note 74, at 238.

235. *Id.* (citing J. ALMON, 1 COLLECTION OF TREATIES &C. BETWEEN GREAT BRITAIN AND OTHER POWERS 136 (1772)).

236. Vattel stated:

> 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 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 it 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.

EMMERRICH DE VATTEL, THE LAW OF NATIONS 129 (Chitty trans., 1934). For the original French, see EMMERRICH DE VATTEL, LE DROIT DES GENS 324 (1758).

237. Fisheries, Boundary and Restoration of Slaves, Oct. 20, 1818, U.S.-Eng., art. I, 8 Stat. 248, 248-49; DOCUMENTS ILLUSTRATIVE OF THE CANADIAN CONSTITUTION, *supra* note 154, at 285.

238. STROHL, *supra* note 74, at 244; 1 Moore DIGEST 781 (1906). United States 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

When Canada seized a United States vessel in the Bay of Fundy, the subsequent arbitration award found that the Bay of Fundy was a water body "over which no nation can have the right of sovereignty;" the arbitrators also concluded that only bays with headlands not exceeding ten miles in width could be closed.[239] While this award did not directly apply to Hudson Bay, it interpreted the 1818 Treaty that was also applicable to those waters.

In 1893, prior to that award, the British government made reference to the legal status of Hudson Bay in the written presentation of its case before the international tribunal hearing the *Bering Sea* case. In that dispute with the United States, the British argued for open seas and limits on territorial jurisdiction and endorsed the position that it had no special authority over the waters of Hudson Bay beyond the normal three mile limit.[240] This official British position, made in an international arbitration with the interested states present, is particularly significant.

Canada's claim of authority over Hudson Bay was historically based on the ancient concept of closed seas that was very much under attack by the late nineteenth century. Thus, Westlake wrote in 1904 that sovereign control over the seas has been "gradually reduced to tolerable measure through such intermediate stages as that of the King's Chambers."[241] While Westlake considered Conception Bay on the coast of Newfoundland as exceptional based upon immemorial usage as territorial sea, he made no exception for Hudson Bay.[242]

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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.

7 U.S. State Papers 167 (1818-1819) (letter from Albert Gallatin and Richard Rush to Secretary State John Adams (Disptach No. 50, London, Oct. 20, 1818)), *reprinted in* Johnston, *supra* note 229, at 7.

239. The Case of the Washington, 1 Moore DIGEST 786 (1906) (Mixed Claims Commission, award of Umpire Bates).

240. 4 FUR SEAL ARBITRATION, PROCEEDINGS OF THE TRIBUNAL OF ARBITRATION, S. EXEC. DOC. 177, 53d Cong., 2d Sess., paras. 197-49, at 112-14 (1894). Vattel's position on the legal status of Hudson Bay is quoted with approval. *Id.* para. 147, at 112.

241. WESTLAKE, *supra* note 164, at 187.

242. *Id.* at 187-88; 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 229, at 11-12.

The right of a coastal state to obtain historic bay status over certain waters has been linked to the ability of the coastal state to subject the waters to its control. Phillimore wrote that a nation's control over a body of water may be contingent upon its ability, "to exclude other nations from the whole portion of the sea so surrounded. . . . ."[243] He then quoted the excerpt from Vattel reported above in which Vattel argued specifically that Hudson Bay could not be acquired by the coastal state.[244] Subsequently, Umpire Bates expressed similar views when he found that the Bay of Fundy was not a bay as defined in the treaties of 1783 and 1818.[245]

Expeditions to explore Hudson Bay and Hudson Strait took place in 1884-1887.[246] In 1894 the Prime Minister, Sir Charles Hibbert Tupper, took the position in a parliamentary debate that Canadian law applied to Hudson Bay.[247] The subject arose out of concern for foreign fishing and hunting in those waters. The government responded by asserting sovereignty and denying that it had been inactive in enforcing its claim. Nevertheless, the government conceded its inability to verify rumors of foreign fishing due to the remoteness of the areas.[248]

In 1897 an Order-in-Council divided administrative authority over the Bay and Hudson Strait by describing administrative boundaries running through the waters.[249] Strohl found, however, that all the official Canadian maps showed the boundaries in Hudson Bay running along the coast and not through the waters.[250] Canadians undertook expeditions to

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243. PHILLIMORE, *supra* note 228, at 274. *See* VATTEL, *supra* note 236. *See also* Balch, *supra* note 165, at 432-33 (observing that European authorities viewed Hudson Bay as an open sea).

244. PHILLIMORE, *supra* note 228, at 274.

245. Umpire Bates stated:

> 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.

United States, No. 4 (1893) Bering Sea Arbitration, British Argument (London) at 145, *quoted in* Balch, *supra* note 165, at 435.

246. Johnston, *supra* note 229, at 14-15.

247. House of Commons Debates, 7th Parl., 4th Sess., 57-58 Vict., vol. II, at 3275-78 (1894). Johnston, *supra* note 228, at 13.

248. House of Commons Debates, 7th Parl., 4th Sess., 57-58 Vict., vol. II, at 3278 (May 28, 1984).

249. STROHL, *supra* note 74, at 238; STATUTES OF CANADA, 1898, at xxxvi. For boundaries, see C. GAZ. vol. XXXI, No. 46 (May 14, 1898), at 2613-14. *See also* Johnston, *supra* note 229, at 13.

250. STROHL, *supra* note 74, at 238.

assert their authority in 1902, 1904, 1906, 1908 and 1910.[251]

While Canada may have claimed jurisdiction over Hudson Bay and Strait, United States whalers operated in the area at least during the period 1830-1900. Toward the latter part of that period, Scottish whalers also operated in the area.[252] The record of the House of Commons Debates suggests that the government was unaware of these activities and took only limited action. These whaling vessels landed on the shores of Hudson Bay. Employees of the Hudson Bay Company knew about some of this activity but it is not clear whether they condemned it or regulated it in any way. Some of these facts were known to the Hudson Bay Company. Writers have debated the legal implications of these activities and this knowledge.[253]

Strohl reports, however, that in 1903 the Canadian government sent a ship into Hudson Bay to reassert Canadian sovereignty over the area and to expel or subject any United States whalers to Canadian authority. None were found.

In 1906 a statute adopted by the Canadian Parliament imposed a whaling license fee premised upon Canada's claim to the Hudson Bay.[254] In 1906-1907 the government conducted patrols in Hudson Bay to collect whaling dues pursuant to the 1906 amendment to the Fisheries Act, which 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. . . . "[255]

In the same year, United States Assistant Secretary of State Adee responded to a question regarding the Canadian claim of authority by stating that "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 limit."[256] In 1908, Canadian authorities met one private fishing and hunting expedition from the United States and the expedition paid the demanded license fees.[257]

The revised Statutes of Canada of 1927 restate the 1906 language that fish licensing fees apply to all vessels in Hudson Bay, "inasmuch as

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251. Johnston, *supra* note 229, at 15.

252. J.T. JENKINS, A HISTORY OF WHALE FISHERIES 350 (1921); Johnston, *supra* note 229, at 8-9.

253. Johnston, *supra* note 229, at 8-9; BOUCHEZ, *supra* note 74, at 230.

254. 1906, R.S.C. ch. 45, § 9(12); Johnston, *supra* note 229, at 14.

255. A. COOK & C. HOLLAND, THE EXPLORATION OF NORTHERN CANADA 302 (1978); An Act to Amend the Fisheries Act, 1906 R.S.C., ch. 13, § 1; PHARAND, *supra* note 49, at 117.

256. 1 Hackworth DIGEST 700-01 (1940); STROHL, *supra* note 74, at 247.

257. STROHL, *supra* note 74, at 246; Johnston, *supra* note 229, at 15.

Hudson bay is wholly territorial water of Canada" including foreign vessels.[258]

In 1937, the Canadian government adopted an Order-in-Council under the Customs Act that described a closing line across the eastern entrance to Hudson Strait.[259] The closing line at Hudson Strait, however, may never have become 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 prepared.[260] Arguably, no delimitation called for by the Order ever entered into force as law.

The publication of 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. Whiteman's *Digest*, published in 1965, noted once again that "[t]he United States has continued to dispute Canada's claim to include Hudson Bay in its territory."[261]

The degree or location of Canadian enforcement actions in Hudson Bay is unknown. The whale licensing requirement ended with the end of whaling around 1915.[262]

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 that "[t]he waters of Hudson bay are Canadian waters by historic title in accordance with the universally accepted international law doctrine applying to historic bays."[263]

Inquiries by Strohl in 1959 revealed that the Canadian government performs the following administrative functions in Hudson Bay: (a) operating ice-breaking patrol vessels in Hudson Strait; (b) maintaining a reporting station for foreign ships passing Cape Chidley, on the south side of the entrance to Hudson Strait although those ships do not always report; (c) patrolling eastern arctic sea coastal points where Eskimos congregate in the summer; (d) operating Royal Canadian Mounted Police patrols for the enforcement of criminal and civil law; and (e) main-

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258. An Act respecting Fisheries and Fishing, 1927 R.S.C., ch. 73. § 9(10).

259. P.C. 1937-3134 (Order of Dec. 18, 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 49, at 129 n.92; Morin, *supra* note 162, at 183-84.

260. Morin, *supra* note 162, at 166.

261. 4 Whiteman DIGEST 237 (1965).

262. PHARAND, *supra* note 49, at 122.

263. House of Commons Debates, 23d Parl., 6 Eliz. 2, vol. II, at 1169 (1957-1958).

taining aids to navigation. Strohl received information from the Department of Transport, Ottawa, dated March 17, 1959, stating that no foreign shipping regulations exist for Hudson Bay and Hudson Strait and that the department maintains no enforcement agency in Hudson Bay and Hudson Strait. [264] This led Strohl to conclude that Canada had not vigilantly maintained its claim over the area in question.[265] Strohl was unable to find new assertions by the United States subsequent to 1906 that denied the Canadian claim. He attributed this lack of attention on both sides to the limited economic value of these waters.[266]

The history of foreign navigation in Hudson Strait and Bay is difficult to obtain. Information from the United States Coast Guard establishes that United States conducted thirteen icebreaker operations in Hudson Strait during the period 1948 to 1957.[267] Excerpts from ships' logs and reports show no record of requests or grants of consent by Canadian authorities. Some of the activities appear compatible only with high sea rights. Thus, on September 13, 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."[268]

In 1957 the Parliament of Canada supported the adoption of a system of straight baselines along the Canadian coastline. That system would have closed off Hudson Bay, Hudson Strait, and the Gulf of Saint Law-

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264. STROHL, *supra* note 74, at 239.

265. *Id.* at 240.

266. *Id.* at 249-50.

267. The United States icebreaker operations were as follows: USCGC Eastwind sailed Sept. 12-14, 1948; USS Edisto sailed Sept. 19-21, 1948; USS Edisto sailed August 21-22, 1956; USS San Marcos and USNS Boyce already at Coral Harbor; all vessels apparently exited Foxe Basin via Hudson Strait, dates unknown. Fax from Cdr. Stu Marsh, Ice Operations, United States Coast Guard, G-N10, to Jonathan I. Charney, Vanderbilt Law School (Feb. 21, 1992) (on file with author).

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 sailed Aug.-Sept. 1957; Hudson Strait to Coral Harbor, Southampton Is.; operations in Foxe Basin and departed via Hudson Strait. *Id.*

The contents of the fax to the author contained: Report of Task Force Eighty, Summer Arctic Operation 1948, CTF 80/A4-3/A9/rs, Serial 025 (Nov. 12, 1948) at 1; Annex 1-(c) at 1, 12, 13; Annex 1-(d) at 1, 9; Memorandum to Commander Joint Task Group 6.3 from Commanding Officer, U.S.S. Edisto (AGB-2), Subject Post Operational Report, Sept. 14, 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, Oct. 17, 1957: Enclosure (1), Enclosure (2)).

268. Report of Task Force Eighty, Summer Arctic Operation 1948, *supra* note 267, Annex 1-(d) at 9.

rence, among other water bodies. The Prime Minister announced this plan in 1963 and the United States objected to it. As a consequence, Canada withdrew the straight baseline system.[269]

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 "possession of Hudson Bay as inland waters [cannot] be regarded as especially essential to the national security of Canada."[270] He then expressed the view that the national security argument would diminish over time.[271]

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 land.[272] This definition places much of the northern portion of Hudson Bay, Hudson Strait, and the northern portion of Ungava Bay within these waters.[273]

By letter dated December 17, 1973, the Canadian Bureau of Legal Affairs defined the internal waters of Canada as including Hudson Bay and Hudson Strait.[274] From 1956 to 1970, statements by the Canadian government were unclear as to whether it claimed the waters as territorial sea or internal waters.[275]

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269. CONFERENCE ON THE LAW OF THE SEA 51-52, U.N. Doc. A/Conf. 13/39, U.N. Sales No. 58.V.4.II (1958); *Canada Sets 12-Mile Fishing Zone*, WASH. POST, June 5, 1963, at A17; 4 Whiteman DIGEST at 1239-40 (1965); SAYRE A. SWARZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS 187 (1972).

270. STROHL, *supra* note 74, at 250.

271. *Id.*

272. 1985 R.S.C., vol. I, ch. A-12, § 2.

273. 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, *supra* note 10, art. 56(1)(b)(iii). Thus, this assertion of pollution protection jurisdiction does not necessarily imply territorial sea jurisdiction, much less internal water jurisdiction. It would, however, be compatible with such jurisdiction.

274. 12 ANN. CAN. DE DROIT INT'L 277-79 (1974).

275. *See* Statement of Mr. Lesage, House of Commons Debates, 22d Parl., 3d Sess., 4-5 Eliz. 2, vol. VII, at 6955 (1956); Hon. L.S. St. Laurent (Prime Minister), House of Commons Debates, 22d Parl., 5th Sess., 5-6 Eliz. 2, vol. III, at 3186 (1957); Hon. P.E. Trudeau (Prime Minister), House of Commons Debates, 28th Parl., lst Sess., 17 Eliz. 2, vol. VI, at 6339 (1969); Hon. P.E. Trudeau (Prime Minister), House of Commons Debates, 28th Parl., 1st Sess., 18 Eliz. 2, vol. VIII, at 8720 (May 15, 1969); Mr. J. Alan Beesley, Standing Committee on External Affairs and National Defense, House of Commons, 28th Parl., at 25:18-19 (Apr. 29, 1970). The claim of internal water status was

Pharand has written that Hudson Strait forms one of the potential passages for the Northwest Passage. He has reported that 131 foreign ships traveled into Hudson Strait between 1977 and 1985. All these passages were partial crossings that did not lead to other destinations.[276] Pharard obtained this information from an officer in the Canadian Coast Guard. Whether Canada consented to these passages was not reported. Canada, obviously, was aware of the transits.

Prior to 1985, Canada had drawn no straight baselines to close Hudson Bay or Strait. Based upon his analysis of the history of the Northwest Passage, Pharand concluded that "the waters of the Northwest Passage [including Hudson Strait] were not internal" waters.[277]

In 1985, Canada finally closed Hudson Bay and Hudson Strait by the system of straight baselines it adopted for the Arctic Archipelago.[278] The government reasserted its internal waters claim to these waters.[279] 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 under international law, the waters west of the line at the entrance to Hudson Strait, including all of Hudson Bay and Hudson Strait, are the internal waters of Canada.

Several states have challenged the legal validity of the Canadian system of straight baselines in the Canadian Arctic. The United States takes the position "that there is no basis in international law to support the

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made in 1975 by the Secretary of State for External Affairs, Allan J. MacEachen. Standing Committee on External Affairs and National Defense, House of Commons, 30th Parl., 1st Sess., Issue No. 24, at 245 (May 22, 1975).

276. PHARAND, *supra* note 49, at 190-91, 199, 209. How many of these crossings into Hudson Strait were made only with the actual permission of Canada is unclear. Crossings made without Canada's permission would be inconsistent with internal water status of these waters. If Canada's permission was secured, acceptance of internal water status is supported.

277. Pharand wrote 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.

Id. at 224.

278. Territorial Sea Geographical Coordinates Order, P.C. 1985-2739, 119-20 C. Gaz. 1985 (Area 7); *see* ATLAS OF THE STRAIGHT BASELINES, *supra* note 3, at 98.

279. Statement of Hon. Joe Clark, Secretary of State for External Affairs, House of Commons Debates, 33d Parl., 1st Sess., 34 Eliz. 2, vol. V, at 6462-64 (Sept. 10, 1985).

Canadian claim."[280] The United States is particularly concerned about its freedom to navigate through the Northwest Passage.[281] The members of the European Community (EC) also object to the system of straight baselines in the Canadian Arctic. The British High Commissioner delivered a note on behalf of the states refusing to accept the legality of these baselines.[282] 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 European Community.[283] This exchange of notes raises serious questions regarding the legal validity of this straight baseline system.

Pharand believes that the system of straight baselines established by Canada for the Canadian Arctic Archipelago is consistent with international law.[284] Serious questions exist as to whether the coastline is "deeply indented and cut into . . . or there is a fringe of islands along the coast in its immediate vicinity" as required by article 4.1 of the 1958 Convention of the Territorial Sea and the Contiguous Zone[285] and article 7.1 of the 1982 LOS Convention.[286] Because of the geography of the Canadian Archipelago and the distance from the mainland shore of the straight baselines, the Canadian system may not meet these requirements. The baselines may be more like those enclosing a coastal archipelago. The 1958 Convention does not permit special archipelagic baselines. The 1982 LOS Convention does authorize a system of straight baselines around mid-ocean archipelagos, but does not permit archipelagic baselines in the case of coastal archipelagos.[287] Consequently, serious questions remain in regard to this Canadian straight baseline system and, thus, the legal status of the waters behind them.

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280. Letter to Hon. Charles McC. Mathias, Jr., U.S. Senate, from James W. Dyer, Acting Assistant Secretary for Legislative and Intergovernmental Affairs, U.S. Dep't of State (Feb. 19, 1986) (on file with author). These views were communicated to the Government of Canada.

281. *Id.*

282. The note stated that "[t]he Member States of the EC cannot therefore in general acknowledge the legality of these baselines and accordingly reserve the exercise of their rights in the waters concerned according to international law." Note No. 90/86 (July 9, 1986) (on file with author).

283. Note No. JCD-0257 from Canadian Department of External Affairs to the British High Commission (August 7, 1986) (on file with author).

284. PHARAND, *supra* note 49, at 252-55.

285. 1958 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 73, art. 4.1, 516 U.N.T.S. at 205.

286. 1982 LOS Convention, *supra* note 10, art 7(1), 21 I.L.M. at 1272.

287. *Id.* art. 47, 21 I.L.M. at 1278.

Under the *Fisheries Case* of 1951,[288] no right of transit exists in waters closed by a system of straight baselines. On the other hand, both the 1958 Convention on the Territorial Sea and the Contiguous Zone, article 4.5 (to which Canada is not a party), and the 1982 LOS Convention, articles 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 LOS Convention establishes the right of transit passage in waters used for international navigation if no alternative route of similar convenience exists. Pharand discusses whether such navigational rights would exist in the Northwest Passage, including Hudson Strait, if it were legally closed by the Canadian system of straight baselines.[289]

Whether the Canadian system of straight baselines in this area would continue to stand if Québec were to become independent is unclear. Article 7.6 of the 1982 LOS Convention states that "[t]he 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 article 4.5 of the 1958 Convention on the Territorial Sea and Contiguous Zone. Canada might be required by this rule to withdraw its straight baseline at Hudson Strait upon Québec's independence. This article protects a state's access to the sea from restrictions accompanying internal water status resulting from the unilateral establishment of straight baselines.[290]

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 that area. Rights of innocent passage and perhaps transit passage also would apply. This provision reflects a broad policy in international law and the law of the sea to provide all states with liberal access to and from the sea. One could, however, focus on the fact that when the baselines were established no such cutting off of another state occurred. Accordingly, the condition may not apply. Furthermore, Québec might not have a territorial sea in the area that could be cut off. If the area were historic internal waters before the establishment of the straight baseline closure or that closure perfected

288. Fisheries Case, 1951 I.C.J. 116.

289. PHARAND, *supra* note 49, at 223-243.

290. The same objective is the basis for the definition of juridical bays that are limited to those bays whose coasts belong to a single state. 1982 LOS Convention, *supra* note 10, art. 10(1), 21 I.L.M. at 1272.

the historic status, all the waters behind the closing line would be internal waters of Canada. Québec may merely have a shoreline boundary adjacent to Canadian internal waters and no 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 in January 1986, he was asked whether the United States would recognize Canadian sovereignty in the Arctic. He responded that the United States did recognize Canada's sovereignty but "there are problems about straits and passages that are important to us."[291] This statement may recognize Canada's sovereignty over the Arctic waters, including the Hudson Bay and Strait areas. More likely, however, it should be interpreted as a recognition of Canadian sovereignty over the land areas, leaving the water areas open to discussion.

The 1988 Canada-United States Agreement on Arctic Cooperation and Exchange of Notes Concerning Transit of the Northwest Passage partly resolved these disputes.[292] 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 purports to preserve 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 agreement 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, not other types of vessels. In the view of the United States, these icebreakers are conducting scientific research and, consequently, fall within the coastal state's authority over the two hun-

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291. DEP'T ST. BULL. 42 (Jan. 1986).

292. Agreement on Arctic Cooperation, Jan. 11, 1988, U.S.-Can., 28 I.L.M. 142 (1989).

293. *Id.* art. 3, 28 I.L.M. at 142.

294. *Id.* art. 4, 28 I.L.M. at 142.

295. *Id.* The agreement is terminable unilaterally by either state upon three months notice. *Id.* art. 5, 28 I.L.M. at 142.

dred 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, the agreement requires the consent of the coastal state, and the United States maintains that its agreement with Canada constitutes no concession to the Canadian claim. Because the requirement of consent applies to all United States icebreakers regardless of whether they conduct scientific research the settlement may be more significant.

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 that recognized coastal state authority in very large water bodies. Even so, writers disputed these claims, and the Treaty with the United States of 1818 implicitly recognized the Hudson Bay as open sea. The United States opposed the closed sea approach from that time forward. Toward the latter part of the nineteenth century, foreign fishing took place in the Bay. The Canadian government admittedly was unable to exercise effective authority over that very large area.

Beginning in the early twentieth 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 through published references back to statements made in 1906. In the period 1948 to 1957, a number of official United States government vessels crossed the Hudson Strait. These crossings were apparently conducted on the basis of the freedom of the high seas and attracted no objection by Canadian authorities.[297] After 1957, Canadian authorities began efforts to close Hudson Bay and Hudson Strait by a system of straight baselines. Objections by the United States caused these efforts to be deferred until 1985 when Canada adopted a system that closed the eastern end of Hudson Strait. International objections by the United States and all the member states of the European Community followed.[298] Pursuant to the 1988 Canada-United States agreement, all United States icebreakers entering the Northwest Passage, which would include Hudson Strait, must obtain Canadian permission to do so. The agreement does not cover other United States ships.

In March 1992 the United States Department of State issued a publication entitled *United States Responses to Excessive National Maritime*

296. *Id.* art. 3, 21 I.L.M. at 142.
297. *See supra* note 267 and accompanying text.
298. *See supra* notes 280-83 and accompanying text.

Claims.[299] While this publication addresses the United States opposition to Canadian claims to the Northwest Passage and the Canadian system of straight baselines in the area, it makes no reference to the Hudson Bay claims.

The record of foreign navigation in those waters is important to a judgment on the status of Hudson Bay. Prior to 1910 considerable foreign navigation by whalers took place in the Bay. Little other direct evidence, however, exists of foreign navigation in Hudson Bay proper. If one views the Hudson Bay and Strait as a single unit, the navigation in Hudson Strait documented by Pharand and by the United States Coast Guard becomes highly relevant. Under the United States Freedom of Navigation Program, the United States exercises navigation rights to preserve and enhance navigational freedoms in waters in which it objects to coastal state claims.[300] Inquiries to offices involved in this program, however, produced no evidence of United States government navigation or overflight in Hudson Bay proper.

The lack of hard evidence of foreign navigation in the waters of Hudson Bay proper puts one on the horns of a dilemma. One could take the position that, in the absence of any overt enforcement, Canada's claim is latent and not effective. Alternatively, one could make the argument that the international community has largely acquiesced to 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 pursue its position in these waters continuously and publicly gives greater credence to United States acquiescence.

The adoption of the Canadian system of straight baselines that closed Hudson Strait at the east and the Canadian Arctic Archipelago to the north was a significant development. Canada has a credible argument that this system conforms to the international law rules permitting a system of straight baselines in coastal areas that are deeply indented or fringed by islands.[301] The maintenance of these lines since 1985 provides strong support for the internal water status of Hudson Bay. On the other hand, the objections by the United States and the members of the European Community place a shadow over this action.

Those objections to the straight baseline system apply, however, to the closure of the entire Canadian Arctic Archipelago. They do not focus on

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299. LIMITS IN THE SEAS NO. 112 (Mar. 9, 1992).

300. *See id.; U.S. Freedom of Navigation Program*, GIST, BUREAU OF PUB. AFFAIRS, U.S. DEP'T ST. (Dec. 1988).

301. 1982 LOS Convention, *supra* note 10, at art. 7(1), 21 I.L.M. at 1276.

Hudson Bay and Hudson Strait. Canada may claim that, while the system is objectionable as a whole, certain closures are not. If Hudson Strait and Hudson Bay were independently within Canadian internal waters, the objections to the system of straight baselines would not pertain. This assumption, of course, throws one back to the original historic water question. Nevertheless, the straight baseline closure does provide further public confirmation of the Canadian position regarding those particular waters.

The evidence to date supports the conclusion that Hudson Bay is internal waters of Canada. The independence of Québec might, however, affect this status. As discussed above, Canada may have to redraw the system of straight baselines 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 sustain.[302] 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 Bay.[303] In that event, Canada and Québec would have 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.

2. Maritime Boundaries in Hudson Bay

Regardless of the legal status of these waters, the maritime boundary question still remains, unless the shoreline as used in the provincial boundary limits Québec's maritime jurisdiction. The earlier discussion suggests arguments why that boundary may not necessarily preclude maritime jurisdiction in Hudson Bay and Hudson 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 equity.[304]

Québec occupies the entire 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 the Bay. Québec's shoreline comprises roughly one-third of the mainland shore of the Bay. As reported above, no part of Hudson Bay is further than two hundred nautical miles from the mean low-water line of the mainland shore or islands. Accordingly, if the normal baseline rules are applicable to the Bay, all

302. *See supra* notes 79-82 and accompanying text.
303. *Id.*
304. *See supra* Part II.

the waters of the Bay and the seabed beyond the twelve mile territorial sea 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 acquires offshore jurisdiction in Hudson Bay, the maritime boundary would be difficult to delimit. Numerous islands seaward of the mainland coast 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 some or all these islands are Québec territory, Québec would calculate its maritime boundary from these islands, giving it a boundary deeper in the Bay.

Arguments made in the international cases, however, 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, one could consider drawing a boundary line in the Bay based on equidistance but modified to disregard the islands.[305] This solution would provide Québec with a portion of the Bay reflecting the relative proportion of the coastline in the Bay held by Québec (approximately one-third). The enclaved islands (using, perhaps, a twelve nautical mile limit or equidistant line when the islands are closer to the Québec shore than twenty-four nautical miles) would diminish this area somewhat. If the ultimate division of the water areas radically diverged from a result approximating 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.

Québec could argue for a simple equidistant boundary line in James Bay, a relatively long thin bay with largely opposite mainland coastlines.[306] Just as in Hudson Bay proper, however, 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. One extremely large island, Akimiski Island, projects

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305. *See* Map 3.

306. The Canada-Denmark (Greenland) Agreement would provide a good precedent for this result. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, at Report No. 1-1.

eastward from the Ontario coastline to the middle of the Bay. Other islands near its eastern tip project further east.

If many of these islands are not included in the 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 intractable.[307] 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. It is likely that Québec would not be completely cut off from a maritime area in James Bay but its maritime zone would be limited and broken up. If Québec holds some or all of the islands, the maritime boundary might be simpler and more favorable to it.

C. *Hudson Strait*

1. The Legal Status of Hudson Strait

The provincial boundary of Québec runs along the shore of the Hudson Strait.[308] In addition to the normal baseline, the historic water status of the waters of the Hudson Strait, and the effect of the Canadian straight baseline that closed the Strait at the east play important roles in determining the location of maritime boundaries in the Strait. 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 within the Northwest Territories. The eastern geographical entrance may be closed by a series of lines that run approximately from East Bluff on Meta Incognito Peninsula and connect the Savage Islands, Resolution Island, Button Islands, and Killinek Island to the mainland by a series of short closing lines.[309] The 1937 Order-in-Council described a similar line as a baseline for the Customs Act.[310] The combined length of these lines is approximately fifty-four nautical miles. The long-

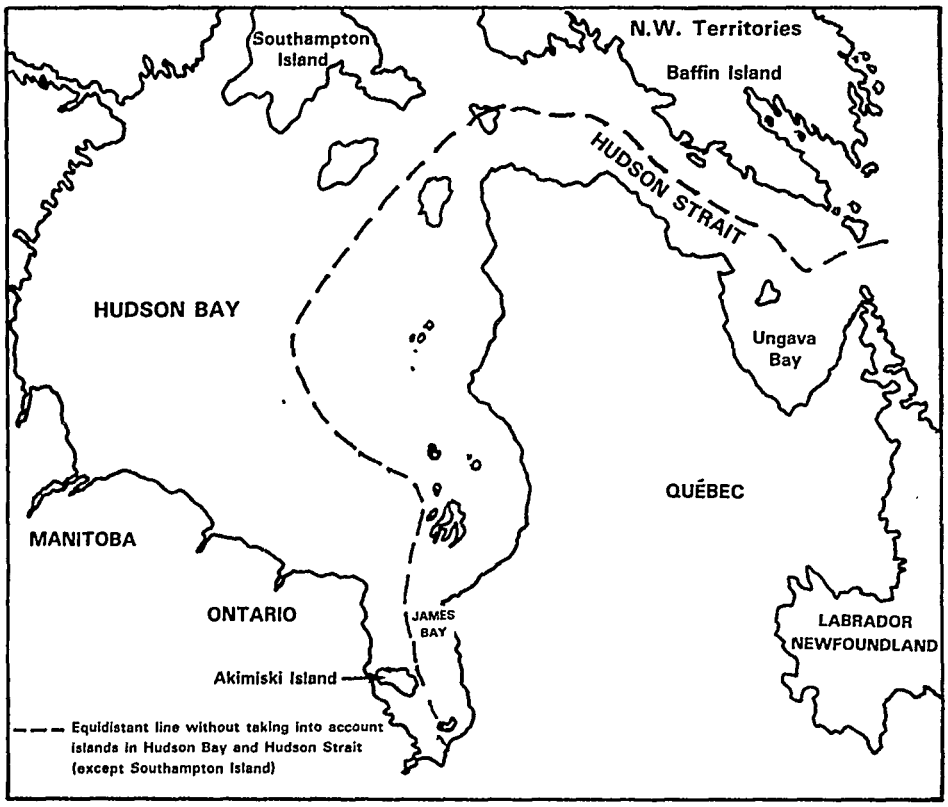
307. *See* Johnston, *supra* note 229, at 154-59.

308. *See supra* section V(B)(1).

309. *See* Map 3. The specific location of these lines could be obtained by applying the 45 degree test discussed above of the area. *See supra* note 71.

310. P.C. 3139-37, Dec. 18, 1937. *See* Letter of the Legal Bureau of the Department of External Affairs, 12 ANN. CAN. DE DROIT INT'L 278-79 (1974).

MAP 3


Southampton Island
N.W. Territories
Baffin Island
HUDSON STRAIT
HUDSON BAY
Ungava Bay
QUÉBEC
MANITOBA
ONTARIO
JAMES BAY
LABRADOR
NEWFOUNDLAND
Akimiski Island
Equidistant line without taking into account islands in Hudson Bay and Hudson Strait (except Southampton Island)

est crossing is approximately thirty-eight 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 approximately seventy-eight nautical miles. The passages at the western entrance narrow to less than twenty nautical miles, but if one passes to the west of Nottingham Island (and thus arguably enters Hudson Bay proper), the passages would exceed thirty nautical miles. The length of the Strait exceeds four hundred nautical miles. Through the middle, the Strait narrows to approximately fifty-four nautical miles. This strait forms one of the alternative routes to the Northwest Passage.[311] Weather considerations, however, limit navigation to the months of July through October.[312]

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 twelve nautical miles of that baseline. River mouths and twenty-four mile juridical bays would be closed. Numerous such features are found along the shores of Hudson Strait.

Ungava Bay, a very large bay located at the southeastern end of the Strait, has an entrance that would be located approximately along a line drawn between the mainland west of Eider Island and the northwestern part of Killinek Island. This line would run north of and would not intersect with Akpatok Island located within the Bay. The closing line would far exceed twenty-four nautical miles (approximately 134 nautical miles). Accordingly, Ungava Bay is not a juridical bay, but it would qualify for a twenty-four mile fall-back line. In addition, the normal baseline would be drawn within the Bay. If the Bay were found to be an historic internal water bay, it would be closed at the point established by the historic evidence. Otherwise, a twenty-four 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, the Bay might not qualify for the fall-back line. If Killinek Island is one of its headlands and that island remains with Canada, the coasts of Ungara Bay would belong to two states.[313] A headland further to the south on Québec territory would avoid this problem.

The historic water status of Hudson Strait is closely tied to that of

311. PHARAND, *supra* note 49, at 190-91, 199.
312. *Id.* at 199; STROHL, *supra* note 74, at 234.
313. 1982 LOS Convention, *supra* note 10, art. 10(1), 21 I.L.M. at 1272.

Hudson Bay, since many of the claims, actions, and counterclaims relate to both water bodies.[314] Little evidence exists, however, to establish Canadian actions in support of historic water status for Hudson Strait or the subsidiary Ungava Bay. Since some of the evidence regarding Hudson Bay may not apply to the Strait and Hudson Bay is further within the land territory of Canada than the Strait, the historic water status of the Strait and Ungava Bay is questionable.

To the extent that these historic actions took place in areas outside of the Strait, such as Hudson Bay proper, they offer little support for the Strait's historic water status. These actions would only support claims to the geographical areas in which they took place. International law does not support the idea that contiguity would form the basis for a territorial claim.[315] Sovereign actions implementing territorial claims, however, 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 the area has limited human activities and the claiming state's actions are sufficient to maintain control over all such activity that does take place there, such actions may form the basis for a claim that would prevail over all other states.[316] Accordingly, occasional but effective exercises of authority in various locations in the Hudson Bay and Hudson Strait area may form the basis for an historic water claim to the entire area.

As discussed above, United States government vessels engaged in significant navigation in Hudson Strait during the period 1948-1957. The vessels fired weapons at balloon targets launched from such vessels while in the Strait.[317] No evidence of Canadian consent or objection is known. These actions directly conflict with Canada's claim that Hudson Bay and Hudson Strait are territorial sea or internal waters.[318]

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314. *See* the discussion regarding Hudson Bay, *supra* section V(B)(1).

315. Isle of Palmas (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83, 83 (Perm. Ct. Arb. 1928).

316. *Id.* at 840.

317. *See supra* notes 267-68 and accompanying text.

318. In 1957 the question of the status of Hudson Bay arose in the House of Commons. The Minister of Northern Affairs and National Resources stated:

> 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. . . .

Then, Mr. Lesage asked, "Are the waters of Hudson strait Canadian waters?. . . ." The Minister replied, "Yes, by historic title." House of Commons Debates, 23d Parl., 6 ELIZ. II, vol. II, at 1169 (1957).

An independent Québec would make the argument for historic water status of the Strait more difficult since it would be located on the coasts of two states.[319] A claim to Ungava Bay would be equally difficult since it has a natural entrance point on Killinek Island that may be retained by Canada. Of course, Québec could claim a more southern closing line 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 objected to it.[320] The United States opposition was most recently voiced in March 1992.[321] 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.

The objections to the system of straight baselines and the United States navigation in the Strait make it difficult for Canada to establish the internal water status of Hudson Strait, one of the access routes to the Northwest Passage. This difficulty distinguishes the Hudson Strait claim from the Hudson Bay claim. As such, foreign states have expressed a strong interest in keeping Hudson Strait navigation free. The Strait is, however, a minor and less desirable entrance to the 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.[322]

As a strait that may be closed by a system of straight baselines, the Hudson Strait may be subject to the regime of transit passage through straits as discussed above. 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 may have to withdraw this baseline since it would cut off the maritime zones of Québec. This rule of law may protect navigation rights.

An independent Québec would share the coast of Hudson Strait with

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319. Unlike juridical bays, historic waters may be located on the coasts of more than one state. *See* discussion *supra* subpart IV(A).

320. *See supra* text accompanying notes 282-83.

321. UNITED STATES DEPARTMENT OF STATE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 20, 25-27, 71-72 (Limits in the Seas No. 112, Mar. 9, 1992)

322. 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." PHARAND, *supra* note 49, at 251. Because he includes Hudson Strait in his examination, this conclusion appears to apply.

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 Québec and Canada to share these waters, 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 Québec has to these waters because, under international law, the Strait has the same status as other internal waters, such as lakes and rivers.

2. Maritime Boundaries in Hudson Strait

Québec and Canada may, however, have maritime boundaries in this area. Since this is clearly an opposite situation in a strait where the distance between the opposite shores is less than two hundred nautical miles, the equidistant line may very well be used throughout its length.[323] The territorial sea and exclusive economic zones in the area would be measured from the normal baseline if the parties conclude that the entire Strait is not internal waters.

Islands in the Strait, which appear to be excluded from the territory of Québec and included in the Northwest Territories, could complicate this delimitation. 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 suggests using a line other than the equidistant line.[324] Québec's coastline in the area approaches fifty percent of the entire coastline of the Strait. The islands are not large relative to the land and coastline of Québec in the area, and many islands are located on the wrong side of the equidistant line drawn between the mainland coasts. This situation might justify enclaving these islands with, perhaps, twelve nautical mile zones. The equidistant line drawn between the islands and the Québec coastline, however, would limit the zones.[325] Other adjustments to the equidistant line diminishing the effect of islands have been used in straits.[326] Otherwise, the equidistant line drawn between the

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323. The Canada-Denmark (Greenland) Agreement would provide a good precedent for this result. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6, at 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 & Hankey, *supra* note 130.

324. *See* Bowett, *supra* note 118.

325. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6; Italy-Tunisia Continental Shelf, Boundary Report No. 8-6; Italy-Yugoslavia Continental Shelf, Boundary Report No. 8-7(1). Map 3 illustrates such a line.

326. *See* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 6; Sweden-U.S.S.R.

mainland coasts may be appropriate. Due to the relative size and particular location of the islands, the line may not be adjusted further to the south. The only exceptions that might justify larger enclaves are the relatively larger islands of Charles and Salisbury.

An interesting question arises at the eastern end of the Hudson Strait. If Québec became independent, a foreign state (Canada) would probably 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 Island.[327] 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 might not prevail. If the Canadian waters at the eastern entrance are territorial sea, the right of innocent passage through straits would apply and, perhaps, so would the right of transit passage. If they were internal waters, these passage rights would not apply.

VI. Conclusion

To describe with certainty the location of the maritime boundaries of Québec were it to become an independent nation state is impossible. First, all these maritime boundaries are negotiable with Canada. Given the complexities and uncertainties of maritime boundary delimitation and the necessary interdependence of Québec and the remainder of Canada, Québec and Canada must consider a negotiated resolution of the maritime boundary problem and related uses of the waters. As a potentially landlocked state, Québec needs to ensure its transit rights through the Gulf of Saint Lawrence.

Absent an agreement with Canada, questions arise with respect to whether Québec would have any maritime zones and, if so, how they would be bounded. Strong arguments favor Québec's 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. Québec would encounter more difficulty in making these same arguments in regard to Hudson Bay and Hudson Strait due to the stronger arguments supporting their internal water status. Québec's secession might prejudice this status, however, permitting the normal mari-

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Continental Shelf and Fisheries/Economic Zone Boundaries, Report No. 10-9.

327. 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 212.

time zones to apply. Equitable concerns are found in international law favoring access to the sea and maritime jurisdiction. Similar conclusions may be 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.

The delimitation of any coastal state's maritime zones is not a simple matter. The same task undertaken in connection with a seceding state raises additional complications. Before secession, the central government's regulation of maritime uses and territorial control may be appropriate, if not desirable. Expansionist claims over adjacent waters may serve the national interests as a whole. A seceding state, however, may have very different interests. Its interests lie in obtaining authority over maritime areas adjacent to its coastline regardless of the disposition of those areas under the previous arrangement. In addition, interests in navigation and overflight to and from the high seas may place the new state in opposition to maritime claims made during the previous arrangement. The law of historic waters apparently protects this interest by requiring the agreement of all the littoral states, although this proposition has not been tested in the case of a newly emerging state. Similarly, straight baseline rules forbidding the cutting off of the territorial sea of a coastal state may also protect the newly emerging state's interest in access to the sea. The law of the sea reflects a strong policy in favor of the right of coastal states to the normal compliment of maritime zones, subject to appropriate boundaries. This protects the important interest of all states in the freedom to communicate and to engage in international commerce. The interests of landlocked states sometimes clash with the coastal states legitimate, but conflicting, interests in regulating activities on land areas subject to their complete sovereignty. Maritime areas are less salient, and certain transit rights apply. The law assumes, however, that if a state has a shore on maritime areas that would normally be attributed to that state's maritime zones, actions by other sovereigns could not foreclose such coastal state authority absent, perhaps, a knowing and voluntary surrender of rights. The right to such zones may be inalienable. No state is known to have surrendered substantial portions of its maritime zones. Seceding states may be guaranteed rights to such zones.

Finally, the doctrine of *uti possidetis* would act to confine the boundaries of a seceding state to its pre-independence boundaries. If applicable, the doctrine might deny the new state the full compliment of maritime zones. Whether this doctrine applies as a rule of customary international law to maritime zones is unclear, especially since developments in the

law of the sea have radically changed the extent and substance of these zones. Those changes argue strongly for the cautious application of this doctrine in these areas if it acts to deny a new state its normal compliment of maritime zones. The doctrine also should be restricted to avoid breathing new life into dormant historic claims having no foundation in modern international law, but only arising as a consequence of new independence gained by a territorial unit that may have historical links to ancient claims.

In certain instances the seceding territory may have held elements of maritime rights prior to secession. Those rights may have been delimited by boundaries that reflect those likely under international law. If such a status quo were established, the doctrine or policies of *uti possidetis* would be appropriately brought to bear. Of course, such an application would require a case-by-case examination of the particular circumstances.

In conclusion, among the many complications that arise as a result of state secession are questions relating to maritime jurisdiction and maritime boundary delimitation. Most of these questions can be resolved by agreement. Failure to agree could result in significant uncertainties and difficulties that could hamper, if not cripple, a newly emerging state.