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THE *MANHATTAN'S* ARCTIC CONQUEST AND CANADA'S RESPONSE IN LEGAL DIPLOMACY

Raymond W. Konan

I. THE CONQUEST AND ITS CHALLENGE

On the night of September 14, 1969, the huge American tanker, *SS Manhattan*,¹ broke loose from the Arctic ice pack to become the first commercial ship² to conquer the Northwest Passage.³ The *Manhattan* had proven that it is technologically possible for properly designed, ice-breaking super-tankers to navigate the frozen waters between the islands of Canada's Arctic archipelago. In order to further establish the year-round feasibility of the route for transporting Alaskan oil to the northeast coast of the United States, the *Manhattan* is making a second voyage through the Northwest Passage this spring.

It is not surprising that many in Canada viewed the *Manhattan's* success with serious misgivings and profound concern. Some felt that Canadian sovereignty in the Arctic had been effectively challenged by the *Manhattan's* conquest.⁴ Prime Minister Pierre Trudeau is reported to have made no response when a reporter suggested that the *Manhattan's* voyage would soon be followed by others that would establish an international legal precedent before Canada's claims in the area could be effectively asserted.⁵ It was feared by some that the first voyage had already transformed the "Canadian" Arctic waters into an international

1. The *Manhattan* is owned by the Humble Oil and Refining Company, a subsidiary of Standard Oil of New Jersey, but is operated on experimental Arctic voyages by a consortium of oil companies.

2. Earlier, but non-commercial, conquests of the Northwest Passage include the following: the 1906 crossing from the Atlantic to the Pacific by Roald Amundsen of Norway in the *Gjoa*, a forty-seven ton herring boat; the 1940-42 passage from Pacific to Atlantic by the Canadian schooner *St. Roch*; the 1944 return voyage of the *St. Roch*; the 1953 Pacific to Atlantic crossing of a squadron of United States Coast Guard icebreakers, the *Spar*, *Bramble*, and *Storis*; and the 1960 underwater crossing by the American nuclear submarine *USS Seadragon*. For a fuller account of the development of the Northwest Passage as a route for water transit, see Pharand, *Innocent Passage in the Arctic*, [1968] 6 CANADIAN Y.B. INT'L L. 3, 42-47.

3. The Northwest Passage refers to the sea route (or routes) between the North Atlantic and the Arctic Ocean through the Canadian Arctic archipelago. The most direct Northwest Passage route is the one taken by the *Manhattan* on its first crossing. It commences at Lancaster Sound in the east, runs west through the Barrow Strait and Viscount Melville Sound, then runs southwest through the Prince of Wales Strait between Banks and Victoria Islands into the Beaufort Sea in the southeastern part of the Arctic Ocean. For a discussion of other routes and a description of conditions in the Parry Channel, see Pharand, *supra* note 2, at 48-51.

4. See, e.g., comments of Member of Parliament, T.C. Douglas, 114 House of Commons Debates, No. 50, 2nd Sess., 28th Parl., at 2694 (January 22, 1970).

5. The Globe and Mail (Toronto), Sept. 12, 1969, at 1, col. 7.

sea route or an international strait.⁶ There was considerable doubt as to what Canada's rights were in the Passage; it was not generally known exactly what Canada had formally claimed in the past. National pride,⁷ the fear of losing something that was Canada's,⁸ conservationist sentiments,⁹ and concern for national security¹⁰ were all stimulated by the *Manhattan's* conquest. In acknowledgment of the conquest and considering its possible implications, the Canadian government appears to have embarked upon a deliberate campaign to bolster Canada's traditional claims in the area and to win support for some untraditional Canadian proposals to protect Canadian interests in the Arctic. Canada's response may well be viewed and analyzed as a purposeful exercise of "legal diplomacy."¹¹

II. LEGAL DIPLOMACY: THE MEDIUM FOR CANADA'S RESPONSE

A. LEGAL DIPLOMACY IN POLITICAL CONTEXT

Legal diplomacy may be defined narrowly as the use by states of claims and assertions based on existing principles and new proposals of international law.¹² It may be defined more broadly to include also the execution of strategies designed to affect the legal rights and obligations of states. The latter definition would include such measures as the calling for an international conference, voting strategies to maximize bloc effectiveness at such a conference or at the United Nations, the decision to accept or not accept the compulsory jurisdiction of the World Court, and domestic legislation to extend state jurisdiction into disputed areas of state authority. Because it is an aspect of overall state diplomacy,¹³ legal

6. Traditional practice has been to recognize a right of innocent passage (at least for merchant vessels) through waterways forming channels of navigation between parts of the high seas, even if the channels are within the territorial waters of the coastal state. W. BISHOP, *INTERNATIONAL LAW* 516 (1962).

7. See comments of Paul Yewchuk, Debates, *supra* note 4, at 2681.

8. See comments of T. C. Douglas, Debates, note 4 *supra*.

9. *Supra* note 4, at 2684.

10. See comments of Paul St. Perre, Debates, *supra* note 4, at 2689.

11. The term is defined and explained in the following section of this note. For a discussion of United States and Soviet "legal diplomacy" in the context of regional lawmaking, see note by this writer, *The Invasion of Czechoslovakia: Precedents in American Legal Diplomacy for the Socialist States' Claim of Right*, 2 *CORNELL INT'L L. J.* 143 (1969).

12. *Supra* note 11, at 144, n. 6.

13. "Diplomacy," as used in this note, is broadly considered to include all steps short of war which states may engage in to communicate their interests and to encourage other states and international bodies to act in accord with them.

diplomacy by either definition is properly seen in the context of international politics. The following propositional sequence¹⁴ may illustrate the relationship of legal diplomacy to its political context:

- (1) States, like other political and social units, have interests which they seek to achieve, protect, or expand.¹⁵
- (2) The international relations of states are dominated, or at least thoroughly permeated, by a complex interplay and competition of national interests.¹⁶
- (3) Diplomacy, broadly conceived, is the predominant method states employ to realize their interests in the international system.¹⁷
- (4) While many types of diplomacy are employed,¹⁸ legal diplomacy, or the use of claims and assertions based on principles and proposals of international law, and the execution of strategies to affect the state's legal position, is prominent in the current practice of states.

Having thus placed legal diplomacy in the context of interstate practice generally, the concept may now be more adequately defined and compared with the concept of international law.

B. LEGAL DIPLOMACY AND INTERNATIONAL LAW

Legal diplomacy, defined as the use of claims and assertions based on pre-existing and newly proposed principles of international law, need not be confused with international law itself. While international law may be viewed as a system of international rights and duties, however dynamic or progressively developing, legal diplomacy should be regarded as legal advocacy. Legal diplomacy need not be conceptually confused with international law any more than an attorney's advocacy need be confused with domestic law. Both states in their legal diplomacy and attorneys in their courtroom advocacy advance principles and proposals of law which an impartial judge would have to rule as specious,

14. The propositional sequence was partially inspired by the functional approach described by R. K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE*, ch. 1 (1957) and Cancian, *Varieties of Functional Analysis*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 29 (1968).

15. Such state interests include increases "in power, in prosperity, in security, in prestige (sometimes substituting for power), and in reputation (useful in attracting allies)." Q. WRIGHT, *THE STUDY OF INTERNATIONAL RELATIONS* 577 (1955).

16. Reinhold Niebuhr has made the categorical, but little disputed statement that, "[t]he selfishness of nations were not to be trusted beyond their own interest. 'No state,' declares a German author, 'has ever entered a treaty for any other means than self interest,' and adds, 'A statesman who has any other motive would deserve to be hung.'" R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY*, xi-xii (1932).

17. See note 13 *supra*.

18. *E.g.*, friendly persuasion, commercial bargaining, formal protest, break of diplomatic relations, trade boycott.

invalid, or at least not preferred. Nevertheless, legal diplomacy serves some of the functions which the international legal system itself is meant to serve. These functions include the articulation of interests, the facilitation of the aggregation of interests into general consensus, the legitimation of state claims, and the formulation of new legal rules.¹⁹

The states of the international community will be considering the legal content and the persuasive quality of the legal diplomacy Canada employs in support of her claims in deciding upon the worth of Canada's claims, and their own interests in having Canada succeed with them. Although this legal diplomacy and its bases in existing and proposed principles of law have not been fully articulated, some claims have been made and some domestic legislation has been proposed to effectuate Canada's claimed jurisdiction over the waters of the Arctic archipelago.

III. CANADA'S RESPONSE IN LEGAL DIPLOMACY

A. "ICE AS LAND" — RULE FORMULATION

Four days after the *Manhattan* had conquered the frozen Northwest Passage, but before it had arrived at its Alaskan destination, Canadian Minister of External Affairs, Mitchell Sharp, writing on the topic, *A Ship and Sovereignty in the North*, declared that, "from a practical point of view, ice is more like land than water in certain parts of the world such as the Canadian Arctic."²⁰ A week later, on September 26, 1969, Prime Minister Trudeau announced that Canada would attempt to persuade the international community to accept the ice pack of the Northwest Passage as land for the purpose of establishing Canadian sovereignty in the area.²¹

External Affairs Minister Sharp openly recognized the important role of legal diplomacy in international law-making and announced Canada's commitment to a course of rule formulation or modification when he stated:

Because international law is in a continual state of modification, it is

19. Still other functions which legal diplomacy would seem to share with the international legal system are conflict resolution (in the attempt to use legal argument and developing or proposed principles of law in the settlement of disputes) and order promotion (the use of law and legal argument for the purpose of restraining interstate hostilities and stabilizing relations through advocacy of orderly procedures for change). The studied scholar or imaginative student may be able to think of still other examples.

20. Sharp, *A Ship and Sovereignty in the North*, *The Globe and Mail*, Sept. 18, 1969, at 7, col. 3.

21. *The Globe and Mail*, Sept. 27, 1969, at 1, col. 1.

not only open to states but, indeed, it is incumbent upon them to contribute to its progressive development. Canada has not hesitated to do this

With respect to the law concerning frozen waters, what state has a better claim than Canada to contribute to the development of international law?

The general principles of international law may have to be applied in a special way in the case of frozen waters, just as special rules are required with respect to the seabed and outer space, the two other environments comparable in the sense that the law is not yet fully developed.²²

It would appear, however, that in taking the view that a new rule of international law might be introduced to provide the basis for Canadian claims of sovereignty over the frozen Arctic waters of the Canadian archipelago, Canada underestimated the fundamental nature of interstate diplomacy as an interplay of national interests. The recent modifications in the customary laws of the sea to provide for the new principles of (1) national rights in the continental shelf beneath the high seas,²³ (2) exclusive national fishing rights in contiguous zones beyond the territorial sea,²⁴ and (3) coastal state rights to draw twenty-four mile baselines from headland to headland²⁵ may only have been possible because a great number of states believed their interests were being advanced. In each case, coastal state jurisdiction was extended outward from national shorelines. Most inland states responded passively because they had developed no dependence on the sea and had no coastal interests of their own to advance. Nearly all coastal states appeared willing to have the world community's interest in the whole reduced because they felt they could achieve an immediate, tangible gain.²⁶

Such a coincidence of interests is not likely to develop on the "ice as land" principle.²⁷ The only states which would gain from the new principle are Canada, Norway, and the Soviet Union, and perhaps, to a much

22. *Supra* note 20, at cols. 4-5.

23. The Convention on the Continental Shelf, *done at Geneva*, April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964), art. 2.

24. The Convention on Fishing and Conservation of the Living Resources of the High Seas, *done at Geneva*, April 29, 1958, [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 599 U.N.T.S. 285 (effective March 20, 1966), art. 7.

25. The Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964), art. 4.

26. See Freeman, *Law of the Continental Shelf and Ocean Resources — An Overview*, in this issue, 105, 116-19, for a discussion of voting patterns on the Continental Shelf Convention.

27. For an earlier discussion of the merits and problems in the "ice as land" principle, see Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L. J. 200, 220-24 (1963).

more limited extent, Denmark and the United States.²⁸ All, or nearly all, other states would lose the "world community" rights they may feel they now possess, such as free passage in international waters, fishing rights, and perhaps even seabed exploitation.

Exclusive Canadian rights of seabed exploitation in the shallow, single-shelf submarine floor of the archipelago may already have been recognized by the Continental Shelf Convention and there are few states with any appreciable fishing interests in the waters of the Arctic archipelago. It is concern for the international character of the Passage as a high seas shipping and naval route which appears to be most centrally at issue. To lessen such protective concern, the Canadian government declared that it will not seek to limit the right of free passage for all ships through the Northwest Passage.²⁹

Perhaps in part to give other states an interest in having Canada control the waters of the Arctic archipelago, the Canadian government declared its commitment to protect the delicate ecological balance of the far North.³⁰ Pollution control gives Canada an identifiable interest in the Arctic which other states might be willing to accept. The danger of pollution, however, is connected to the prospects of increased navigation in the Passage — a fact which goes directly against the argument that the ice of the Passage should be regarded as land.³¹

The community of states is not likely to adopt a new principle of law to accommodate Canadian claims to Arctic sovereignty at the expense of community interests if the Canadian claims do not have a firm basis in existing law. The novel "ice as land" principle is not essential to Canadian supervision of pollution measures. Such authority could be given via an international agreement or convention without prejudicing the alleged international character of the waterway.

Apparently Canada's leaders have come to recognize the lack of general interest in the "ice as land" formulation and have not carried out their announced campaign to sell it to the world as a desirable new principle of law. Canadian legal diplomacy would appear to have greater prospects of success if, instead of proposing a new formulation of law, it were to

28. United States President Richard Nixon, however, has indicated in a statement to Congress on February 18, 1970, that the United States has more interest in having the Arctic's frozen waters regarded as high seas than in having them regarded as land subject to territorial sovereignty. N.Y. Times, February 19, 1970, at 1, col. 8.

29. *Supra* note 20, at col. 6.

30. Speech from the Throne (prepared by Prime Minister Trudeau), 114 House of Commons Debates, No. 1, 1st Sess., 28th Parl., at 1 (Oct. 23, 1969).

31. That is, pollution is a danger precisely because the Northwest Passage may be used as a regular transportation route for transport vessels, particularly oil-carrying supertankers. This fact would seem contradictory to the assertion that the frozen waters should be regarded as land.

rely on the doctrine of "historic right"³² to win exemption from the requirements of contemporary standards of international law. There is considerable history upon which a Canadian claim of "historic right" might be based.

B. LEGITIMATION VIA "HISTORIC RIGHT"

1. *The Fisheries Case Precedent*

Canada may be able to legitimate³³ its claim of sovereignty over the waters between the islands of her Arctic archipelago by making a persuasive case of "historic right." The International Court of Justice in the *Anglo-Norwegian Fisheries* case³⁴ upheld the doctrine of historic right declaring that historical practice and general acceptance by other states can be valid grounds for the recognition of rights which need not conform to current standards of international law. The Court spelled out what it regarded as the basis for recognizing Norway's historic right of sovereign jurisdiction over the waters of its coastal archipelago in the following terms:

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historic consolidation which would make it enforceable as against all States.³⁵

The *Fisheries* decision legitimated Norway's claim that the waters between the Norwegian coastline and its coastal archipelago³⁶ were internal waters on the ground that Norway had exercised the necessary jurisdiction over them for a long period without opposition from other states in a kind of *possessio longi temporis*.³⁷ The result was that Norway's jurisdiction over the said waters must now be recognized by all states, even though the exercise of such jurisdiction over them would derogate from contemporary principles regulating the internal waters of the archipelago.

32. The doctrine of "historic right" is discussed in § III, B, 1, *infra*.

33. The concept of "legitimation" refers generally to acceptance as valid; legitimacy may be based on some form of judicial or arbitral opinion, or upon general community acceptance without any such proceeding.

34. *Fisheries Case* (United Kingdom v. Norway), [1951] I.C.J. Rep. 116.

35. *Id.* at 138.

36. The geography of the Norwegian archipelago and coastline is discussed in the *Fisheries Case* opinion, *supra* note 34, at 127, 134, 141.

37. *Id.* at 130.

The Norwegian claim was exempted from current law by virtue of Norwegian "historic right."³⁸

Specifically, the *Anglo-Norwegian Fisheries* decision legitimated Norwegian baselines of 45 miles in length around the outer perimeter of the coastal island group to enclose the waters within them as internal waters. At the widest points of land separation, baselines enclosing the waters within the Canadian archipelago which comprise the Northwest Passage would be 50 miles across the entrance of Lancaster Sound in the east and 100 miles across the M'Clure Strait in the west. Professor Pharand has asserted that such lines would be contrary to international law,³⁹ presumably because their length exceeds permissible limits under the 1958 Convention of the Territorial Sea.⁴⁰ If, however, Canada could succeed in asserting its claim as an "historic right," current law on the maximum length of baselines would not apply.⁴¹ The World Court specified no maximum length limitations in the *Fisheries* case. There is no language in the opinion which indicates that the Court regarded the 45 mile baselines it authorized as the maximum length permissible under "historic right."

Therefore, it need only be determined if Canada can meet the tests of the *Fisheries* case: 1) a well-defined claim, 2) consistently applied, and 3) general toleration by states without opposition.⁴²

2. Canada's Case for Historic Right

Canada's claims of sovereignty over the waters of the Canadian Arctic archipelago may be traced back to the 1904 publication of a map of Canadian territories prepared by the Department of the Interior.⁴³ That map may also have been the first embodiment in a public document of the "sector theory."⁴⁴ It portrayed Canada's boundaries as extending along the 141st and the 60th meridians of west longitude northward to the Pole. It is of considerable significance that all subsequent Canadian maps have shown these same national boundaries. Publication of the maps, however, was not accompanied by any more explicit claims of sovereignty over the sector which includes land, water, and ice.

38. *Id.* at 139.

39. Pharand, *supra* note 2, at 58.

40. *Id.* at 58-60.

41. *Supra* note 34, at 131.

42. Additional considerations of the Court were 1) "the close dependence of the sea upon the land domain" in the concern of "local needs and practical requirements", 2) "the more or less close relationship existing between certain sea areas and the land formations", and 3) "economic interests peculiar to a region evidenced by a long usage". *Supra* note 34, at 133. Canada's legal position is discussed in light of these considerations by Head, *supra* note 27, at 219-20.

43. Pharand, *supra* note 2, at 51.

44. For a discussion of the "sector theory" in Canadian context, see Head, *supra* note 27, at 202-10.

A direct claim was made in 1925 when the Canadian Minister of the Interior, Charles Stewart, stated that a government bill introduced to amend the Northwest Territories Act was specifically designed to assert Canada's "ownership over the whole northern archipelago."⁴⁵ When asked if Canada's territory extended to the North Pole, the Minister replied, "Yes, right up to the North Pole."⁴⁶ This claim, reiterated a week later by the same Minister,⁴⁷ appears to have gone uncontested.⁴⁸

Some twenty years later, in 1946, Lester B. Pearson, then Canadian Ambassador to the United States declared that:

A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northland, but the islands *and the frozen sea* north of the mainland between the meridians of its east and west boundaries, extended to the North Pole. (emphasis added)⁴⁹

The claim was again made in 1953 when Prime Minister St. Laurent introduced a bill creating the Department of Northern Affairs. He emphatically declared, "We must leave no doubt about our active occupation and exercise of our sovereignty in these northern lands right up to the Pole."⁵⁰ The new department was to be "symbolic of the actuality of the exercise of Canadian sovereignty over them."⁵¹ The Prime Minister's appointed head of the new department, Jean Lesage, however, did not follow the direction of the Prime Minister, for on one occasion in 1956, Mr. Lesage made a statement in the House of Commons to the effect that Canada had "never subscribed to the sector theory in application to the ice The sea, be it frozen or in its natural state, is the sea; and our sovereignty exists over the lands and over our territorial waters."⁵²

Although this statement appeared aberrant from Canadian policy as evidenced by the above noted statements of 1925, 1946, and 1953, as well as from all Canadian maps of the area since 1904, Professor Pharand⁵³ of the University of Ottawa has attached great weight to it. Professor Pharand has even suggested that the Lesage statement "more accurately formulated" Canada's claims and was "the best official evidence avail-

45. [1925] 4 Parliamentary Debates, at 3772 (June 1, 1925).

46. *Id.* at 3773.

47. *Id.*, at 4069 (June 10, 1925).

48. Head, *supra* note 27, at 216. Cited are a 1959 report to the House of Commons by the Secretary of State for External Affairs to the effect that there were no disputes with either the United States or the Soviet Union since 1900 "concerning the ownership of any portion of the Canadian Arctic" and a 1957 government report on U.S. compliance with the Canadian Shipping Act.

49. Pearson, *Canada Looks 'Down North'*, 1946 FOREIGN AFFAIRS 638-39.

50. [1953-54] 1 House of Commons Debates 700 (Dec. 8, 1953).

51. *Id.*

52. [1956] 7 House of Commons Debates 6955 (Aug. 3, 1956).

53. A. Donat Pharand, Dep't of Political Science, University of Ottawa.

able indicating the Canadian position"⁵⁴ even after Prime Minister Diefenbaker had implicitly repudiated it by stating that it was his administration's policy to do everything possible "to assure that our [Canadian] sovereignty to the North Pole be asserted and continually asserted, by Canada."⁵⁵ Professor Pharand's interpretation would seem to reflect a confused perspective on the claim-making of states. He seems to have regarded Canada's spokesmen as formulators of law rather than as advocates of national welfare. How else could he have judged the Lesage formulation as a "more accurate" picture of Canada's claims than the picture presented by prior and subsequent claims by Canadian heads-of-state? The distinction at issue is a crucial one, not only for the observer of legal diplomacy but also for the judge of international law, for a state's legal rights sometimes turn on determinations of what it has claimed in the past.⁵⁶ This is particularly true when issues of historic rights are involved.

Although the government showed great reluctance to make any unequivocal claim of sovereignty over the Arctic waters for several months after the *Manhattan's* conquest, such a claim was made by Minister of External Affairs Mitchell Sharp on February 19, 1970. Referring to all the waters of the Canadian Arctic archipelago, Mr. Sharp declared, "These are our waters. There has never been any question of that. We have always regarded them as our waters."⁵⁷ It would appear that historic right is at the basis of this claim and that Canada may eventually make a case for historic right, even though this case has not yet been articulated by Canadian authorities.

From Canadian maps and statement of various heads-of-state as well as from Canadian practice in the waters of the archipelago, it may be found that Canada has made a sufficiently well-defined "claim" of jurisdiction over the waters as her Arctic archipelago. This issue, however, is subject to debate.

In considering whether the claim has been "consistently applied," we must consider the implications of the Lesage deviation discussed above. The World Court seems to have ruled on this point in a manner favorable to Canada. The relevant passage from the decision reads as follows:

The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the

54. Pharand, *supra* note 2, at 53.

55. [1958] 4 House of Commons Debates 3652 (Aug. 16, 1958).

56. On this point, the International Court of Justice in the *Fisheries Case*, *supra* note 34, at 132 observed: "Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."

57. *The Globe and Mail*, Feb. 20, 1970, at 1, col. 6.

United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period. . . .⁵⁸

It would thus appear that the Court would not place great weight on one deviation from traditional state policy in its application of the historic right doctrine. Indeed, it would be a strange brand of international law which would allow one statement by one cabinet member to doom the policy of a state asserted over long periods of time and clarified by heads-of-state subsequent to the deviation. The Lesage deviation, therefore, would probably not be a sufficient one to forfeit Canadian claims of historic right if the other criteria are met.

Finally, the test of "no opposition" or "general toleration" must be considered. Opposition now,⁵⁹ if it has not been expressed earlier — as apparently it has not^{59A} — would probably be regarded as too late. In the opinion of the Court, "general toleration" over a long period would serve as "the basis of an historical consolidation which would make it enforceable as against all States."⁶⁰

In summary, it would appear that Canada *may* be able to achieve legitimation of her claimed jurisdiction over the frozen waters of her archipelago under the doctrine of historic right either by meeting the tests of the *Norwegian Fisheries* decision in a judicial or arbitral proceeding or by receiving a gradual acknowledgment by the world community of states of the validity of Canadian historical practice and claims in conferring territorial jurisdiction to Canada. However, Canada's case for legitimation might alternatively be made under the standards of contemporary conventional law, apart from the tests of historic right.

C. LEGITIMATION VIA INTERNATIONAL CONVENTION

The 1958 Convention on the Territorial Sea and the Contiguous Zone⁶¹ provides for the drawing of straight baselines along certain coastal archipelagos to be used for measuring the territorial sea outward from them and enclosing the waters within them as internal waters. Article 4 of the Convention provides as follows:

1. [I]f there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

58. *Supra* note 34, at 138.

59. Recently voiced opposition by the United States to regarding the Northwest Passage as anything but high seas is discussed in § III, D, *infra*.

59A. *See* note 48 *supra*.

60. *Supra* note 34, at 138.

61. Note 25 *supra*.

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

In order to establish a right to draw baselines which would enclose the waters of her Arctic archipelago, Canada would have to argue that the islands form a "fringe . . . along the coast" which lay in the coast's "immediate vicinity," that the baselines would follow the "general direction of the coast," and that there are sufficient links between the sea and land areas to justify the "internalizing" of the waters. While Canada's case for the southern tier of islands forming a fringe in the immediate vicinity of the coast might prove persuasive, there can be serious dispute over whether the northern tier — those islands above the Parry Channel — is part of a fringe in the coast's immediate vicinity.⁶² The islands of the southern tier are less than twenty-four miles from the coast or from each other, but the islands of the northern tier are, for the most part, more than twenty-four miles from the southern tier.⁶³ It may be significant that they are separated not only by distance but by the main channel of the Northwest Passage as well. Thus, it would be unlikely that an international tribunal would find both island groups as meeting the "fringe in the immediate vicinity" test. The southern tier may well meet the test, but the northern tier would probably be held not to meet it.

The second test which the Canadian archipelago would have to meet requires that its outer perimeter follow the "general direction of the coast." While there may be a "unitary appearance"⁶⁴ of the whole archipelago with the mainland, a close look at a globe or map will reveal that the southern tier of islands alone follows the "general direction" of the coast more closely than do the two tiers together. A general survey of directions seems to be the test suggested by paragraph 2 of Article 4 of the Convention.

The paragraph includes a second test, namely that the sea areas be "closely linked" to the land area. Canada has a case suggesting compliance with this test on the basis of her historically exclusive exercise of jurisdiction over the entire archipelago area. The government has provided welfare, postal, and meteorological services to the 10,000 Eskimos of the archipelago, seventy-five per cent of whom were reported in 1964 to be living almost exclusively upon fish and mammals of the northern waters and ice for food and clothing.^{64A}

62. The fact that the Canadian Arctic archipelago is "divided into two principal parts" was noted by Pharand, *supra* note 2, at 48, but not in the context of legal distinctions.

63. For a description of these island groups, see Pharand, *id.*

64. This "unitary appearance of the formation" was commented upon by Head, *supra* note 27, at 218.

64A. HARRIS, CANADIAN POCKET ENCYCLOPEDIA 56 (1963-64).

It would appear that Canada can make a case for baselines enclosing the waters of her Arctic archipelago under Article 4 of the Territorial Sea Convention. Her case might well be a convincing one, at least in regard to the southern tier of her Arctic islands — those below the Parry Channel. The prospects for such baselines being extendable to the northern tier appear much less favorable.

To date, Canada has not drawn baselines around the waters of the Arctic archipelago, although there is domestic legislation providing for them, because, in the words of External Affairs Minister Sharp, "To do so in some areas would be to take an action that might compromise the position of the Canadian government, in future declarations."⁶⁵

One such "future declaration" which might thereby be prejudiced is a claim of sovereignty over all the waters of the Arctic archipelago by virtue of historic right — a claim which wins legitimation not from a contemporary drawing of baselines, but rather from historic practice.

D. DOMESTIC LEGISLATION — NON-LEGAL STRATEGY TO AFFECT LEGAL RIGHTS

Although the historic right doctrine and Article 4 of the Territorial Sea Convention provide the most probable potential bases for recognition of Canada's claims of sovereignty over all or a part of the Arctic waters of the Canadian archipelago, neither case has been fully elaborated or formally advanced by Canada. In fact, the Canadian government most recently has acted "to guard against any possible litigation"⁶⁶ of issues which might affect the status of Canada's claims of Arctic sovereignty and authority to set shipping standards to apply even beyond the archipelago.

On April 7, 1970, Canada's Ambassador to the United Nations, Yvon Beaulne, presented Secretary General U Thant with a letter partially withdrawing Canadian recognition of the compulsory jurisdiction of the International Court of Justice. The scope of this withdrawal of recognition covers:

disputes arising out of or concerning jurisdiction of rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.⁶⁷

65. *Supra* note 4, at 3625 (Feb. 16, 1970). The enabling legislation is the Coastal Fisheries Protection Act, 1-2 Eliz. II, S.C. 1952-53, c. 15, § 2(b).

66. Statement by Prime Minister Trudeau, 114 House of Commons Debates, No. 97, 2nd Sess., 28th Parl., at 5623 (April 8, 1970).

67. N.Y. Times, April 9, 1970, at 12, col. 1.

This new reservation to Canada's willingness to be brought before the World Court was timed to coincide with the introduction in the House of Commons of two bills "dealing with protection of Canada's marine environment and the living resources of the sea."⁶⁸ Canada has rejected international litigation of her claims and instead has chosen a course of domestic legislation to advance her Arctic claims while indicating the need for new formulations of international law.

The first of the two bills is a proposed amendment of the 1964 Territorial Sea and Fishing Zones Act to provide for a twelve mile territorial sea limit in place of the three mile rule presently contained in the Act.⁶⁹ If successful, the legislation would constitute a Parliamentary act of diplomacy in the assertion of twelve mile territorial sea limits and would provide the necessary basis for general recognition of Canadian sovereign rights over twelve miles of coastal seas.⁷⁰ If the twelve mile limit comes to govern, it will be impossible for ships to navigate the Northwest Passage without traversing Canadian territorial waters.⁷¹ This would not, however, allow Canada to prevent innocent passage.⁷² The 1958 Geneva Convention on the Territorial Sea defines innocent passage to include any passage "not prejudicial to the peace, good order or security of the coastal State."⁷³ Canada may, however, argue at some point that the passage of ships, such as by the oil-tanker, *Manhattan*, does not meet the test of innocent passage unless Canadian standards of safety are met.

Rigid safety requirements for all ships passing through any waters of the Canadian Arctic archipelago or within 100 nautical miles of them are provided for in the second bill placed before the House of Commons.⁷⁴ Fines of \$100,000, seizure, and forfeiture of both ship and cargo are provided for violaters of those requirements. By winning international acceptance of these measures, Canada may establish her sovereignty in an indirect or *de facto* way.

In explaining Canada's unwillingness to litigate the jurisdictional issues raised by the bills, Prime Minister Trudeau stated:

68. Debates, *supra* note 66, at 5624.

69. Bill C-203, introduced and given first reading in the House of Commons. Debates, *supra* note 66, at 5626.

70. The World Court commented in the *Fisheries* case that "[t]he delimitation of sea areas has always an international aspect. . . it is true that the act of delimitation is necessarily a unilateral act. . ." *Supra* note 34, at 132.

71. A ship passing through the Parry Channel could not navigate the Barrow Strait without coming within 12 miles of one of the following islands: Bathurst, Garrett, Lowther, Young, or Russell. It would also have to pass within three miles of Banks, Princess Royal, or Victorial Island at the western end of the Passage unless the more northerly M'Clure Strait, which is more exposed to blocking by older and harder Arctic ice from the permanent polar ice cap, is chosen.

72. Convention on the Territorial Sea, *supra* note 25, art. 15.

73. *Id.*, art. 14, para. 6.

74. Bill C-202, introduced and given first reading in the House of Commons, Debates, *supra* note 66, at 5626.

It is well known that there is little or no environmental law on the international plane and that the law now in existence favours the interests of the shipping states and the shipping owners engaged in the large scale carriage of oil and other potential pollutants.⁷⁵

Despite Canada's efforts to avoid litigation, some form of international proceeding may ultimately determine the limits of Canadian authority over the waters of its Arctic archipelago, for the United States was quick and firm in registering its dissent from the Canadian claims inherent in the proposed legislation:

International law provides no basis for these proposed unilateral extensions of jurisdictions on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction.

. . . [M]erchant shipping would be severely restricted, and naval mobility would be seriously jeopardized. The potential for serious international dispute and conflict is obvious.⁷⁶

The United States implored Canada not to effectuate the proposed legislation, but rather to cooperate in a search for internationally agreed solutions. If the Canadian government is not willing to delay action on the bills, the United States has suggested that U.S.-Canadian "differences" be submitted to the International Court of Justice.⁷⁷

The recent Brussels Conference produced two conventions dealing with controls of marine pollution and compensation for damages, but it did not go far enough to relieve Canadian concern for the safety of her Arctic North.⁷⁸ The Canadian government has now proceeded to act on its own authority to control the threat of pollution from Northwest Passage voyages. The Prime Minister has declared, "[S]omebody has to preserve this area for mankind until international law develops, and we are prepared to help it by taking steps on our own."⁷⁹

Whether the Canadian proposals for extended domestic legislation will be followed by other states' unilateral claims as were the Truman Proclamations of 1945 or by a new international conference to more fully resolve the problems of maritime pollution and coastal state jurisdiction is not yet clear. Canada's response in legal diplomacy to the *Manhattan's* conquest and to the potential threat of pollution of the Canadian Arctic has joined the social-political-legal issues between the competing interests of protection of coastal states from the dangers of marine pollution and the preservation of the freedom of passage on the high seas for all states.

75. *Supra* note 66, at 5624.

76. Press Release of Department of State on Canada's Claim to Jurisdiction Over Arctic Pollution and Territorial Sea Limits, April 15, 1970.

77. *Id.*

78. For a comprehensive discussion of the accomplishments and limitations of the Brussels Conference, see Note, *Reflections on Brussels: IMCO and the 1969 Pollution Conventions*, in this issue of the JOURNAL at .

79. Montreal Star, April 9, 1970 at 1, col. 1.

The questions of how much authority the archipelago state may exercise in inter-island waters and how much extra-territorial authority the coastal state may exercise to protect its territorial seas and coasts from contamination are not strictly legal questions. They are questions which legal diplomacy as well as law will have to resolve. They will be resolved in the context of conflicting interests competing through the medium of existing principles and newly-formulated proposals of international law.