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## Global Warming Heats up the American-Canadian Relationship: Resolving the Status of the Northwest Passage under International Law

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# Global warming heats up the American-Canadian relationship: Resolving The Status of the Northwest Passage Under International Law

## ABSTRACT

Global warming is turning the hypothetical Northwest Passage into a reality. Shipping that utilizes the Northwest Passage can save over 4000 miles in travel, with the attendant economic benefits. However, the legal status of the Northwest Passage, in particular the portion of the Northwest Passage which cuts through the Canadian Arctic Archipelago, remains indeterminate and is a source of contention between the United States and Canada. Canada takes the position that the Northwest Passage is internal Canadian waters, while the United States takes the position that the Northwest Passage constitutes an international strait. While these two positions have strengths and weaknesses, it is likely that the two nations will continue to defer a final resolution of this issue and either continue with the status quo or seek a diplomatic solution.

William Y. Kim<sup>1</sup>

## Introduction

On September 14, 2007, the European Space Agency announced that analysis of satellite imagery showed that the accelerating shrinkage in ice cover had opened up the Northwest Passage, a “short cut between Europe and Asia that had been historically impassable.”<sup>2</sup> Using the Northwest Passage had previously been considered commercially impractical due to multi-year pack ice that rendered navigation hazardous or impossible.<sup>3</sup> However, lured by the savings of almost 4000 miles compared to the Panama Canal route, international shipping is already attempting to use the Northwest Passage.<sup>4</sup> These

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1. J.D., Michigan State University College of Law.
  2. *ESA Portal – Satellites witness lowest Arctic ice coverage in history*, ESA.INT, [http://www.esa.int/esaCP/SEMYTC13J6F\\_index\\_0.html](http://www.esa.int/esaCP/SEMYTC13J6F_index_0.html) (last visited Dec. 6, 2010).
  3. Michael Byers & Suzanne Lalonde, *Mounting Tension and Melting Ice: Exploring the Legal and Political Future of the Arctic: Who Controls the Northwest Passage?*, 42 VAND. J. TRANSNAT'L L. 1133, 1135 (2009).
  4. See James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INT'L J. MARINE & COASTAL L. 257, 258 (2007); <sup>1st</sup>

developments inject new tension into the disagreement between the United States and Canada over the status of the Northwest Passage under international law.

Canada takes the position that the Northwest Passage constitutes internal Canadian waters, which gives them broad authority to regulate and restrict maritime traffic through the Northwest Passage.<sup>5</sup> In contrast, the United States takes the position that the Northwest Passage constitutes an international strait, with international shipping having the right of transit passage.<sup>6</sup> While it is currently unlikely that either the United States or Canada would be willing to submit this dispute to an international tribunal, the dispute in the Northwest Passage showcases the difficulty that even closely allied neighbors can face in protecting their own interests under international law.

Part I of this article provides a historical overview of the Northwest Passage and prior disputes between the United States and Canada regarding the Northwest Passage. Part II analyzes the development of international law relevant to the Northwest Passage dispute. Part III analyzes the strengths and weaknesses of the positions held by the United States and Canada. Part IV will conclude by examining the practical limitations on resolving this issue through an international tribunal.

## I. The History of the Northwest Passage

### A. Geographical Background

The Northwest Passage refers to the body of Arctic water that connects the Atlantic and Pacific oceans along the northern coast of North America.<sup>7</sup> It stretches from the Bering Strait in the west, runs along the northern coast of Alaska and Canada, and then weaves through the Canadian Arctic Archipelago until it exits through the Davis Strait and Baffin Bay in the east.<sup>8</sup> Since European colonization of North America began, explorers have sought a usable route around the northern coast of North America.<sup>9</sup> However, arctic weather

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*Commercial Ship Sails Through Northwest Passage*, CBC NEWS, <http://www.cbc.ca/canada/north/story/2008/11/28/nwest-vessel.html> (last visited Dec. 6, 2010).

5. MICHEAL BYERS, WHO OWNS THE ARCTIC? 43 (2009)

6. *Id.* at 42.

7. See, e.g. *The Northwest Passage Today*, Of Maps and Men: In Pursuit of a Northwest Passage, [http://libweb5.princeton.edu/visual\\_materials/maps/websites/northwest-passage/nwp-today.htm](http://libweb5.princeton.edu/visual_materials/maps/websites/northwest-passage/nwp-today.htm) (last visited Dec. 6, 2010).

8. *Id.*

9. BYERS, *supra* note 5 at 36-37.

conditions created insurmountable barriers for early explorers, particularly the multi-year pack ice common in the waterways that did not melt during the summers, but instead built up year after year.<sup>10</sup>

*B. Successful Navigations of the Northwest Passage*

The first successful transit of the Northwest Passage took three years of hard sailing and was completed by Roald Amundson in 1906.<sup>11</sup> In the wake of this accomplishment, the Canadian government made a formal claim to possession of the lands and islands within the Northwest Passage using a “sector” theory of sovereignty.<sup>12</sup> However, this sector claim has never been recognized internationally.<sup>13</sup> While the United States formally protested this sector claim, the practical difficulties of navigating the Northwest Passage meant that no real confrontation between Canada and the United States occurred.<sup>14</sup> It did, however, mark the first time that Canada made the claim that the waters of the Northwest Passage constituted “internal Canadian waters” as well as the first United States rejection of this claim.

No ship would repeat Amundson’s achievement for nearly four decades, until the *St. Roch*, with Henry Larsen of the Royal Canadian Mounted Police in command, successfully navigated the Northwest Passage.<sup>15</sup> The 1950s marked the first transit of the Northwest Passage by a ship flying the United States flag, when the U.S. Coast Guard cutter *Storis* successfully transited the Northwest Passage in 1957.<sup>16</sup> Four years later, in 1961 the U.S.S. *Seadragon* completed the

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10. *Id.*

11. *Id.* at 37. All prior attempts to navigate the Arctic passage failed. *Id.*

12. See John Kennair, *An Inconsistent Truth: Canadian Foreign Policy and the Northwest Passage*, 34 VT. L. REV. 15, 23-24 (2009); Luke R. Peterson, *International Strait or Internal Waters? The Navigational Potential of the Northwest Passage*, PROCEEDINGS OF THE MARINE SAFETY COUNCIL, Summer 2009, at 44, 47. Both articles note that the Canadian government no longer attempts to use the sector theory to claim sovereignty over the Northwest Passage.

13. Peterson, *supra* note 12 at 47.

14. Canada, DoD 2005.1-M MARITIME CLAIMS REFERENCE MANUAL, 96 available at [http://www.dtic.mil/whs/directives/corres/20051m\\_062305/canada.doc](http://www.dtic.mil/whs/directives/corres/20051m_062305/canada.doc) (last visited Dec. 6, 2010) [hereinafter MARITIME CLAIMS]; Kennair, *supra* note 12 at 24.

15. *Canada at War: The Arctic: Northwest Passage, 1944*, TIME.COM, <http://www.time.com/time/magazine/article/0,9171,801448,00.html> (last visited Dec. 6, 2010).

16. *Storis, 1942*, USCG.MIL, <http://www.uscg.mil/history/webcutters/Storis1942.pdf> (last visited Dec. 6, 2010).

first submarine transit of the Northwest Passage.<sup>17</sup> As the 1960s drew to a close, Exxon sent a specially modified super-tanker, the S.S. *Manhattan*, through the Northwest Passage in an experiment to test the viability of the Northwest Passage as a commercial shipping route.<sup>18</sup> Although neither Exxon nor the U.S. government sought Canadian permission for this voyage, the Canadian government preemptively granted permission anyways.<sup>19</sup>

In the wake of the *Manhattan*'s voyage, the Canadian government enacted the Arctic Waters Pollution Prevention Act (AWPPA) in 1970.<sup>20</sup> Although international law at that time did not recognize coastal state rights further than twelve nautical miles from shore, the AWPPA imposed requirements on all shipping within 100 miles of Canada's Arctic shore.<sup>21</sup> Shortly thereafter Canada attempted to propose legislation at the Intergovernmental Maritime Consultative Organization (IMCO) that would have validated the range of the AWPPA.<sup>22</sup> However, this proposal was rejected by the IMCO.<sup>23</sup> Canada's efforts met with greater success in the 1982 UN Convention on the Law of the Sea (UNCLOS) with the adoption of Article 234, which granted coastal states additional rights over ice-covered seas within their Exclusive Economic Zone (EEZ).<sup>24</sup> However, at least one scholar noted that while this gives coastal nations the right to enact

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17. *Dictionary of American Naval Fighting Ships: Seadragon II*, HISTORY.NAVY.MIL, <http://www.history.navy.mil/danfs/s8/seadragon-ii.htm> (last visited Dec. 6, 2010). It is notable that this is one of the few instances where the course taken by a submarine is publicly available, since submarine operations are classified by the U.S. government and are thus generally unavailable. See, e.g. Byers & Lalond, *supra* note 3 at 1177.
  18. BYERS, *supra* note 5 at 44-45.
  19. *Id.* At the time, international law only recognized a three-mile limit for territorial seas, and the S.S. *Manhattan*'s projected route was entirely outside of that three-mile limit. However, the *Manhattan* became trapped in ice and required the assistance of the Canadian icebreaker *John A. MacDonald*. Because of this assistance, the *Manhattan* was forced to enter Canadian territorial waters by coming within three miles of the Princess Royal Islands. *Id.* at 45.
  20. BYERS, *supra* note 5 at 46.
  21. *Id.* Byers also notes that Canada effectively admitted that these requirements violated international law at the time by taking steps to prevent the matter from being litigated at the I.C.J. *Id.*
  22. Kennair, *supra* note 12 at 17.
  23. *Id.*
  24. UN Convention on the Law of the Sea, art. 234, Dec. 10, 1982, 1833 U.N.T.S. 561.

environmental legislation protecting the waterways, it fails entirely to address the question of sovereignty over those waterways.<sup>25</sup>

*C. The Voyage of the Polar Sea: The Northwest Passage Dispute Comes to a Head*

The Northwest Passage dispute between Canada and the United States came to a head in 1984, when the U.S. informed Canada that the U.S. Coast Guard icebreaker *Polar Sea* would utilize the Northwest Passage to sail from Thule, Greenland to its home port of Seattle, Washington.<sup>26</sup> The United States clearly stated that its notification was a courtesy and did not constitute recognition of the Canadian position regarding the Northwest Passage.<sup>27</sup> While Canada was inclined to work with the United States to address logistical concerns regarding the *Polar Sea*, Canadian public opinion forced Canada to take a more confrontational posture.<sup>28</sup>

Diplomatic negotiations between the United States and Canada eventually led to the 1988 Agreement on Arctic Cooperation.<sup>29</sup> While neither nation conceded the validity of the other's position regarding the status of the Northwest Passage, the Agreement did specify that the United States would only operate icebreakers within the Northwest Passage with Canadian consent.<sup>30</sup> The Agreement on Arctic Cooperation did not apply to any ships besides icebreakers, and explicitly preserved each nation's original position regarding the Northwest Passage.<sup>31</sup>

*D. Recent Developments in the Northwest Passage*

Since the implementation of the 1988 Agreement on Arctic Cooperation, neither the United States nor Canada has forced a confrontation over the status of the Northwest Passage. However, the European Space Agency's announcement that sea ice in the Northwest Passage had shrunk to the point that the Northwest Passage could be considered open raises the specter of increasing commercial use of the Northwest Passage.<sup>32</sup> An increasing number of

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25. Kennair, *supra* note 12 at 18.

26. BYERS, *supra* note 5 at 51.

27. *Id.*

28. *Id.* at 51-52.

29. Agreement on Arctic Cooperation, U.S.-Can., Jan. 11, 1988, 60 U.N.T.S. 1995.

30. *Id.*

31. *Id.* The Agreement on Arctic Cooperation also states that all icebreakers are also by definition research vessels, and both nations agreed to share information gained from the research activities of their icebreakers. *Id.*

32. ESA Portal, *supra* note 2.

commercial vessels, including cruise ships, have utilized the Northwest Passage in the past decade.<sup>33</sup>

Currently, registration of ships using the Northwest Passage is voluntary under Canadian law, with approximately 98% of shipping complying.<sup>34</sup> In 2008, Canadian Prime Minister announced that Canada would be making registration mandatory.<sup>35</sup> However, Canada has of yet not done so, potentially due to United States' concerns about validating Canada's claims to sovereignty over the Northwest Passage.<sup>36</sup> The increased commercial traffic and Canada's attempt to regulate it makes it increasingly likely that the formal status of the Northwest Passage under international law will become an issue of concern for both the United States and Canada.

## II. The Northwest Passage and International Law

Article 38 of the Statute of the International Court of Justice ("I.C.J.") recognizes three primary sources of international law.<sup>37</sup> First, the I.C.J. recognizes "international conventions," which are usually formulated as treaties, but which could include conventions, protocols, and declarations. Second, the I.C.J. recognizes international customs where those customs are accepted as a general practice required by law. Third, the I.C.J. recognizes the general principles of law recognized by civilized nations. In addition, Article 38 also identifies as a "subsidiary means for the determination of rules of law" prior judicial decisions and the teachings of the publicists.<sup>38</sup>

### A. *Treaties Alone Cannot Determine International Law in the Northwest Passage*

With the exception of the previously mentioned Agreement on Arctic Cooperation, there are no treaties concerning the Northwest

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33. See, e.g. Frank Luba, *Cruise Trips to Northwest Passage on Rise*, THEPROVINCE.COM, <http://www.theprovince.com/Cruise+trips+Northwest+Passage+rise/3827493/story.html> (last visited Dec. 6, 2010); Captain Mark Behrend, *Logbook of the Northwest Passage*, HL-CRUISES.COM, <http://www.hl-cruises.com/redwork/do.php?layoutid=100&node=275236&language=2> (last visited Dec 6, 2010); *1<sup>st</sup> Commercial Ship Sails Through Northwest Passage*, *supra* note 2.

34. Byers, *supra* note 5 at 70-71.

35. *Id.* at 71.

36. *Id.* at 71-72. A spokesperson for the United States embassy stated that "[w]e want to ensure that any enhanced protection of the Canadian Arctic marine environment is achieved in a manner that is consistent with the international law of the sea." *Id.* at 72.

37. Statute of the International Court of Justice, art. 38(1), 26 June 1945, 59 Stat. 1055.

38. *Id.*

Passage that bind both the United States and Canada.<sup>39</sup> While as a body of water the Northwest Passage would seem to fall within the purview of the United Nations Convention on the Law of the Sea, the United States has not yet ratified the UNCLOS.<sup>40</sup> Thus, despite the fact that Canada ratified the UNCLOS on November 7, 2003, the failure of the United States to ratify the UNCLOS prevents it from being considered international law by virtue of its status as a binding treaty.<sup>41</sup> While both the United States and Canada are signatories to Convention on the Territorial Sea and the Contiguous Zone (CTSCZ), a predecessor of the UNCLOS, Article 311 of the UNCLOS specifically supersedes its predecessors and thus keeps the CTSCZ from being binding upon Canada.<sup>42</sup>

The 1988 Agreement on Arctic Cooperation, while binding both the United States and Canada, is a document of extreme brevity. Only a page and a half long, the agreement contains very few applicable provisions, and those provisions are both specific and limited. After the customary introductions, paragraph 3 focuses on the substance of the treaty:

3. In recognition of the close and friendly relations between their two countries, the uniqueness of ice-covered maritime areas, the opportunity to increase their knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts:

— The Government of the United States and the Government of Canada undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose;

— The Government of Canada and the Government of the United States agree to take advantage of their icebreaker navigation to develop and share research information, in accordance with generally accepted principles of international

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39. Agreement on Arctic Cooperation, *supra* note 29.

40. *Chronological List of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 15 November 2010*, UN.ORG, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea) (last visited Dec. 10, 2010).

41. *Id.*

42. United Nations Convention on the Law of the Sea, art. 311, Dec. 10, 1982, 1833 U.N.T.S. 561 [hereinafter UNCLOS]; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 [hereinafter CTSCZ].



law, in order to advance their understanding of the marine environment of the area;

— The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.<sup>43</sup>

A careful reading of the Agreement on Arctic Cooperation reveals that its scope encompasses only icebreakers of the United States and Canada. Commercial shipping, private craft, and non-icebreaker military vessels are excluded from the Agreement. Furthermore, both nations specifically reserved their original positions regarding waters in question and prevented the Agreement from affecting their respective positions through Article 4.<sup>44</sup>

No other treaties relating to the Arctic waters or the Northwest Passage have been registered with the United Nations. Thus, it is clear that there is no treaty binding both the United States and Canada which can be used to determine international law applicable to the Northwest Passage dispute.

*B. The United States Largely Accepts the UN Convention on the Law of the Sea as Customary International Law*

Despite the failure of the United States government to ratify the UN Convention on the Law of the Sea, this failure is not due to an overall rejection of the UNCLOS. Instead, the United States objected to Part XI of the UNCLOS, particularly as it dealt with mineral exploitation of the seabed beyond the limits of national jurisdiction.<sup>45</sup> The United States accepts most of the UNCLOS as codifying customary international law.<sup>46</sup> This position was recently reaffirmed by United States diplomats participating in the Arctic Ocean Conference, held in Ilulissat, Greenland in May of 2008.<sup>47</sup> Thus, the

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43. Agreement on Arctic Cooperation, *supra* note 29.

44. *Id.* Paragraph 4 reads, “Nothing in this agreement of cooperative endeavor between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.” *Id.*

45. Rachael E. Salcido, *Law Applicable on the Outer Continental Shelf and in the Exclusive Economic Zone*, 58 AM. J. COMP. L. 407, 409 (2010).

46. See, e.g. Letter from David Wilkins, Ambassador of the U.S., to Peter Boehm, Assistant Deputy Minister, N.Am., Dep’t of Foreign Affairs & Int’l Trade (Can.) (Oct. 27, 2006), available at [www.state.gov/documents/organization/98836.pdf](http://www.state.gov/documents/organization/98836.pdf) (last visited Dec. 10, 2010); Kraska, *supra* note 4 at 263.

47. Arctic Ocean Conference, Ilulissat, Green., May 27-29, 2008, Ilulissat Declaration (May 28, 2008), in Danish Foreign Policy Yearbook 2009

UNCLOS, although not a treaty binding both the United States and Canada, can largely be viewed as a codification of customary international law. As such, both the United States and Canada would be bound by those provisions that are determined to be customary international law, despite the United States failure to ratify the UNCLOS.<sup>48</sup>

### 1. Treatment of “Internal Waters” Under the UNCLOS

Canada’s position is that the Northwest Passage constitutes “internal waters.” Article 8 of the UNCLOS defines internal waters as “waters on the landward side of the baseline of the territorial sea.”<sup>49</sup> Article 8 makes an exception for archipelagic states, of which Canada does not qualify.<sup>50</sup> However, Article 7 of the UNCLOS allows for the drawing of straight baselines where “there is a fringe of islands along the coast in its immediate vicinity.”<sup>51</sup> In 1985, one month after the voyage of the *Polar Sea* through the Northwest Passage, the Canadian Foreign Minister announced that Canada would use straight baselines to determine the limits of Canada’s internal waters.<sup>52</sup> Canada’s baselines surrounded the entirety of the Canadian Arctic archipelago, thus covering that portion of the Northwest Passage.

Several nations, including the United States, protested Canada’s claim on the basis that the baselines were excessively long and diverted too much from the direction of the mainland coast.<sup>53</sup> This position relies on the third paragraph of Article 7, which states that “[t]he drawing of straight baselines must not depart to any

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154, 154 (Danish Inst. for Int’l Studies ed., 2009). The Declaration affirmed the commitment of the participating nations (Canada, Denmark, Norway, the Russian Federation, and the United States) to the “existing legal framework” of the “law of the sea.” *Id.* Of those five nations, only the United States has not ratified the UNCLOS. *Status of the United Nations Convention on the Law of the Sea*, UN.ORG, [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf) (last visited Dec. 10, 2010).

48. *See, e.g.* North Sea Continental Shelf, Merits (Ger./Neth.; Ger./Den.), 1969 I.C.J. 2 (Feb. 20). The judgement in the North Sea Continental Shelf case discussed the manner in which a treaty, which had not been ratified by Germany, might still be considered to codify customary international law and thus bind Germany. *Id.* at 14-16.

49. UNCLOS, art. 8.

50. UNCLOS, art. 46. Essentially, states composed of a continental landmass with a nearby archipelago cannot be considered archipelagic states under the UNCLOS. *Id.*

51. UNCLOS, art. 7, para. 1.

52. BYERS, *supra* note 5 at 52.

53. BYERS, *supra* note 5 at 53-54.

appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters.”<sup>54</sup>

Canada, by declaring that the Northwest Passage was internal Canadian waters, sought the ability to exercise its sovereignty over the waters of the Northwest Passage, in accordance with Article 2 of the UNCLOS.<sup>55</sup> This sovereignty is not unlimited; in particular, Article 18 of the UNCLOS establishes the right of “innocent passage” for foreign ships.<sup>56</sup> “Innocent passage” is defined by the UNCLOS to mean “navigation through the territorial sea” for the purpose of traversing that sea in a “continuous and expeditious” manner.<sup>57</sup> Innocent passage must also be conducted in a manner that is “not prejudicial to the peace.”<sup>58</sup> Articles 21 through 26 give the coastal state a wide variety of powers (and some limitations) to regulate and oversee shipping through internal waters.

In addition, Canada also invokes Article 234 of the UNCLOS, which grants coastal states additional rights to regulate waters in ice-covered areas for the purpose of preventing, reducing, or controlling pollution.<sup>59</sup> This article was a compromise added at the behest of Canada, which sought the additional legitimacy for its ability to protect its claimed waters from pollution.<sup>60</sup> Canada originally sought to enshrine its sovereignty claims over the Northwest but could not gain enough support for its position.<sup>61</sup> However, the applicability of Article 234 may itself be in question, since it deals specifically with “ice-covered areas.” Since the effect of global warming, and the underlying reason for the heightened concern regarding the Northwest Passage, is the loss of surface ice, it is uncertain as to whether Article 234 still applies.<sup>62</sup>

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54. UNCLOS, art. 7, para. 3.

55. UNCLOS, art. 2.

56. UNCLOS, art. 18.

57. *Id.*

58. UNCLOS, art. 19. Article 19 also lists a variety of actions incompatible with innocent passage, including researching, fishing, intelligence gathering, and the use or threat of use of force. *Id.* In addition, submarines must travel on the surface and identify themselves. UNCLOS, art. 20.

59. UNCLOS, art. 234. Article 234 is restricted to areas “where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation.” *Id.*

60. See Kennair, *supra* note 12 at 17-18; Kraska, *supra* note 4 at 274.

61. Kennair, *supra* note 12 at 17-18

62. See, e.g. Peterson, *supra* note 12 at 46; Byers & Lalonde, *supra* note 3 at 1200-01. It is interesting to note that the scholars from Canada

## 2. Treatment of "International Straits" Under the UNCLOS

The position of the United States is that the Northwest Passage constitutes an international strait, with foreign vessels having the right of transit passage.<sup>63</sup> Article 37 of the UNCLOS applies to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."<sup>64</sup> In regards to the Northwest Passage, the applicable high seas are the Atlantic Ocean on the eastern end of the Northwest Passage, and the Pacific Ocean on the western end.

If it is classified as an international strait, foreign ships would enjoy the right of transit passage, defined as "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas . . . and another part of the high seas."<sup>65</sup> Ships exercising the right of transit passage are required to comply with a number of conditions, including proceeding through the strait without delay, refraining from the threat or use of force, refraining from activities beyond those incident to normal transit, and compliance with international regulations for safety and pollution control.<sup>66</sup> In addition, ships exercising transit passage may not conduct research or surveys without the permission of the coastal state.<sup>67</sup>

Coastal states are also restricted in their ability to regulate an international strait where the right of transit passage exists. Article 41 specifically gives coastal states the right to designate sea lanes to prescribe traffic separation schemes when necessary.<sup>68</sup> In addition, Article 42 allows coastal states to adopt laws and regulations with respect to safety, pollution, fishing, and customs-related activity.<sup>69</sup> However, these laws and regulations may not discriminate against foreign ships and their application cannot have the practical effect of "denying, hampering, or impairing the right of transit passage."<sup>70</sup> Transit passage may also not be suspended.<sup>71</sup>

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(Byers & Lalonde) and the United States (Peterson) have noted this uncertainty.

63. BYERS, *supra* note 5 at 42.

64. UNCLOS, art. 37.

65. UNCLOS, art. 38, para. 2.

66. UNCLOS, art. 38, para. 1-2.

67. UNCLOS, art. 40.

68. UNCLOS, art. 41.

69. UNCLOS, art. 42, para. 1.

70. UNCLOS, art. 42, para. 2.

71. UNCLOS, art. 44.

While, under the UNCLOS, transit passage is only possible through an international strait, an international strait does not automatically allow for transit passage. Article 35 limits the scope of transit passage by excluding "any areas of internal waters within a strait, except where the establishment of straight baselines . . . has the effect of enclosing as internal waters areas which had not previously been considered as such."<sup>72</sup> The key question thus becomes whether or not the Northwest Passage was considered internal Canadian waters prior to Canada's application of straight baselines.

It is also unclear whether Article 234 of the UNCLOS applies to international straits, because the negotiators did not expressly deal with the issue.<sup>73</sup> While Article 234 itself is written in broad manner that could encompass international straits, Article 42, which governs the "laws and regulations of states bordering straits relating to transit passage," specifically limits itself "to the provisions of this section."<sup>74</sup> However, Article 42 then goes on to list pollution as an acceptable subject for regulation, although with a more limited scope.<sup>75</sup> This lack of clarity in the UNCLOS creates additional potential for conflict over the legal status of the Northwest Passage. The UNCLOS also creates an additional loophole in pollution-related laws and regulations for military vessels used only in governmental, non-commercial service.<sup>76</sup>

*C. Relevant Prior Judgments from the International Court of Justice*

While prior decisions of international tribunals are not binding precedent, those decisions are a "subsidiary means for the

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72. UNCLOS, art. 35(a). Article 36 of the UNCLOS also excludes international straits where an alternative route "of similar convenience with respect to navigational and hydrographical characteristics" exists. UNCLOS, art. 36. No such alternative route exists in relation to the Northwest Passage.

73. Byers & Lalonde, *supra* note 3 at 1182-83.

74. UNCLOS, art. 42.

75. UNCLOS, art. 42(1)(a). Article 42 allows the coastal state to give effect "to applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances." *Id.* Article 234 does not include the restriction of "giving effect to applicable international regulations. UNCLOS, art. 234.

76. Kennair, *supra* note 12 at 18. Kennair notes that when the Canadian government attempted to use Article 234 of the UNCLOS to justify regulation of ships through the Arctic ice shelf, the United States government responded by pointing out that Article 236 of the UNCLOS provided a sovereign immunity clause. *Id.* This sovereign immunity clause specifically exempts military vessels from provisions of the UNCLOS regarding protection and preservation of the environment. UNCLOS, art. 236.

determination of rules of law.”<sup>77</sup> The principles used by the I.C.J. in two cases have a direct bearing on the issues involved in the dispute over the Northwest Passage. These cases have been cited by both the United States and Canada in support of their respective positions.

#### 1. The Norwegian Fisheries Case – Defining Appropriate Straight Baselines

The *Norwegian Fisheries* case was decided by the I.C.J. in 1951.<sup>78</sup> It involved a dispute between the United Kingdom and Norway over fishing rights, in particular how the presence of Norway’s “skjaergaard,” a collection of rocks, islands, and reefs, affected the delineation of Norwegian territorial waters through the drawing of straight baselines.<sup>79</sup> The United Kingdom disputed Norway’s use of straight baselines to enclose the entire skjaergaard as territorial waters, instead arguing that the baselines must be drawn on the “low-water mark on permanently dry land which [was] a part of Norwegian territory, or the proper closing line of Norwegian internal waters.”<sup>80</sup> The court rejected this contention, stating that geographic realities dictated that outer lines of the skjaergaard must be taken into account when delimiting Norwegian territorial waters.<sup>81</sup>

The United Kingdom also argued that if baselines could be used, then each baseline could be no longer than ten nautical miles.<sup>82</sup> This contention was also rejected by the I.C.J., which noted that while the ten-mile rule enjoyed a certain amount of support, it had “not acquired the authority of a general rule of international law.”<sup>83</sup> The I.C.J. also refused to endorse any particular system of drawing baselines, instead noting that “the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.”<sup>84</sup>

Another pertinent point involved the United Kingdom’s attempt to define portions of the waters in the skjaergaard as a strait, which

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77. Statute of the International Court of Justice, art. 38(1)(d), 26 June 1945, 59 Stat. 1055.

78. Fisheries, Judgment (U.K. v. Nor.), 1951 I.C.J. 5 (Dec. 18).

79. *Id.* at 21-23.

80. *Id.* at 24.

81. *Id.* at 25-26. The I.C.J. justified this decision by noting that the western sector of the mainland was bordered by the skjaergaard and thus constituted a whole with the mainland. *Id.* The I.C.J. later explicitly gave its sanction to Norway’s drawing of baselines between the outer islands of the skjaergaard. *Id.* at 29.

82. *Id.* at 29-30.

83. *Id.* at 32.

84. *Id.* at 33.

would have prevented Norway from classifying them as internal waters.<sup>85</sup> The United Kingdom argued that the portions followed by the Indreleia navigational route constituted a maritime strait.<sup>86</sup> However, the I.C.J. noted that the Indreleia was more accurately described as “a navigational route prepared as such by means of artificial aids to navigation provided by Norway.”<sup>87</sup> Given that, the I.C.J. declined to treat the Indreleia differently than the other waters of the skjaergaard.<sup>88</sup>

After finding that the Norwegian government had not violated international law by drawing straight baselines, the I.C.J. then proceeded to expound on the characteristics of valid straight baselines under international law.<sup>89</sup> The court first noted that land granted a coastal state the right to the waters off its coast. Thus, “while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.”<sup>90</sup> The court noted that a second consideration would be the relationship between “sea areas and the land formations which divide or surround them.”<sup>91</sup> Finally, the court noted that considerations beyond “purely geographic” factors are valid, such as economic interests evidenced through historical usage.<sup>92</sup>

After determining the basic rules of permissible baselines, the ICJ then examined how Norway had created its system, what effect Norway’s system had against the United Kingdom, and whether it was applied in a way that conformed to international law.<sup>93</sup> By using a variety of historical documents, the court established that Norway had established a coherent system for establishing baselines stretching back to 1812, and that this system had been encountered no

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85. *Id.* at 33-34.

86. *Id.* at 34.

87. *Id.*

88. *Id.*

89. *Id.* at 34-35. The I.C.J. noted that these characteristics, “though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse, facts in question.” *Id.* at 35.

90. *Id.* at 36.

91. *Id.* The court further clarified this point by stating that “[t]he real question raised in the choice of base-lines is . . . whether certain sea areas lying within those lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters.” *Id.*

92. *Id.* at 36-37.

93. *Id.* at 38.

opposition from other states.<sup>94</sup> Furthermore, the United Kingdom's position in the North Sea, the United Kingdom's own interests, and the United Kingdom's failure to protest against early iteration of the Norwegian position justified enforcement against the United Kingdom.<sup>95</sup>

When examining whether Norway's baselines conformed to international law, the I.C.J. gave great weight to Norway's historical claims that marginalized the United Kingdom's concerns that the baselines deviated too severely from the general direction of the Norwegian coast.<sup>96</sup> Additionally, it found that the "vital needs of the population," supported by "ancient and peaceful usage" could legitimately be taken into consideration when determining whether the baselines were "moderate and reasonable."<sup>97</sup> Taking all of its findings into consideration, the I.C.J. found that baselines drawn by Norway were permissible under international law.<sup>98</sup>

## 2. The Corfu Channel Case – What is an International Strait

Decided in 1949, the *Corfu Channel* case involved a dispute between the United Kingdom and Albania.<sup>99</sup> The case emerged from an incident in 1946 when a squadron of British warships departed from the port of Corfu and proceeded through the North Corfu Channel, where they struck mines.<sup>100</sup> The mines were encountered while the British ships were transiting through Albanian territorial waters.<sup>101</sup> A substantial portion of the *Corfu Channel* decision addressed the question of whether the Albanian government was responsible for the mines which had damaged the British warships and whether the court had jurisdiction to impose a penalty.<sup>102</sup> It is, however, the second issue addressed by the *Corfu Channel* case that is relevant to the Northwest Passage dispute: whether the passage of British warships through the Corfu Channel violated Albanian sovereignty.<sup>103</sup>

The Albanian government had previously claimed that foreign warships and merchant vessels had no right to pass through Albanian

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94. *Id.* at 45.

95. *Id.* at 52.

96. *Id.* at 57-58.

97. *Id.* at 58-59.

98. *Id.* at 60.

99. *Corfu Channel, Judgment (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

100. *Id.* at 17-18.

101. *Id.* at 22-23.

102. *Id.* at 42.

103. *Id.* at 49.



territorial waters without the prior notification and consent of the Albanian government.<sup>104</sup> The British government vigorously protested this position, claiming that “innocent passage through straits [was] a right recognized by international law.”<sup>105</sup> The I.C.J. found that it was “generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state.”<sup>106</sup> Further, the court stated that “[u]nless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”<sup>107</sup>

The Albanian government did not contest this rule of international law directly, but instead attempted to argue that although the North Corfu Channel was geographically a strait, it did not qualify as an “international highway.”<sup>108</sup> The Albanian position was based on the claim that the North Corfu Channel was of “secondary importance,” was not a “necessary route,” and that it was used almost exclusively for local traffic.<sup>109</sup> The I.C.J. began its analysis by attempting to determine what factors were most important in determining whether a waterway was an international strait:

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Egean (sic) and the Adriatic Seas.<sup>110</sup>

In determining that the North Corfu Channel had been a useful route for international traffic, the I.C.J. referred to records showing that almost three thousand ships of various nationalities passed through the North Corfu Channel over a 21-month period.<sup>111</sup> It also noted that

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104. *Id.* at 50.

105. *Id.*

106. *Id.* at 52.

107. *Id.*

108. *Id.* at 52-53.

109. *Id.*

110. *Id.* at 53.

111. *Id.* at 53-54.

the channel had been used regularly by the British for over eighty years and that other navies also used the Channel.<sup>112</sup> The court then concluded that the “North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in times of peace.”<sup>113</sup>

### III. The Northwest Passage Dispute

Despite the generally close relationship between the United States and Canada, the Northwest Passage has proven to be a source of contention between the two neighbors. Driven by national economic, security, and environmental concerns, Canada seeks to establish its control and sovereignty over the waters of the Northwest Passage.<sup>114</sup> As a practical matter, the United States shares many of Canada’s concerns and in the past has been willing to work with the Canadian government to protect the Northwest Passage.<sup>115</sup> In contrast, the United States is more concerned with the establishment of precedent that would allow other nations to close off or restrict navigational rights in other areas of the world.<sup>116</sup>

#### *A. Canada’s Position Regarding the Northwest Passage*

Canada’s position is that the Northwest Passage is “internal waters” as defined by the UNCLOS in international law. Canada also asserts that their position is supported by the reasoning of the I.C.J. in the *Norwegian Fisheries* case. Beginning with Canada’s 1906 declaration of sovereignty over the Northwest Passage, Canada has consistently maintained its sovereignty claim. However, the reasoning

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112. *Id.* at 54.

113. *Id.* at 55. The I.C.J. did note, however, that because technically a state of war existed between Albania and its neighbor Greece, that Albania would have been justified in “issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization. *Id.*”

114. *See Address by Minister Cannon at Launch of Statement on Canada’s Arctic Foreign Policy*, INTERNATIONAL.GC.CA, <http://www.international.gc.ca/media/aff/speeches-discours/2010/2010-057.aspx?lang=eng> (last visited Dec. 11, 2010). Minister Cannon listed the primary goals of Canada’s arctic foreign policy as exercising sovereignty, promoting economic and social development, protecting the arctic environment, and improving and devolving governance. *Id.*

115. BYERS, *supra* note 5 at 59-60. Byers notes that during the Cold War the U.S. and Canada collaborated on the DEW line of radar stations stretching from Alaska to Greenland, as well as in the deployment of underwater surveillance systems around the Arctic archipelago. *Id.*

116. *See Kraska, supra* note 4 at 270. Kraska identifies the United States core interest as “freedom of navigation.” *Id.*

behind that claim has shifted over the years. Its initial claim in 1906 utilized a “sector” theory of delineation, claiming “everything within a pie-shaped sector extending from the continental coastline to the geographic North Pole.”<sup>117</sup> The validity of this claim was never recognized internationally, and was eventually dropped by the Canadian government.<sup>118</sup> Currently, Canada espouses two separate rationales for its claim of sovereignty over the Northwest Passage.<sup>119</sup>

#### 1. Canada’s First Claim: Internal Waters by Historic Title

Canada attempts to support its own claim to the Northwest Passage by historic use, similar to how Norway established its claim in the *Norwegian Fisheries* case by establishing its historic use to the waterways within and surrounding the skjaergaard.<sup>120</sup> Canadian legal scholars point to three centuries of exploration by British explorers, followed by the transfer of title from the United Kingdom to Canada in 1880.<sup>121</sup> Canadian scholars also point to legislation enacted by the Canadian government in the early 1900s regulating various activities within the Arctic Archipelago and annual patrols conducted by the Royal Canadian Mounted Police.<sup>122</sup> Noted Canadian legal scholar Donat Pharand has pointed out that the historical title claim has a serious flaw: none of the pre-1900 activities were combined with an explicit claim to the *waters* of the Northwest Passage, and the claims in the 1900’s that did include such a claim were consistently opposed by the United States.<sup>123</sup>

Canadian legal scholar Michael Byers has attempted to rectify the weaknesses in this claim by using the native Inuit’s historical occupation of the Arctic Archipelago, who ranged over both the islands and the ice-covered waterways for hundreds of years.<sup>124</sup> However, even Byers has noted that in order for this claim to succeed, Canada would need to establish that “(1) sea ice can be subject to occupancy and appropriation like land (2) under international law, indigenous people can acquire and transfer sovereign rights and (3) indigenous rights holders ceded such rights, if they did exist, to

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117. BYERS, *supra* note 5 at 43.

118. *Id.* at 43-44.

119. ROBERT DUFRESNE, LIBRARY OF PARLIAMENT, LAW AND GOV’T DIV., CONTROVERSIAL CANADIAN CLAIMS OVER ARCTIC WATERS AND MARITIME ZONES 2 (2008), available at <http://www2.parl.gc.ca/content/LOP/ResearchPublications/prb0747-e.pdf>.

120. DUFRESNE, *supra* note 119 at 2-3.

121. See, e.g. BYERS, *supra* note 5 at 49.

122. *Id.*

123. *Id.* at 50.

124. *Id.*

Canada.”<sup>125</sup> The first element is the most problematic, as there is no support in international law for such a proposition.<sup>126</sup>

Comparing the Canadian claim, that the Northwest Passage constitutes historic internal waters, with the situation in the *Norwegian Fisheries* case, it is clear that Norway possessed a much stronger historical claim to the skjaergaard than Canada does to the Northwest Passage. Norway’s historical claim included nearly a century of expressed sovereignty over the waters of the skjaergaard, uncontested by other states.<sup>127</sup> In contrast, Canada’s express claims of sovereignty over the Northwest Passage were consistently challenged by the United States and other nations. Thus, Canada’s historical internal waters claim is likely insufficient to establish that Canada should be allowed to classify the Northwest Passage as internal waters. Perhaps due to recognition of these weaknesses, Canada has sought other means to establish the Northwest Passage as internal waters, although it has never explicitly dropped that claim as it did with its sector theory claim.

## 2. Canada’s Second Claim: Straight Baselines

Following the voyage of the United States Coast Guard icebreaker USCGC *Polar Sea* in 1985, the Canadian Minister for External Affairs announced the adoption of straight baselines around the entire Arctic Archipelago, to take effect on January 1, 1986.<sup>128</sup> This claim was subject to official protest by the United States government.<sup>129</sup> The European Community also protested Canada’s use of straight baselines, stating that:

The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general.

Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.<sup>130</sup>

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125. Byers & Lalonde, *supra* note 3 at 1156.

126. Kraska, *supra* note 4 at 271.

127. Fisheries, *supra* note 79 at 48-49.

128. DUFRESNE, *supra* note 119 at 3.

129. MARITIME CLAIMS, *supra* note 14 at 96.

130. James Kraska, *International Security and International Law in the Northwest Passage*, 42 VAND. J. TRANSNAT’L L. 1109, 1119 (2009) citing Note from British High Commission, Note No. 90/86 (Jul. 9, 1986), reprinted in Telegram from U.S. Embassy in Paris, No. 33625 (Jul. 24, 1986)

The European Community further specified that it protested Canada's use of straight baselines on the basis that the baselines were "excessively long and diverted too much from the general direction of the mainland coast."<sup>131</sup>

Byers attempts to use the *Norwegian Fisheries* case as a justification for Canada's application of straight baselines to encompass the entire Arctic Archipelago and the Northwest Passage.<sup>132</sup> However, Byers's argument depends on the inclusion of Canada's historic internal waters claim for validity. In the *Norwegian Fisheries* case, Norway's use of straight baselines to enclose the skjaergaard was justified because of Norway's long-standing historical use and the lack of protest by foreign states of Norway's sovereignty claim.<sup>133</sup> Since historical use of the Northwest Passage is dependent on the dubious contention that Inuit use of surface ice can satisfy the usage requirement, Canada cannot establish that its claims of sovereignty were ever accepted by the international community.

The Canadian position regarding the length of their baselines appears to rest upon a misunderstanding of the *Norwegian Fisheries* case. In that case, the I.C.J. rejected the United Kingdom's contention that a 10-mile rule existed preventing certain baselines from being drawn absent a historical claim.<sup>134</sup> However, the 10-mile rule rejected did not relate to the length of the baseline itself, but rather the distance from the baseline to a low-water mark.

When discussing the length of the baseline itself, the I.C.J. approved a baseline of 38.6 nautical miles in length.<sup>135</sup> In contrast, Canada's baselines surrounding the Arctic Archipelago include baselines of nearly 100 miles in length.<sup>136</sup> The extreme length of Canada's baselines makes their use questionable under international law. Unfortunately, the UNCLOS does not define the length of permissible baselines.

In addition, Canada's reliance on the *Norwegian Fisheries* case to justify its use of straight baselines also appears to ignore one significant difference between the Norwegian skjaergaard and the Northwest Passage. The Norwegian skjaergaard, and most of the waterways in question in *Norwegian Fisheries*, are fjords. The Merriam-Webster Dictionary defines "fjord" as "a narrow inlet of the

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131. BYERS, *supra* note 5 at 53.

132. BYERS, *supra* note 5 at 54.

133. Fisheries, *supra* note 79 at 48-49.

134. Fisheries, *supra* note 79 at 31-32.

135. Fisheries, *supra* note 79 at 55.

136. BYERS, *supra* note 5 at 54.

sea between cliffs or steep slopes.”<sup>137</sup> By definition, a fjord has only a single point of egress, as compared to a strait (or series of straits like the Northwest Passage) which has multiple points of egress.

Thus, while Canada’s use of straight baselines may be permissible under the broadest reading of the UNCLOS, the length of those baselines and the lack of a historical basis recognized by other nations lends weight to the position of those nations that protest Canada’s use of strait baselines to encompass the entire Arctic Archipelago. However, while it would be incorrect to state that international law supports the Canadian position, neither would it be correct to state that international law rejects the Canadian position. The geographically unique features of the Northwest Passage make analogizing to previous situations difficult.

#### *B. The United States Position Regarding the Northwest Passage*

The United States position is that the Northwest Passage constitutes an international strait between two high seas and that foreign shipping thus has the right of transit passage.<sup>138</sup> This position rests on both the UNCLOS as a codification of customary international law and the clarification of customary international law by the I.C.J. in the *Corfu Channel Case*. The decisive characteristic of an international strait under both the UNCLOS and *Corfu Channel* is twofold: (1) the waterway must connect two high seas, and (2) it must be used for international navigation.<sup>139</sup> Of those two factors, the only real area in dispute is whether the Northwest Passage satisfies the second factor of being used for international navigation.<sup>140</sup>

##### 1. How Much Use is Enough?

The question of use is difficult to resolve because historically the Northwest Passage has been commercially impassable due to surface ice.<sup>141</sup> The few ships that did transit the Northwest Passage did so largely with Canadian permission, even if the ships involved did not actively seek Canadian permission.<sup>142</sup> James Kraska, a U.S. Navy

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137. *Fjord*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/fjord> (last visited Dec. 11, 2010).

138. RONALD O’ROURKE, CONGRESSIONAL RESEARCH SERVICE, CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS 22 (2010), available at <http://handle.dtic.mil/100.2/ADA517084>.

139. See, e.g. UNCLOS, art. 37; *Corfu Channel*, *supra* note 99 at 53.

140. See, e.g. BYERS, *supra* note 5 at 54. Byers, a Canadian legal scholar, acknowledges that the Northwest passage “clearly connects two parts of the high seas, namely the Atlantic and Arctic oceans.” *Id.*

141. See, e.g. BYERS, *supra* note 5 at 11.

142. Peterson, *supra* note 12 at 48. For example, permission was granted pre-emptively for the voyage of the S.S. Manhattan in 1969 despite not

Judge Advocate General (JAG), attempted to sidestep the issue of use by writing:

There is nothing in the Law of the Sea Convention to suggest additional tests or requirements for recognition as an international strait, so there is no authority for the idea that a strait is only a strait if it meets a certain minimum threshold of shipping traffic, a specific number of transits, a timetable or regularity of transits, transit by certain types of vessels, or whether the vessel is accompanied or not accompanied by icebreakers.<sup>143</sup>

Kraska's statement is technically correct, in that the UNCLOS does not set a minimum threshold of shipping traffic.

However, the I.C.J.'s decision in *Corfu Channel* is often cited as justification for the existence of some sort of threshold. Pro-Canadian legal scholars point out that international shipping in the Northwest Passage falls far short of the 2,884 ships that transited the North Corfu Channel over a twenty-one-month period.<sup>144</sup> However, *Corfu Channel* does not necessarily establish any kind of standard for satisfying the usage criteria of an international strait, because in that case, the evidence showing the 2,884 transits was entered to counter the assertion of the Albanian government that the North Corfu Channel was not used for international shipping.<sup>145</sup> While *Corfu Channel* can serve to establish that some actual international shipping is required to qualify a strait as an international strait, it does not refute the assertion that a single transit of international shipping would qualify that strait as an international strait under the UNCLOS.

While satisfying the usage requirement of an international strait will likely require more use than a single transit, it is simply unclear as to how much use will be required. The situation becomes even more uncertain when the issue of submarines are added into the calculation. Several legal scholars believe that submarine navigation plays a key part in motivating the United States position.<sup>146</sup> Under

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being sought by either the United States government or the ship's owners. BYERS, *supra* note 5 at 44-45.

143. Kraska, *supra* note 4 at 275.

144. BYERS, *supra* note 5 at 55. Byers correctly notes that this number only accounts for ships that had put into the port of Corfu and registered with customs agents, and did not include ships which transited the channel without stopping at Corfu. *Id.*

145. *Corfu Channel*, *supra* note 99 at 53-54.

146. See, e.g. BYERS, *supra* note 5 at 75, John T. Olliver, *A Window of Opportunity: The U.N. Convention on the Law of the Sea*, PROCEEDINGS

the UNCLOS, submarines invoking the right of innocent passage may pass through the internal waters of coastal states; however, they are required to travel on the surface.<sup>147</sup> When transiting through an international strait, submarines may remain submerged.<sup>148</sup>

The passage of non-Canadian submarines through the Northwest Passage could potentially establish sufficient use to qualify it as an international strait.<sup>149</sup> Unfortunately, it is difficult to determine whether such transits have occurred, because movements of U.S. Navy submarines are classified and unavailable to the public, as are any agreements or notifications which the Canadian government may have received. It is thus impossible to determine if submarine transits of the Northwest Passage have occurred in a manner that would satisfy the usage requirements of an international strait.

## 2. Has Canada Acquiesced to the Claim that the Northwest Passage is an International Strait?

The passage of submarines through the Northwest Passage also raises the issue of whether Canada has acquiesced to the United States position that the Northwest Passage constitutes an international strait.<sup>150</sup> Under the general principles of international law, a nation's practice of acquiescence can create a binding

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OF THE MARINE SAFETY COUNCIL, Summer 2009, at 6, 7; Kraska, *supra* note 4 at 279.

147. UNCLOS, art. 20.

148. BYERS, *supra* note 5 at 75.

149. While Canada possesses four submarines, they are all diesel-electric boats of the *Victoria* class. *Submarines – Victoria Class*, navy.forces.gc.ca, [http://www.navy.forces.gc.ca/cms/1/1-a\\_eng.asp](http://www.navy.forces.gc.ca/cms/1/1-a_eng.asp) (last visited Dec. 11, 2010). As diesel-electric boats, Canada's submarines lack the ability of nuclear-powered submarines to remain submerged indefinitely, preventing them from operating beneath the Arctic ice cap. BYERS, *supra* note 5 at 75. Nuclear-powered submarines such as those operated by the United States, United Kingdom, Russia, China, France, and India, do not have this limitation.

150. BYERS, *supra* note 5 at 76. Byers notes that if submarine passage through the Northwest Passage were conducted without Canadian knowledge, the failure of Canada to enforce its claim would be excused on the basis of ignorance. However, Byers also considers it likely that Canada has been aware of American, French, and British submarine movements and has at least tacitly consented to those movements. *Id.*



obligation.<sup>151</sup> In addition, as a general principle of law and equity, principles of estoppel are also a valid part of international law.<sup>152</sup>

The actions, or more specifically the lack of actions, taken by the Canadian government in regard to the submerged movements of submarines through the Northwest Passage creates the potential that Canada has acquiesced to the United States and European Community position that the Northwest Passage constitutes an international strait. In 1995, Canadian Defense Minister David Collenette stated publicly that the Canadian government acquiesced to the use of Canadian waters by U.S. submarines.<sup>153</sup> However, Collenette later clarified this statement by saying that while there was no formal agreement, information on submarine activities was shared between Canada and its allies for the purposes of safety and minimizing interference.<sup>154</sup> While not conclusive, these statements by a high-ranking Canadian official could be seen as an acknowledgement by Canada that it had acquiesced to the use of the Northwest Passage as an international strait by American submarines.

In addition, Canada has continually failed to take concrete action disputing the United States claim that the Northwest Passage is an international strait. NORDREG, Canada's registration system, established in 1977 under the AWPPA, is a voluntary registration system. 2% of international shipping fails to register with NORDREG without legal consequence.<sup>155</sup> Canada does, however, have the capability to monitor shipping through the Northwest Passage, through its RADARSAT-2 satellite.<sup>156</sup> Taken together, the Canadian government is able to detect potential challenges to its sovereignty claims by looking for unregistered traffic, but is unwilling to take

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151. *See, e.g.* Right of Passage over Indian Territory, Judgment (Portugal v. India), 1960 ICJ 5, 13-14 (Apr. 12). In that case, the I.C.J. stated that having found that "a practice clearly established between two States, which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice." *Id.*

152. *See, e.g.* Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment (Can./U.S.), 1984 ICJ 4 (Oct. 12). Canada argued that acquiescence, in relation to the recognition of rights, "[o]ne government's knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute, and the failure of protest in the face of that conduct, involves a tacit acceptance of the legal position represented by the other Party's conduct or assertion of rights." *Id.* at 131-32.

153. BYERS, *supra* note 5 at 76.

154. *Id.* at 76-77.

155. *Id.* at 70-71.

156. *Id.* at 66-67. Byers notes that the prospect of losing RADARSAT-2's monitoring capabilities motivated the Canadian government to maintain RADARSAT-2 as a vital Canadian asset. *Id.* at 67.

concrete steps to challenge ships that are utilizing the Northwest Passage in defiance of their sovereignty claim. This kind of inactivity could be considered acquiescence to the United States position that the Northwest Passage is an international strait, because Canada has failed to develop or exercise the capability to enforce its sovereignty claim.

### 3. Was the Northwest Passage an International Strait Prior to 1985?

While Canada's historical internal waters claim has weaknesses due to its reliance on the untested argument that indigenous peoples can claim title to sea ice, the United States strongest historical argument relies on the fact that Canada first utilized straight baselines in 1985. Article 35(a) of the UNCLOS states that the right of transit passage can still exist through an international strait that has been classified as internal waters, where the use of straight baselines "has the effect of enclosing as internal waters areas which had not previously been considered as such."<sup>157</sup> It is for this reason that the Canadian "historic internal waters" argument is so critical. Even if Canada's method of using straight baselines is found to be valid under international law, if the Northwest Passage was not considered internal waters prior to the enactment of straight baselines in 1985, then international shipping would retain the right of transit passage through the Northwest Passage.<sup>158</sup>

The question then becomes whether Canada can establish its claim that the Northwest Passage constitutes historic internal Canadian waters. As discussed previously, this is problematic for Canada because explicit claims to the waters of the Northwest Passage were protested by the United States and other nations.<sup>159</sup> Canada is therefore unable to point to widespread acceptance, by foreign states, of their claim that the Northwest Passage constitutes internal waters, a key factor in the I.C.J.'s *Norwegian Fisheries* judgment.

Canada's position would be greatly strengthened if native peoples could claim title to sea ice, but this proposition has never been tested in any international forum. The closest analogy would be an advisory opinion by the I.C.J. that ruled that indigenous nomadic peoples can claim title to land, by virtue of long-standing occupation and use.<sup>160</sup> However, applying this advisory opinion to the Inuit in the Arctic Archipelago is difficult because of the changing nature of sea ice. In addition the *Western Sahara* decision did not specify what rights were

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157. UNCLOS, art. 35(a).

158. UNCLOS, art. 35(a); see, e.g. Kennair, *supra* note 12 at 27; Kraska, *supra* note 130 at 1122.

159. See *supra* Part III(a)(1).

160. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 2, 8-9 (Oct. 16).

gained by the nomadic peoples, only that the colonization by Spain was not a result of occupation *terra nullius*, but rather through agreements concluded with local rulers.<sup>161</sup> While this basic principle could apply, it would require that (1) international law recognize that peoples can claim title to sea ice, and that (2) that title would transfer from sea ice to the waterway if the sea ice should melt. As this appears to be an entirely new principle of international law, Canada would need to convince other states to adopt these principles.

Thus, it is difficult for Canada to conclusively establish that, prior to the enactment of straight baselines in 1985 the Northwest Passage constituted internal Canadian waters. Without establishing this historical factor, Canada's use of straight baselines does not meet the standards established under customary international law. Unless they can do so, the waters of the Northwest Passage would likely be considered an international strait, with foreign vessels having the right of transit passage.

*C. Resolving the Northwest Passage Dispute Between the United States and Canada*

Given the nature of international law and international tribunals, it is unlikely that the United States and Canada will consent to placing this dispute before an international tribunal. Canadian concerns regarding its sovereignty and the weaknesses in the Canadian position make it unlikely that Canada would consent to having a third party determine the outcome.<sup>162</sup> Similarly, weaknesses in the United States' position and the concern for setting an unfavorable precedent make it equally unlikely that the United States would consent to jurisdiction.<sup>163</sup> In addition, the generally strong relationship between Canada and the U.S. and the likelihood that the United States and Canada have some sort of tacit agreement regarding usage of the Northwest Passage by U.S. Navy vessels reduces the impetus to quickly resolve this issue.<sup>164</sup> Thus, both nations will likely be satisfied with the status quo and allow the present situation to continue.

However, should the United States ratify the UNCLOS, the dispute resolution provisions of Part XV would become relevant.<sup>165</sup> While Section 1 of Part XV of the UNCLOS requires states to use peaceful means to achieve a settlement, Sections 2 and 3 set forth

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161. *Id.*

162. *See supra* section 0

163. *See supra* note 116 and accompanying text.

164. *See supra* note 150 and accompanying text.

165. UNCLOS, Part XV.

procedures for binding decisions.<sup>166</sup> The binding decision provisions, however, are only invoked at the request of one of the parties.<sup>167</sup> Given the close ties and shared concerns of Canada and the United States, and the unpredictability of the outcome, the likelihood that either nation would invoke the binding decision provisions is probably low.<sup>168</sup>

Thus, the means for resolving this dispute would most likely be diplomatic and result in a document similar to the 1988 Arctic Cooperation Agreement.<sup>169</sup> Due to the American priority of preserving freedom of navigation, any agreement would likely contain provisions similar to those in the Arctic Cooperation Agreement which preserved the original positions of the United States and Canada.<sup>170</sup> Canada could likely gain significant control and oversight over maritime transit of the Northwest Passage through such an agreement, addressing its key concerns.<sup>171</sup> While not a final or perfect solution to the dispute regarding the Northwest Passage, such an agreement would likely be in the best interests of both nations and place minimal stresses on the relationship between the United States and Canada.

#### IV. Conclusion

Both the United States and Canada have weaknesses in their respective positions over the status of the Northwest Passage. Canada's claim that the Northwest Passage constitutes internal Canadian waters has never been accepted by the international community. In addition, their usage of straight baselines exceeds those previously accepted under international law, and their historical claim depends on a principle that has never previously been proposed: that indigenous peoples can gain and transfer title to sea ice. The United States position that the Northwest Passage constitutes an international strait relies on an extremely small number of movements to satisfy the usage characteristic of international straits and is not aided by the classified nature of submarine navigation. However, formal protests by the United States and other nations do preserve a fallback position: that even if Canada's use of straight baselines to claim the Northwest Passage as internal waters is acceptable under

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166. *Id.*

167. *Id.*, Art. 286.

168. *See, e.g.* BYERS, *supra* note 5 at 78-80; Kennair, *supra* note 12 at 30-31; Kraska, *supra* note 4 at 267.

169. *See* Agreement on Arctic Cooperation, *supra* note 29.

170. *See id.* at Art. 4; *see also supra* note 150 and accompanying text.

171. *See supra* note 114 and accompanying text.

international law, this would not preclude the right of transit passage due through the Northwest Passage due to the lack of valid historical claims.

As a practical matter, the close relationship between Canada and the United States means that the dispute over the Northwest Passage is unlikely to become a matter of serious contention between the two nations. Canada and the United States share significant concerns, including security, economic development, and environmental protection. However, these shared interests diverge greatly when the legitimate Canadian desire to exercise and protect its sovereignty clashes with the equally legitimate American need to protect free transit rights throughout the globe.

This dispute is unlikely to be put before an international tribunal that could issue a judgment unfriendly to either nation's interests. Thus, the most likely resolution to this dispute would be diplomatic, in a manner similar to the 1988 Agreement on Arctic Cooperation which provided the United States and Canada with a framework for operation of icebreakers in the Northwest Passage without unnecessarily compromising either nation's legal position. A similar agreement could satisfy Canada's need to protect its sovereignty and address its immediate environmental concerns, while ensuring that the United States could avoid creating the kind of international legal precedent that would jeopardize the principle of freedom of the seas.