

AN INCONSISTENT TRUTH: CANADIAN FOREIGN POLICY AND THE NORTHWEST PASSAGE

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INTRODUCTION

The Arctic has been an issue of concern to Canada since its birth as a country. Gold rush prospectors, European adventurers, and Cold War fears have all led to a sense of insecurity over Canada's Arctic sovereignty. The Northwest Passage is just one issue in this controversy, but it raises the questions at hand: How can Canada best assert its sovereignty over the Northwest Passage, and how can it best protect its human and environmental security interests in this region? Are these two questions mutually exclusive, or are they really the same issue? And what does sovereignty truly mean when looking at this waterway?

Canada has been inconsistent in its rhetoric and actions, and this inconsistency has exacerbated Canada's insecure position. Canada claims that the Northwest Passage is part of its internal waterways and that it has the exclusive right to legislate and control shipping through these waters. However, it has neglected to invest in and develop the means to effectively control these waters. In the past, time was on Canada's side because there was not much international navigation through these waters. With climate change, however, this might all change. So what must Canada do to resolve this question?

Most of the debate over the last four decades has been centered on this question, and two schools of academic thought have formed: some see the solution as a political one, while others see a remedy in international law. This paper does not intend to provide a solution but rather to examine some of the solutions that have been put forward. The first school of thought holds that this waterway is an international strait and that Canada should negotiate a political means to protect its human and environmental security concerns. Academics such as James Kraska, Douglas Johnston, and Franklyn Griffiths fall in this category because they look to international regime mechanisms to regulate the Northwest Passage.¹ Canada is familiar with this approach; it often uses multilateralism to protect its interests, both domestically and internationally. It has also used this approach because it has limited economic and military means at its disposal.

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1. *See infra* Part II.A.

The second position contends that the waterway is part of Canada's internal waters, as defined by international case law, so these waters are clearly Canadian and it is Canada's right to control the Northwest Passage. Donat Pharand, Don McRae, and Rob Huebert maintain this position,² which seemingly arose after the limited success Canada gained in 1982 with the United Nations Convention on the Law of the Sea (UNCLOS).³ After the crossing of the Northwest Passage by the *Manhattan*, Canada began to put together legal arguments designed to protect its domestic interests. As part of its foreign policy strategy for the Arctic waters, Canada has sought to influence the evolution of international law.

Are these two approaches sufficient to secure Canada's interests with regard to the Northwest Passage, or must it do more? Ken Coates, Whitney Lackenbauer, and others contend that Canada is at a crossroads with regard to the Northwest Passage. They believe Canada must decide whether it is prepared to assert its sovereign interest over these waters by making economic and military commitments along with other diplomatic efforts.⁴

This paper ends with a discussion of the possible outcomes for Canada based on whether one looks at the Northwest Passage as an international strait or part of its internal waters. Three outcomes are possible: first, Canada can assert its exclusive claims over the Northwest Passage and clarify its position under international law; second, Canada could look for a compromise solution where it acquiesces to the position that the waterway is an international strait, but that Canada maintains control and influence over these waters; and finally, Canada could lose all rights and claims to the Northwest Passage, and jurisdiction over international navigation would rest with the international community. Whatever the end result, the solution will have to be both a political and legal one, and Canada must invest in its Arctic interests. Before embarking on this discussion, however, a background history on the Northwest Passage should first be examined.

I. THE BACKGROUND STORY

For decades, Canada has developed what some would call an "ad hoc" foreign policy toward protecting its interests in the Canadian Arctic. Domestically, Canada created law to protect the Arctic environment,

2. See *infra* Part II.B.

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

4. KEN COATES ET AL., ARCTIC FRONT: DEFENDING CANADA IN THE FAR NORTH 189–217 (2008).

namely the Arctic Waters Pollution Prevention Bill of 1970.⁵ Furthermore, it granted passage to those few ships that attempted to traverse the waterway, regardless of whether official requests were ever made.⁶ Such actions were designed to demonstrate its sovereignty over this region, though this was not enough for Canadian policy makers. Canada needed to have international recognition to affirm its sovereignty. One of its first maneuvers was to influence the development of international treaty law to reflect its position.

Public international law has been the refuge of less powerful states, offering them a sense of justice and protection from the predation of larger or more aggressive countries. It is a system based on trust, or faith, as it has little *hard* power, but it does create a sense of legitimacy to an international problem or solution. Reluctant to bring its question of sovereignty over the Northwest Passage before the International Court of Justice (ICJ), Canada sought another course of action—to affirm its sovereignty through the United Nations Convention on the Law of the Sea (UNCLOS).⁷ In the 1970s, a new convention was under negotiation and Canada sought to develop international support for its position.⁸ It pressed forward with an environmental angle to its argument, a philosophy that was then in its nascent stage.⁹ At the Stockholm Convention on the Human Environment in 1972, Canada began to develop its position. In the following year, Canada proposed legislation on the protection of coastal waters at the Intergovernmental Maritime Consultative Organization (IMCO), convened to look at maritime pollution.¹⁰ In the end, however, Canada's proposal was not accepted. Instead, a compromise solution was added to the UNCLOS

5. Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12 (2009), available at <http://laws.justice.gc.ca/PDF/Statute/A/A-12.pdf>; see Robert Huebert, *A Northern Foreign Policy: The Politics of Ad Hocery*, in *DIPLOMATIC DEPARTURES: THE CONSERVATIVE ERA IN CANADIAN FOREIGN POLICY, 1984–93*, 84, 89 (Nelson Michaud & Kim Richard Nossal eds., 2001) (“[T]he Arctic Waters Pollution Prevention Act . . . created a 100-mile-wide pollution protection zone beyond Canada’s Arctic archipelago.”).

6. See Douglas M. Johnston, *The Northwest Passage Revisited*, 33 *OCEAN DEV. & INT’L L.* 145, 146–50 (2002) (noting the “unconsented transit” of ships in 1968, 1970, and 1985); Huebert, *supra* note 5, at 85.

7. UNCLOS, *supra* note 3; TOM KEATING, *CANADA AND WORLD ORDER: THE MULTILATERALIST TRADITION IN CANADIAN FOREIGN POLICY* 170 (1993).

8. Donald McRae, *The Negotiation of Article 234*, in *POLITICS OF THE NORTHWEST PASSAGE* 98, 102–03 (Franklyn Griffiths ed., 1987).

9. It should be noted that the first environmental case in international law was the *Trail Smelter Case*, which regarded cross-border pollution between Canada and the United States. *Trail Smelter (U.S. v. Canada)*, 3 R. Int’l Arb. Awards 1905 (1935), available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

10. McRae, *supra* note 8, at 102–03.

negotiations in Article 234.¹¹ This gave Canada the legitimacy to protect the waterways covered by the Arctic ice shelf, but did not affirm—or deny—its sovereignty over the Northwest Passage.

The United States would challenge Canada's claim over the Northwest Passage in 1985 with the voyage of the *Polar Sea*. The voyage itself was quite innocent and based in necessity, as the United States needed to get its icebreaker from Seattle to the Atlantic coast. The notice that the United States gave to Canada raised concerns for the Canadian government and challenged its reading of UNCLOS. When the United States first gave notice to Canada and asked whether they would like to share in the operational research, Canada had little concern and approved the voyage.¹² Soon after, however, media attention surrounding the trip led to political interest, and the Privy Council Office was tasked with “coordinating an immediate reaction to the voyage.”¹³

Once again Canada raised concerns over the sovereignty of the Northwest Passage and began to consider legal responses through the ICJ. This never happened, but an interesting point was brought forward. Though Canada could regulate ships travelling through the Arctic ice shelf, as per UNCLOS Article 234, the United States also pointed out that Article 236 provided a sovereign immunity clause.¹⁴ Because the *Polar Sea* was a government vessel, it was exempt from Canadian laws.¹⁵ Knowing that a legal option was no longer available,¹⁶ Canada chose to move toward a bilateral resolution to its problem. In short, Canada and the United States began to negotiate what would later be called the Arctic Cooperation Agreement.¹⁷

Since the 1940s and throughout the Cold War, Canada and the United States had mutual security goals within the Arctic region that encouraged cooperation between these two states. The fear that Germany, and later the Soviet Union would use the Arctic as access to the North American continent was a logistical reality and threat.¹⁸ Furthermore, the mutual

11. UNCLOS, *supra* note 3, at art. 234; *see generally* McRae, *supra* note 8.

12. *See* Huebert, *supra* note 5, at 85 (stating that the initial request was on May 21, 1985 and Canada responded positively on June 11, 1985, with the caveat that the countries would work out pollution prevention measures).

13. *Id.* at 85–86.

14. UNCLOS, *supra* note 3, at art. 234, 236; Hubert, *supra* note 5, at 92.

15. Hubert, *supra* note 5, at 92.

16. Donald McRae, *Arctic Sovereignty? What is at Stake?*, 64 BEHIND THE HEADLINES 1, 11 (2007).

17. United Nations Arctic Cooperation Agreement, Jan. 11, 1988, 1995 U.N.T.S. 60, available at http://untreaty.un.org/unts/60001_120000/30/4/00058175.pdf.

18. *See* Douglas C. Nord, *Searching for the North in North American Foreign Policies: Canada and the United States*, 37 AM. REV. CAN. STUD. 207, 209–10 (2007) (describing actions taken

economic interests of Canada and the United States were also on the table at this time; both countries were working toward the Free Trade Agreement. Thus, a little squabble over travelling through the Northwest Passage created real concern—a solution was needed.

The countries first negotiated at a bureaucratic level, but, because of each party's intense desire not to compromise its position, these negotiations became deadlocked. The burgeoning relationship between Brian Mulroney and Ronald Reagan facilitated a resolution that led to the Arctic Cooperation Agreement in 1988.¹⁹ Though a simple agreement that pertains only to icebreakers, the Agreement allowed these two states to move forward in their other relations.²⁰ This cooperation lasted until 2006, when the new conservative government of Canada announced plans to invest in protecting its interests in the Arctic region, including its waterways.²¹

II. THE CURRENT DEBATE

Canada maintains that the Northwest Passage is not an international strait, but rather part of its internal waters, as based upon the principle of straight boundary lines encompassing its archipelago. This was a principle first suggested by Senator Poirier in 1907, which pertained more to land at that time.²² It would not be until 1964 that Canada would incorporate the straight-line principle with its stewardship of the Arctic and the Canadian waters adjacent to its archipelago.²³ These claims, however, have yielded contention, most notably from the United States, which did not accept Canada's claims over the Northwest Passage.²⁴ In the late 1960s and early 1970s, the United States attempted to develop a multinational regime for

by the United States and Canada in an effort to protect from enemy attack).

19. United Nations Arctic Cooperation Agreement, Jan. 11, 1988, 1995 U.N.T.S. 60, available at http://untreaty.un.org/unts/60001_120000/30/4/00058175.pdf; see Huebert, *supra* note 5, at 92–93 (arguing Brian Mulroney wished to resolve the issue and move on to free trade talks).

20. Huebert, *supra* note 5, at 92–93.

21. See, e.g., Ian Austen, *Canada Announces Plans for 2 New Bases in its Far North*, N.Y. TIMES, Aug. 11, 2007, at A3; *Harper on the Arctic: 'Use it or lose it,'* TIMES COLONIST (Victoria), July 10, 2007, <http://www.canada.com/topics/news/story.html?id=7ca93d97-3b26-4dd1-8d92-8568f9b7cc2a>; Prime Minister Stephen Harper, Speech in Iqaluit, Nunavut: Securing Canadian Sovereignty in the Arctic (Aug. 12, 2006), <http://www.pm.gc.ca/eng/media.asp?id=1275>.

22. McRae, *supra* note 8, at 98.

23. See Huebert, *supra* note 5, at 86 (“Canada had first used straight baselines in 1964, under The Territorial Sea and Fishing Zone Act.”).

24. See IVAN HEAD & PIERRE TRUDEAU, *THE CANADIAN WAY: SHAPING CANADA'S FOREIGN POLICY, 1968–1984*, 28 (1995) (stating that the disagreement over the Northwest Passage put “the Canadian and U.S. governments on a most uncomfortable adversarial footing”).

the Arctic that would “pre-empt strictly national jurisdiction” over Arctic waterways.²⁵ The premise behind these contrasting positions was the potential commercial use of the Northwest Passage as an international strait, providing an alternative route to connect the Atlantic and Pacific oceans. The debate over how to protect these waters and adjacent lands centers on whether the Northwest Passage is an international strait or part of Canada’s internal waterways. These two positions will now be examined.

A. An International Strait?

From the United States’ perspective, the Northwest Passage is an international strait, as defined by UNCLOS Article 37.²⁶ In essence, an international strait is a body of water that links two other major bodies of water, and that the bordering states have no rights of control to prevent the innocent passage of ships through this strait.²⁷ An easy way to conceptualize the idea of an international strait is to liken it to a path crossing a farmer’s field to get from point A to point B. If, over a period of time, a path has been created across this field by habitual public use and unrestricted by the farmer, a right of crossing commonly known as an easement is created. This does not give the public any rights to the land itself or to stop and linger, nor does it allow the farmer to restrict travel. In essence, the path becomes part of the public domain.

The Northwest Passage links the Atlantic and Pacific oceans and could provide an alternative to the Panama Canal, for shipping, reducing both time and costs. It is for this reason the United States has continually challenged Canada’s assertion of straight baseline boundaries that enclose the Northwest Passage and supported the *Manhattan* voyage in 1969.²⁸ Its purpose was not only to demonstrate the viability of this route, but also to encourage transit of shipping through this body of water²⁹ and establish the precedent of an international strait.

The passage of the *Manhattan* brought forth the recognition that the Arctic waters are a unique body of water with specific environmental

25. J.L. GRANATSTEIN & ROBERT BOTHWELL, *PIROUETTE: PIERRE TRUDEAU AND CANADIAN FOREIGN POLICY* 81 (1990).

26. UNCLOS, *supra* note 3, at art. 37; James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INT’L J. MARINE & COASTAL L. 257, 262 (2007).

27. MATTHEW CARNAGHAN & ALLISON GOODY, CAN. LIB. OF PARLIAMENT, PARLIAMENT RESEARCH BUREAU, (PRB) 05-61E: CANADIAN ARCTIC SOVEREIGNTY 3–4 (2006), available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.pdf>; DONAT PHARAND, CANADA’S ARCTIC WATERS IN INTERNATIONAL LAW 8 (1988).

28. See Kraska, *supra* note 26, at 263 (discussing United States policies and the *Manhattan* voyage).

29. *Id.*

concerns that needed to be addressed. The questions, therefore, were how to protect these waters from foreseeable disasters, and how to protect the environment and the indigenous peoples of Canada from the impacts of shipping. If the waters are an international strait, Canada does not have the right to place restrictive regulations to ensure such security. James Kraska has put forth a compelling argument that, because such regulations would have to come from the international community, the International Maritime Organisation (IMO) is the appropriate mechanism to ensure Arctic shipping regulations to allay Canadian concerns.³⁰ As Kraska states, “The outcome of the debate may not be as critical as some would believe, since acceptance of the passage as an international strait would permit Canada to seek development of internationally accepted standards for protecting the strait at the International Maritime Organization.”³¹

The IMO is a well-established organization that oversees the regulation of maritime traffic. It establishes international standards and provides the necessary regime to regulate Arctic shipping and protect the Canadian Arctic.³² Kraska argues that, “Recent developments at the International Maritime Organization in the area of safety, security and marine environmental protection, particularly with regard to vital sea lanes, provide a practical model for resolving the dispute.”³³ International negotiations, however, have a tendency to develop upon the lowest common denominator, which could create unwanted loopholes or insufficient regulations to police these waters. As seen with the negotiations of Article 234, pertaining to the Arctic ice shelf, Canadian objectives to establish sufficient legislation to protect its interests fell short of their desired goal in 1982.³⁴ Further to this, the interests of non-Arctic states would also be influencing the development of this legislation, which could be perceived as an undermining of Canadian sovereignty concerns.

An alternative regime, suggested by Professors Douglas Johnston and Franklyn Griffiths, is to develop the Arctic Council into an appropriate agency to allow for a collective stewardship, with regard to these waters.³⁵

30. *Id.*

31. *Id.* at 259.

32. McRae, *supra* note 16, at 5.

33. Kraska, *supra* note 26, at 262.

34. *See supra* notes 7–11 and accompanying text.

35. Franklyn Griffiths, *Towards a Canadian Arctic Strategy*, 1 CAN. INT’L COUNCIL: FOREIGN POL’Y FOR CAN.’S TOMORROW 11–13 (2009), available at <http://www.canadianinternationalcouncil.org/download/research/foreignpol/towardsaca~2/cicfpctno1> (suggesting that the basis for a regime supporting cooperative stewardship projects in the northwestern waters can be found in the Arctic Council); Johnston, *supra* note 6, at 149–50 (arguing that a pragmatic solution supports a transit management regime similar to that of the northwest Atlantic).

As Johnston points out:

In arguing the merits of a transit management regime for the Northwest Passage, it is important to underline that the Canadian government has always conceded the importance of making this waterway available, . . . subject to the all-important condition that transiting vessels comply fully with the strict regulatory regime Canada has put in place under its Arctic Waters Pollution Prevention Act.³⁶

It is for this reason that Johnston argues the merits of a *functionalist* approach to this issue, in which those states with a vested interest in protecting these waters take a lead in developing the rules to facilitate the use of this waterway. Such practices would allow Canada to maintain the cost-effectiveness of protecting its sovereign interests while developing a viable sea route.³⁷

Created as an international forum to examine Arctic issues, the Arctic Council is made up of the eight Arctic states, and is well aware of all of the environmental and human security issues that pertain to this region of the world.³⁸ Thus, only Arctic states would be involved in developing any rules and legislation, as they pertain to the Northwest Passage. This would require, however, the Arctic Council to develop legislative capabilities, which were opposed by the United States when this forum was created.³⁹ The United States' position was founded upon the principle that only it has the sovereign control to legislate within United States territory:

Although indirectly stated, the answer appears to relate to “national interests” and the United States position as a “superpower with world wide interests” but with direct control over only a small segment of the Arctic. As a consequence . . . the United States would be opposed to any initiative that might

36. Johnston, *supra* note 6, at 149.

37. See Griffiths, *supra* note 35, at 16–17 (suggesting that non-Arctic states should contribute financially to collective action projects to preserve future considerations, such as shipping, in the area); Johnston, *supra* note 6, at 152 (questioning whether Canada should bear transit management costs or pass them on to users).

38. THE ARCTIC COUNCIL, DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL (1996), available at <http://arctic-council.org/filearchive/Declaration%20on%20the%20Establishment%20of%20the%20Arctic%20Council-1..pdf>.

39. See Johnston, *supra* note 6, at 154 (arguing that the United States forced a weaker Arctic Council).

have any adverse effect on the rights and freedoms inherent in the superpower status.⁴⁰

Allowing such a body to create legislation would appear to undermine United States sovereignty in this region and set an unwanted precedent. From a Canadian perspective, the same could be said because there are non-Arctic states, namely the European Union, which have influence over other council members.

James Kraska touches upon a third alternative, based upon an international precedent that gave control to one state over an international strait. The Montreux Convention of 1936 allows Turkey to monitor and control the waters of the Bosphorus, restricting traffic through this waterway.⁴¹ These waters, also known as the Turkish Straits, run through an area once controlled by the Ottoman Empire, which lost much of its authority after the First World War. As Turkey had historical control of this region, it made the argument that it should be able to control these waters, stating that subsequent treaties after 1919 had become obsolete because of changed political circumstances.⁴²

A similar solution could be put forth that would maintain the Northwest Passage as an international strait, while allowing Canada to establish the regulations to protect its environmental and human security concerns. Such a suggestion would have to meet international approval. The question of whether Canada could claim historical control over these waters, as compared to that of Turkey's control of the Bosphorus, could arise. However, it is unclear if Canada would accept such a suggestion because it may be construed as a threat to Canadian sovereignty.

B. Or Internal Waters?

From a Canadian perspective, the Northwest Passage is part of Canada's internal waterways. Canada utilised straight baselines to demark its territory since as early as 1907, thereby enclosing the Northwest Passage as part of its internal waters. Senator Poirier suggested the original actions in direct response to Roald Amundsen's traverse of this waterway in 1906.⁴³ Senator Poirier's motion was as follows: "That it be resolved that the

40. Shelagh D. Grant, 47 *ARCTIC* 101, 102 (1994) (reviewing ORAN R. YOUNG, *ARCTIC POLITICS: CONFLICT AND COOPERATION IN THE CIRCUMPOLAR NORTH* (1993)).

41. See Kraska, *supra* note 26, at 275 (citing the Montreux Convention as an example of a "long-standing international convention in force" (quoting UNCLOS, *supra* note 3, at art. 35(c)).

42. This was based on *rebus sic stantibus*—"things thus standing"—an international law principle that treaties lose force when there is a fundamental change in circumstances.

43. PHARAND, *supra* note 27, at 8.

Senate is of opinion that the time has come for Canada to make a formal declaration of possession of the *lands and islands* situated in the north of the Dominion, and extending to the North Pole.”⁴⁴ Such a claim was based upon the principle that these lands once were the territory of the Hudson’s Bay Company, which Canada took possession of in 1867 through the British–North America Act. It would later act upon this claim by creating legislation for monitoring and maintaining these lands as early as 1923, when it granted scientific licenses to explorers of this region. There was never any formal protest to these unilateral actions. Rather, there was implicit acceptance because there was little there of interest.⁴⁵ The result of this action was to turn the Northwest Passage into an internal waterway.

An internal waterway is one over which the governing state has complete sovereignty and control, and there are no international rights to innocent passage through these waterways, as per UNCLOS.⁴⁶ These waters are enclosed by lands, harbours, and coastal waters toward the landward side of the straight baselines used by a state.⁴⁷ To use a metaphor to explain these waters, imagine Canada as a house, the structure of which forms its territorial boundaries. The Northwest Passage could be likened to a path from the front door of the house through to the back of the house, and it is the house owner who has control and say on what takes place within this dwelling. If this passage was outside the home-owner’s control, the inhabitants’ security would be compromised, both physically and environmentally. Even if other neighbours agreed to follow certain rules of passage, or to assist if damages were suffered, this would not allay the security fears of the inhabitants.

Canada’s interests in pursuing Article 234 was that the government at the time perceived international law to be underdeveloped as it pertained to protecting Canadian sovereignty interests in the Arctic. In the 1980s, however, Professor Donat Pharand put together a legal argument, which, based upon international case law, maintained the Northwest Passage was an internal waterway and not an international strait.⁴⁸ Working off of two particular cases, the *Norwegian Fisheries* (1951) and the *Corfu Channel* (1949), he constructs a compelling argument to assert Canada’s position.⁴⁹

44. *Id.* (emphasis in original).

45. See Thomas M. Tynan, *Canadian–American Relations in the Arctic: The Effect of Environmental Influences Upon Territorial Claims*, 41 REV. OF POLS. 402, 407 (1979) (noting that in 1944 the sovereignty of the Arctic regions was not in dispute).

46. McRae, *supra* note 16, at 4.

47. See Kraska, *supra* note 26, at 270 (stating that internal waters are all waters in a territory landward of a baseline drawn along the coast at the low-water line).

48. See PHARAND, *supra* note 27, at 92, 217–18.

49. *Id.*

These cases deal with the issues of internal waterways and international straits respectively, as there was no treaty law at that time.⁵⁰

In the *Norwegian Fisheries* case, the question of contention was whether a fjord in Norway's northern regions was part of its internal waters or part of international waters.⁵¹ The challenge was raised by the United Kingdom, which contended that those waters were not part of Norway's internal waters for if one followed the coastline, they would not meet those criteria. The ruling on the case, however, made the point that if a straight line was drawn from two separate headlands, it would in fact be an internal waterway.⁵² Furthermore, if waters were part of a state's historic waters, then they were also internal waters.⁵³ The test for historic waters was established as follows:

1. that there was an exclusive exercise of a state's authority over the waters;
2. that the state had a long usage of those waters; and
3. that there was acquiescence to this by other states.⁵⁴

The relevance of this to Canada was that in 1963 it used this reasoning, based upon the straight baselines claiming the Arctic Archipelago to the North Pole, to assert that the Northwest Passage was an internal waterway. These islands, accepted to be under sovereign control of Canada, constituted the headlands needed to draw the line cutting off the Northwest Passage from the high seas. Furthermore, because there had been few ships capable of navigating the waters due to its ice cover most of the year, Canadian icebreakers were the most frequent vessels to traverse the Northwest Passage. The only test that could not be proclaimed was that of acquiescence by other states, as it pertained to the waterway itself. Nevertheless, in 1975, Allan MacEachen, Canada's Secretary of State, reasserted Canada's claim that the Northwest Passage was not an international strait, but rather an internal waterway.⁵⁵

The definition of an international strait would be codified in the 1958 UNCLOS treaty, but the test for it was established in the *Corfu Channel*

50. *Id.*

51. *Id.* at 92.

52. *Id.*

53. *Id.* at 92-94.

54. *See id.* (arguing that the historic treatment of waters is the determining factor); Kraska, *supra* note 26, at 264 (citing U.N. OFFICE OF LEGAL AFF., CODIFICATION DIVISION, *Judicial Regime of Historic Waters, Including Historic Bays*, ¶ 80, U.N. DOC. A/CN.4/143 (Mar. 9, 1962)).

55. *See PHARAND, supra* note 27, at 215 (arguing the Northwest Passage is an internal waterway because of its usage).

case (1949).⁵⁶ This case was brought by the United Kingdom against Albania for the sinking of one of its naval vessels during mining operations.⁵⁷ The ICJ, in one of its first cases, ruled that Albania was liable for these damages, as this was a customary waterway used as a shipping lane.⁵⁸ In essence, there are two test criteria to determine an international strait—they are the geography associated to the waterway and its functionality.⁵⁹

As mentioned above, an international strait is a body of water that, banked by two land masses, links two major bodies of water. The key to this is the question of the land masses, which if they were to overlap territorially, would close the waterway off to international shipping. In short, this would form an internal body of water or, in other words, a legal strait. Another way of explaining this is that if the two land masses adjacent to the waterway were less than six miles apart,⁶⁰ then there would be a legal strait. If they were more than six miles apart, then the channel would be an international strait.⁶¹

The second test is that of the functional use of the waterway. In the *Corfu Channel* case, the waterway was a shipping lane used by many vessels, which led to the question of its import to international shipping.⁶² The frequency of ships travelling through the channel was quite high, and it proved of value to international maritime commerce.⁶³ Thus, the court ruled that in times of peace, this route had a functional value that deemed it to be an international strait.⁶⁴

With UNCLOS, however, there was a lack of clarification on what frequency was needed to prove a channel as a functional international strait. Further questions that also arose referred to the value of cargo and tonnage of those ships.⁶⁵ In essence, these questions asked how important was this route to international maritime commerce? Obviously, in the *Corfu Channel* case it was deemed to be important, but can the same be said for the Northwest Passage?

To date, few ships have actually, or officially, made the journey through the Northwest Passage, and this is simply because of the adverse conditions in the Canadian Arctic.⁶⁶ Though these conditions will probably

56. *Id.* at 217–19.

57. *Id.*

58. *Id.*

59. *Id.*

60. At this time, a state's coastal boundaries only extend three miles from its shores.

61. PHARAND, *supra* note 27, at 216.

62. *Id.* at 217–19.

63. *Id.*

64. *Id.* at 217–19.

65. *See id.* (arguing usage of waterway is still undefined).

66. *See id.* at 224–25 (listing the 45 trips across the Northwest Passage).

change with the melting of the Arctic ice caps, the waterway has still not proven itself to be an important route for international maritime commerce, and the *Corfu Channel* case only looks at *actual* frequency of travel to define functionality. McRae takes this point one step further, as it pertains to the latter definition of an international strait, as per Article 37, noting that the Article pertained to “actual[]” international straits, and “not waters that could potentially be used for international navigation.”⁶⁷ It could quite comfortably be argued, therefore, that the Northwest Passage does not meet this criterion as things currently stand.

As for the geographic criterion, at the time of the *Corfu Channel* case, coastal boundaries were set at three miles. In 1997, however, Canada declared that it was extending its boundaries to 12 miles, as set out in UNCLOS.⁶⁸ That would mean that in order for the channel to be considered an international strait, the waterway would need to be more than 24 miles across throughout the Northwest Passage. Because there are some very narrow parts of this channel, it would not constitute an international strait.⁶⁹ Kraska, however, challenges this claim, asserting that because the straight baselines closed off waters that had previously been an international waterway, effectively turning them into internal waters, the right of innocent passage still exists.⁷⁰ McRae rebuts by noting that Canada was not a party to UNCLOS at the time of drawing those baselines, only ratifying the agreement in 2003.⁷¹ Does this improve Canada’s legal claim to “internal waters”? Douglas Johnston raises another question pertaining to whether the *Norwegian Fisheries* case can truly apply to Canada’s Arctic coastline.⁷² In the *Norwegian Fisheries* case, the straight baseline was drawn between points of the mainland, and not part of an archipelago. So, do they still apply? In either case, one would still have to establish the historical usage of these waters and whether it meets the functional test necessary to define an international strait.⁷³

67. McRae, *supra* note 16, at 15.

68. UNCLOS, *supra* note 3, at art. 3; Kraska, *supra* note 26, at 263.

69. See PHARAND, *supra* note 27, at 224 (arguing that, because any travel across the Northwest Passage requires travel in Canadian national waters, the Northwest Passage is not an international strait).

70. Kraska, *supra* note 26, at 271.

71. See McRae, *supra* note 16, at 13 (noting that Canada was not a party in 1982); see also ROBERT DUFRESNE, CAN. LIB. OF PARLIAMENT, PARLIAMENTARY RESEARCH BUREAU, (PRB) 07-39E: CANADA’S LEGAL CLAIMS OVER ARCTIC TERRITORY AND WATERS 6 (2007), available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0739-e.pdf>.

72. See Johnston, *supra* note 6, at 148 (arguing that the Canadian coastal waters do not meet UNCLOS requirements as does Norway’s northern coast).

73. See *id.* (arguing that Canadian designation of the waters as “historical internal waters” and the geographic traits of the land must be considered in determining the water body’s status); McRae, *supra* note 16, at 14 (noting historic evidence is a criterion for establishing baselines).

CONCLUSION AND DISCUSSION

The question remains whether Canada should argue that the Northwest Passage is part of Canada's internal waters before an international tribunal. Such a position would determine the issue once and for all and allow Canada to put together appropriate policies. Of course, the outcome may not be in Canada's favour, which would have a negative impact within Canada, as Canadians identify themselves as an Arctic state. It may also limit Canada's future ability to set standards upon international standards through the Northwest Passage, negating Canada's environmental and human security position of the last four decades. As things currently stand, though the United States and European Union contest Canada's claim of internal waters, they do accept Canada's standards for transit through the Northwest Passage.⁷⁴ Would this influence be enough to assuage Canadian concerns for control over this region?

One of the practical elements of sovereignty is the ability to control the territory to which one lays claim. For the most part, Canada's Arctic has been inaccessible due to the harsh climatic conditions, and the lack of interest in this region of the globe. With climate change and the melting of the Arctic ice shelf, the waters of this territory become more accessible, and the question of whether Canada can exert its sovereign claims over its internal waters becomes more relevant. This is one of the questions that Kraska implies in the challenge to Canada's claims of "internal waters," indicating that a state must be able to control them.⁷⁵ McRae goes on to say that even if a state had sovereignty over a territory, it could lose that sovereignty by failing or ceasing to "exercise effective control."⁷⁶ The fear of Canada losing its sovereignty claims motivated Prime Minister Stephen Harper to announce the development of a new military Arctic policy shortly after coming to office in 2006.⁷⁷ This was much to the chagrin of the United States, which thought Canada and the United States had come to a working agreement over the Northwest Passage in 1988. The United States

74. See Michael A. Becker, *International Law of the Sea*, 43 INT'L LAW. 915, 920 (2009) (stating that, contrary to Canada's claim, "[t]he United States and the European Union, however, treat the passage as an international strait subject to the right of transit passage"); McRae, *supra* note 16, at 17–19 (discussing Canada's powers as a coastal state over Canadian ports, commercial shipping, and ice-covered areas).

75. See Kraska, *supra* note 26, at 264 (explaining that United States and European opinion of the Northwest Passage as an international strait might cause Canada to lose the claim that the Passage is an internal waterway because acquiescence of foreign nations is one prong of the U.N. three-prong criteria for internal waters).

76. McRae, *supra* note 16, at 3.

77. See *supra* text accompanying note 21.

Ambassador, David Wilkins, questioned Canada's need to exert complete control over the Northwest Passage, renewing the Arctic sovereignty debate.⁷⁸

In the past, Canada has used civilian means, with a limited military presence, to assert its Arctic sovereignty claims. Canada's icebreakers had been administered through the Department of Transport so that its navy could focus upon its NATO commitments. On land, Royal Canadian Mounted Police have been used to show a presence in these territories, with a small group of Inuit Rangers to enhance this presence. Now, however, with an aging icebreaker fleet, there is a need to reinvest to develop Canada's Arctic capabilities, which have waned over the decades.⁷⁹ The question remains whether Canada can afford to police its own waters or must rely upon the help of others. One solution is the direct development of northern Canada, using private investments to assert Canadian sovereignty. This contradicts some of Canada's environmental approaches of the past, but it is consistent with Canada's economic interests in the Arctic. Another approach, if Canada cannot practically sustain the defence of its Arctic territories, may be to redefine what sovereignty means to Canadians.

Arctic sovereignty to Canadians has always been about *control*: not in the sense of absolute control, but in a sense where their rights and authority to set limits are acknowledged and respected. Does this mean that *sovereignty* and *control* have different intentions? Article 234 and the Arctic Cooperation Agreement indicate that other states acknowledge Canada's interests in the Arctic region, and respect its position, without acquiescing to Canadian sovereignty claims. This has given Canada a *functional* control over these waters. It has been a hallmark of Canadian foreign policy to use consultation and cooperation with other states to pursue its international and domestic interests. So, why should the Northwest Passage be deemed a different scenario? What approach can Canadian policy-makers take to successfully fortify their interests?

Whitney Lackenbauer suggests that Canada must take a "3-D" approach, which is based upon defence, diplomacy, and development, for the Arctic region.⁸⁰ Canada can no longer rely upon the good will of the

78. Nord, *supra* note 18, at 207.

79. See COATES ET AL., *supra* note 4 at 189–217 (arguing that Canada should modify its behavior to take a more active role in the Far North).

80. Whitney Lackenbauer, *From Polar Race to Polar Saga: An Integrated Strategy for Canada and the Circumpolar World*, 3 CAN. INT'L COUNCIL: FOREIGN POL'Y FOR CAN.'S TOMORROW, Executive Summary (2009), available at <http://www.canadianinternationalcouncil.org/download/resourcece/archives/foreignpol/cicfpctno3> ("A 3-D (defence-diplomacy-development) approach that recognizes the possibility for international cooperation, fixates less on potential 'sovereignty loss' and encourages sustainable socio-economic development will place Canada in a better position to seize opportunities and become a world leader in circumpolar affairs.").

United States to assist it in protecting its northern frontier. Instead, “[b]eing a good neighbour means having the ability to control your territory and waters so that you do not have to rely entirely on your friends to do so.”⁸¹ He further suggests that Canada should build upon its diplomatic efforts of the past to strengthen its claims. In this he acknowledges that quiet diplomacy, rather than the political rhetoric used by politicians trying to score points in the media, has done more for Canadian Arctic sovereignty.⁸² Finally, he suggests that “Canada needs to commit to internal development in close partnership with Northern leaders, and must discern a more central role for northerners in governance, research, environmental monitoring and enforcement, to exercise its sovereignty, practice meaningful stewardship and reduce its vulnerability to external criticism.”⁸³ In short, Canada needs to develop a made-in-Canada approach that demonstrates our understanding of the Canadian Arctic, an understanding beyond other states, which reflects our expertise to control this region. But where do we go from here?

Canada should be aware that there are three possible outcomes with respect to its concept of sovereignty over the Northwest Passage. The first is to fight for absolute sovereignty and control. This would appease Canadians at home, but at what cost? Realistically, Canada cannot afford to maintain this course without a large economic investment into its Arctic frontiers, including the Northwest Passage, and it would need to rethink its other foreign policy initiatives elsewhere around the globe. With its trade having become continentally centric, is this a wise approach? Is Canada willing to stand up for its concerns before an international tribunal to assert its claims, and what if it loses this battle?

The second scenario that Canada could consider is that of a compromise solution where its rights and interests are protected under international law, allowing for Canadian influence and a limited amount of control. The approaches offered by Kraska, Griffiths, and Johnston would fall within this strategy, allowing Canada to assert its concerns.⁸⁴ The least favourable solutions of those stated above would be to have the IMO become the regulating body, as there would be too much non-Arctic state influence on creating regulations. The Arctic Council has its hurdles to overcome, namely its inability to create binding rules and norms and its subjection to the influence of non-Arctic states. The third option, from a Canadian perspective, might actually be best—create an international treaty confirming the Northwest Passage as an international strait, regulated by

81. *Id.* at 20.

82. *Id.* at 4–9.

83. *Id.* at 57.

84. *See supra* Part II.A.

Canada under international consent. This would also have problems to overcome. Canada would still need to develop the nautical capabilities to effectively regulate these waters, at some economic and strategic costs, while renouncing its claims to these waters as internal. Such an act would not resonate well politically within Canada.

Finally, the third scenario is that Canada would lose all rights and claims to the Northwest Passage. Though such an outlook is the least likely of all three scenarios, it nevertheless speaks to Canadian fears: that it would lose its sovereignty over this waterway. In this scenario, the Northwest Passage would be deemed to be an international strait and the international community would decide upon the standards of maritime navigation without any Canadian contributions being considered. Such a situation could arise if Canada chose to take no steps toward asserting its claim of sovereignty over these waters or, ironically enough, by losing a challenge at an international tribunal, where it failed to make its case. It could also lose its claim of sovereignty if Canada lost its ability to assert its control over these waters.

The result is that whether these waters are considered an international strait or internal waters, Canada has to invest in ways to police the Northwest Passage if it wants to protect its domestic interests—namely human and environmental security—in the Arctic region. There is no other choice for policy-makers if they wish to both assert sovereign control, whether this be limited or not, and to protect its domestic interests in this region. Because of economic considerations, and Canada's limited abilities to populate and control the Arctic region, a compromise solution would be its best option to date. In such a scenario, though it would lose its perspective of full sovereignty over these waters, Canada could gain the legal legitimacy necessary to assert its influence over the Northwest Passage. This is where *the inconsistent truth* arises, for Canada cannot maintain its sovereignty without the assistance, and compliance, of other states. Canada is not truly pursuing full sovereignty over these waters, as in stopping those ships that traverse the Northwest Passage, as it accepts the potential for this waterway's commercial use. Rather, Canada is looking for the ability to assert its influence to protect its interests in the Arctic region. For this to occur, it will have to make political compromises, fortified by international law, to achieve its goals.

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