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THE NORTHWEST PASSAGE: SOVEREIGN SEAWAY OR INTERNATIONAL STRAIT? A REASSESSMENT OF THE LEGAL STATUS

GILLIAN MACNEIL[†]

ABSTRACT

The status of the Northwest Passage has been the subject of disagreement for at least 30 years. The debate has gained new urgency recently as evidence suggests that the warming trends associated with climate change are causing a reduction in Arctic sea ice. The practical consequence of those physical changes is that the formerly ice choked waters of the Northwest Passage might become an attractive route to commercial shippers as early as 2050.

The debate surrounding the status of the Passage is relatively narrow. At issue is the degree of control which the coastal state, Canada, has over the waters of the seaway. The Canadian position is that the Northwest Passage forms part of its historical internal waters and, as such, Canada has the right to exercise full sovereignty over the Passage. These sovereign rights mean that Canada is the only country with the automatic right to use the Passage. By contrast, potential user states, including the United States, have argued that the Northwest Passage is an international strait and that foreign ships enjoy navigational rights in those waters.

The debate between the coastal states and potential user states has been framed as a legal question and is therefore suited to a legal examination. An analysis of the dispute, placing the positions of the parties against customary law of the sea and the provisions of the United Nations Convention on the Law of the Sea, indicates that both arguments suffer weaknesses.

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While the parties' words indicate that they may be at potentially irreconcilable odds, a review of state practice suggests the development of an Arctic regime, which is responsive to the needs of the coastal state and the requirements of user states, is currently underway.

INTRODUCTION

The status of the waters of the Canadian Arctic in general, and the Northwest Passage in particular, is a matter which is again receiving attention in the fields of international relations and international law. At issue is the degree of control that Canada, the coastal state, is entitled to exert over the waters off the northern mainland and island coasts. Driven by the impact of climate change, which could result in the Passage being used for commercial shipping in the near future, the changing physical reality is setting the needs of the coastal state against the requirements of potential user states who want access to the Passage to be as unrestricted by laws as possible. Canada has claimed the Arctic waters, including the Northwest Passage as part of its historical internal waters but, this claim has been the subject of protest by other states. The most significant party to the dispute with Canada, as a result of proximity and power, is the United States. American leaders believe that their own security and sovereignty are best assured by the ability to freely navigate their ships anywhere they might be required. As such, the United States asserts that the Northwest Passage is an international strait subject to a regime of transit rights. The dispute between Canada and the United States is framed in legal terms and is thus subject to any uncertainties which are found in international law.

This paper is an effort to assess the current Canadian and American positions against the modern customary and conventional law of the sea, and demonstrates that there are difficulties with the arguments made by both states. It will begin with an exploration of why the status of the Arctic seems to be increasing in importance. This will be followed by an exploration of the strength of the Canadian and the American legal arguments on the status of the Arctic waters in general, and the special situation of the Northwest Passage. As weaknesses are found in both arguments, the analysis continues by looking at the current practice in the Canadian Arctic, and asking whether a regime different from those asserted by the parties is taking shape. This examination of current practice concludes that, rather than conforming to either of the two categories put forward by the parties, there is instead a unique Arctic regime developing. As a judicial solution to the question of the Northwest Passage seems unlikely, the contours of this emerging Arctic regime, and the question of how it might be preserved, are addressed in the final part of this essay.

I. THE INCREASING IMPORTANCE OF THE ARCTIC

The increased interest in the Northwest Passage over the last few years is a direct result of the impact of climate change on the Arctic. Much of the current interest in the Arctic arises from concerns about climate change.¹ Warming trends in the northern regions of North America, and Northern and Central Asia exceed the global model by as much as 40%.² However, some view the general warming of the Arctic and attendant retreat of the polar ice pack as positive. In particular, the reduction of the ice pack has sparked renewed interest in the Arctic as the locus of potential shipping routes.³ In terms of the Canadian Arctic, one author observed that, “[g]lobal warming’ suggests positive impacts for Canadian shipping[.]”⁴ A “viable” alternative to the Panama Canal would be considered by some as a positive development for the shipping industry.⁵ In addition to commercial shipping, the general warming of the Arctic has sparked renewed interest in exploring the area for energy resources⁶ further increasing the likelihood of a rise in Arctic shipping.⁷ Essentially, the shift in the conditions of the Arctic due to climate change is sparking positive economic interest in the region.

This renewed interest is provoking a sense that it is necessary to settle the status of the Northwest Passage. To date, there has been no real need to make a final determination of rights in and over the Northwest

¹ Douglas M. Johnston, “The Future of the Arctic Ocean: Competing Domains of International Public Policy” (2003) 17 *Ocean Y.Bk.* 596 at 597.

² Carl Anderson, “Global Warming and Canada’s Shipping Lanes: An Oceanographer’s View” (2003) 17 *Ocean Y.Bk.* 563 at 575-576.

³ Lawson Brigham and Ben Ellis, eds., *Arctic Marine Transport Workshop* (Anchorage: Northern Printing, 2004) 2 [Arctic Marine Transport Workshop]. Arctic Marine Transport, online: <http://www.arctic.gov/files/AMTW_book.pdf>.

⁴ Anderson, *supra*, note 2 at 563.

⁵ Rob Annandale, “Clear Sailing in the North?” *MacLean’s* (October 3, 2005) MacLeans, online: <http://www.macleans.ca/topstories/canada/article.jsp?content=20051003_113126_113126>

⁶ Paul Reynolds, “The Arctic’s new gold rush” *BBC News* (October 25, 2005), BBC, online: <<http://news.bbc.co.uk/2/hi/business/4354036.stm>>. Rob Huebert, “The Law of the Sea and the Arctic: An Unfulfilled Legacy” [An Unfulfilled Legacy] (2004) 18 *Ocean Y.Bk.* 193 at 198.

⁷ Rob Huebert, “Climate Change and Canadian Sovereignty in the Northwest Passage” [Climate Change] (2004) *Isuma* 86 at 88.

Passage.⁸ In large part, the lack of urgency can be attributed to the fact that the Northwest Passage has seen very little use largely due to the heavy multi year ice which clogs the Passage and complicates navigation.⁹ Additionally, it is assumed that any challenge to the Canadian position on the Northwest Passage will come from the United States.¹⁰ Since 1988, the Canada-United States relationship over the Passage has been governed by an Executive Agreement (the impact of which will be examined below), which permits American icebreakers to transit the Passage, provided Canada gives prior consent.¹¹ The combination of difficult navigation and an Executive Agreement means that neither the United States nor Canada has an incentive to reopen the debate.¹² As long as commercial transits of the Northwest Passage are unlikely, the disagreement is allowed to remain, as one commentator characterized it, “politely dormant.”¹³

However, the general warming trends have already begun to have an impact on shipping in the waters off Canada’s north and surrounding the Arctic Archipelago. This makes it impossible to ignore the contested status of the Passage any longer. In the 2000, five ships arrived a week early in Iqaluit in order to have a chance at navigating the Passage and the Canadian Coast Guard was providing escort services into the second week of November, two weeks later than usual.¹⁴ It is difficult to obtain precise information on ice conditions in the Northwest Passage the Canadian Ice Service does admit that the amount of ice in the Canadian Arctic is declining, and predicts that there could be ice free summers

⁸ *Ibid* 90.

⁹ Humphrey Melling, “Sea Ice of the Northern Canadian Arctic Archipelago” (2002) 107 *Journal of Geophysical Research* 2 at 2-1. *Journal of Geophysical Research*, online: <<http://www.agu.org/journals/jc/jc0211/2001JC001101/2001JC001101.pdf>>, Huebert, “An Unfulfilled Legacy” *supra*, note 6 at 203.

¹⁰ Rob Huebert, “The Shipping News Part II: How Canada’s Arctic Sovereignty is on Thinning Ice” [The Shipping News Part II] (2003) 58 *Int’l J.* 295 at 305.

¹¹ Can. T.S. 1988 No. 29.

¹² Huebert, “Climate Change” *supra*, note 7 at 91.

¹³ Alanna Mitchell, “The Northwest Passage Thawed” *The Globe and Mail* (February 5, 2000) A9. *Globe and Mail*, online: <<http://www.carc.org/whatsnew/writings/amitchell.html>> at 5.

¹⁴ *Ibid* 4.

as early as 2050.¹⁵ For example the model used for the *Arctic Climate Impact Assessment* was described as being “too coarse” to be applicable to the rather narrow straits and passages which make up the Northwest Passage.¹⁶ In spite of this, officials have stated that the possibility of ice-free seasons in 20-30 years has yet to spark any commercial interest. As such, they are focused on developing shipping in the Canadian Arctic to meet regional needs, and not to promote the Northwest Passage as a potential alternative to the Panama Canal.¹⁷

This narrow focus on developing the Passage for regional use, and taking no steps to encourage or facilitate large scale commercial use of the Northwest Passage, can be seen as a logical extension of the Canadian position that the waters of the Passage are internal. If the waters of the Northwest Passage are internal, then Canada, as the coastal state, is the only country with automatic rights to navigate the Northwest Passage. The difficulty is that the melting brought about by climate change, and the renewed interest in commercial use of the Passage, is raising the possibility of serious new challenges to Canada’s position that the Arctic waters between the Canadian mainland and the northern edge of the Canadian Arctic Archipelago are internal.¹⁸ This clash of asserted rights, combined with the likely challenge by user states, is injecting a sense of urgency into discussions of the Northwest Passage. As a result of the potential of this challenge, it is necessary to define and assess the positions of the disputing parties and to determine whether those positions are supportable when the law (contained in both customary law and the United Nations Convention on the Law of the Sea (UNCLOS)) is applied to the geographic and historic conditions of the area.

¹⁵ *Arctic Marine Transport Workshop, supra*, note 3 at 5.

¹⁶ *Arctic Marine Transport Workshop, supra*, note 3 at A-27.

¹⁷ *Arctic Marine Transport Workshop, supra*, note 3 at 5. It should be noted that this statement is at odds with an assessment of interest made in 2000 by André Maillet, currently the superintendent of the Canadian Coast Guard’s ice operations, maritime region, who stated that industry was picking up quickly on the possibility of using the Northwest Passage, Mitchell *supra*, note 13 at 4-5.

¹⁸ In general see; Michael Byers and Suzanne Lalonde, “Our Arctic Sovereignty is on Thin Ice” *The Globe and Mail* (August 1st, 2005) *Globe and Mail*, online: <<http://www.arcticnet-ulaval.ca/index.php?fa=News.showNews&home=4menu=55&sub=1&id=77>> [Arcticnet].

II. THE CANADIAN CLAIM: AN OVERVIEW

The Canadian position on the Northwest Passage is subsumed by a larger claim to sovereignty over the waters of the Canadian Arctic Archipelago in general. The Canadian position was most clearly stated by then Secretary of State, Joe Clark in the House of Commons in 1985. He asserted that the waters of the Canadian Arctic Archipelago were historical internal waters.¹⁹ In order to strengthen that claim, Joe Clark announced the establishment of a series of straight baselines which would take effect on January 1st, 1986.²⁰ These would enclose the waters of the Canadian Arctic, reinforcing the Canadian claim. Since 1985, the Department of Foreign Affairs has not issued any new statements on the Canadian position and,²¹ there have been no official statements which contradict the 1985 assertion that the waters are historical internal waters. To the contrary, various statements made recently have served to confirm that the view of Canadian officials remains unchanged.

In 2000, a document entitled *The Northern Dimension of Canada's Foreign Policy*, established Canada's goals regarding the North. The first two objectives articulated in this paper were:

1. To enhance the security and prosperity of Canadians, especially northerners and Aboriginal peoples;
2. To assert and ensure the preservation of Canada's sovereignty in the North.

More recently, the Defence section of Canada's *International Policy Statement* asserted that a key aspect of domestic defence by the Canadian Forces will be to, "increase their efforts to ensure the sovereignty and security of our territory, airspace and maritime approaches, including the Arctic."²² This statement was supported by positive action when the Department of National Defence announced the commencement of Project Polar Epsilon on June 2, 2005. Project Polar Epsilon is a, "Joint

¹⁹ *House of Commons Debates*, (September 10, 1985) at 6463 (Hon. Joe Clark).

²⁰ S.O.R./85-872.

²¹ Huebert, "Climate Change" *supra* note 7 at 88.

²² Department of National Defence, *A Role of Pride and Influence in the World: Defence* (Ottawa, 2005) 17. DND, online: <http://www.forces.gc.ca/site/reports/dps/pdf/dps_e.pdf>.

Space-Based wide area surveillance and support capability that will provide all-weather, day/night observation of Canada's Arctic region and its ocean approaches."²³ The project will use data obtained from the satellite, Radarsat-II, which is scheduled for launch in 2006.²⁴

The contention that the waters of the Arctic are subject to Canadian sovereignty has also come from sources outside the federal government. A discussion paper developed by the governments of Canada's Northern territories state that those three governments, "share [...] objectives with respect to sovereignty and security in the North: (1) Building northern capacity to enhance Canada's ability to assert its sovereignty in the Arctic."²⁵

Military officials have also made strong statements regarding Canadian Arctic sovereignty. During a 2005 sovereignty exercise in the Arctic, Commodore Bob Blakely of the Royal Canadian Navy stated that:

This is a demonstration of Canada's will to exercise sovereignty over our own back yard [...].The sea is a highway that's open to everyone. We will allow everybody passage as long as they ask for our consent and comply with our rules: 'use our resources wisely and don't pollute the fragile northern ecosystem.'²⁶

After an episode in 2000 where a submarine was spotted in the Cumberland Sound, Colonel LeBlanc, Canada's military commander in Yellowknife, stated that the act was a violation of Canadian sovereignty which could have been taken as a covert operation of war and, had his

²³ Department of National Defence News Release, "Project Polar Epsilon Will Enhance Canada's Surveillance and Security Capability" (June 2, 2005) DND, online: <http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1674>.

²⁴ Kristina Davis, "Project Polar Epsilon: Canada's security and surveillance enhancement" (July 13, 2005) DND, online: <http://www.forces.gc.ca/site/community/mapleleaf/vol_8/vol8_26/826_07.pdf>.

²⁵ Governments of Yukon, Northwest Territories and Nunavut, *Developing a New Framework for Sovereignty and Security in the North* (2005) at 2. Government of Yukon, NWT and Nunavut, online: <http://www.gov.yk.ca/news/2005/files/sovereignty_and_security_in_the_north.pdf>

²⁶ Francis Harris, "Canada flexes its muscles in dispute over Arctic Wastes" *Daily Telegraph* (August 22, 2005) *Daily Telegraph*, online: <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/08/22/wcan22&sSheet=/news/2005/08/22/ixworld.html>>.

soldiers spotted the submarine, they would have forced it to the surface or, possibly, attacked it.²⁷

In 2004, the Canadian Executive, including Head of the Canadian Government and the Head of State, confirmed Canadian claims to sovereignty. During a visit to Nunavut, former Prime Minister Martin made comments regarding Canadian Arctic sovereignty.²⁸ This was followed by the promise during the October 2004 Speech from the Throne to create a comprehensive Northern Strategy in partnership with, “territorial partners, Aboriginal people and other northern residents.” Part the strategy is to “protect the northern environment and Canada’s sovereignty and security...”²⁹ Finally, in reply to the Speech from the Throne, former Prime Minister Martin in the House of Commons stated:

Let me speak here of a region of particular challenge and remarkable opportunity, our far north... The North is a land of mystic grandeur, of mountains rising through the clouds, of valleys carved deep by glaciers, of icebergs shaped by wind and wave. [...] As a government, we will work with the territories, their governments and aboriginal groups to further develop the economy of the north. We will do so in a way that will sustain the environment and benefit the people [...]. Let there be no doubt, we will protect Canada’s sovereignty in the Arctic.³⁰

The survey indicates is that, from the highest levels of the federal government through territorial leaders, to military leaders, Canadians in positions of power today consider the waters of the Arctic Archipelago to be subject to full Canadian sovereignty, or to use the legal term, internal waters.³¹

²⁷ Mitchell *supra* note 13 at 6.

²⁸ Arcticnet, *supra*, note 18. Canadian Press, “Martin Reaffirms Canada’s Sovereignty over North” *CTV News* (Aug. 11, 2004) CTV, online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20040811/Martin_North_040811?s_name=&no_ads=> [Canadian Press].

²⁹ *House of Commons Debates*, 002 (October 5, 2004) at 9 (Rt. Hon. Adrienne Clarkson).

³⁰ *House of Commons Debates*, 003 (October 6, 2004) at 45 (Hon. Paul Martin).

³¹ As will be discussed in the text, at customary law, internal waters were subject to the full sovereignty of a state. It is to this which Canada refers in its claims over the Arctic waters. Article 8 of UNCLOS also uses the term “internal waters” to describe the waters enclosed by straight baselines however, the legal rights over such waters,

However, these more recent assertions of sovereignty can be viewed as problematic. All the statements assert Canadian sovereignty over the Arctic but none reiterate that the basis of that sovereignty is historic title, nor are the words “internal waters” specifically used. Does this indicate an alteration in the Canadian position? Since the establishment of straight baselines around the Arctic had the effect of making the waters internal regardless of any previous status,³² the question must be asked: are subsequent assertions to sovereignty based on historic title, or do they only refer to the effect of the baselines on the status of the waters? This question is important, as Article 8(2) of UNCLOS provides that where waters are made internal by means of baselines, a right of innocent passage exists. Otherwise, according to Article 2 of UNCLOS, internal waters are considered to be part of the sovereign territory of a state, and are thus subject to the full range of jurisdictional powers which a state may exercise on its land territory. It is submitted that, regardless of the failure to re-articulate the basis of the Canadian claims, there has been no change in the Canadian position.

III. RESOLVING THE INCONSISTENCIES

Since at least 1985, it has been understood that Canada views the waters of the Arctic Archipelago as internal waters and that historic title is the basis of that claim. Given Clark’s statement of sovereignty in the House of Commons, any subsequent statement should be viewed as merely an affirmation of that position. As long as it is understood that Canada claims the waters as internal and that the claim is made on the grounds of historic title, there should be no need to reaffirm that the waters are internal as well as sovereign, or that the claim is based on historic title with every renewed statement of sovereignty. One would only expect reference to the status of the waters as internal, or the grounds support-

as will be seen, are only those rights which may be exercised over the territorial sea of a state.

³² *Fisheries Jurisdiction Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116. *United Nations Convention on the Law of the Sea (UNCLOS)*, 1833 U.N.T.S. 3, art. 8. UNCLOS, online: <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

ing those statements of sovereignty, if the position of Canadian leaders had changed.

Given the lack of statements regarding any alteration of the Canadian position, and the fact that recent assertions of Canadian sovereignty have come from high level officials who could make authoritative statements regarding changes to the Canadian claims, it is logical to conclude that the Canadian position has not altered since 1985. Further supporting this conclusion is the use of the word “sovereignty.” If Canadian claims were based simply on a legal reality resulting from baselines, one would expect the claim made to be that Canada enjoys Arctic “jurisdiction” or “authority.” “Sovereignty” is a far stronger term and indicates a more possessive and personal claim. In short, Canada views the waters of the Arctic Archipelago, including the Northwest Passage, as internal waters by reason of historic title.

A second problem which may arise from the more recent statements of sovereignty needs to be addressed. Some of those statements, for instance the Speech from the Throne,³³ do not refer to the waters of the Arctic specifically, only to Arctic sovereignty generally. Or, more problematically, in one of former Prime Minister Martin’s statements, specific reference is made to the land, and not the waters.³⁴ Does this lack of specific reference to Arctic waters represent an abandonment of claims to Canadian sovereignty over the Arctic waters in general and the Northwest Passage in particular? The answer to this question is no.

The dispute over rights in the Northwest Passage is part of a larger challenge to Canadian Arctic sovereignty. It is widely known that Canada claims sovereign rights over the Passage.³⁵ It is also widely known that Canada is party to other disputes regarding Arctic territory; for example are the dispute with Denmark over which nation has claim to Hans Island, the dispute with the United States over the boundary delimitation of the Beaufort Sea and the Continental Shelf delimitation of the Arctic, which involves Canada, Denmark, Norway and Russia (among others).³⁶ Each of these disputes represents a threat to Canadian Arctic

³³ *Supra* note 29.

³⁴ Canadian Press, *supra* note 28.

³⁵ For articles providing evidence of this notoriety see Francis Harris, *supra* note 26 and Paul Reynolds, *supra* note 6.

³⁶ Harris, *supra* note 26 and Reynolds, *supra* note 6. See also the Russian submission to the Commission on the Continental Shelf as well as the replies of

sovereignty. If tested in a court, there would be a strong evidentiary basis had Canadian leaders enumerated each threat to which their comments referred. However, as a practical matter it must be remembered that failure to enumerate every threat to which the comments might refer does not amount to a denial of any specific challenges to Canada's Arctic sovereignty. Realistically, given the particular forum in which the comments have been made, and the number of potential threats to which they refer, one would only expect references to specific aspects of the dispute when Canadian leaders are in fact referring to a particular instance of the larger sovereignty challenge.

The question remains whether a specific reference to Arctic sovereignty may override a more general assertion of sovereignty. For example, former Prime Minister Martin's reference to sovereignty over Arctic land during his trip to Nunavut.³⁷ Again the answer is no. Making reference to specific sovereignty concerns is not inconsistent with, and can not override, more general statements. In defining the Canadian position, the issue is not the form which assertions of sovereignty have taken; the issue is whether sovereignty has been continuously asserted. To divide each statement of sovereignty from the whole context of the current sovereignty challenge and examine it in isolation is counter-productive. The important point is that each individual statement of sovereignty is not, in fact, an individual statement. Every word and act is part of the larger framework of Canadian claims to sovereignty in the Arctic and, each word and act should be viewed as a part of that greater whole. It is the cumulative effect of the statements and acts which articulate the Canadian position; that position is that Canada has historic title to the waters north of the Canadian mainland and that title extends to sovereignty over the waters of the Canadian Arctic Archipelago which include the Northwest Passage.

IV. THE AMERICAN POSITION

In contrast to the general Canadian position that all the waters of the Archipelago are internal Canadian waters, the American claim focuses

interested governments, including Canada. These documents are available at <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm>.

³⁷ Canadian Press, *supra* note 28.

specifically on the waters of the Northwest Passage. The Americans assert that the waters of the Northwest Passage form an international strait and are subject to a regime of transit rights.³⁸ Transit passage, as described in Part III of UNCLOS, means that foreign ships enjoy freedom of navigation in international straits subject to the specific limitations of Part III.³⁹ Those limitations, found largely in Articles 39-42, generally require that ships conform to internationally accepted standards, and not to any more stringent laws enacted by the coastal state.⁴⁰

V. REASSESSMENT: WHY NOW?

Articulating the positions of the parties is, however, only the first and easiest step. It is simple enough for Canadian officials to make assertions of Arctic sovereignty generally and to state that the waters of the Northwest Passage are internal waters specifically, or for the Americans to claim that the Passage is an international strait; it is another matter to prove that either contention is true. No state has yet found it necessary to formally challenge the Canadian position in a court. In large part, the lack of persistent challenge may be because the chief opponent to the Canadian position, and the one most likely to initiate a challenge,⁴¹ is the United States and the 1988 Executive Agreement mentioned above (in section II. on “The Increasing Importance of the Arctic”) negates any need for challenge. As the Agreement is without prejudice to the position of either nation, respecting the Agreement will not harm any future position taken, and in general only ice breakers can navigate the Passage meaning that commercial shipping is merely a growing potential and not yet a reality, there has been no need to revisit the dispute over the status of the Northwest Passage.⁴² However, with the physical changes to the Passage and the renewed interest in using the Passage, it is no longer clear that the dispute can remain buried.

³⁸ J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2d ed. (The Hague: Martinus Nijhoff Publishers, 1996) 339.

³⁹ UNCLOS, *supra* note 32 art. 38(2).

⁴⁰ Also noted by Huebert, “The Shipping News Part II” *supra* note 10 at 300.

⁴¹ Huebert, “The Shipping News Part II” *supra* note 10 at 305.

⁴² Can. T.S. *supra* note 11. Huebert, “Climate Change” *supra* note 7 at 91.

VI. THE CANADIAN ARGUMENT: CONVENTIONAL AND CUSTOMARY LAW

Assessing the relative strength of the Canadian and American positions taken in the dispute over the Northwest Passage is complicated. Certainly, as Canada ratified the United Nations' Convention on the Law of the Sea in 2003, the provisions of that Convention govern Canada on the international stage. However, customary law must also be examined when looking at the status of the Northwest Passage. This is so for two reasons; the first is that the provisions of UNCLOS have not fully passed into customary law. As such, non-parties to UNCLOS, like the United States, are not bound by its provisions. Secondly, UNCLOS is an umbrella convention and its provisions are worded very generally. The lack of specificity of some provisions results in a continued reliance on customary law interpretations. However, as Canada is a party to UNCLOS, the treaty provisions are the logical place to begin an examination of the validity of its position over the Northwest Passage in international law.

The Canadian assertion of historic rights presents an immediate problem in attempting to settle the status of the Northwest Passage under UNCLOS. Although UNCLOS refers to historic rights, the treaty provides no definition. Article 35 of the treaty says that nothing in Part III, the part governing international straits, affects any areas of internal waters except where straight baselines have enclosed waters not previously internal. What this means is, if Canada has historic title to the Northwest Passage, its sovereignty over the waters is complete and unaffected by the transit rights granted in Part III of UNCLOS. Absent governing definitions in UNCLOS, it is customary international law which must provide the analytical framework to Canada's claims to historic title.

The requirements to establish historic rights are reasonably straightforward. A state must show that it has exercised sovereignty over the area in question for a long period of time with the acquiescence of other states.⁴³ However, under customary law, it also (at one time) appeared that a state could consolidate its title to marine areas using a combina-

⁴³ Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988) § 6 [*Canada's Arctic Waters*]. R. Douglas Brubaker, "Straits in the Russian Arctic" (2001) 32 *Ocean Dev. & Int'l L.* 263 at 266.

tion of baselines supported by history. The result of such a consolidation would be to make the waters internal.⁴⁴ If this dual possibility, historic title or consolidated title, did exist under customary law, there was a possibility that Canada, by enacting baselines in 1986, unquestionably made the waters internal before ratifying UNCLOS and so, the provisions of Part III would be inapplicable.

Based upon his assessment of the criteria for historic title, a leading Canadian expert, Donat Pharand, concluded that the Canadian claim to historic title was problematic.⁴⁵ Rob Huebert, another Canadian expert on Arctic matters, is even less convinced by Canada's claims to historic title than Pharand. Five years ago, Huebert asserted that, "[w]e know darn well the internal-water argument doesn't hold."⁴⁶ He reiterated this position in a 2001 article, this time relying on Pharand's assertion that the historic waters argument is weak.⁴⁷

However, contrary to the pessimistic position of Huebert, Pharand concluded that under customary law, the option of consolidating title to a marine area by using history to support the positioning of baselines was available.⁴⁸ On his reading of customary law, Pharand determined that such a consolidation would result in the waters becoming internal with no right of passage.⁴⁹ Based upon his examination of Canada's history, the position of the Arctic baselines and his understanding of customary international law, Pharand determined that Canada's Arctic baselines were valid and that the waters of the Canadian Arctic archipelago were made internal in 1986.⁵⁰ Contrary to his assessment of customary law, Pharand did admit that under the *Convention on the Territorial Sea* and UNCLOS, it was possible that such a consolidation of title might result in waters having the associated rights only of territorial waters.⁵¹ As

⁴⁴ *Fisheries Jurisdiction Case*, *supra* note 32, Pharand, *Canada's Arctic Waters*, *supra* note 43 § 9.5.

⁴⁵ Pharand, *Canada's Arctic Waters*, *supra* note 43 § 8.3 (pg. 125).

⁴⁶ Mitchell, *supra* note 13 at 5.

⁴⁷ Huebert, "Climate Change" *supra* note 7 at 89.

⁴⁸ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 9.5.

⁴⁹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 5.2 (pg. 93).

⁵⁰ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 11. Donat Pharand, "Canada's Sovereignty over the newly enclosed Arctic Waters" (1987) 25 Can. Y.Bk. Int'l L. 325 at 329 [Canada's Sovereignty].

⁵¹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 5.2 (pg. 93).

Canada, at a minimum, consolidated title under customary law, the waters were made internal. Had it been done under UNCLOS, Canada may have been limited to the claim that the waters were subject to the same rules which govern territorial waters.

However, Pharand's position is problematic, as is the fact that some have relied on his conclusions. For instance, the legal position of Canada has changed since Pharand's assessment. Canada, as a party to UNCLOS, is now only able to assert rules of customary law, upon which Pharand's analysis is built, against non-party states. As against the 148 other parties to UNCLOS, Canada is bound by the provisions of that treaty. Further, as Canada had signed the treaty in 1982, it is unclear whether the baseline legislation that Canada enacted could have resulted in a legal position inconsistent with what is permissible under UNCLOS.⁵² More problematic is that Pharand's argument—that waters subject to consolidation of title, based on baselines and history, are internal—has not been accepted by the International Court of Justice (ICJ) as a correct statement of customary international law.

Pharand submitted that the majority of the Court was incorrect in not holding that historic title and consolidation of title both have the result of making waters internal in the *Tunisia/Libya Continental Shelf Case*.⁵³ Given the disagreement between the Arctic expert and the World Court, the question must be asked: which is the more correct statement of international law?

VII. CUSTOMARY LAW & CANADA: WHO TO FOLLOW?

The special expertise of academic writers in international law, such as Pharand, has been recognized in the *Statute of the International Court of Justice*,⁵⁴ which permits the Court to consult the teachings of highly qualified publicists as a subsidiary means for determining the rules of international law. As such, there is some reason to give significant weight

⁵² *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 18.

⁵³ Pharand, *Canada's Arctic Waters*, *supra* note 43 at pg. 126 n. 16.

⁵⁴ *Statute of the International Court of Justice*. United Nations, online: <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> art. 38(1)(d).

to Pharand's conclusions. His conclusions are also appealing from the point of view of one arguing for Canadian sovereignty. This is because his conclusions support Canada's assertion that the waters of the Archipelago are internal. However, there exists greater reason to favour the statements of the International Court of Justice, when attempting to determine applicable customary international law.

To begin with, Article 38(1)(d) of the *Statute of the International Court of Justice* states that academic writers may be consulted by the Court in order that the Court be able to determine the rules of International Law. Thus, the article which recognizes the expertise of academics still gives preference to the Court as the final arbiter of the content of the rules of international law. Further, as the *Statute of the International Court of Justice* sets out;

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

b) International custom, as evidence of a general practice accepted as law;

c) The general principles of law recognized by civilized nations.

Based upon Article 38, it is clear that the role of the ICJ is to declare the content of customary law based upon evidence presented by parties, not to formulate the content of customary international law. Granted that the distinction between declaration and formulation is difficult and, and that the ICJ's decisions are only binding between the parties and in respect of that particular case;⁵⁵ the provisions must give a strong reason to take *dicta* of the ICJ as persuasive evidence of the content of customary international law.

Another major rationale for giving effect to the opinions of the ICJ is that the Court is the principle judicial organ of the United Nations,⁵⁶ which now has 191 members, all of whom are parties to the *Statute of the International Court of Justice*.⁵⁷ The broad membership of the UN, and by extension the Court, confers upon its chief judicial organ a cer-

⁵⁵ *Ibid*, art. 59.

⁵⁶ *Ibid*, art. 1. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 art. 92 [*Charter*].

⁵⁷ *Charter*, *ibid* art. 93.

tain inherent legitimacy. In addition to this inherent legitimacy, the ICJ is composed of legal experts. Members of the court must be persons who are possessed of the qualifications necessary to achieve judicial office in their home state or have recognized competence in international law.⁵⁸ Finally, decisions of the ICJ are made after full submissions and argument by parties to a dispute, after the collection of evidence and, if necessary, with the assistance of experts.⁵⁹ This procedure provides a broad range of sources from which the content of customary international law may be determined. Perhaps most significantly, customary international law is derived from state practice, and it is state parties who present evidence to the Court. As a result of this, the Court is in a unique position to be able to examine and make authoritative pronouncements upon the content of customary international law. As such, there exists strong incentive to ask what the ICJ has said is required to prove historic title and what the result of a consolidation of title by the use of baselines might be. If the opinions of the Court contradict the views of a particular expert, there is cause to tailor legal arguments to fit the opinions of the Court.

Three cases must be examined in attempting to discern the opinions of the ICJ regarding historic waters. The first most detailed examination was done in the *Fisheries Jurisdiction Case*. In deciding that case, the Court made some important pronouncements on historic waters. First, it provided a definition of historic waters that states;

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.⁶⁰

The Court then asserted that a claim to historic rights was a derogation from general international law.⁶¹ As historic waters represent a departure from general rules of law, it is assumed such claims will import a special burden of proof on the claimant.⁶² The Court, in its analysis, then subsumed the discussion of historic rights into the criteria for as-

⁵⁸ *Statute of the International Court of Justice*, *supra* note 54 art. 2.

⁵⁹ *Statute of the International Court of Justice*, *supra* note 54, arts. 42, 43, 50 & 51.

⁶⁰ *Fisheries Jurisdiction Case*, *supra* note 32 at 130.

⁶¹ *Fisheries Jurisdiction Case*, *supra* note 32 at 130.

⁶² Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 6.6.

sessing the validity of baselines. It found that the history of Norway supported the chosen baselines and that the waters enclosed by the lines were internal.⁶³

Following the *Fisheries Jurisdiction Case*, the Court examined historic rights in the *Continental Shelf Delimitation Between Tunisia and Libya*,⁶⁴ and the *Maritime Boundary Delimitation Between El Salvador and Honduras (Nicaragua intervening)*.⁶⁵ The cases are important, as the majority judgements of the Court in these cases alter the law regarding historic rights and consolidation of title set out in the *Fisheries Jurisdiction Case*.

In the *Tunisia/Libya Case*, a majority of the Court stated that there was no single régime governing a finding of historic title, only particular régimes for each recognized case of historic title⁶⁶ (it was this statement to which Pharand objected in his 1988 treatise).⁶⁷ The régimes to which the Court referred were: a régime based upon acquisition and occupation and a régime based upon the existence of rights “*ipso facto* and *ab initio*.”⁶⁸ By this, the majority of the ICJ seems to have meant that, under customary international law, rights over historic waters may be akin to those which arise when waters are internal or, they may be limited to the rights enjoyed over territorial waters.⁶⁹ In spite of the criticism of Pharand and the dissents of certain members of the Court (notably Judge Oda with whose analysis Pharand agreed)⁷⁰ a majority of the Court reiterated this statement of the law regarding historic title in the 1992 *El Salvador/Honduras Case*.⁷¹ Oddly, the Court in the *El Salvador/Honduras Case* also quoted the definition of historic waters from the *Fisher-*

⁶³ *Fisheries Jurisdiction Case*, *supra* note 32 at 142.

⁶⁴ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [Tunisia/Libya], [1982] I.C.J. Rep. 18.

⁶⁵ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [El Salvador/Honduras], [1992] I.C.J. Rep. 351.

⁶⁶ *Tunisia/Libya*, *supra* note 64 at 74.

⁶⁷ Pharand, *Canada's Arctic Waters*, *supra* note 43 at 126, n. 16.

⁶⁸ *Tunisia/Libya*, *supra* note 64 at 74.

⁶⁹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 5.2 (pg. 93) read with pg. 126 n. 16.

⁷⁰ Pharand, *Canada's Arctic Waters*, *supra* note 43 at 126, n. 16.

⁷¹ *El Salvador/Honduras*, *supra* note 65 at 589.

ies Jurisdiction Case, indicating that the definitional aspect of that case which refers to historic waters as internal remains good law.⁷²

In spite of the position which the ICJ has articulated a question remains regarding the weight to be given to the analyses of the law governing historic waters contained in the *Tunisia/Libya Case* and the *El Salvador/Honduras Case*. In the *Tunisia/Libya Case*, the court found it unnecessary to make a determination regarding Tunisia's claim to historic title and,⁷³ as a result, the statements made by the majority of the ICJ may be taken as *obiter* and dismissed (as Pharand argued in 1988).⁷⁴ However, the statements were reiterated in the *El Salvador/Honduras Case*. In that case, the historic status of the Bay of Fonseca was not in issue – both parties agreed it was an historic bay.⁷⁵ However, the Court did find it necessary to undertake an examination of the particular régime which governed the Bay of Fonseca.⁷⁶ As a part of the final result did depend upon that examination, it appears that the “particular régimes” comments may no longer simply be dismissed as *obiter* and instead, must be taken as part of the content of customary international law.

Therefore, under current customary law, if Canada can show that the waters of the Arctic Archipelago are historical internal waters, then Canada is entitled to treat the waters of the Arctic, including the Northwest Passage as internal. If Canada is only able to show that the waters were made internal by a combination of baselines supported by history, then potential user states likely have a right to innocent passage. The situation is the same under UNCLOS, i.e. if the waters were made internal be virtue of legitimate baselines, the right of innocent passage survives.⁷⁷

⁷² *El Salvador/Honduras*, *supra* note 65 at 588.

⁷³ *Tunisia/Libya*, *supra* note 64 at 76.

⁷⁴ Pharand, *Canada's Arctic Waters*, *supra* note 43 at 126 n. 16.

⁷⁵ *El Salvador/Honduras*, *supra* note 65 at 588.

⁷⁶ *El Salvador/Honduras*, *supra* note 65 at 588-89.

⁷⁷ UNCLOS, *supra* note 32 art. 7.

VIII. APPLICATION OF INTERNATIONAL LAW TO THE CANADIAN POSITION

Assuming this is a correct statement of current international law governing historic waters, the question to be answered is whether Canada can claim historic rights over the waters of the Arctic Archipelago in general and the Northwest Passage in particular. As noted above, in 1988, Pharand found that the answer was no. However, since that time, the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* and the *Inuvialuit Final Agreement* have come into effect. As such, it is worth asking whether this alters the strength of Canada's claims. It has been noted that the ICJ has found that the historic presence of nomadic peoples can support a state's claim to historic title.⁷⁸ Therefore, although the Inuit are not nomadic,⁷⁹ the presence of the Inuit as original peoples and their agreements with Canada may have an impact.

To reiterate the requirements, in order to support a claim of historic title, Canada, as the claimant state must show that it has exercised exclusive authority, for a long period of time with the acquiescence of other states. It is suggested that in examining the factors necessary for a finding of historic title, that both the words and actions of the claimant state and any opposing state are important. While it is unclear whether actions speak louder than words (or vice versa), if the actions of a state contradict a protest, it may be found to lessen, or overcome, the impact of those words.

In terms of an exclusive exercise of authority over a long period of time, Canada can show a long, but generally inconsistent history of exercising authority.⁸⁰ However, as Pharand noted, if the laws and regulations of the coastal state are never challenged, very little is required to maintain effective and exclusive control.⁸¹ Further, in the particular context of the Canadian Arctic, it is worth questioning how high the degree of control exercised by Canada must be. As Canada has never sug-

⁷⁸ Arcticnet, *supra* note 18.

⁷⁹ Inuit Tapirisat of Canada, *The Inuit of Canada* (Department of Indian Affairs and Northern Development, 1995) 6 [Inuit Tapirisat].

⁸⁰ See the discussion in Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.

⁸¹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 6.1.

gested that it is interested in closing the waters of the Passage entirely, and is simply concerned that users conform to Canadian-set shipping standards,⁸² one would only expect the enforcement of measures which are directed to that end.

In terms of the degree of challenge to Canadian laws, it is worth noting that there have been few challenges to Canadian sovereignty over the Northwest Passage. In fact, there has, to date, been very little use of the Northwest Passage at all (only ninety-nine full transits in 101 years, thirty-eight of which were by Canadian flagged ships).⁸³ Because of the minimal use which has been made of the Northwest Passage, it is submitted that Canada had no need to initiate a constant, comprehensive strategy to assert its sovereignty.

In the case of Canada's Arctic, what measures were, and are being, undertaken? From 1906-1911, Canada applied whaling legislation to ships operating in at least part of the claimed area,⁸⁴ in addition, in 1913, a Canadian expedition was sent to patrol the waters of the Arctic in order to explore and to enforce Canadian Customs and Fishing Regulations against American whalers.⁸⁵ After World War I ended, an annual Arctic patrol was instituted in order to protect and affirm Canada's sovereignty. As part of this greater show of control, the RCMP was established as a permanent presence in important areas to consolidate title over the islands and supervise adjacent waters. Canada also exercised control over various supply missions undertaken by American ships after the Second World War.⁸⁶ More recently, Canada enacted the *Arctic Waters Pollution Protection Act* (AWPPA) in 1970. The provisions of the AWPPA, which remains in force, are applied to ships entering Arctic waters.⁸⁷ NOR-

⁸² Huebert, "Climate Change" *supra* note 7 at 93, Douglas M. Johnston, "The Northwest Passage Revisited" (2002) 33 *Ocean Dev. & Int'l L.* 145 at 149. See also the preamble to the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12.

⁸³ *Arctic Marine Transport Workshop*, *supra* note 3, Appendix F. A further indication of minimal use can be seen in the terms of sale for the Churchill Port facility. The port was so little used that in 1997, it was sold for a mere \$10 (ten). Annandale, *supra* note 5.

⁸⁴ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.2 (pp. 117-119).

⁸⁵ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.2 (pg. 120).

⁸⁶ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.2 (pp. 120-121).

⁸⁷ Brubaker, *supra* note 43 at 276-77. *Arctic Water Pollution Prevention Act*, *supra* note 82 s. 4(1).

DREG, a reporting system, is also available to ships entering Canadian Arctic Waters. This system is used to facilitate rescues and assistance should either be required (the system is however voluntary).⁸⁸ However, there are problems with Canada's assertions that it has had, and continues to have, control over the Arctic. As late as 2003, Canada did not require a ship entering Arctic waters to give ninety-six hours notice, as was necessary for ships entering southern waters.⁸⁹ This notification requirement is now in place for Arctic waters as well.⁹⁰ Does this constitute a sufficient exercise of control over a sufficiently long period to meet the first two of the criteria for historic title? Given the minimal use of the waters and the lack of desire to exclude all foreign vessels, the answer may very well be yes.

Pharand did identify a further factor which he believed harmed the Canadian claim; the fact that British and Canadian explorers did not specifically claim the waters of the Archipelago when claiming the land.⁹¹ This failure however, may no longer be a factor. If recognition is given to the presence of original peoples, the Canadian claim to historic title in the Arctic is strengthened by the presence of the Inuit in the Arctic. This is so in particular because Canada has signed land claims agreements with both the Inuvialuit (Inuit of the Western Arctic) and the Inuit. According to the terms of the 1984 *Inuvialuit Final Agreement*;

the Inuvialuit cede, release, surrender and convey all their aboriginal claims, rights, title and interests, whatever they may be, in and to the Northwest Territories and Yukon Territory and adjacent offshore areas, not forming part of the Northwest Territories or Yukon Territory, within the sovereignty or jurisdiction of Canada.⁹²

Similarly, in the 1993 *Agreement Between the Inuit and Canada*, the Inuit;

⁸⁸ NORDREG website. Nordreg, online: <http://www.ccg-gcc.gc.ca/cen-arc/mcts-sctm/mcts-services/vtrarctic_e.htm>.

⁸⁹ Huebert, "The Shipping News Part II" *supra* note 10 at 302.

⁹⁰ See notice at <<http://www.notmar.gc.ca/eng/services/notmar/96hour.pdf>>.

⁹¹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.3 (pp. 122-123).

⁹² Agreement can be found online at <http://www.ainc-inac.gc.ca/pr/agr/inu/wesar1_e/pdf>. Accessed Dec. 5, 2005.

In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:

a) Cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.⁹³

The area covered by these two agreements stretches from 141° in the west to the eastern edges of the Arctic Islands and includes the waters of the Northwest Passage.⁹⁴

As a result of these Agreements, provided the Inuit subject to these Agreements can establish an historic presence, Canada should now be able to assert title by cession. Did the Inuit have an historic presence over the land and waters of the Arctic which should be recognized? The Inuit have inhabited the Arctic regions of what is now Canada for 4,000 years. The occupation and use of the land by the Inuit covered an area ranging from the Mackenzie Delta in the west to the Labrador Coast in the East and from the southern part of Hudson Bay to the High Arctic Islands in the North. Further, until the signing of the land claims agreements, the Inuit had never signed any treaty ceding their land to European explorers, or earlier Canadian governments. Finally, Inuit hunting activities were not limited to land, or ice, but included hunting on the open water.⁹⁵

Based upon these enumerated factors, added to the absence of non Inuit in the area until the arrival of English explorers in the 16th century it is apparent that the Inuit can prove an historic presence, which included use and occupation, of the area in question. By the terms of the 1984 and 1993 Agreements, whatever rights or title that presence conferred are now vested in Canada and it falls to the Canadian state to assert and defend, and claim, that title or those rights on the international level.

The combination of Inuit rights, now vested in Canada, and the exercise of Canadian authority over the Arctic waters (which began even before title and rights had been ceded) strengthens the claim that Cana-

⁹³ Indian and Northern Affairs Canada, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (1993) cl. 2.7.1.

⁹⁴ See map available on the Atlas of Canada website at <http://www.atlas.gc.ca/site/english/maps/reference/national/can_political_ereferencemap_image_view>.

⁹⁵ *Inuit Tapirisat*, *supra* note 79 at 1-3, 11.

da, by virtue of agreement with one of its founding peoples and through the exercise of authority over the waters in dispute, has historic title to the region. The question is; does it go far enough?

Rather than answer this question directly, it is useful to examine the final requirement for a finding of historic title; the acquiescence of other states. As both the United States and the European Union have protested Canadian assertions of sovereignty to the Arctic,⁹⁶ it might be expected that Canada can not demonstrate sufficient acquiescence and that, therefore, the relative strength and longevity of any exercise of sovereignty is moot. However, it must be asked whether the actions of the United States or European Union members contradict the statements of opposition which they have made, weakening the protests. Further, it may be useful to ask whether there are indications of acquiescence which support Canadian assertions of sovereignty and which would give an indication that the addition of Inuit rights to the Canadian claim make Canada capable of supporting the argument of historic title.

Looking first at the practice of the United States, it has twice engaged in actions that challenge Canadian claims to sovereignty over the Northwest Passage. The first challenge came in 1970 after the Humble Oil tanker, the *Manhattan*, traversed the Northwest Passage. The official challenge came in response to the enactment of the AWPPA and the extension of Canada's territorial sea out to 12M as a response to the tanker's journey.⁹⁷ The second challenge came in 1985, when the United States Coast Guard Ice Breaker, *Polar Sea*, transited the Passage without asking Canadian permission. These two actions were based on the United States' government position that the waters of the Northwest Passage were, in 1969-70 terms, high seas⁹⁸ or are, in post-UNCLOS terms, a strait used for international navigation.⁹⁹

⁹⁶ Huebert, "Climate Change" *supra* note 7 at 90.

⁹⁷ Donat Pharand, *The Northwest Passage; Arctic Straits*, vol. 7 (Dordrecht: Martinus Nijhoff Publishers, 1984) 107 [*International Straits*], Donald R. Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A reassessment" (1993) 26 *Cornell Int'l L. J.* 331 at 339-341.

⁹⁸ Department of State, "Memorandum for Mr. Kissinger" (March 12, 1970) 3, available online at: <<http://www.state.gov/documents/organization/52576.pdf>>.

⁹⁹ Huebert, "Climate Change" *supra* note 7 at 90, Steven R. Ritchey (Lt. Col. USAF), "The Northwest Passage: Troubled Waters for United States-Canada Relations" (National War College, 1987) 17, available online: <<http://www.ndu.edu/library/n3/SSP-87-129.pdf>>.

However, the strength of the American position has been undermined by the actions, or inactions, which it has taken both in regard to its challenges, and in the aftermath of those challenges. First, it is necessary to note that, although the United States did not request Canadian permission to send the *Manhattan* or the *Polar Sea* through the Passage, in both cases, there was Canadian involvement or acquiescence in the transits.¹⁰⁰ While it might be suggested that such involvement was permitted as a sop to an ally's wounded pride, if the United States was strongly committed to the position that the waters of the Northwest Passage are free to use by anyone, one would have expected them to settle any hurt feelings after the fact and so avoid compromising their position by accepting the involvement of the Canadian state. Further, after the transits by the *Manhattan* and the *Polar Sea*, Canada took legislative measures in response to the perceived threat to Canadian Arctic sovereignty. In response to the legislative actions of Canada, in 1970 the enactment of the AWPPA and the extension of Canada's territorial sea to 12M and in 1985 the establishment of baselines, the United States did virtually, nothing.

In 1970, the response of the United States to Canadian legislative actions was a protest Note, but the Note was not followed by legal action. This is of some significance as the reservation with which Canada entered to the jurisdiction of the ICJ related only to the AWPPA, and not to the extension of Canada's territorial sea. Yet in spite of this limit on Canada's reservation, the United States did not follow up on its protest by initiating a case before the ICJ.¹⁰¹ This lack of response was in spite of the fact that a memo to Henry Kissinger, then holding the position of Assistant to the President for National Security Affairs, stated that Canadian acts to assert sovereignty in the Arctic, "are critical for national

¹⁰⁰ Pharand, *International Straits*, *supra* note 97 at 47, Ritchey, *ibid* 7, although, as Ritchey points out, the permission which was granted had not been sought. *Arctic Marine Transport Workshop*, *supra* note 3 at A-22.

¹⁰¹ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 8.3 (pg. 124). The United States' protest Note to Canada pointed out that the Canadian declaration did not preclude Canada from voluntarily submitting the dispute to the ICJ, but did not actually request that Canada do so. The Note stated that the US was willing to accept the 12M limit but, only as part of an international treaty. The Canadian declaration of a 12M limit did not meet this requirement but, the US did not pursue an international legal remedy before the Court. *House of Commons Debates*, 006 (April 15, 1970) (Appendix "A") 5923 at 5924.

security interests and seriously degrade the entire United States law of the sea posture on which military mobility depends.”¹⁰²

In the wake of the transit of the *Polar Sea*, the United States also took action which had the potential effect of weakening its stated position. In 1988, the United States and Canada signed an Executive Agreement which provided that United States ice breakers would only transit the Northwest Passage with Canada’s prior consent.¹⁰³ It has been suggested that the Agreement provides limited protection for Canada as it only regulates passage by ice breakers however,¹⁰⁴ even today, the Northwest Passages is only navigable by ice breakers or ice strengthened ships and so this restriction is really just a reflection of functional reality.

By contrast, the United States concession to the consent requirement cannot be so easily reasoned away. The United States asserted that its ships could freely transit the Northwest Passage. As a reflection of that, it sent the *Polar Sea* through without asking permission. Three years later, the United States signed an Agreement which required that it seek permission from Canada before sending its icebreakers through the Passage. It is unlikely this was done in anticipation that the United States would be making frequent use of the Passage; between the transits of the *Manhattan* and the *Polar Sea*, there were no American transits of the Passage. As a result, it cannot be supposed that this was a measure designed to avoid likely future conflict. Further, the Agreement was basically a “win” for Canada. Although the Agreement states that it is without prejudice to the positions of the parties,¹⁰⁵ it gives Canada exactly what it sought; a requirement that the United States obtain permission before using the Passage.¹⁰⁶ Clause 3 of the Agreement is a clear reflection that the United States retreated significantly from its stated position that the waters were an international strait, “The Government of the United States pledges that all navigation by U.S. icebreakers within

¹⁰² Memorandum for Mr. Kissinger, *supra* note 98 at 4.

¹⁰³ Can. T.S. *supra* note 11.

¹⁰⁴ Rothwell, *supra* note 95 at 346. Elizabeth B. Elliot-Meisel, “Still Unresolved after fifty years; the Northwest Passage in Canadian-American relations, 1946-1998” (1999) 29 Amer. Rev. Can. St. 407 at 418.

¹⁰⁵ Can. T.S. *supra* note 11.

¹⁰⁶ Elliot-Meisel, *supra* note 104 at 418.

waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.”¹⁰⁷

In addition to this series of actions and inactions, by the United States in response to Canadian assertions of sovereignty, must be added the fact that, although the United States and the European Union have protested the claims of Canadian Arctic sovereignty,¹⁰⁸ most ships which operate in the Arctic do so in compliance with Canadian law.¹⁰⁹ Additionally, the United States has apparently accepted that Canadian laws apply to American commercial vessels.¹¹⁰ Finally, since the end of the Cold War, eco-tourist voyages to the Arctic have become popular and, when such trips take place in the Canadian Arctic, it is done with Canadian permission.¹¹¹

However, this discussion represents only one third of the argument. While it seems that there is some strength to the Canadian assertion that the waters of the Passage are internal by virtue of historic title, it must be considered whether there is greater validity to the American argument that the waters of the Passage form an international strait. As the United States is not a party to UNCLOS, it seems logical to begin this discussion with the position at customary law.

IX. THE AMERICAN ARGUMENT

The customary law governing international straits was set out by the International Court of Justice in the 1949 *Corfu Channel Case*. In that case, the ICJ determined that there was both a geographic and a functional requirement to be met in establishing that a strait is an international strait. Geographically the strait must connect one part of the high seas with another part of the high seas.¹¹² Functionally, which the Court considered the less important of the two requirements, the strait must be useful for international navigation.¹¹³ In determining utility, the Court

¹⁰⁷ Can. T.S. *supra* note 11.

¹⁰⁸ Huebert, “Climate Change” *supra* note 7 at 90.

¹⁰⁹ Brubaker, *supra* note 43 at 279.

¹¹⁰ Brubaker, *supra* note 43 at 277.

¹¹¹ Huebert, “Climate Change” *supra* note 7 at 87.

¹¹² *Corfu Channel Case (Merits)*, [1949] I.C.J. Rep. 4 at 28.

¹¹³ *Ibid.*

accepted evidence of high use (2,884 ships) over a short period of time (one year, nine months) representing a fair number of flags (seven).¹¹⁴ If it is established under customary law that a strait is used for international navigation, innocent passage rights apply.¹¹⁵

Under UNCLOS, the geographic requirement has been extended. A strait may be an international strait if it connects one part of the high seas or an EEZ (Exclusive Economic Zone) with another part of the high seas or an EEZ.¹¹⁶ If this geographic requirement is met, and the strait is used for international navigation, then parties to UNCLOS enjoy “transit rights” through the strait.¹¹⁷ As there is no definition in UNCLOS, the test for an international strait is the same as that articulated in the *Corfu Channel Case*.¹¹⁸ The régime of transit rights created by UNLCOS is friendlier to foreign shipping than that of innocent passage. Transit rights cannot be hampered by the coastal states, and it is generally accepted international standards to which a ship is required to conform, by contrast, coastal states may enact laws relating to innocent passage in some circumstances (generally for the safety of shipping, the security of the coastal state and environmental protection).¹¹⁹

In applying the above criteria to the Northwest Passage, it becomes apparent that proving the assertion that the waters of the Northwest Passage form an international strait is subject to considerable difficulties. It is generally accepted that the Northwest Passage satisfies the geographic requirement.¹²⁰ As the ICJ characterized this geographic requirement as the more important of the two,¹²¹ this provides a boost to claims the Passage is an international strait. However, it seems unlikely that the Northwest Passage would meet the functional definition of an international strait.

While it has been suggested that the functional requirement will be lessened when applied to the ice-choked waters of the Northwest

¹¹⁴ *Ibid* 29.

¹¹⁵ *Ibid* 28.

¹¹⁶ UNCLOS, *supra* note 32 art. 37.

¹¹⁷ UNCLOS, *supra* note 32 art. 38.

¹¹⁸ Pharand, *Canada's Arctic Waters*, *supra* note 43 at § 14.1 (pg. 216).

¹¹⁹ UNCLOS, *supra* note 32 arts. 44, 39 and 21.

¹²⁰ Pharand, *International Straits*, *supra* note 97 at 99, Rothwell, *supra* note 97 at 353-54.

¹²¹ *Corfu Channel Case*, *supra* note 112 at 28.

Passage,¹²² there has been no suggestion that this requirement will be removed in its entirety. A reduction in the functional requirement is supported by simple reality. Clearly, no one would require that the Passage be navigated nearly 3,000 times over a two-year period in order to qualify as an international strait. Such a requirement would be impossible, and it is unlikely that international law would be so restrictively applied. What is unclear is the degree of use which might be required to meet the functional requirement.¹²³ In examining the three factors identified by the ICJ as relevant, number of flags, period of time, and actual transits, it still seems that the Northwest Passage is unlikely to meet even a reduced functional requirement.

It must be conceded that the ships which have made the transit represent a reasonably high number of flags. Indeed, ships carrying seventeen different flags have made the transit.¹²⁴ However, even with this relatively high number of flags, it is extremely doubtful that a Passage which has been transited fewer than 100 times in more than 100 years could be characterized as a strait that is being used for international navigation (to paraphrase the *Corfu Channel Case*).¹²⁵ The same would apply to an examination under UNCLOS. Although the United States asserts that potential use of a strait may be considered in determining whether a particular strait is international, it is generally agreed that only actual use is relevant.¹²⁶ Thus, in asking whether the Northwest Passage is a strait used for international navigation, it is only the ninety-nine transits which have so far been completed, which may form part of the inquiry.

Finally, in assessing the overall strength of the United States position that the Passage is a strait used for international navigation, and thus subject to transit rights, it is useful to remember that the United States is not a party to UNCLOS. The regime of transit rights which the United States claims as a right is a creation, entirely, of UNCLOS. As it is not clear this regime has been accepted as forming a part of custom-

¹²² Rothwell, *supra* note 97 at 354-55.

¹²³ Huebert, "The Shipping News Part II" *supra* note 10 at 301.

¹²⁴ *Arctic Marine Transport Workshop*, *supra* note 3 at Appendix F.

¹²⁵ *Corfu Channel Case*, *supra* note 112 at 28. See also Rothwell, *supra* note 97 at 148.

¹²⁶ Pharand, *International Straits*, *supra* note 97 at 102, Rothwell, *supra* note 97 at 354-55, Brubaker, *supra* note 43 at 267.

ary international law at this time,¹²⁷ even if the United States was correct and the Northwest Passage is a strait used for international navigation, they could, as non parties to the treaty, at best claim innocent passage rights through the Passage.¹²⁸

X. COMPARING THE LEGAL POSITIONS

This examination of current law and practice shows that, while the Canadian position that the waters are historical internal waters is (at best) supportable on the basis of ceded original people's title and (at worst) problematic, the United States position on the subject is (at best) optimistic and (at worst) grounded in wishful thinking. Given that there are problems with the legal positions of both parties, it is unlikely that either the United States or Canada will choose to resort to legal process to settle this dispute.¹²⁹ The dispute involves very significant concerns. Each party has articulated a position which it considers necessary to assure its security and neither is likely to permit a loss of control over a process that will determine rights which will impact such vital interests. Further, the last time the two countries resorted to international legal process (the Gulf of Maine arbitration) neither was satisfied with the outcome.¹³⁰

This examination of Canadian and American assertions, set against current legal requirements and practice, as opposed to the statements of other nations, indicates that Pharand may have been too quick to dismiss the possibility that Canada could prove historic title to the waters of the Arctic. Although it is not clear that Canada could prove such title, it is not clear that such a claim is doomed to failure from the outset. Even if Canada is unable to support a claim to historic title, it is possible that, at a minimum, the current situation admits that the waters of the Passage were made internal by virtue of the 1985-86 baselines and that, the strength of UNCLOS Article 234 permits Canada to restrict the in-

¹²⁷ Brubaker, *supra* note 43 at 268.

¹²⁸ *Corfu Channel Case*, *supra* note 112 at 28.

¹²⁹ Andrea Charron, "The Northwest Passage Shipping Channel; Sovereignty First and Foremost and Sovereignty to the Side" (2005) 7 J. of Mil. & Strat. Stud. 1 at 3-4. Journal of Military and Strategic Studies, online: <<http://www.jmss.org/2005/summer/articles/charron.pdf>>.

¹³⁰ Rothwell, *supra* note 97 at 368.

nocent passage rights which apply to user states. This is the final question which must be examined when assessing the current status of the Northwest Passage in international law.

XI. A THIRD ALTERNATIVE

Before asserting that recent practice suggests that other states are tacitly admitting Canadian historic title, it must be pointed out that, if the baselines established in 1985-86 are valid, the waters of the Canadian Arctic Archipelago are internal (although subject to rights of innocent passage). This is so by virtue of both customary law (as examined above) and by virtue of Article 8(2) of UNCLOS. Although Canada's baselines were protested,¹³¹ subsequent state practice, if it is not sufficient to show acquiescence to historic title, should be sufficient to overcome the effects of the protests to the baselines. No legal challenge has been raised against the baselines and foreign vessels, as indicated above, generally operate in compliance with Canadian laws.¹³² Further, academic commentary has suggested that, based on the factors enumerated in the *Fisheries Jurisdiction Case*, and codified in UNCLOS Article 7, the baselines are justifiable.¹³³

A brief discussion of the factors enumerated in the *Fisheries Jurisdiction Case* and in UNCLOS will suffice to assess Canada's baselines. Essentially, baselines can be used where a coastline is deeply indented or if there is a fringe of islands in the immediate vicinity. A baseline must not depart to an appreciable extent from the direction of the coast and the sea areas within the baselines must be sufficiently closely linked to the nearby land to be subject to the regime of internal waters. In drawing the baselines, account may be taken of interests particular to the region concerned as evidenced by long usage.¹³⁴

In terms of the Canadian Arctic, the baselines which have been established around the outer edge of the Arctic islands are unquestion-

¹³¹ Rothwell, *supra* note 97 at 345.

¹³² Brubaker, *supra* note 43 at 279.

¹³³ Pharand, "Canada's Sovereignty" *supra* note 50 at 331, Rothwell *supra* note 97 at 367.

¹³⁴ UNCLOS, *supra* note 32 art. 7, *Fisheries Jurisdiction Case*, *supra* note 32 at 133, 138.

ably justifiable. In geographic terms, it is sufficient to point out that the baseline regime established by Canada around the Arctic Archipelago must conform to the legal requirements articulated by the ICJ in the *Fisheries Jurisdiction Case*. As such, if a coast were similar to the Norwegian coast, it would be a strong indication that such a maritime area is properly able to be enclosed by baselines. In this connexion, it is worth noting that Judge McNair's dissent in the *Fisheries Jurisdiction Case* compared the Norwegian Coast to the Canadian coast.¹³⁵ If the similarity was sufficient to be apparent to a member of the ICJ in 1951, there seems little reason to doubt that such similarity can support the contention that the Canadian Arctic Archipelago is properly subject to a baseline regime today.

In addition, the baselines which Canada has established can be supported by the presence of the Inuit and their particular interests. The Inuit have for centuries developed cultural practices which range over the area enclosed by the baselines.¹³⁶ The cultural practices which they established over that time required that they move with the seasons.¹³⁷ Moreover, those cultural practices remain central to the Inuit today.¹³⁸ Given the importance of the enclosed area to the Inuit, the similarity with the Norwegian situation and the fact that, in that case, the ICJ characterized that type of offshore archipelago as constituting, "a whole with the mainland, it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters,"¹³⁹ any challenge to the Canadian delimitations is very likely to meet with failure. It is also worth considering that, if the waters of the Archipelago were simply made internal by the establishment of the baselines, there might be no need to insist on a formal challenge to the delimitation as, by virtue of Article 8(2) of UNCLOS a right of innocent passage would apply. Such rights would permit use of the Northwest Passage by foreign flagged ships.

It is also possible that innocent passage rights in the Arctic might not be incompatible with Canadian needs. Innocent passage rights, as

¹³⁵ *Fisheries Jurisdiction Case*, *supra* note 32 at 169.

¹³⁶ *Inuit of Canada*, *supra* note 79 at 2.

¹³⁷ *Inuit of Canada*, *supra* note 79 at 6.

¹³⁸ *Inuit of Canada*, *supra* note 79 at 7, 16.

¹³⁹ *Fisheries Jurisdiction Case*, *supra* note 32 at 128.

detailed by UNCLOS Article 19, set limits on what a foreign vessel is permitted to do in the waters of the coastal state. Although it does not specifically require that a foreign vessel submit to all the laws of a coastal state, it may be that in ice covered waters, innocent passage rights are modified by the impact of Article 234 (the so-called Canadian clause). It has been suggested that, even absent ratification of UNCLOS by Canada, the country was able to benefit from the effects of Article 234 as it was a generally accepted provision even absent ratification.¹⁴⁰ As such, it is possible that the acquiescence of other states to Canadian laws is based, not on the strength of Canada's historic title, but because Canada, by customary and conventional international law, is permitted to enact more stringent pollution prevention measures in its arctic waters, restricting the rights of innocent passage which user states otherwise enjoy.¹⁴¹

Canada has asserted that the waters are historical internal waters because such a position was deemed necessary to protect Canadian sovereignty and security. However, it has never been the Canadian position that they would not permit use of the Arctic waters by foreign ships.¹⁴² If the impact of the Canadian clause is such that innocent passage in ice covered areas requires compliance with stringent environmental laws (as opposed to "normal" rights of innocent passage which only require abstention from acts of wilful or serious pollution)¹⁴³ it is submitted that such a situation would be compatible with Canadian needs. Inspections to ensure compliance with environmental laws added to the requirements for passage to be innocent (found in UNCLOS Article 19) would adequately protect both the Arctic environment and Canadian sovereignty. Therefore, it is possible that state practice is leading to a situ-

¹⁴⁰ Ted L. McDorman, "Editorial: Canada Ratifies the 1982 United Nations Convention on the Law of the Sea: At Last" (2004) 35 *Ocean Dev. Int'l L.* 103 at 108.

¹⁴¹ Brubaker, *supra* note 43 at 269 suggested that practice was leading to the primacy of Article 234 for surface transits of ice covered waters.

¹⁴² See for example the statement made by Jean Chrétien, then Minister of Indian Affairs and Northern Development, on April 16, 1970 that, "[t]he government wants Canadian Arctic waters to be opened up to commercial shipping." *House of Commons Debates*, 006 (April 16, 1970) at 5938 (Hon. Jean Chrétien). The Canadian position was also reported by Johnson *supra* note 82 at 149 and Huebert, "Climate Change" *supra* note 7 at 93.

¹⁴³ UNCLOS, *supra* note 32 art. 19(2)(h).

ation in which one article of UNCLOS, Article 234, is being read as modifying other provisions of the treaty, tipping the balance of rights, in this case, in favour of the coastal states. Indeed, this suggestion is compatible with the theory that state practice in the Arctic was already resulting in the development of a circumpolar customary law outside of UNCLOS.¹⁴⁴

XII. THE STATUS QUO: SHOULD WE MAKE A CHANGE?

The only remaining question is whether a negotiated settlement is preferable to letting a *modus vivendi* develop. Canada may want to examine the possibility of renegotiating the Agreement with the United States over the Passage. Now that it is possible for ice strengthened ships, rather than only ice breakers, to navigate the Passage, the current Agreement may no longer give adequate protection to Canadian interests. The likelihood of any renegotiation, when assessed in light of current conditions, is however, minimal. It has been suggested recently that comments by the former United States Ambassador to Canada, Paul Celluci, should be taken as an invitation to negotiate. Celluci, before leaving Canada, indicated that the United States is currently looking at everything through the terrorism prism and, as such, might be willing to make concessions on the Northwest Passage if it is in the United States' security interests.¹⁴⁵

Practically, such concessions are unlikely to materialize. It was argued during the Cold War that an admission that the Northwest Passage is internal Canadian waters would benefit United States security by permitting the regulation, or exclusion, of Soviet ships from the Passage. This was not a strong enough argument to sway the United States in 1970 or 1985; American leaders considered it more important to be able to freely navigate their own ships than to restrict the navigational

¹⁴⁴ Brubaker, *supra* note 43 at 279.

¹⁴⁵ Arcticnet, *supra* note 18. See also Franklyn Griffiths, "The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice" (2003) 58 Int'l J. 257 at 270-271. Griffiths argues the current context may make the United States challenge to Canadian sovereignty less likely.

rights of Soviet ships in one area.¹⁴⁶ Similarly, if the United States today considers that its interests are best served by maintaining a position consistent with free navigation, they are unlikely to concede Canadian sovereignty and control over the Passage. Therefore; a legal resolution is unlikely as neither party will want to lose control of the process and, a bilateral agreement is unlikely as only one party, Canada, currently has a reason to upset the status quo.¹⁴⁷

CONCLUSION

The question of the status of the Northwest Passage has garnered increasing attention by academics, and Canadian leaders have made statements asserting Canadian Arctic sovereignty generally. However, the reality may be that Canada's position will strengthen if it delays a final determination the status of the Passage. Although it is in Canada's interest to alter the current status quo with regard to the 1988 Agreement with the United States, it is not in Canada's interest to do anything would will upset the general compliance with its laws which it currently enjoys. Regardless of the reasons for compliance, the effect is for Canada to secure the control it desires. The longer the compliance continues, the more likely it becomes that compliance will be recognized as an obligation imposed by customary law. Canada should attempt to characterize derogations from compliance as unjustifiable breaches of customary law. In the case of Canadian allies, like the United States, justification of such a breach could not even be based upon necessity, as Canada is unlikely to refuse passage to allied nations, especially in a situation of emergency.

Given that time and the continuation of current practice can only strengthen Canada's position, one can expect that while Canadian leaders will continue to assert Arctic sovereignty and continue to take reasonable unilateral measures to secure that sovereignty on a domestic level, they will do nothing to cause a reaction on the international level.

¹⁴⁶ Huebert, "The Shipping News Part II" *supra* note 10 at 305.

¹⁴⁷ Elliot-Meisel, *supra* note 104 at 421. Elliot-Meisel suggests that, while Canada arguably has a stronger incentive to settle the dispute, a resolution is also in the interests of the US. For an argument that Canada is likely to maintain the status quo, see Charron, *supra* note 129 at 25.

Although certainty regarding the status of the Passage might be desirable, it is not yet an urgent issue urgency, such that should Canada risk spoiling the peaceful compliance it currently enjoys.