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The South China Sea Award: prompting a revived interest in the validity of the Canada's historic internal waters claim?

Krittika Singh and Timo Koivurova

Abstract

In the South China Sea Arbitration 2016, the Tribunal ruled on the criteria to determine the historic status of waters. Historic title claims are exceptional as they create rights and obligations outside the United Nations Convention on the Law of the Sea (UNCLOS). This article examines the Canadian historic title claim to the Northwest Passage in light of the ruling. First, the article will go into the Tribunal's analysis of the criteria and standard of evidence required for establishing a historic rights/title claim (specifically, China's claim in the South China Sea). Next, Canada's claim will be tested against the three general criteria (effective exercise of jurisdiction, passage of time and acquiescence by foreign states). The goal of this article is to highlight the positive and negative aspects of Canada's historic internal waters claim.

Keywords: historic rights, historic title, internal waters, evidence, South China Sea, Northwest Passage

1. Introduction:

The South China Sea dispute between the Philippines and China decided (also) a question of law that is of significance to Canada's historic claim in its northern waters that include the famous Northwest Passage(s). Both Canada and China invoke such historic rights to claim sovereignty over maritime areas.¹ While the Canadian claim relates to waters lying to the north of its coastline (including the Northwest Passage), China's claim refers to waters located (also) far off its coast, in the South China Sea. Canada asserts full sovereignty over shipping in the Arctic waters whereas China

¹ The article only relates to sovereignty over maritime areas. While sovereignty over islands of the Arctic Archipelago to the north of Canada is settled (with the exception of the tiny Hans Island, located in the Kennedy Channel portion of Nares Strait between Ellesmere Island and northwest Greenland. See Michael Byers, *International Law and the Arctic* (Cambridge University Press, 2013) 10-16; See also David H. Gray, 'Canada's Unresolved Maritime Boundaries' (1997) 5(3) *IBRU Boundary and Security Bulletin* 61, 68-69. 'Canada's sovereignty claim today is concerned with the waters of the Arctic archipelago, which encompass the various routes of the Northwest Passage.' See Donald McRae, 'Arctic Sovereignty? What Is at Stake?' | *Canadian International Council* (2007) 64 *Canadian Institute of International Affairs* and the *Centre for International Governance Innovation* 1, 3,6.) The sovereignty issue with respect to islands in the South China Sea is still unresolved. See Ministry of Foreign Affairs, People's Republic of China, Briefing by Xu Hong, Director General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines (12 May 2016), available at <www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1364804.shtml>

claims exclusive rights to the resources of the South China Sea.² Both nations have proceeded differently in making their claims. Canada enacted legislation in 1985 towards its historical claim, establishing straight baselines to define the outer limit of its historic internal waters.³ China has not enacted legislation on the matter, and its claim was inferred by the South China Sea Tribunal from official statements made and diplomatic correspondence - expressly linking the nine-dash line to its historical rights in the South China Sea.⁴ References to historical rights are also contained in its domestic legislation implementing the maritime zones under the United Nations Convention on the Law of the Sea (UNCLOS hereafter).⁵

² See McRae (n 1). Also see (n 9) and paragraphs 207-214 (especially 214) of the *The South China Sea Arbitration Award* [2016] PCA Case No 2013-19 67 (Permanent Court of Arbitration).

³ The full statement made on 10 September 1985, by the Secretary of State for External Affairs, J.Clark: "For a long time, Canada has upheld a sovereignty claim in the Arctic, embracing land, sea and ice and extending to the seaward facing coast of the Arctic Archipelago. No previous government however has defined its precise limits or delineated Canada's internal waters and territorial sea in the Arctic. This government proposes to do so. An order in council establishing straight baselines around the outer perimeter of the Canadian Arctic archipelago has been signed today and will come into effect on January 1, 1986. These baselines define the outer limit of Canada's historic internal waters. Canada's territorial waters extend 12 miles seaward of the baselines...The exercise of functional jurisdiction in Arctic waters is essential to Canadian interests. But it can never serve as a substitute for the exercise of Canada's full sovereignty over the waters of the Arctic archipelago. Only full sovereignty protects the full range of Canada's interests. The full sovereignty is vital to Canada's security. It is vital to Canada's Inuit people. And it is vital even to Canada's nationhood." See Erik Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Nijhoff 1993) 99. See also M Irish & A de Mestral, *Canadian Practice in International Law During 1985: Parliamentary Declarations*, (1986) 24 Canadian Y.B.Int'l L. 416-420; (1985) 24 Int'l Legal Materials 1723-1728.

⁴ On 7 May 2009, China sent two Notes Verbales to the UN Secretary-General in response to Malaysia and Vietnam's Joint Submission of the preceding day to the Commission on the Limits of the Continental Shelf (CLCS). In its notes, China stated as follows: "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community." Appended to China's notes was a map depicting the 'nine-dash line' (the 2009 Map). See also Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (Annex 191), No. CML/18/2009 (7 May 2009) (Annex 192). According to the Tribunal, China has repeated variations on its formula in its diplomatic correspondence and in the public statements of its official spokespersons, but has never expressly clarified the nature or scope of its claimed historic rights nor has it ever clarified its understanding of the meaning of the nine-dash line. See Paragraphs 180- 187 of the *The South China Sea Arbitration Award* (n 2). *South China Sea Arbitration Award* [2016] PCA Case No 2013-19 67. See also Paragraph 160 of the Award on Jurisdiction.

⁵ *ibid* Paragraph 179. Article 14 of the *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998) provides: "the provisions in this Law shall not affect the rights that the People's Republic of China has been enjoying ever since the days of the past." The translation maintained by the UN Department of Ocean Affairs and the Law of the Sea translates Article 14 as: "The provisions of this Act shall not affect the historical rights of the People's Republic of China." Available at <www.un.org/depts/los/legislationandtreaties/pdffiles/chn_1998_eez_act.pdf>

Since the Philippines took China to the Arbitral Tribunal because of the latter's alleged illegal historic waters claim, the Arbitral tribunal took a stance on the criteria to judge the historic status of waters while the UNCLOS does not provide any guidance on the issue. It is of interest whether we can use this judicial guidance in studying another claim for historic rights over marine areas - that of Canada's claim over its northernmost waters. As reviewed, these waters are different from the waters claimed by China but there are similarities (in the source of rights asserted), which enable us to test the Canadian case against the criteria laid down by the Arbitral tribunal. While historic waters are covered by customary international law, many questions have remained open, because there have not been authoritative sources providing exact content to how historic waters claims can be proven. The South China Sea Award elaborates the criteria and applies it to a dispute between states, resulting in an authoritative pronouncement of how historic waters claims can be established. This fact alone makes it timely to revisit the validity of the Canadian historic title claim. It is of importance to ask whether the Canadian historic internal waters claim is legally justifiable if studied against the criteria the Arbitral Tribunal elaborated. Since the Chinese and Canadian historic internal waters claims are similar in their expansive nature and source of such rights, they can be compared and contrasted.

In this article, we will first look into the principles examined by the Tribunal for historic rights claims over maritime areas in general. Then we will apply these principles towards the study of the Canadian historic title claim. We will finally conclude whether the Canadian claim can be seen to be valid in international law on the basis of the requirements of proof set out by the tribunal.

2. Criteria for determining Historic Rights claims over maritime areas

Maritime sovereignty and sovereign rights arise from sovereignty over land. The UNCLOS entitles the coastal state to various zones projected from its coastal baselines. There are corresponding rights and jurisdiction and these differ in each zone.⁶ Both Canada and China claim maritime sovereignty that cannot be based on UNCLOS since the negotiators left historic waters claims out of the scope of the

⁶ *ibid.*

Convention. China's claim, represented by the nine-dash line, extends beyond its exclusive economic zone (and that of Vietnam and Philippines).⁷ Canada encloses waters as its historic internal waters, which would otherwise also be territorial seas (including innocent passage rights for foreign vessels).⁸ Both of these claims are thus exceptional in nature, based on rights existing independently of the Convention.⁹

These rights, called *historic rights* broadly, find their source in principles of customary international law.¹⁰ Expressed in different terms (historic rights, historic title, historic bays, historic waters), these are rights that arise from historical processes over maritime areas. Other than three oblique references, these rights did not find their way into the UNCLOS.¹¹ The South China Sea Award systematically analyzed these historic rights.¹²

⁷ The claim has been noted above, a map attached to the claim depicts the geographic extent (or the nine-dash line) (the "2009 Map"). See paragraph 206 of *the South China Sea Arbitration Award*: "As far as the Tribunal is aware, the most insightful formulation by China of its claims in the South China Sea, beyond its claim to sovereignty over islands and their adjacent waters, is as a claim to "relevant rights in the South China Sea, formed in the long historical course." – Ministry of Foreign Affairs, People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Award by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 October 2015) (Annex 649).

⁸ Refer to (n 3)

⁹ *The South China Sea Arbitration Award* (n 2). Paragraph 207: "Much of the area encompassed by the 'nine-dash line', would also fall within a claim to an exclusive economic zone or continental shelf drawn from the various features of the Spratly Islands... where however, China has asserted rights in areas beyond the maximum entitlements that could be claimed under the Convention, the Tribunal considers that such assertions indicate a claim to rights existing independently of the Convention." In Paragraph 211, the Tribunal concludes that China does claim rights to petroleum resources and fisheries within the 'nine-dash line' on the basis of historic rights existing independently of the Convention. See Paragraphs 207-214 for the Tribunal's analysis of the 'Nature of China's Claimed Rights.'

¹⁰ There exists, within the context of the law of the sea, a cognizable usage among the various terms for rights deriving from historical processes. The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law.... does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'." Finally, a 'historic bay' is simply a bay in which a State claims historic waters. See Paragraph 225 of the *South China Sea Award* (n 2); Also see *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (1982) Judgment ICJ Rep 18, paragraph 100.

¹¹ The Convention does not contain substantive provisions on 'historic rights'. There are passing references: Articles 10(6) and 298(1)(a) refer to 'historic bays' and articles 15 and 298 (1)(a) refer to 'historic title'.

¹² In doing so, the tribunal relied heavily on the memorandum on historic waters produced by the UN Secretariat: 'Juridical Regime of Historic Waters, Including Historic Bays' (1962) UN Doc.

We find three main contributions of the award for the study and application of ‘historic rights’ principles.¹³ *First*, it synthesized the historic rights principles, which would be useful while ‘categorizing’ other comparable claims.¹⁴ The Tribunal itself used this categorization while analyzing the nature of China’s claim. It distinguished between ‘historic rights’ and ‘historic title’ claims: while historic title is used specifically to refer to historic sovereignty over land or maritime areas, the term historic rights is more general in nature. It may include sovereignty, but also more limited rights such as fishing rights or rights of access that fall well short of a claim of sovereignty.¹⁵ The Tribunal circumscribed the scope of China’s claim and placed it in the category of ‘historic rights falling short of sovereignty’.¹⁶ Thus, it ruled out full sovereignty. *Second*, the Tribunal discussed the compatibility of historic rights with UNCLOS.¹⁷ It separated China’s historic rights claim into two parts - rights

A/CN.4/143 (hereinafter referred to as 'the UN Study'). Previous cases have dealt with one or more of the historic rights terminology but not all simultaneously. For instance, ‘historic title’ was briefly analyzed while discussing the straight baselines dispute in the *Anglo-Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116. The doctrine of ‘historic bay’ was discussed while deciding on the delimitation of the Gulf of Fonseca, a ‘historic bay’ in *Land, Island and Maritime Frontier Dispute (El Salvador and Nicaragua (intervening) v Honduras)* [1992] ICJ Rep. The Court distinguished between historic fishing rights and historic title that would bear on the entitlement to maritime zones in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (2001) Merits ICJ Rep 40. Also see *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (n 9) and paragraph 224 of the *South China Sea Arbitration Award* (n 2).

¹³ See Yoshifumi Tanaka, ‘Reflections on Historic Rights in the South China Sea Arbitration (Merits)’ (2017) 32 *The International Journal of Marine and Coastal Law* 482: The Tribunal in the South China Sea Arbitration made a significant contribution to clarify the concept of historic rights and the relationship between historic rights and the Convention.

¹⁴ Categorization seems to be an essential step while deciding on historic rights claims. Also see Tanaka (n 13) 466: ‘Given that the lack of precision of the various "historic concepts" may entail the risk of encouraging States to make historic claims of increasing scope to marine spaces, the clarification of the concept of historic rights and that of historic title by the Tribunal can be thought to be a welcome development’.

¹⁵ *Supra* (n 10)

¹⁶ According to the tribunal, historic title over maritime areas is typically exercised either as a claim to internal waters or as a claim to the territorial sea (See paragraph 222 of the Award (n 2)). The Tribunal concluded that China does not claim historic title to the waters of the South China Sea, but rather a constellation of historic rights short of title. For the tribunal, the dispositive proof that China’s claim is not one to historic title lies in China’s conduct, which according to the tribunal is incompatible with a claim that the waters of the South China Sea constitute China’s territorial sea or internal waters. See Paragraphs 207-214, 221, 227-229 of the *The South China Sea Arbitration Award* (n 2).

¹⁷ The Tribunal conducted a study of Articles 293, 311 of UNCLOS and Article 30 of the Vienna Convention on the Law of Treaties. Article 311 sets out the relationship between the Convention and other international agreements. According to the Tribunal, the provision applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement. The Tribunal formulated four propositions for interpretation:

(a) Where the Convention expressly permits or preserves other international agreements, Article 311(5) provides that such agreements shall remain unaffected. The Tribunal considers that this provision equally applies where historic rights, which may not strictly take the form of an agreement, are expressly permitted or preserved, such as in Articles 10 and 15, which expressly refer to historic bays

compatible with the Convention and those in excess of and incompatible with it.¹⁸ It stated that the Convention supersedes earlier rights and agreements to the extent of any incompatibility.¹⁹ In doing so, the tribunal gave primacy to the system of maritime zones created by the Convention and the intention of its drafters.²⁰ *Third*, the Tribunal laid out parameters or criteria (three-element test) for a valid historic title or historic rights claim to be established: a. effective exercise of jurisdiction, b. passage of time and c. acquiescence by foreign states.²¹ The Tribunal weighed the seemingly compatible claims against these three criteria.²² China did not pass the test according to the Tribunal. The Tribunal's reasoning is presented along with a description of these three elements in the next section.

and historic titles. (b) Where the Convention does not expressly permit or preserve a prior agreement, rule of customary international law, or historic right, such prior norms will not be incompatible with the Convention where their operation does not conflict with any provision of the Convention or to the extent that interpretation indicates that the Convention intended the prior agreements, rules or rights to continue in operation. (c) Where rights and obligations arising independently of the Convention are not incompatible with its provisions, Article 311(2) provides that their operation will remain unaltered. (d) Where independent rights and obligations have arisen prior to the entry into force of the Convention and are incompatible with its provisions, the principles set out in Article 30 (3) of the Vienna Convention and Article 293 of the Convention provide that the Convention will prevail over the earlier, incompatible rights or obligations. See paragraphs 235-238 of the *South China Sea Arbitration Award*.

¹⁸ Paragraphs 246, 261- 263 of the *The South China Sea Arbitration Award* (n 2).

¹⁹ The Tribunal concludes that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention. Upon China's accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law, and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention. This should not be considered exceptional or unexpected. The Convention was a package that did not, and could not fully reflect any State's prior understanding of its maritime rights. Accession to the Convention reflects a commitment to bring incompatible claims into alignment with its provisions, and its continued operation necessarily calls for compromise by those States with prior claims in excess of the Convention's limits. See Paragraphs 262-263 of the Award.

²⁰ Building on prior international law and the 1958 Convention on the Law of the Sea, UNCLOS establishes limits for maritime entitlements and comprehensively sets out the rights and obligations of coastal States, as well as other States, within such maritime zones. The intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasizes the desirability of establishing "a legal order of the seas." The Convention supersedes earlier rights and agreements to the extent of any incompatibility. See Paragraphs 231, 245, 246 of *The South China Sea Arbitration Award* (n 2).

²¹ See paragraph 222 of the Arbitration Award; See paragraphs 80-148, 185 of the UN Study.

²² "...the entry into force of the Convention had the effect of superseding any claim by China to historic rights to the living and non-living resources within the 'nine-dash line' beyond the limits of China's maritime zones as provided for by the Convention...the Tribunal nevertheless considers it important, for the sake of completeness, to distinguish among China's claim to historic rights and to separate those that are, in fact, in excess of and incompatible with the Convention, from those that are not..." See Paragraph 263 of the *The South China Sea Arbitration Award* (n 2).

3. *The Uneasy Parallel: the Historic Title Test*

The tribunal in the South China Sea Arbitration applied and clarified the fairly uncertain criteria for historic waters found in general international law (also laid down in the UN Juridical Study) to China's historic rights claim.²³ In this part, we will first consider the Award, and then flesh out the parameters for historic waters from secondary sources to assess Canada's claim in its northerly waters.²⁴ Rationally speaking, if China's historic rights (short of sovereignty) claim was cut short in terms of these requirements, Canada's historic title (full scale sovereignty) claim might require an even higher burden of proof than historic rights. Is Canada poised to pass the test? We will consider the basic evidence strengthening and weakening the claim.

3.1 *Effective Exercise of Jurisdiction*

The Tribunal stated, "the scope of a claim to historic rights depends upon the scope of the acts that are carried out in the exercise of the claimed right."²⁵ China claims (exclusive) historical rights to the living and non-living resources in the waters of the South China Sea.²⁶ The tribunal found the evidence submitted as 'irrelevant' for the purpose of the claim.²⁷ The Tribunal states further: 'historic rights are in most

²³ The Tribunal notes from the UN Study that historic waters would be internal waters or territorial sea according to whether the sovereignty exercised over them in the course of the development of historic title was sovereignty as over internal waters or sovereignty as over the territorial seas. It then goes on to explain the process of development of such title based on the three criteria or factors. See Paragraph 222 of the *The South China Sea Arbitration Award* (n 2).

²⁴ For the secondary sources, see 'Juridical Regime of Historic Waters, Including Historic Bays' (n 12). It reviews State practice, arbitral and judicial decisions, codification projects and the opinion of writers. Also see D.P.O'Connell, *The International Law of the Sea* (Vol. I (1982)), 420; Clive Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff Publishers 2007). Also see Franckx (n 3). Also see Michael Byers and Suzanne Lalonde, 'Who Controls the Northwest Passage?' <<http://liu.xplorex.com/sites/liu/files/Publications/7Jun2006ArcticWatersDiscussionPaper.pdf>>. Pharand lists additional parameters to be considered for establishing historic title: (1) the legal effect of protest, (2) the vital interests of the claimant State, and (3) the burden of proof. See Pharand, 'Requirements of historic waters' in Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge University Press 1988).

²⁵ See paragraph 266 of the *The South China Sea Arbitration Award* (n 2).

²⁶ See the Tribunal's Considerations and the nature of China's claimed rights in the South China Sea in paragraphs 207-214 of the *South China Sea Arbitration Award* (n 2).

²⁷ " Paragraph 266... The scope of a claim to historic rights depends upon the scope of the acts that are carried out as the exercise of the claimed right. Evidence that either Philippines or China had historically made use of the islands of the South China Sea would at most support a claim to historic rights to those islands. Evidence of use giving rise to historic rights with respect to the islands however would not establish historic rights to the waters beyond the territorial sea. The converse is also true: historic usage of the waters of the South China Sea cannot lead to rights with respect to the islands there. The two domains are distinct. Paragraph 264. In its public statements, diplomatic

instances, exceptional rights. They accord a right that a State would not otherwise hold, were it not for the operation of the historical process giving rise to the right and the acquiescence of other States in the process.’²⁸ In the Tribunal’s view, China’s historical record of activities in the South China Sea demonstrates no exceptional rights but simply an exercise of high seas freedoms permitted under international law. These, according to the tribunal, cannot form the basis for the emergence of a historic right.²⁹ The tribunal then goes on to establish what would be adequate evidence for establishing historic rights in the South China Sea:

270. Historical navigation and fishing beyond the territorial sea cannot form the basis for the emergence of a historic right. Evidence that merely points to even very intensive Chinese navigation and fishing in the South China Sea would be insufficient. Instead, in order to establish historic rights in the waters of the South China Sea, it would be necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right. In practice, to establish the exclusive historic right to living and non-living resources within the ‘nine-dash line’, which China now appears to claim, it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced in such restrictions. In the Tribunal’s view, such a claim cannot be supported. The Tribunal is unable to identify any evidence that would suggest that China historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea. With respect to the non-living resources of the seabed, the Tribunal does not even see how this would be theoretically possible. Seabed mining was a glimmer of an idea when the Seabed Committee began the

correspondence, and in its public Position Paper of 7 December 2014, China has repeatedly asserted sovereignty over the Spratly Islands and Scarborough Shoal. According to China, its nationals have engaged in navigation and trade in the South China Sea and the activities of Chinese fishermen in residing, working, and living among the Spratly Islands “are all manifestly recorded in Geng Lu Bu (Manual of Sea Routes) which was passed down from generation to generation among Chinese fishermen.” There is indeed much interesting evidence-from all sides- that could be considered by a tribunal empowered to address the question of sovereignty over the Spratly Islands and Scarborough Shoal. This Tribunal, however, is not empowered to address that question. For its part, the Philippines has likewise argued about the historical limits of China’s land territory, the degree of China’s historical commitment to oceangoing trade and navigation, and China’s historical knowledge concerning the Spratly Islands. In the Tribunal’s view, however, much of this evidence- on both sides- has nothing to do with the question of whether China has historically had rights to living and non-living resources beyond the limits of the territorial sea in the South China Sea and therefore is irrelevant to the matters before this Tribunal.

²⁸ Paragraph 268 of the *The South China Sea Arbitration Award* (n 2).

²⁹ *ibid* paragraph 269. Prior to the introduction of the Convention system- and certainly prior to the Second World War- the international legal regime for the oceans recognized only a narrow belt of territorial sea and the vast areas of high seas that comprised (and still comprise) the majority of the oceans. Under this regime, nearly all of the South China Sea formed part of the high seas, and indeed China’s Declaration of the Government of the People’s Republic of China on China’s Territorial Sea of 4 September 1958 expressly recognizes that it applies to “the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.” For much of history, therefore, China’s navigation and trade in the South China Sea, as well as fishing beyond the territorial sea, represented the exercise of high seas freedoms. China engaged in activities that were permitted to all States by international law, as did the Philippines and other littoral States surrounding the South China Sea. Before the Second World War, the use of the seabed, beyond the limits of the territorial sea, was likewise a freedom open to any State that wished to do so, although as a practical matter the technological ability to do so effectively has emerged only recently...”

negotiations that led to the Convention. Offshore oil extraction was in its infancy and only recently became possible in deep-water areas...With respect to the seabed, the Tribunal does not see any historical activity that that could have been restricted or controlled, and correspondingly, no basis for a historic right.”

It is useful now to turn to secondary sources, to which also the Tribunal accords relevance, for a more detailed analysis of the sub-elements. The UN Juridical study states: the first requirement to be fulfilled in order to establish a basis for a title to historic waters can be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming State. This can be broken down into three sub elements: the scope of authority, acts by which it can be exercised, and effectiveness.³⁰

3.1.1 Scope of the authority:

The scope of the authority required to form a basis for a claim to historic waters will depend on the scope of the claim itself.³¹ As noted above, the South China Sea Tribunal also commented on this sub-element when it considered the scope of China’s claim in light of its conduct in the South China Sea.³² It deduced the ‘evidence’ from the Chinese side from China’s public statements, diplomatic correspondence and its public position Paper. The Philippines submitted evidence in support of its position. The Tribunal held that there was inadequate evidence from both sides.

3.1.2 The acts by which it can be exercised

In the first place, the acts must emanate from the State or its organs. The acts must be public (they must be acts by which the State openly manifests its will to exercise authority over the territory). The acts must have the notoriety that is normal for acts of

³⁰ Paragraph 84 of the UN Study.

³¹ The UN Study further elaborates: there can hardly be any doubt that the authority that a State must continuously exercise over a maritime area in order to claim it validly as “historic waters” is sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters. See paragraphs 85-87 of the ‘Juridical Regime of Historic Waters, Including Historic Bays’ (n 12).

³² China did not officially submit its case. The South China Sea Tribunal stated in its Award: “In the absence of a more specific indication from China itself, it necessarily falls to the Tribunal to ascertain, on the basis of conduct, whether China’s claim amounts to ‘historic title’.” See paragraph 206 of *The South China Sea Arbitration Award* (n 2).

State. Secret acts could not form the basis of a historic title, the other State must have the opportunity to know what is going on.³³

3.1.3 Effectiveness

Sovereignty must be effectively exercised, i.e., the intent of the State must be expressed by deeds and not merely by proclamations.³⁴ Examples of deeds: keeping foreign ships away or foreign fishermen away from the waters claimed as historic waters.³⁵ The Tribunal concluded that China's activities in the South China Sea were not 'effective' to establish sovereignty over the waters.³⁶

3.2 *Passage of Time*

The UN Study states that a State must have maintained its exercise of sovereignty over the area for a considerable time. Thus 'usage', in terms of a continued and effective exercise of sovereignty over the area by the State claiming it is required for the establishment of title to historic waters.³⁷ The activity from which the required usage must emerge is consequently a repeated or continued activity of the same State. The passage of time is essential. The Study states further that no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment when sufficient time has elapsed for the usage to emerge. It will be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage.³⁸

3.3 *Acquiescence by Foreign States*

According to the UN Study, there are three sub-elements to this: (i) what kind of opposition would prevent the historic title from emerging, (ii) how widespread in

³³ Paragraphs 89-97 of the UN Study.

³⁴ Ibid. Paragraphs 98-105. The Study states an exception: It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. Some scholars recognize an exception for a special geographic situation. See (n 54) below. The UN Study states that it is essential that to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken.

³⁵ Ibid.

³⁶ As discussed above, exercise of former high seas freedoms not enough.

³⁷ Also see Clive Symmons, 'Chapter 13: The Need for Effective Exercise of Jurisdiction' in Symmons (n 24).

³⁸ Paragraphs 101-105 of the UN Study.

terms of the number of opposing States must the opposition be, and (iii) when must the opposition occur.³⁹

3.3.1 Opposition

The Study quotes Fitzmaurice: “Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country’s right, by resistance to the *enforcement* of the claim, or by counter-action of some kind.”⁴⁰ More important than establishing a list of acts is to emphasize that whatever the acts they must effectively express a sustained opposition to the exercise of sovereignty by the coastal State over the area in question. “The protest must be an effective one depending on what the circumstances require.”⁴¹

3.3.2 How widespread must the opposition be

The Study states: “the question of opposition is a question of appreciation, not a question of arithmetic and the opposition of one State in view of the circumstances of the particular case may well be of greater importance than that of another State”.⁴²

3.3.3 Time of opposition

The opposition must have been effectively expressed before the historic title came into being.⁴³ The length of time necessary for such historic right to emerge is a matter of judgment; it must be considerable, but no precise time can be indicated.⁴⁴ Time cannot begin to run until the exercise of sovereignty has begun. The exercise of sovereignty must be effective and public and the time can therefore not begin to run until these two conditions have been fulfilled.⁴⁵

4. *Analysis of the Canadian historic internal waters claim*

³⁹ Paragraph 112 of the UN Study.

⁴⁰ Paragraph 114 of the UN Study.

⁴¹ Paragraph 115 of the UN Study.

⁴² Paragraph 118 of the UN Study.

⁴³ Paragraph 121 of the UN Study.

⁴⁴ Paragraph 123 of the UN Study.

⁴⁵ Paragraph 124 of the UN Study.

In the South China Sea Award, the Tribunal analyzed China's conduct in the South China Sea to understand the nature and scope of its claim. In this section, we will analyze Canada's activities in the Arctic Archipelago to evaluate whether Canada meets the three requirements of effective exercise of jurisdiction, passage of time and acquiescence by foreign states.⁴⁶

First, on official claiming, Canada started articulating its claim over the waters of the Arctic Archipelago in response to transits through the Northwest Passage by the *Manhattan* in 1969 and reasserted it following the *Polar Sea* transit in 1985.⁴⁷ McRae notes: 'Control over the Northwest Passage lies at the heart of the Canadian Arctic Sovereignty issue'.⁴⁸ Until the *Manhattan* voyage in 1969, there was no practical need for the country to demonstrate sovereignty over the waters.⁴⁹ Over the fifteen years (from 1970 to 1986), Canada used different juridical bases to frame its claim.⁵⁰ We will refer to the 'ambiguity' this created while evaluating the historic title claim.

Canada claims historic title over the waters north of its coastline, i.e., internal waters status for these waters.⁵¹ McRae states in this respect:

⁴⁶ See Sections 3.1, 3.2, 3.3 of the article.

⁴⁷ See Franckx (n 3). Canadian Arctic policy in the Arctic is characterized by a foreign action-Canadian reaction pattern. In the period of relative tranquility following the *Manhattan* crisis, characterized by an absence of direct foreign challenges, there appeared no rush for the government did not elaborate on the juridical basis to claim sovereignty over the Arctic waters. Or as stated by an author: "It was embarrassing to be caught unprepared by the *Manhattan* in 1969, it is inexcusable to be in the same state sixteen years later." Also see P. Burnet, 'Paper Sovereignty' (1985) 13 N. Persp. (No.3) 3.

⁴⁸ McRae (n 1).

⁴⁹ *ibid.* In 1963 Ivan Head wrote, "It is highly unlikely that uninterrupted surface passage from the Labrador Sea to either the Arctic Ocean or the Beaufort Sea, or *vice versa*, will ever be a reality. Future demands for the right of innocent passage through the archipelago are speculative to a degree." Transits of the Passage had been few, and they had generally been Canadian. "The voyage of the *Manhattan* awakened Canada to the possibility that there would be commercial shipping through the Northwest Passage. It also opened eyes to the enormous potential for environmental damage if oil tankers were eventually to transit Arctic waters, and it reawakened interest in the debate over sovereignty over the waters of the Arctic."

⁵⁰ Franckx (n 3) makes a note of the theories put forward by Canadian scholars to support a sovereignty claim over Arctic waters: sector theory, ice is land theory, historic title, straight baselines, functional pollution jurisdiction; McRae (n 1). Canada itself threw away some of these theoretical formulations (the sector theory, Ice-is –land theory) through its actions.

⁵¹ The government did not legislate on this subject until 1985. See Franckx (n 3), the relevant portion from the full statement made on 10 September 1985, by the Secretary of State for External Affairs, J.Clark: "...An order in council establishing straight baselines around the outer perimeter of the Canadian Arctic archipelago has been signed today and will come into effect on January 1, 1986. These baselines define the outer limit of Canada's historic internal waters..." A letter of the Legal Bureau of 17 February 1973 had stated that Canada "claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada on a historical basis, although they have not been declared as such in any

‘Canada’s Arctic sovereignty claim today is concerned with the waters between the islands of the Arctic archipelago, which encompass the various routes of the Northwest Passage. One basis for a sovereignty claim is that they are the internal waters of Canada on the basis of historic title. Such a claim involves treating Canada’s rights to sovereignty over the lands, established through historic, effective occupation and control, as rights to sovereignty over the waters as well.’⁵²

The requirements of proof for such a full sovereignty claim over the waters would be activities evidencing such sovereignty. Goldie states in this respect, “states asserting a historic claim must unequivocally exercise an authority which is exclusively referable, not to some lesser claim such as the regulation of fisheries and game, but to its plenary and sovereign power.”⁵³ Pharand, however, while maintaining that effective control is generally necessary states that effectiveness may vary according to a number of factors such as “the size of the area and its remoteness.”⁵⁴

Byers and Lalonde make a note of the evidence for effective exercise of jurisdiction by Canada:⁵⁵

treaty or by any legislation.” See E. Lee, *Canadian Practice in International Law During 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs* (1974) 12 *Canadian Y.B. Int’l L.* 272, 279. A memorandum of the Legal Bureau of 1980 confined itself to repeat the assertion, without clarifying the underlying reasoning: “As to full sovereignty proper, Canada continues to maintain the position that the waters of the Arctic archipelago, including the Northwest Passage, are internal waters of Canada.” See Legal Bureau Memorandum of 17 September 1980, reprinted in L. LeGault, *Canadian Practice in International Law During 1980 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs* (1981) 19 *Canadian Y.B. Int’l L.* 322. But no corresponding action was undertaken by the Canadian government to display sovereignty. The UN Study states that the display of sovereignty must be ‘public’, see *supra* (n 33); Symmons states that effectiveness must be continuously displayed after the critical date, over the entire area of the claim. See Symmons (n 24).

⁵² Mc Rae (n 1) 6-7.

⁵³ L.F.E. Goldie, ‘Historic Bays in International Law- An Impressionistic Overview’ (1984) Vol.11, No.2, Art 3, 38.

⁵⁴ Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge University Press 1988) 97. Also see Symmons (n 24). A question arises as to whether the geographical remoteness of the historically claimed waters may, pro rata, automatically scale down the requisite degree of effective control. It might be submitted that the waters claimed by Canada are mostly ice-covered for most part of the year and are consequently inaccessible. Pharand states that the nature of the action will depend on the nature of the foreign challenge. If it is foreign fishing, the exclusion of foreign fishers must be effected. If it is navigation by foreign ships, their exclusion and subjection to special authorization would constitute the best proof of exclusive jurisdiction. Short of such actual exclusion, the coastal state must make formal protests and follow up, if necessary, with all available peaceful means. See Donat Pharand, ‘The Arctic Waters and the Northwest Passage: A Final Revisit’ (2007) 38:1-2 *Ocean Development and International Law* 3. Currently, Article 234 of the UNCLOS regulates such ‘ice-covered areas’ (formerly regulated by the 1970 AWPPA).

⁵⁵ See Byers and Lalonde (n 24). They quote from Pharand (n 24) 113-125., “British explorers, beginning with Martin Frobisher in 1576 and ending with those in search of the Franklin expedition in 1859, covered virtually all the waters of the Canadian Arctic Archipelago. The instructions to the official expeditions of the British explorers was to discover a passage between the Atlantic and Pacific Oceans.” Pharand adds however: an examination of the journals and narratives of those expeditions

“Canada based its claim to historic internal waters on the fact that the archipelago had been mapped by British explorers prior to the transfer of title in 1880, and explored and patrolled by Canada after that date. The very few non-consensual transits of the Northwest Passage were cited as further evidence of Canada’s authority and control. Canada also pointed out that the Inuit- who are Canadian citizens- had travelled and lived on the ice for millennia.”⁵⁶

Donat Pharand adds to this list the legislation adopted by Canada already in 1906, which required a license to be obtained by whalers when hunting in Hudson Bay and the territorial waters north of the 50th parallel.⁵⁷

reveals that their takings of possession in what is now the Canadian Arctic Archipelago were confined to land. This confirms an earlier finding. See Gordon Smith, *A Historical Survey of Maritime Exploration in the Canadian Arctic and its Relevance with Subsequent and Present Sovereignty Issues* (1970) 26. After the transfer of islands to Canada in 1880, Canada patrolled most of these waters, beginning with the more southern ones such as Hudson Bay and Strait, Frobisher Bay and Cumberland Sound, and then extending its patrols to Lancaster Sound, Barrow Strait and the connecting inlets and sounds to the South. It sent explorers from 1897 to 1913, and government expeditions from 1913-1922. In 1922, the Eastern Arctic Patrol was created and annual patrols were made until at least 1958. In 1926, the Arctic Islands Preserve was created within the sector formed by the 60th and 141st degrees of longitude with the aim of protecting Arctic wildlife and Inuit culture. After WWII, the Canadian Coast Guard was established and charged with the principal tasks of providing ice breaking services and re-supplying Arctic communities. The Coast Guard is also charged with the implementation of the regulations adopted under Canada’s Arctic Waters Pollution Prevention Act of 1970. Since 1970, Canadian survey ships have been active in surveying and charting the waters of the Archipelago. In 1977, Canada instituted the NORDREG registration system for ships entering the Arctic, which provides for all ships to report to the Coast Guard before entering the waters of the Archipelago.

⁵⁶ Also see Donald McRae, ‘Arctic Sovereignty? What Is at Stake?’ | Canadian International Council’ (2007) 64 *Canadian Institute of International Affairs and the Centre for International Governance Innovation* 7: “Some support for a historic claim to the waters of the Arctic archipelago rests on the practice of the Inuit who for centuries occupied the land and ice, making no distinction between the frozen land and the frozen sea.” Contrastingly, at p.3, McRae admits to High Arctic relocations of Inuit peoples based on a desire to support Canada’s sovereignty in the Arctic. Byers and Lalonde (n 24) at p.11 concede that in making such a line of argument Canada would have to prove: (i) that sea ice can be subject to occupancy and appropriation like land (see S.B.Boyd, ‘the Legal Status of the Arctic Sea Ice: a Comparative Study and a Proposal’ (1984) 22 *Can. Y.B. Int’l L.* 105 *et seq.*); (ii) that under international law, indigenous people can acquire and transfer sovereign rights (see the *Western Sahara Case* where the ICJ recognized that territories inhabited by indigenous peoples having a measure of social and political organization were not *terra nullius* and thus confirmed a limited but no less real international legal status on these human “collectivités”, See *Western Sahara*, Advisory Opinion [1975] ICJ Rep. 79 *et seq.*); and (iii) that such rights, if they did exist, were in fact ceded to Canada (see the 1993 *Nunavut Land Claims Agreement* which affirms the intent of the Inuit to transfer to Canada any rights they might have had over the sea-ice under international law: Article 15.1.1© states that “Canada’s sovereignty over the waters of the Arctic Archipelago is supported by Inuit use and occupancy). The authors note later in the article that the Canadian government has not yet implemented all of the provisions of the Nunavut Land Claims Agreement. They add: “to some degree, the omission weakens the argument that the Nunavut Agreement supports Canada’s claim over the Northwest Passage.” See other difficulties with establishing (i), (ii) and (iii) at p.133 in Michael Byers, *International Law and the Arctic* (Cambridge University Press 2013).

⁵⁷ See Pharand (n 24) 111-112. Control was exercised over Hudson Bay as a historic bay. Pharand quotes from another study that refers to the waters of a historic bay as ‘national waters’, explaining that ‘they stand in all respects on precisely the same footings as the national territory’. See Sir Cecil Hurst, ‘The Territoriality of Bays’ (1923) 3 *B.Y.I.L.* 54. Further, at the time, territorial waters were three-miles as measured from the mainland and around each island. Captain Bernier, in charge of the expeditions from 1904-1910 however does not appear to have limited himself to the three miles in his

Yet, many also note counteracting evidence to the effective exercise of jurisdiction. First, British and Canadian explorers confined their takings of possession to land and islands and not to waters.⁵⁸ Second, the geographical scope of the whale hunting legislation is doubtful.⁵⁹ Third, conflicting legislations and official statements/declarations were made by Canada for the exercise of sovereignty or jurisdiction over the waters from 1970-73.⁶⁰ Fourth, the United

enforcement of the license requirement. Pharand writes that the government later felt that Captain Bernier had been a little forceful in implementing Canadian whale hunting regulations. He had received instructions to patrol the waters including Davis Strait, Baffin Bay, Lancaster Sound, Barrow Strait, Viscount Melville Sound, M'Clure Strait and the Beaufort Sea as far as Herschel Island.

⁵⁸ *ibid.* The expeditions were instructed to patrol and explore the *waters* and formally take possession of islands (*land*). New islands were discovered, Canadian flags hoisted, notices left of Canadian customs laws. Even the formal taking of possession by Captain J.E. Bernier on July 1st, 1909 of the whole Arctic Archipelago lying to the north of America from longitude 60 degrees W to 141 degrees longitude up to latitude 90 degrees N has to be interpreted as being limited to the land areas. Bernier himself stated in his report covering that expedition that "specific instructions were given as to the waters to be patrolled, explored, and *lands to be annexed.*" Also see Bernier's letter dated April 5, 1910, addressed to the Deputy Minister of Marine and Fisheries, accompanying his report, in J.E. Bernier, *Cruise of the Arctic 1908-09*, (1910) xix. On this, Pharand observes that the sector theory, which is implicit in the formulation of this taking of possession, is of no legal value as a basis for a claim of sovereignty in international law, even if such a claim is restricted to lands and islands.

⁵⁹ *Ibid* 123. Considerable doubt exists as to whether the whale hunting legislation of 1906, making the purchase of a licence mandatory, applied to all waters north of the 55th parallel aside from Hudson Bay. The wording of the licence itself (the vessel is 'hereby licenced to engage in Whale Fishery or hunting whales within the waters of Hudson Bay, or the *territorial waters of Canada* north of the 55th parallel of north latitude') would seem to limit the requirement to the 'territorial waters of Canada', which extended to three miles at the time. Thus its use as evidence for Canada's effective exercise of jurisdiction for *all* waters of the Arctic Archipelago is limited.

⁶⁰ See Franckx (n 3) 83. In the Throne Speech of 24 October 1969, it was announced that the government would introduce legislation establishing measures necessary to prevent and protect the Arctic seas from pollution. See R. M'Gonigle & M. Zacher, 'Canadian Foreign Policy and Control of Marine Pollution' in B. Johnson & M. Zacher (eds), *Canadian Foreign Policy and the Law of the Sea* (Vancouver, University of British Columbia Press 1977) 12. Initially, within the Bureau of Legal Affairs in the Department of External Affairs the idea had emerged that the extension of the territorial sea from 3 to 12 nautical miles would constitute an appropriate interim response to the American challenge (i.e., the *Manhattan* crossing). It was finally decided to sponsor two initiatives at the same time and the government introduced two bills on 8 April 1970: the Bill to Amend the Territorial Sea and Fishing Zones Act of 1964 and the Arctic Waters Pollution Prevention Bill (hereinafter the A.W.P.P.A). The purpose of the Act to amend the Territorial Sea and Fishing Zones Act was to secure a tighter grip for Canada on the foreign shipping through the Northwest Passage. The most commonly used western entrance to the Northwest Passage (Prince of Wales Strait) as well as Barrow Strait on the east side, became at a certain point totally encompassed by Canadian territorial waters, leaving no complete strip of high seas in the middle. A legal advisor of the Department of External Affairs stated: "An important effect of this action is that it brings two key 'gateway areas' of the Northwest Passage-Barrow Strait and Prince of Wales Strait, indisputably *under complete Canadian sovereignty* under any realistic and reasonable view of existing international law, regardless of differences of views as to Canada's claim to sovereignty over the whole of the Northwest Passage." See J. Beesley, 'Rights and Responsibilities of Arctic Coastal States: the Canadian View' (1971) 3 J. Mar. L. & Com. 7. The main purpose of the Arctic Waters Pollution Prevention Act of 1970 was to prevent pollution in a 100-mile zone adjacent to the Canadian coast above the 60th parallel. In the zone, the Governor-in-Council may prescribe "shipping safety control zones." See paragraphs 11 and 12 of the A.W.P.P.A. The statute applied to foreign ships as well. Initially seen as a unilateral assertion on the part of Canada, the Act

States lodged formal protests against Canada's legislations.⁶¹ According to Pharand, for all of these reasons, Canada would not succeed in establishing that the waters of the Canadian Arctic Archipelago are historic internal waters.⁶²

Thus, from the evidence, it cannot be said that *all* of these waters have formed part of the national territory of Canada in the same way as land.⁶³ Canada has only had possession over the islands, and sovereignty over islands is distinct from sovereignty over waters.⁶⁴ The main question lies in what kind of control Canada has exercised over these waters, and it is safe to state that there has been Canadian patrolling and law enforcement in the waters. Has there been Canadian exclusion of fishing or navigation of foreign vessels?⁶⁵ In 1906, whaling licenses applied only to a limited geographic area and not the entire Archipelago, and an examination of later Canadian

came into effect after two years, after high-level consultations by Canada to make it acceptable on the international plane. These two acts were the Canadian Government's response to the crossing of the U.S. commercial oil tanker *S.S. Manhattan*. Franckx notes that Canada sidestepped making a straightforward claim of sovereignty over its Arctic waters by claiming functional pollution jurisdiction over those waters. The political "masterstroke" saved Canada from a direct international conflict over the issue of sovereignty on which the Canadian position might not have been that convincing. Also see R. M'Gonigle and M. Zacher, 'Canadian Foreign Policy and Control of Marine Pollution' in B. Johnson and M. Zacher (eds), *Canadian Foreign Policy and Law of the Sea* (Vancouver, University of British Columbia Press 1977) 113. Thus the official government position had been left ambiguous on purpose. Meanwhile, a letter of the Legal Bureau of 17 February 1973 stated that Canada "claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada on a historical basis...." See supra (n 51).

⁶¹ Ibid. Both the 1970 Acts "met with a prompt response from the United States and led to what may be one of the more acerbic exchanges in the history of diplomatic communications between the two countries". See L. LeGault, 'Maritime Claims' in R. Macdonald, G. Morris and D. Johnston (eds), *Canadian Perspectives on International Law and Organizations* (Toronto, University of Toronto Press) 385.

⁶² Pharand (n 24). Other scholars note: historic title needs more research of British and Canadian history (McRae states, "until such research is done it is difficult to draw specific conclusions on the question of historic title". See D. McRae 'Arctic Waters and Canadian Sovereignty' (1983) 38 Int'l J. 482.), has not been consolidated yet, or even if consolidated, the Canadian government would do well to not use the theory as there are latent inconsistencies with the Canadian policy concerning the settlement of aboriginal claims. See J.-Y. Morin, *Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Arctique* (1970) 8 Canadian Y.B. Int'l L. 240-242; K. Beauchamp 'International Legal Issues in Arctic Waters' in *Canadian Arctic Resources Committee Ocean Policy and Management in the Arctic* (Ottawa 1984) 53, 58.

⁶³ Some of these waters admittedly have a different status, for example Hudson Bay is treated as a historic bay. Supra (n 57)

⁶⁴ The Tribunal in the *The South China Sea Arbitration Award* (n 2) notes: "...evidence of use giving rise to historic rights with respect to the islands would not establish historic rights to the waters beyond the territorial sea." See Paragraph 266 of the *South China Sea Arbitration Award*; Also see Franckx (n 3).

⁶⁵ As noted above in the sub-elements to effective exercise of jurisdiction (Section 3.1 of the article), sovereignty must be effectively exercised.

legislation reveals (merely) territorial sea and contiguous zone type fishery and pollution jurisdiction.⁶⁶

Evidence pointing to mere territorial sea or contiguous zone type jurisdiction would not be commensurate to the sovereignty claim.⁶⁷ Even fishery enforcement may be only a complementary factor.⁶⁸ More effective is asserted control over foreign

⁶⁶ See Franckx (n 3) 67-70. "Canada established a 12-mile contiguous zone in 1936 to control growing trafficking of liquor. (Also see Customs Act, with amendments asserted to 28 June 1955, reprinted in United Nations Legislative Series, Laws and Regulations on the Regime of the Territorial Sea (1957) UN Doc ST/LEG/SER.B/6 95; H. Smith, 'The Contiguous Zone' (1939) 20 Brit.Y.B. Int'l L.122. Franckx comments that one has to place the actual impact of this law in its proper perspective. This statute does not seem to have actually been enforced against foreign ships. See H. Smith, *The Law and Custom of the Sea* (Stevens & Sons Ltd., London, 1959) 28). Before UNCLOS I, Canada opted for extended fishery jurisdiction because of a growing presence of foreign fishing vessels along the Canadian coast. In 1964, a 12-mile fishing zone was proclaimed by Canada. In 1970, Canada introduced a 12-mile territorial sea through its *Act to Amend the Territorial Sea and Fishery Zones Act*. Fishery closing lines were also enacted in 1970: zone 1 related to the Gulf of St. Lawrence, zone 2 to the Bay of Fundy, both on the East Coast. Zone 3 concerns Queen Charlottes Sound, Hecate Strait and Dixon Entrance on the West Coast. See *Canadian Government Note Establishing Fishing Zones*, 26 December 1970, reprinted in (1970) 9 Int'l Legal Materials 438-440. Simultaneously, Canada enacted a functional pollution jurisdiction, *The Arctic Waters Pollution Prevention Act* in 1970. Canada also extended the field of application of the Canadian Shipping Act from the territorial sea and fishing zones, as installed in early 1970, to the newly created 200-mile fishing zone, as of 1 January 1977. Although not an exclusive economic zone *stricto sensu*, Canada does claim a 200-mile fishery and pollution prevention zone at present."

⁶⁷ As discussed above, enforcement action must be 'commensurate' to the nature of the claim. See Paragraphs 85-87 of the UN Study: 'The interrelationship between the scope of the claim and the scope of the authority which the claiming State must exercise, and also the soundness of the assumption that the claim to "historic waters" is a claim to sovereignty over the waters, may be illustrated by an example. Suppose that a State asserted, on a historical basis, a limited right related to a certain maritime area, such as the right for its citizens to fish in the area. This would not in itself be a claim to the area as "historic waters". Nor could the State, even if it so wanted, claim the area as its "historic waters" on the basis of the fact that its citizens had fished there for a long time. The claim would in such case not be commensurate with the factual activity of the State or its citizens in the area. Suppose on the other hand that the State has continuously asserted that its citizens had the exclusive right to fish in the area, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its "historic waters". The authority exercised by the State would be commensurate to the claim and would form a valid basis to the claim (without prejudice to the condition that the other requirements for the title must also be fulfilled); Symmons lists examples of contiguous zone type jurisdiction: regulations for customs, fiscal, immigration and sanitary purposes, maritime inspection for national security, seabed exploitation and leases, pollution control, wildlife regulations. See Clive Symmons, 'Chapter 13: The Need for Effective Exercise of Jurisdiction' in Clive Symmons (n 24).

⁶⁸ Paragraph 86 of the UN Study states that a nation's continuous assertion of exclusive fishery rights might give rise to a historic fisheries claim, but not a historic inland waters claim. "A State claiming historic *internal waters* status for a coastal zone must generally prove a type of jurisdictional control which can *only inherently relate to internal waters* and past fishing control may be equivocal on this." See Clive Symmons (n 24) 182. Symmons also quotes Mc Dougal and Burke, 'changing the status of waters from territorial sea to internal waters does not diminish or increase authority with respect to fishing, but it does add to coastal State competence with respect to navigation, since in customary law, there had been no right of innocent passage through internal waters. He also states the reasons why such control was found insufficient: *first*, "assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters, i.e., it may involve a characteristic of territorial seas rather than inland waters." (Also see the U.S. Supreme Court *Cook Inlet* Case 422 US 184 at p 199 (1975));

navigation (i.e., no innocent passage) in internal waters.⁶⁹ Thus, the question is whether there was exclusion of foreign navigation. Before passing of title, only British explorers and whalers visited the area.⁷⁰ Soon afterwards, explorers and expeditions were primarily Canadian.⁷¹ Studies conducted on innocent passage in the Arctic waters before the *Manhattan* crossing and a decade later concluded that such right existed in favour of foreign ships throughout the passage, even in the “territorialized” Prince of Wales Strait.⁷² The *Manhattan* voyage itself was undertaken to test the viability of the Northwest Passage for future transits.⁷³ The Polar Sea transit followed.⁷⁴ Not to mention the submarine transits (and drifting

second, “this whole matter has been in more recent times been intertemporally affected by the progressive expansion of exclusive fishery zones beyond a territorial sea limit. (See U.S. Supreme Court Case *Alaska v US* 545 US 75 (2005)- arrest of fishing vessels was cited as evidence of an act of sovereignty, which fell within the contiguous zone and in violation of later fishery legislation.)

⁶⁹ See McRae (n 1). ‘The *territorial waters* of a state are just like its land territory. But, there is an important qualification. There is a right of innocent passage through the territorial sea. Any waters that lie inland of the territorial sea (bays, inlets, harbours, etc.) are known as *internal waters* and are subject to the full sovereignty of the coastal state with no associated right of innocent passage through them. The right of passage through the territorial sea has its limits. A vessel exercising that right of passage must not act in a way that is prejudicial to the “peace, good order or security of the coastal state”- that is the sense in which this passage is known as “innocent passage”- and submarines must navigate on the surface. The coastal state may adopt laws and regulations relating to innocent passage in the territorial sea, including for the “prevention, reduction and control of marine pollution”. However, the coastal state could not take away the right of passage completely, something that it could do in the case of waters that are internal.’

⁷⁰ Pharand (n 54) 113-114.

⁷¹ *ibid*

⁷² D. Pharand ‘Innocent Passage in the Arctic’ (1968) 6 Canadian Y.B. Int’l L. 58. Also see Pharand (n 54) 123: There was a “gate” of territorial waters through the Prince of Wales Strait as the Princess Royal Islands, lying in mid-strait reduce the width of the passage to less than six miles. Thus Canada exercised control over these waters as its territorial waters.

⁷³ See Franckx (n 3) 76-79. Although a commercial venture, the voyage represented the U.S. position on the matter: beyond 3 nautical miles around the separate islands, all the waters of the Canadian archipelago constituted high seas. Moreover, the U.S. looked upon the Northwest Passage as an international strait, where the principle of freedom of passage should reign. The United States had clearly indicated that it was prepared to let the status of the Arctic waters become an issue of direct confrontation between Canada and the United States. It was against this background that the 1969 passage was effectuated. If the challenges to Canadian sovereignty over the Arctic had until then mainly been territorial in nature, the voyage of the *Manhattan* had definitely relocated the crux of the problem to the maritime aspects of the matter”. See T. Tynan, ‘Canadian-American Relations in the Arctic: The Effect of Environmental Influences Upon Territorial Claims’ (1979) 41 Rev. Pol. 423.

⁷⁴ Weighing the positive aspects against the negative ones one year before the Polar Sea crisis, Professor Pharand still came to the conclusion that such a claim would not succeed on the historic title argument alone. See Pharand, D., ‘The Legal Regime of the Arctic: Some Outstanding Issues’ (1984) 39 Int’l J. 765-769. Even if the A.W.P.P.A. applied to commercial ships after 1970, regarding warships and government ships operated for non-commercial purposes, the classification into which the Polar Sea falls, an author states: “coastal state control is virtually non-existent, even the Arctic Waters legislation does not apply to these vessels.” Following the Polar Sea Voyage, Mc Dorman states that even the 1985 statement with respect to navigation within the newly proclaimed baselines was not inconsistent with the right of innocent passage. See T. McDorman, ‘In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage’ (1986) 10 Marine Pol’y p. 246. Refusal to take permission by the U.S. and Canadian granting of the same will be reviewed in the section on foreign acquiescence.

stations) through these waters after the mid-1950s.⁷⁵ The evidence suggests that there has not been effective exclusion of foreign navigation in the Arctic waters.

Regarding the passage of time criterion, McRae states:

“A potential difficulty with the historic title claim is a lack of consistency in the way the Canadian government has over the years promoted and advocated the claim. This has led some to doubt whether such a claim would be upheld if it ever came before a court of law.”⁷⁶

Until the 1986 enactment of straight baselines to enclose its internal waters, the Canadian historic title claim cannot be said to have been properly asserted.⁷⁷ Authors note different dates to be relevant for the notification of the claim.⁷⁸ In our opinion, the Canadian government’s position has been all but clear because of its multiple actions. The 1970 legislations (controversial at the time) asserted jurisdiction of a different nature from a full sovereignty claim. The notoriety achieved by these legislations was followed by their subsequent implementation, creating considerable ambiguity. The “territorial gate” theory especially is incompatible with an internal waters claim.⁷⁹ Ted McDorman aptly states: “An international legal tribunal being

⁷⁵ Franckx (n 3) 75: Many of the early U.S. submarine cruises under the Arctic ice passed through the so-called Canadian sector. See W. Lyon, ‘The Submarine and the Arctic Ocean’, (1963) 11 *Polar Rec* 703. In August 1960 the U.S.S. Seadragon successfully sailed the Northwest Passage from East to West, followed two years later by the U.S.S. Skate. See T. Pullen, ‘What Price Canadian Sovereignty?’ (1987) 113 *U.S. Naval Inst. Proc. (No.9)* 70. U.S. drifting stations, a program that started in 1951, entered the Canadian sector before the late 1960s.

⁷⁶ McRae (n 1).

⁷⁷ After the Polar Sea voyage, the country decided to opt for straight baselines to claim full sovereignty over the waters of the Arctic Archipelago as internal waters. See Franckx (n 3) 69. Also see Byers (n 56) 136. Rather than a geographical criterion, for Canada, the purpose of enacting straight baselines was to confirm its sovereignty, to enclose the waters as internal waters. See McRae (n 1) 13: ‘..Straight baselines are more than an assertion that the waters of the Arctic archipelago are internal waters. They are also an important step in consolidating the claim that these are Canadian internal waters by virtue of historic title..’; Also see J.-Y. Morin, (1968) 6 *Canadian Y.B. Int’l L.* 91-114: on certain occasions the few sinuosities of the coast did not require the use of the system of straight baselines; O’ Connell states: “Certainly there are areas of the Canadian Coast, where the system has been used, which can be regarded as analogous to the Norwegian Coast, but the system is being progressively applied to the whole Canadian coastline, and not only to those parts which are geographically exceptional.” See D. O Connell, *The International Law of the Sea* (Vol.1, Clarendon Press, Oxford 1982) 214. Franckx at p.101 states that even the drawing of baselines in 1985 may have clarified the Canadian position but not the legal regime applicable to the Northwest Passage.

⁷⁸ According to Byers and Lalonde it was first advanced by Prime Minister Trudeau in 1969 (See Byers and Lalonde (n 24).) while some refer to the 1973 letter of the Legal Bureau mentioned in (n 58). See Pharand (n 24). If considered, the scope of this declaration was more expansive than the *Act to Amend the Territorial Sea and Fishing Zones Act* and the *Arctic Waters Pollution Prevention Act*. While the former sought to increase the territorial sea from 3 to 12 nautical miles, the latter was functional pollution control legislation.

⁷⁹ The *Act to Amend the Territorial Sea and Fishing Zones Act* had the effect of creating ‘gates’ of territorial waters on the east and west entrances to the Northwest Passage. See Franckx (n 3). Also see

seized with this issue at the time of the passage of the Polar Sea would have undoubtedly found Canada's claim to the waters of the Arctic as historic internal waters as indifferently pursued and inconsistently expressed, which would have been severely damaging to Canada's position".⁸⁰

Acquiescence by foreign States is also an important criterion for a historical waters claim to be valid in international law. In the South China Sea Award, the Tribunal finds no acquiescence for China's historic waters claim. It states in this respect:

"Since the adoption of the Convention, historic rights were mentioned in China's Exclusive Economic Zone and Continental Shelf Act, but without anything that would enable another State to know the nature or extent of the rights claimed. The extent of the rights asserted within the 'nine-dash line' only became clear with China's Notes Verbales of May 2009. Since that date, China's claims have been clearly objected to by other States. In the Tribunal's view, there is no acquiescence."⁸¹

Can we find acquiescence to the Canadian historic internal waters claim by Canada from the part of the foreign States? Byers and Lalonde admit that the United States has opposed Canada's claim to historic internal waters since it was first advanced (by Prime Minister Pierre Trudeau in 1969).⁸² Franckx notes in the wake of the *Manhattan* passage: "Although the United States was manifestly refusing to ask for permission for its Coast Guard vessels (accompanying the commercial tanker *Manhattan*) to pass through the waters, Canada tried to alleviate the shortcoming by enhancing the level of Canadian participation in the whole operation".⁸³ In 1985, the

Pharand (n 21) 123-124 and by the same author 'Canadian Arctic Sovereignty: Are Canadian and U.S. Interests Contradictory or Complementary? Proceedings of the Ronald St. John Macdonald Symposium (March 1986), International Insights Society, Occasional Paper No.1, Halifax, Dalhousie University (1987) 4-5.

⁸⁰ T. McDorman, 'In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage' (1986) 10 *Marine Pol'y* 254-255. Symmons (n 23) quotes Libyan pleadings in *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (n 12): "successful (Tunisian) variations in legislation clearly contradict the idea of historic rights established since time immemorial and widely recognized since ancient times." See Counter-Memorial pleadings vol.2, at 194, para 120.

⁸¹ Refer to paragraphs 182- 185, 275 of the *The South China Sea Arbitration Award* (n 2). In particular, Paragraph 184: China's notes prompted immediate objections from Vietnam and Malaysia, as well as subsequent objections from Indonesia and Philippines. (See Note Verbale from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009) (Annex 193); Note Verbale from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009) (Annex 194); Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010) (Annex 197); Note Verbale from the Permanent Mission of the Republic of Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011) (Annex 200).

⁸² Byers and Lalonde (n 24) 11.

⁸³ Franckx (n 3) 77-78.

United States sent a Coastguard icebreaker- *the Polar Sea*- through the Northwest Passage without seeking Canada's permission. Ottawa once again made a point of granting permission unilaterally, and asked to place three observers on board.⁸⁴ Washington acceded to the request and later promised to provide advance notice of future transits by its coastguard vessels, while continuing publicly to dispute the Canadian claim.⁸⁵ Byers and Lalonde add that: "However, it is unclear what degree of international acceptance is required to support a valid claim to historic internal waters. Are the objections of a single but very powerful country sufficient to prevent the creation of a historic title?"⁸⁶ According to McKinnon, "given the great interest of the United States in having a right of passage from the north shore of Alaska through the Northwest Passage to the eastern coast of the United States, it seems likely that its protests should be given significant weight."⁸⁷

At the same time, McKinnon believes that the American opposition contains several weaknesses, including the fact that 16 years passed from 1969 to 1985 without the United States mounting a "practical protest to Canada's claim." He also argues that a voyage by *the Polar Sea* "probably cannot be considered an effective protest to Canada's claim since both countries agreed that the trip would be made without prejudice to their respective claims."⁸⁸ Yet, again, as McRae points out, the United States is not the only state that protested on Canada legislating its northern waters as historic internal waters, since the then European Community also protested.⁸⁹

⁸⁴ Byers and Lalonde (n 24) 11

⁸⁵ *ibid.* Also see Articles 3© and 4 of the *Agreement on Arctic Cooperation*, 11 January 1988, reprinted in (1988) 28 I.L.M. 142. According to Franckx, "the main purpose of this agreement was the regulation of icebreaker navigation in the area. Article 4 explicitly states that nothing in the agreement, nor any practice developed thereunder will affect the respective positions of the parties. It was drafted as a practical solution to a longstanding dispute." See Franckx (n 3) 102.

⁸⁶ J.B.McKinnon, "Arctic Baselines: A Litore Usque ad Litus" (1987) 66 Can. Bar. Rev. 800. Quoted in Byers and Lalonde (n 23).

⁸⁷ *Ibid.*

⁸⁸ *ibid.* In response, see Franckx (n 3) 103: the formal protest made by the United States in 1986 and the 1988 agreement, the content of which seems to indicate that both parties very much agree to disagree on the crucial question weaken the submission.

⁸⁹ Articles 3© and 4 of the *Agreement on Arctic Cooperation*, 11 January 1988, reprinted in (1988) 28 I.L.M. 142. McRae states, "Canada's enacting of straight baselines in 1985 was met with protests by the United States and by the European Community. However, the Reagan administration in the United States seemed less interested in pressing its legal position and more interested in finding a way to cooperate with Canada. Thus, in 1988 the Arctic Cooperation Agreement was entered into between Canada and the United States under which the United States pledged "all navigation by US icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada". Both parties, however, reserved their legal positions on the law of the sea, implicitly protecting their respective positions on the legal status of the waters of the Northwest Passage. (The

5. Conclusion

The dispute that the Philippines took to the Arbitral Tribunal against the expansive historic waters claims by China led to the Tribunal taking a stance on the basic criteria on which a state can prove its historic sovereignty over water areas.⁹⁰ Even if there have been studies on the criteria for establishing historic rights or title to marine areas, the Tribunal's stance on these basic criteria clarified the evidence that is needed to prove a historic claim over water bodies. This is an important role that international tribunals and courts perform: they can authoritatively specify the law especially in areas that have remained undeveloped, such as historic rights over marine areas, which could not be negotiated to the UNCLOS. The Tribunal's elucidation is clarifying also in the sense that some suggestions for criteria for historic waters claim were not taken up by the Tribunal, such as whether it would be important that the marine areas in question would be of vital interest for the state concerned.⁹¹

Given that there are these two very unique and expansive historic waters claims (even if also dissimilar in some respects) – Chinese and Canadian historic waters claims – it is useful to revisit the Canadian historic internal waters claim, especially now after the

United States maintains that the Passage is an international strait). See McRae (n 1). Also see Byers (n 56) 137-138. The United Kingdom acted on behalf of all the members of the European Community (which at that time included Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, and the United Kingdom) in stating that the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.

⁹⁰ The Tribunal did not specifically refer to the particularities of the Chinese historical claim, but took a broader perspective concerning the impact of the UNCLOS on all preestablished historic rights/titles in areas beyond the territorial sea within the framework of the historic development of these zones. See Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017) 48:2 *Ocean Development and International Law* 187. Also see Tanaka (n 13).

⁹¹ Some Canadian authors submit justifications in support of its claim: protecting the traditional Inuit way of life, protecting the Arctic marine environment, national security, which may, arguably, form part of 'vital interests' of a State. See Byers and Lalonde (n 24). On this point, see paragraphs 139-140 of the UN Study. It notes in the context of historic bays "it hardly seems appropriate to deal with the problem of these vital needs in the context of "historic bays". It quotes with approval Bourquin who states, historic title is one thing, and vital interest another. Additionally the study states: giving the parties the right to claim vital bays would come near to destroying the usefulness of any provision in the convention regarding the definition or delimitation of bays. The same logic should apply to historic waters other than 'bays'. Pharand states that vital interests are to be considered for a case of consolidation of title and not historic waters. The doctrine of historic waters is to be distinguished from consolidation of title. See Pharand (n 24) 167.

Arbitral Tribunal's authoritative specification of how a state can demonstrate its historic waters claim.

In this article, we have examined the Canadian historic internal waters claim via the criteria expounded by the Arbitral Tribunal. It seems difficult for Canada to prove that it has a good case for historic internal waters claim, especially when we examine the Canadian government's action.⁹² There is no effective exercise of jurisdiction over the marine waters and this has not taken place for a long period of time. Moreover, there have been protests from the United States and the European Union to the Canadian historic internal waters claim so acquiescence does not seem to be there. The only strong part of the Canadian claim is the fact that the Inuit have been using these icy waters as their homelands, so it is impossible to say outright that Canadian historic waters claim would be invalid, even if most of the legal evidence points to this direction.⁹³ For us and perhaps most commentators as examined above, the negative elements relating to the claim of historic internal waters outweigh the positive acts through which Canada has sought to assert its authority.

⁹² See also D.R.Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment" (1993) 26 Cornell Int'l L.J. 359; Pharand (n 24) 122-125. Also see N.C.Howson, "Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage" (1988) 26 Colum. J. Transnat'l L. 365. Byers and Lalonde (n 22) note: At the present time, it seems that only Professor Francis Rigaldies is convinced that the waters of the Arctic Archipelago are Canadian by virtue of historic title. See F. Rigaldies, "Le statut des eaux de l'archipel de l'Arctique canadien" (1987) 2 Espaces et Resources maritimes 45.

⁹³ This part of the argument is also strengthened by the evolution of international law relating to indigenous peoples, in particular by the adoption in 2007 of the UN Declaration on the Rights of Indigenous Peoples. See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.