

The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?

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Abstract

For decades, Ottawa and Washington have been agreeing to disagree on the question of the legal status of the Northwest Passage. One argument which has been consistently raised on the U.S. side and which has precluded any attempts to end the deadlock has been the fear of creating a negative precedent. This article assesses whether U.S. concerns are warranted: Could coastal States elsewhere in the world rely on an eventual recognition of Canadian sovereignty over the Northwest Passage to bolster their claims over a local strait?

Keywords :

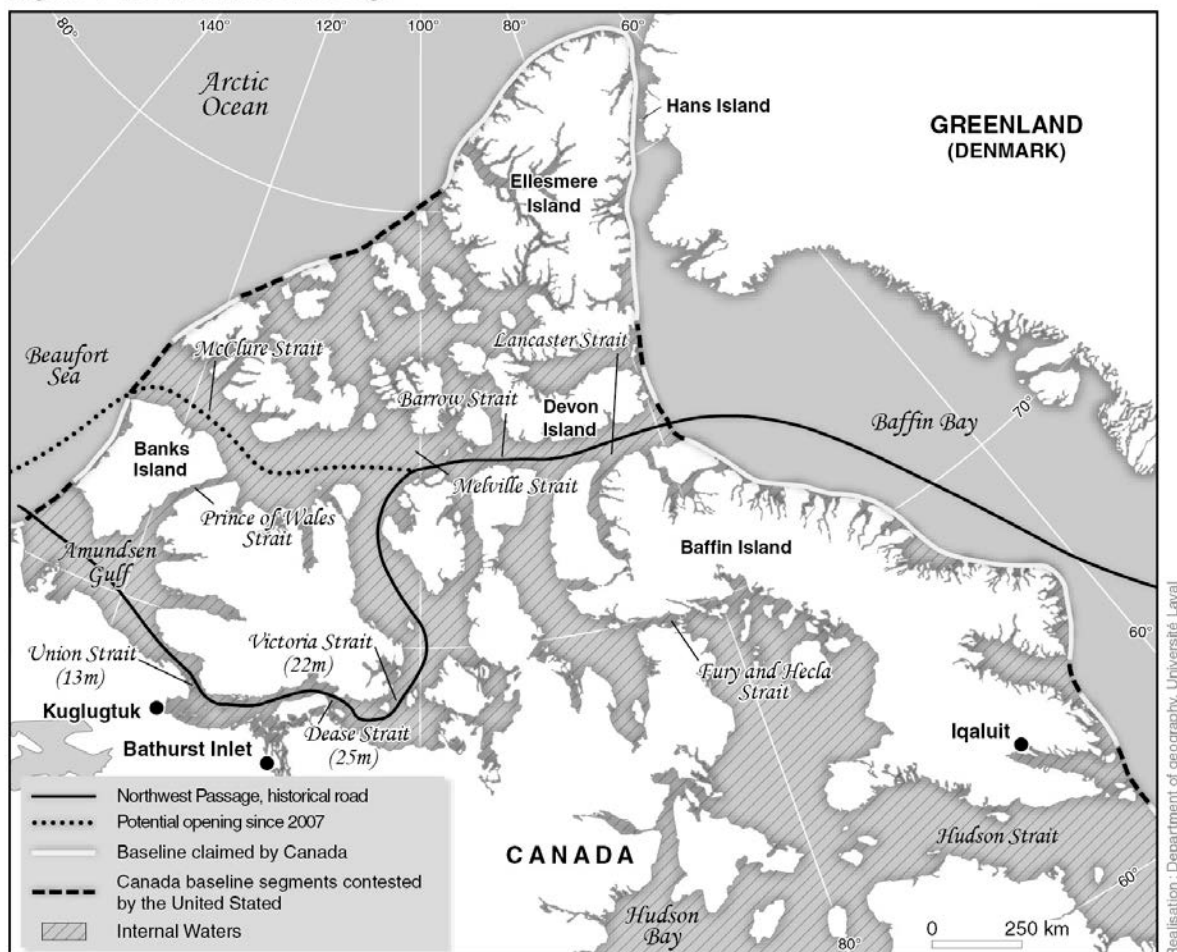
Northwest Passage; precedent; United States; official practice.

I. Introduction

There has been much written in recent years about existing and potential disputes in the Arctic and Canada has featured prominently in such reports. Canada is involved in maritime boundary disputes with the United States (Beaufort Sea) and Denmark/Greenland (Lincoln Sea) and has an extended continental shelf area beyond 200-n. miles which will likely overlap with the U.S., Danish and possibly Russian extended shelf areas. All of these disputes have been well managed to date and will eventually be resolved in accordance with established rules and procedures.

Recent media attention has also focused on international opposition to Canada's sovereignty over the Northwest Passage. (See Figure 1) However, much like the dispute over the boundary line in the Beaufort Sea, the debate over the Northwest Passage is not new. For decades, Ottawa and Washington have been agreeing to disagree on the question. However, as with the other Arctic files, what is new is the realization that the Northwest Passage can no longer be viewed as a sterile, arcane or academic debate; climate change has transformed the issue into one of immediate and pressing concern for Canada and other stakeholders. Indeed, increased access to the region, thanks to a dramatic loss of sea-ice, has given the parties involved an impetus to find solutions to all the various existing disputes, including the Northwest Passage.

Figure 1 The Northwest Passage



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The quarrel over the legal status of the Northwest Passage stands in some contrast to the other Arctic disputes involving Canada because of the wide array of interested parties. However, though Canadian Arctic governance measures have in the past been the object of protests by other States¹ and recent E.U. policy documents have emphasized freedom of navigation in the Arctic routes,² only the United States has publicly asserted that the Northwest Passage is a strait used for international navigation. While Canada and the United States have found pragmatic and effective ways to overcome their difference of opinion on the status of the Northwest Passage, there is no doubt that Washington has been the most vocal and persistent objector to Canada's sovereignty claim. It is in light of this role as principal opponent that this article will focus on U.S. policy and practice.

Ottawa and Washington's respective positions regarding the Northwest Passage are well established. Successive Canadian governments have declared that all of the waters within Canada's Arctic archipelago are Canadian historic internal waters over which Canada exercises full sovereignty. This claim necessarily includes the right to govern and control access to the various routes which make up the Northwest Passage.³ For its part, Washington has consistently maintained that the Northwest Passage is an international strait through which the ships and aircraft of all nations enjoy a right of transit passage.⁴

A number of reasons explain the longstanding stalemate over the Northwest Passage: decades of public pronouncements reiterating the official Canadian and American positions have severely limited the two governments' political *marge de manoeuvre*. Ambiguities in the legal regime, including the very definition of an international strait, have also allowed both States to craft solid, reasonable and persuasive arguments. But perhaps most importantly, one argument has been consistently raised on the U.S. side which has precluded any attempts to end the deadlock – to recognize Canada's historic waters claim over the Northwest Passage or indeed to accept any compromise solution which does not characterize the waters as an international strait,⁵ would set a dangerous precedent which could then be invoked by other coastal States to claim a similar coveted status for a local strait.

James Kraska of the U.S. Naval War College, for example, stresses the legitimate concern of maritime powers over the negative impact for the freedom of the seas principle which would result from the recognition of Canadian sovereignty over the Northwest Passage.⁶ Even the possibility that Canada and the United States might find a working agreement that recognizes Canadian control over the Passage has been decried by Kraska, who argues that "a special deal between the United States and Canada provides a precedent for other coastal states to develop a bilateral treaty for controlling traffic in any of the numerous strategic international straits around the world, such as Iran and Oman cooperating to control the Strait of Hormuz."⁷ Elizabeth Elliot-Meisel also highlights the United States' fear of "a negative precedent if it recognizes Canada's sovereignty over the Passage".⁸ As early as 1986, Bruce McKinnon was doubtful that the United States could ever be persuaded to accept Canada's claim: "I think the US government probably feels that it simply cannot afford, at least publicly, to give way on any one of these disputes involving a strait. It would set a bad precedent for all its other disputes".⁹ Nicholas Howson underlines that similar concerns exist at the State Department and focuses particularly on the straits of Malacca, Hormuz and the Philippine archipelago straits.¹⁰ According to David Larson, archipelagic States in Asia, such as Indonesia and the Philippines, could use the Northwest Passage as a pretext to unilaterally restrict the freedom of the seas in strategically sensitive areas.¹¹ Luke Petersen also insists that "there are several straits and waterways that have similar

characteristics to the Northwest Passage, [...] Australia's Torres Strait, the Strait of Malacca, and Iran's claims regarding the Strait of Hormuz all may be affected by a determination (no matter what that determination is) as to the status of the Northwest Passage."¹²

Other experts are more moderate when analyzing the value of any potential precedent set by the settlement of the Northwest Passage issue in favour of Canada. S.J. Birchall considers that such a precedent would be relevant only for disputes involving an archipelago.¹³ Quoting Rebecca Dube's theory in an April 2006 *USA Today* article that the Northwest Passage might set a precedent for Malacca or Hormuz,¹⁴ C.J. MacNeill observes that the "International Court of Justice's decision in the Norwegian Fisheries Case establishing straight baselines along the outer shores of the Norwegian Fjords would refute this theory."¹⁵

The U.S. government has clearly expressed its fear on several occasions spanning more than four decades, that recognizing Canada's sovereignty over the Northwest Passage "would be taken as precedent in other parts of the world".¹⁶ Ted McDorman refers to a Note from the U.S. Secretary of State dated 14 April 1970 explaining the views of the United States: "If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some frivolous, but all equally invalid according to international law."¹⁷ In 1985, the U.S. Ambassador to Canada, Thomas Niles, in responding to Canadian initiatives adopted following the passage of the *Polar Sea*, noted that "one of the serious concerns that the United States had with Canadian action regarding the Arctic waters was that it might have a precedent value for other states arguing in favor of increased jurisdiction over waters and passing vessels".¹⁸ McDorman comments that one of the most high profile communications by the United States on the importance of precedent in regards to the Northwest Passage came from President Reagan in 1987. In a private letter to Prime Minister Mulroney, included in the latter's memoirs, Reagan states: "I have to say in all candor that we cannot agree to an arrangement that obliges us to seek permission for our vessels to navigate through the Northwest Passage. To do so would adversely affect our legitimate right to freely transit other important areas globally."¹⁹ More recently, a U.S. Navy's 2010 report entitled *Strategic Objectives for the U.S. Navy in the Arctic Region* explicitly provides that "[w]e cannot view the Arctic in isolation; the application of international law in the Arctic establishes precedent germane to all the world's oceans, straits, and sea lanes."²⁰ Garrett Brass, Executive Director of the U.S. Arctic Research Commission has been quoted as reporting that U.S. officials worry about what sort of precedent the Northwest Passage could set for international straits in global hot spots, such as the Strait of Hormuz and the Strait of Malacca: "We don't want people closing the Strait of Gibraltar".²¹

This article will attempt to establish whether U.S. concerns over the potential creation of a negative precedent are warranted. Is the Northwest Passage in fact similar to those other oft-mentioned strategic straits? Could coastal States rely on an eventual recognition of Canadian sovereignty over the Northwest Passage to bolster their claims over specific straits? And if the fear of creating a precedent is warranted, has Washington reacted in a consistent manner in response to other claims over straits around the world? Has Canada borne the brunt of U.S. fears over encroaching coastal State jurisdiction or have other States bordering international straits also been the object of American protests.

In addressing this key argument in the Northwest Passage debate, it will not of course be possible to consider every international strait connecting the world's oceans. Not only are they too numerous but the very concept of what constitutes an international strait is the subject of

differing and often conflicting interpretations. While L. M. Alexander identifies 265 straits used internationally for navigation,²² R.W. Smith considers that there are 220 such straits.²³ Another figure given is 136²⁴ and Larson considers that there are 134 international straits.²⁵ These significant variations in estimates underline the importance of subjective factors in the determination of what constitutes an international strait.

II. An Overview of the International Legal Rules

To assess the “precedent argument” as a justification for refusing to entertain the notion of Canadian sovereignty over the Northwest Passage, a number of key legal concepts must be outlined.

The world’s oceans are today subject to a generally accepted body of rules which seek to establish what is often an uneasy compromise between coastal States’ rights and the fundamental principle of freedom of navigation. This tension underlies many of the key sections of the 1982 United Nations Law of the Sea Convention (LOS Convention)²⁶ and the international customary rules governing the shared use of the maritime domain.

As a result of the compartmentalization of ocean spaces confirmed by the LOS Convention, the concept of baselines is of critical importance. Indeed, all of a coastal State’s maritime zones are defined by reference to its established baselines.²⁷ Article 5 of the Convention provides that the normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. However, article 7 provides that “[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline...”

As P. Vincent explains, a coastal State’s powers and prerogatives diminish as the distance from shore increases.²⁸ For this reason, a State exercises the greatest degree of control over its internal waters, defined in article 8(1) of the LOS Convention as “waters on the landward side of the baseline of the territorial sea...” While the Convention does not set out a detailed set of international rules governing internal waters, State sovereignty is the key concept, as confirmed by article 2(1) of the Convention²⁹ and by the International Court of Justice’s 1986 *Nicaragua* decision:

The basic concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1 of the United Nations Charter, extends to the *internal waters* and territorial sea of every State and to the air space above its territory.³⁰

Recognized as an integral part of a State’s territory, international law thus provides that internal waters are subjected to the full force of the coastal State’s legislative, administrative, judicial and executive powers. Foreign ships benefit from what has been termed as a presumptive right of entry into the internal waters of a coastal State but G. Gidel insists, “the presumption is in favour of a right of access to ports; but [it is a] presumption and not [an] obligation”.³¹ This right to control foreign access to internal waters, which necessarily implies a right to deny access if national imperatives so dictate, is a source of concern for the international community where a strait used for international navigation is included within a coastal State’s internal waters.

The drawing of straight baselines has been the primary mechanism through which international straits have been enclosed within a coastal State’s internal waters. Whereas article 5 of the LOS Convention provides that the normal baseline, in the absence of specific geographical

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circumstances, should be “the low-water line along the coast”, many States have instead relied on the use of straight baselines as defined in article 7. Yet both the Convention and customary international law stipulate fairly restrictive circumstances in which the recourse to straight baselines can be justified,³² as well as strict conditions to be met in the actual drawing of baselines.³³ It is on the basis of these specific rules that the U.S. State Department has for some years decried the excessive resort to article 7 and the drawing of allegedly illegal straight baselines by many States.³⁴

In the wake of the *Polar Sea* controversy in August 1985,³⁵ Canada acted to consolidate its legal position in regards to the Northwest Passage by drawing straight baselines connecting the outer headlands of its Arctic archipelago.³⁶ In making the announcement, Joe Clark, the then Minister for External Affairs, took care to specify that “these baselines define the outer limit of Canada’s historic internal waters.”³⁷ If Canada’s straight baselines were drawn to identify the precise extent of Canadian historic internal waters in the Arctic, it has been argued that the baselines are not captured by the strict threshold and construction rules defined by the International Court in the *Norwegian Fisheries*³⁸ case and later codified in both article 4 of the 1958 Territorial Sea and Contiguous Zone Convention³⁹ and article 7 of the LOS Convention.⁴⁰

Under international law, a country may validly claim title over waters on historic grounds if it can show that it has, for a considerable length of time, effectively exercised its exclusive authority over the maritime area in question. However, the legal status of the maritime areas regarded as historic waters will vary according to the nature of the sovereign acts exercised by the coastal State(s). This important aspect is underlined in the 1962 U.N. Secretariat Study on the Juridical Regime of Historic Waters: “These areas would be internal waters *or* territorial sea according to whether the sovereignty exercised over them in the course of development of the historic title was sovereignty as over internal waters *or* sovereignty as over the territorial sea.”⁴¹

Canada’s claim that the Northwest Passage constitutes Canadian historic internal waters is based, amongst other things, on the fact that British explorers mapped the archipelago prior to the transfer of title in 1880⁴² and that the area was subsequently patrolled and policed by Canadians.⁴³ Canadian involvement in all of the Northwest Passage transits that have taken place to date can also be cited as evidence of Canada’s authority over the waterway.⁴⁴

However, even if Canada can demonstrate that it has effectively exercised its exclusive authority over the waters of the Arctic archipelago for a considerable length of time, it must also satisfy the third required element: acquiescence.⁴⁵ Canada must show that during this same period of time, its exercise of authority has been acquiesced in by other countries, especially those directly affected by it. Donat Pharand considers this to be a fatal flaw in Canada’s historic waters argument, for none of the early activity in the Archipelago was ever coupled with an explicit claim to the straits and channels between the islands and later explicit expressions of the claim have been consistently opposed by the United States.⁴⁶

If Canada cannot validly claim title to the waters of its Arctic archipelago on historic grounds, its baseline system will have to meet the relevant international legal rules. Furthermore, in such a scenario, article 8(2) of the LOS Convention might well guarantee certain navigational rights. Adopted in the LOS Convention to prevent the use of baselines becoming an unacceptable infringement on the core value of freedom of navigation from article 5(2) of the 1958 Territorial Sea Convention,⁴⁷ article 8(2) provides that “[w]here the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters

areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”

The concept of innocent passage is normally associated with the territorial sea which can extend up to a maximum of 12-n. miles from a State’s baseline. While article 2(1) of the LOS Convention declares that: “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea,” the interests of the international community are explicitly recognized by the inclusion of a specific set of rules governing the right of innocent passage of foreign ships through zones of territorial sea.

Articles 17 to 19 of the LOS Convention provide for the right of all ships to traverse the territorial waters of a coastal State provided such passage is continuous and expeditious⁴⁸ and is not prejudicial to the peace, good order and security of the coastal State.⁴⁹ The second paragraph of article 19 provides a list of activities which, if engaged in by ships while traversing territorial waters, will be considered to be prejudicial to the coastal State.⁵⁰ Article 20 further provides that “[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.”

Articles 21 through 26 of the Convention detail the rights and obligations of the coastal States and of foreign ships in regards to innocent passage through the territorial sea. The first paragraph of article 21 provides a fairly broad list of subjects for which the coastal State can adopt laws and regulations, for example, the safety of navigation and the preservation of the marine environment. The second paragraph, however, warns that such laws and regulations can not apply to the design and construction, manning or equipment of foreign ships unless they give effect to generally accepted international rules or standards. Paragraph 4 of article 21 exhorts foreign ships exercising the right of innocent passage to comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

While article 24 of the LOS Convention reminds the coastal State that it must not hamper the innocent passage of foreign ships through its territorial sea, article 25 clearly states that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” Paragraph 3 of article 25 further provides that the coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension is to take effect only after having been published.

A coastal State’s sovereign control over its internal waters, and the many rights and prerogatives recognized to it over the innocent passage of foreign ships in its territorial sea, are in marked contrast to the regime of transit passage which applies within international straits. Indeed, the LOS Convention contains a separate section, Part III, dealing exclusively with the rules governing “Straits used for international navigation.”

While Part III reflects the consensus ultimately reached during the Third U.N. Law of the Sea Conference on the scope and nature of the legal regime applicable to international straits, no precise definition of what constitutes an “international strait” could be agreed upon. Consequently, the principal source of law on this issue remains the International Court’s ruling in the 1949 *Corfu Channel* case.⁵¹

In one of the key passages of its decision, the International Court identified the twin criteria which together define an international strait: “one pertaining to geography and the other

to the function or use of the strait” to borrow Pharand’s words.⁵² In answering the question “whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for the international navigation,” the Court stated that “the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation”.⁵³

On the basis of the *Corfu Channel* case, most commentators agree that both a geographical and a functional element must be satisfied for a body of water to qualify as an international strait. Indeed, the Court’s deliberate use of the coordinative conjunction “and” gives equal weight to both criteria. The first criterion pertaining to geography has not been the subject of much discussion and was simply updated in article 37 of the LOS Convention to reflect the creation of the exclusive economic zone: “This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

It is the second, functional criterion, which has fuelled debate among law of the sea specialists. Some commentators, primarily American, have argued that so long as the body of water can, potentially, be used for international navigation, the Court’s functional definition or test is satisfied.⁵⁴ Others, including Canada’s foremost expert on the Northwest Passage, Pharand, have argued that before a strait can be defined as an international strait, it must be a “useful route for international maritime traffic”,⁵⁵ that it must have a history of usage, as of right, by the ships of foreign nations.⁵⁶ Some support for this view, which insists on actual use, can be gathered from the various references to straits in Part III of the LOS Convention. Indeed, Part III is entitled “Straits *Used* for International Navigation” and this reference is repeated in articles 34, 36 and 37. Reference could also be made to the pleadings of the United Kingdom in the 1951 *Norwegian Fisheries* case where an international strait was defined as “any legal strait to which a special regime as regards navigation applies under international law because the strait is *substantially used* by shipping proceeding from one part of the high seas to another.”⁵⁷

However, while doubts may exist as to whether a particular body of water, like the Northwest Passage, meets the definition of an international strait under international law, the legal regime which governs vessels within international straits is now firmly established. Most importantly, a separate and distinct navigational regime is defined by Part III of the LOS Convention, the right of transit passage, which differs in some key respects from the right of innocent passage through territorial waters.

Article 38 of the LOS Convention provides that all ships and aircraft enjoy the right of transit passage through international straits and that such right “shall not be impeded.” Whereas the right of innocent passage through territorial water applies only to ships, the right of transit passage extends to the air corridor above an international strait and can, therefore, also be exercised by aircraft. In its second paragraph, article 38 clarifies that transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Article 39 details the duties of ships and aircraft during passage and provides that they must “refrain from any activities other than those incident to their *normal* modes of continuous and expeditious transit...” As the normal mode of transit for submarines is underwater, article 39(1)(c) confirms their right to transit international straits submerged, another key difference with the right of innocent passage in territorial waters.

Articles 41 and 42 of the LOS Convention specify the subjects relating to transit passage for which States bordering straits may adopt laws and regulations. Article 41 confers rights similar to those in regards to the territorial sea for the designation of sea lanes and traffic separation schemes provided such measures conform to generally accepted international regulations. On the other hand, article 42 provides a much more restricted list of general issues which may be regulated by coastal States within an international strait: the safety of navigation; the prevention, reduction and control of pollution; the prevention of fishing activities; and the loading or unloading of any commodity, currency or person.⁵⁸ Significantly, coastal States are only entitled to adopt laws for the prevention of pollution within a strait which give effect to existing international standards. Thus, article 42, entitled “Laws and regulations of States bordering straits relating to transit passage,” more severely curtails the exercise of State prerogatives than its counterpart, article 21 “Laws and regulations of the coastal State relating to innocent passage” within territorial waters.

Of critical importance, the last article in the section on transit passage, article 44, categorically states:

States bordering straits *shall not hamper transit passage* and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be *no suspension of transit passage*.⁵⁹

Compared to the rules which govern internal or territorial waters, international law provides that a State bordering an international strait may exercise only limited powers over navigation within that strait.

Finally, it must be noted that particular categories of straits, as defined by the LOS Convention, are exempted from the right of transit passage or are governed by a distinct regime. For example, article 35 provides that nothing in Part III of the Convention affects “the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” The Turkish straits - the Dardanelles and Bosphorus – for example, fall into this category as they are governed by the specific regime defined in the 1936 Montreux Convention.⁶⁰

Article 36, provides that Part III “does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics...” This category necessarily only applies to straits which are more than twenty-four miles wide, like the Florida Strait or Strait of Havami between Cuba and the Florida keys.⁶¹ As R.R. Churchill and A.V. Lowe explain, “[i]n ... these exceptional cases ... there exists freedom of navigation through the economic zone or high seas route, and the right of innocent passage through the bands of territorial seas which lie on either side of it.”⁶²

A third category of straits exempted from the regime of transit passage is defined by article 38(1): “... [i]f the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” According to Churchill and Lowe, the Strait of Messina between Italy and Sicily and the Pemba Channel off Tanzania fall within this

category.⁶³ Article 45(1)(a) of the LOS Convention stipulates that in such cases, a non-suspendable right of innocent passage applies between the island and the mainland.

Article 45(1)(b) defines a final category of straits in which the principal regime of transit passage as defined by Part III does not apply: straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. Churchill and Lowe refer to the Straits of Tiran, those narrow sea passages between the Sinai and Arabian peninsulas which separate the Gulf of Aqaba from the Red Sea, as an example of this type of strait.⁶⁴ As with straits formed by an island, article 45(1)(b) provides that a non-suspendable right of innocent passage will apply in straits which connect a part of the high seas or an exclusive economic zone with the territorial sea of a coastal State. It should be noted that if the Northwest Passage ever came to be considered a strait used for international navigation, none of the special regimes defined by Part III of the LOS Convention would apply but rather, it would be subject to the general rules relating to transit passage.

A final set of rules must be outlined before considering the precedential value of the Northwest Passage for other straits around the world. While Part III of the LOS Convention deals specifically with the issue of straits used for international navigation, Part IV is devoted to archipelagic States. Article 46(1) defines an “archipelagic State” as a State constituted wholly by one or more archipelagos and which may include other islands. While the inclusion of a distinct archipelagic regime within the LOS Convention was promoted by such States as Indonesia, the Philippines and Fiji, according to Churchill and Lowe, article 46 would appear to include a number of States who are not normally considered as archipelagic States.

Secondly, the definition of an archipelagic State would appear to embrace a number of States who do not normally consider themselves to be archipelagic States, such as Japan, New Zealand and the United Kingdom. While it is not clear whether States have a choice as to whether they consider themselves as archipelagic States, they certainly do have an option as to whether they draw archipelagic baselines – and the capacity to draw such baselines appears to be the only consequence of a State being designated as an archipelagic State – since article 47 says ‘an archipelagic State *may* draw straight archipelagic baselines’ (emphasis added). In any case most of these non-traditional archipelagic States will in practice be unable to draw archipelagic baselines because of the rules governing the drawing of such baselines...⁶⁵

The LOS Convention stipulates a number of fairly restrictive rules before a coastal State can draw straight baselines to define its archipelagic waters. Article 47(1) provides that “an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.” States in which the total area of land exceeds that of water, like Cuba, Great Britain, Iceland or New Zealand, cannot therefore meet this criterion and are therefore not entitled to draw archipelagic baselines.⁶⁶ Furthermore, article 47(2) dictates that the length of individual baselines is not to exceed 100-n. miles, except that “up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.”

Article 49(1) of the Convention stipulates that the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47 regardless of their depth or distance from the coast. And article 49(2) specifies that “this sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.” However, this sovereignty is exercised subject to the right of archipelagic sea lanes passage conferred upon the ships and aircraft of all States by Part IV of the LOS Convention.

Article 53(1) of the LOS Convention provides that an archipelagic State may designate sea lanes and air routes for the continuous, expeditious and unobstructed passage of foreign ships and aircraft through or over its archipelagic waters and its adjacent territorial sea. Specific rules are then detailed in the following paragraphs of article 53 governing the designation of such sea lanes and air routes:

Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.⁶⁷

An archipelagic State may also prescribe traffic separation schemes for the safe passage of ships through narrow channels within its sea lanes.

The rights and duties of both coastal States and foreign ships and aircraft in regards to the right of archipelagic sea lanes passage mirror the regime defined by the LOS Convention for international straits and the right of transit passage. Indeed, article 54 in Part IV, which bears the rather lengthy title, “Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage” simply refers to the key provisions of the straits regime under Part III of the Convention: “Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage.” Much like the legal regime governing the right of transit passage through international straits, the right of archipelagic sea lanes passage allows for limited coastal State control over passing vessels and aircraft.

With these various legal regimes and specific rules in mind, it is now possible to better understand and evaluate other examples where coastal States have claimed a right to exercise some form of control over a strait bordering their territory. These situations will be analyzed and discover whether they could or might be influenced by any resolution of the Northwest Passage dispute in favour of Canadian sovereign control over navigation in its various routes. Of key interest throughout this analysis will be the U.S. responses – to what extent have U.S. official pronouncements, reactions and actions been consistent when confronted with what Washington considers to be an excessive maritime claim over an international strait.

III. Cases where Straits included within the Internal Waters of the Coastal State have been the Subject of U.S. Protests

1. The Piombino Strait

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The Italian government, by Presidential Decree n°816 dated April 26, 1977, established straight baselines around the Tuscan archipelago and also laid claim to the Gulf of Tarantino on the basis of an historic title.⁶⁸ Doubts have been voiced as far back as 1977 regarding the legality of the Italian baselines which enclose the entire Tuscan archipelago and thus encompass the Strait of Elba or Piombino.⁶⁹ The Italian claims are not recognized by the United States and in 1986, nine years after they were first proclaimed, Washington lodged a formal and public protest with the Italian government.⁷⁰ In 2009, France also appears to have publicly challenged the Italian baselines after several years of tacit acquiescence.⁷¹ France and the United States insist that Italy must accept a right of transit passage through the strait, or at the very least, a right of innocent passage. In support of their position, the U.S. and French governments invoke the fact that navigation through the strait, albeit of a mainly local character, was significant before the Italian baselines enclosed it and this argument is also espoused by some scholars.⁷²

Figure 2 The Tuscan Archipelago and the Strait of Messina



2. The Northeast Passage

The Soviet Union began considering the waters around its Siberian archipelagos as Soviet internal waters as early as the 1940s.⁷³ In 1965, it formally declared that the basis for this claim was historic title.⁷⁴ Washington challenged the claim by sending icebreakers each summer between 1962 and 1967, ostensibly to conduct oceanographic research in the contested waters according to the official American announcement.⁷⁵ There is little doubt, however, that the main goal of the missions was to signal the U.S. government's strong opposition to the Soviet claim.⁷⁶ The presence of U.S. Coast Guard vessels in what it considered to be its sovereign waters triggered protests from the Soviet Union who also reacted by sending reconnaissance aircraft to

Lalonde, Suzanne et Frédéric Lasserre, "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

monitor the movements of the American ships.⁷⁷ In 1964, the icebreaker *Burton Island* attempted to transit the Dmitri Laptev Strait, but gave up in the face of Soviet protests and intimidation by Soviet warships.⁷⁸ In 1965, the U.S.S. *Northwind* similarly tried to cross the Vilkitski Strait, but also faced determined opposition from Soviet frigates.⁷⁹ Then in 1967, the American icebreakers *Edisto* and *Eastwind* notified the relevant Soviet authorities of their intention to sail north of the Severnaya Zemlya archipelago before transiting through the Bering Strait; they were however forced to turn back when confronted with strong Soviet military opposition.⁸⁰ Since the 1967 showdown, U.S. icebreakers have not attempted to utilize the Russian Arctic straits.⁸¹ However, the United States officially reiterate its protest against the Soviet claim in 1982, 1984 and 1986.⁸²

Figure 3 The Northeast Passage



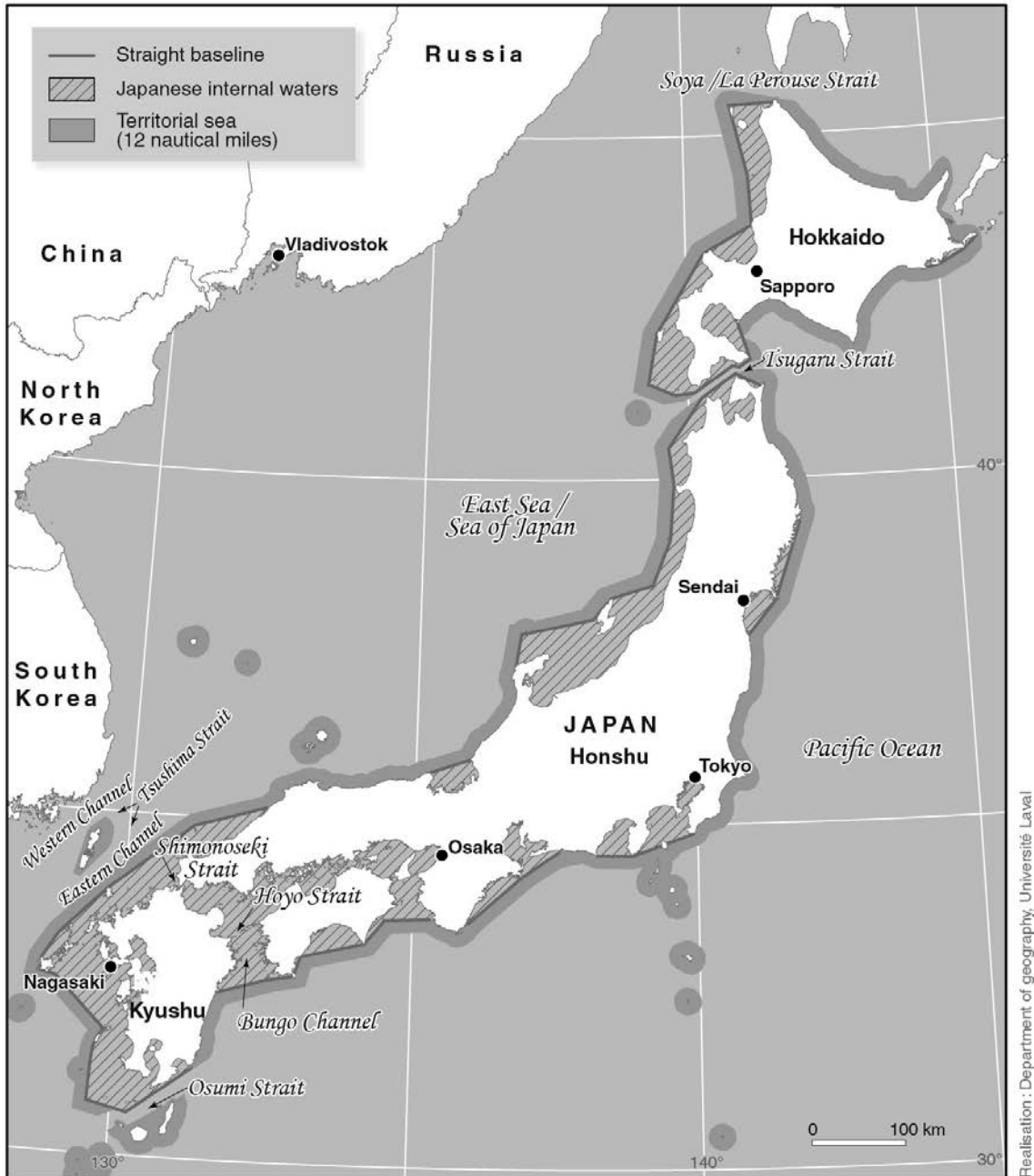
3. The Japanese Straits

In June 1996, Japan adopted Law No. 77 which established straight baselines around most of the Japanese archipelago.⁸³ The Japanese government deliberately left four major straits outside its baseline system: La Pérouse/Soya; Osumi; Tsugaru; and the eastern channel of Tsushima Strait. The western channel of Tsushima Strait, which separates Japan and South Korea, could not be enclosed and remained subject to the normal rules of delimitation. Furthermore, while in 1977 Japan extended its territorial sea to 12-n. miles in keeping with evolving international norms, it specifically excepted from this general measure the four straits. Within these strategic waterways, the limits of Japan's territorial sea vary between 3 and 12-n. miles.⁸⁴ By claiming a reduced territorial sea where the strait measured less than 24-n. miles wide, Japan ensured that a high seas corridor would continue to exist. Some analysts have speculated that Japan was

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motivated by the desire to prevent submerged submarines from coming too close to the Japanese coastline.⁸⁵ As discussed above, article 36 of the LOS Convention provides that the right of transit passage does not apply to a strait if there exists through the strait a high seas route. Therefore, foreign submarines cannot remain submerged when transiting through Japan's territorial waters within those straits.⁸⁶ Another source explains that the Japanese measure enables nuclear-armed U.S. Navy ships and submarines to transit the strait without violating Japan's prohibition against nuclear weapons in its territory.⁸⁷

Figure 4 The Japanese Straits



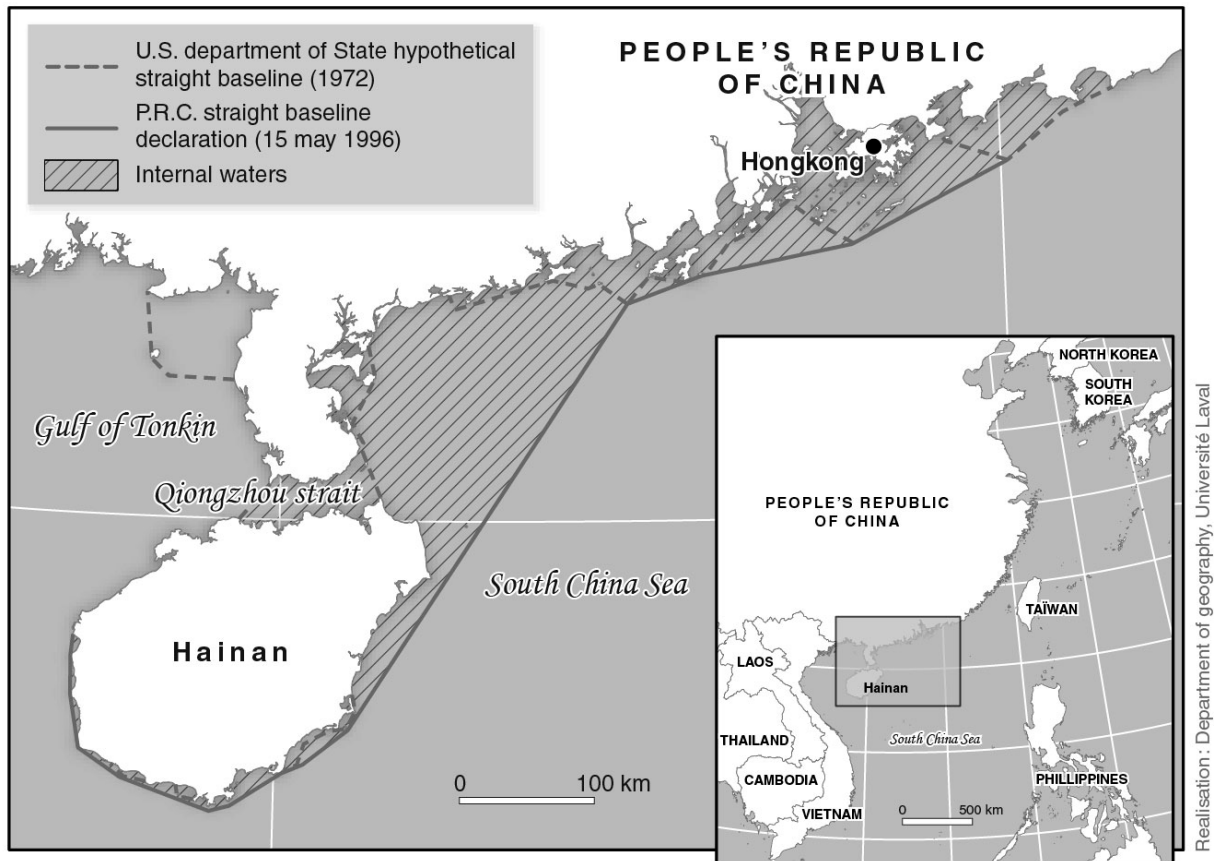
Japan's baselines encompass the straits between Honshu, Kyushu and Shikoku Islands: Shimonoseki Strait, Hoyo Strait and Bungo Channel. These particular baselines and Japanese control over the enclosed straits are not recognized by the United States. Washington officially protested against Japan's claim in 1998 and conducted an "operational challenge" in 1999.⁸⁸ According to the United States, these straits are international waters open to all since they are used for international navigation.⁸⁹ On March 16, 1999, the Japanese government replied that its straight baselines were drawn in complete conformity with international law.⁹⁰

It is unclear to what extent Japan could invoke the Northwest Passage as a precedent to defend its sovereignty claim over the Shimonoseki, Hoyo and Bungo Straits. Certainly the United States appears to have reacted to the Japanese claim in much the same way it has to Canada's claim over the Northwest Passage – Washington is adamant that the Japanese Straits are "used for international navigation" through which all ships and aircraft must enjoy the right of transit passage. However, if Washington's policy of reacting to and denouncing coastal State claims to extended jurisdiction is based on its perceived interest in defending and promoting freedom of navigation, the Japanese claim does not present much of a threat. The international community's interest in free and direct access to major maritime routes has been preserved since the five strategic straits remain fully accessible and ships can easily circumnavigate the Japanese mainland. The Japanese government not only exercised restraint in drawing its straight baselines, but it actually claims less than what current international legal rules afford it. The law of the sea, both the LOS Convention and international customary law, provide that a coastal State is entitled to exercise its sovereignty over territorial sea measuring up to 12-n. miles from its baselines. Japan has chosen not to exercise its sovereignty to the full extent provided by international norms and has acted in such a way so as to preserve the freedom of navigation of the high seas through those straits. As such, a resolution of the Northwest Passage dispute would in all likelihood have very little impact on the rights of ships navigating in and around Japan.

4. The Qiongzhou Strait between Hainan and China's Mainland

On September 4, 1958, of the People's Republic of China issued a Declaration which defined its territorial sea as a zone 12-n. miles in width.⁹¹ The Declaration also claimed Bohai Bay (Gulf of Tonkin) and the Qiongzhou Strait, between Hainan Island and southern China, as part of Chinese internal waters. More recently, the 1992 Law on the Territorial Sea declared that the method of straight baselines would be relied upon to define the Chinese territorial sea.⁹² The follow-up legislative instrument, the Declaration on the Baseline of the Territorial Sea, May 15, 1996, published the coordinates of China's baselines drawn around the Chinese mainland, Hainan Island as well as the disputed Xisha/Paracel Islands in the South China Sea.⁹³ The baseline system confirmed China's position according to which the Qiongzhou Strait is entirely within Chinese internal waters.⁹⁴

Figure 5 The Qiongzhou Strait



It appears as if the United States anticipated that China would eventually use straight baselines to enclose the Qiongzhou Strait, going so far as to postulate in 1972 how such a baseline might be defined.⁹⁵ Washington maintains that several segments of China's baseline are inconsistent with international law⁹⁶ and that the Chinese measures do not terminate the right of transit through what the United States sees as an international strait.⁹⁷ This position has been formally rejected by China on the basis that foreign ships do not enjoy and never have had a "right of innocent passage" (sic) through Qiongzhou Strait.⁹⁸ The reference to the right of innocent passage seems to indicate that China has never accepted that the straits regime applies to the Qiongzhou Strait, either because it feels it does not meet the definition of an international strait or because it believes that the exception defined in article 38 of the LOS Convention applies in this case.⁹⁹ The United States formally protested China's initial claim in 1958, and again in 1996 - calling into question the legality of both the baseline system and the claim to internal waters status for Qiongzhou Strait - and proceeded to conduct "operational assertions" in 1997.¹⁰⁰ However, according to Ji Guoxing, the Chinese claim has reportedly been effectively established as the United States has been unable to prevent China from enforcing its regulations and legislation.¹⁰¹

5. The Palk Strait

The Palk Strait, situated between India and Sri Lanka, was recognized as forming part of the Parties' historic waters by a bilateral treaty concluded on June 28, 1974.¹⁰² Sri Lanka subsequently formalized its claim to its part of the Strait in January 1977 and India followed suit. Lalonde, Suzanne et Frédéric Lasserre, "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

in June 1979.¹⁰³ The Palk Strait is included within India's and Sri Lanka's internal waters, though in this particular case, it is on the basis of an historic title rather than the drawing of straight baselines.¹⁰⁴ The Indian and Sri Lankan claims are not recognized by the United States. Washington lodged a protest in 1986, several years after the claims were first formulated, and proceeded to conduct operational assertions in 1993 and 1994 against India and in 1999 against Sri Lanka.¹⁰⁵

It should be noted that the Palk Strait is only 5 to 9 meters deep, with many shallow reefs, and serves no strategic traffic but only local coastal trade. However, in July 2005, India took the first steps towards making the Sethusamudram Shipping Canal Project a reality. The project aims to dredge a deep channel within the Indian sector of the Palk Strait.¹⁰⁶ If the canal transforms the Palk Strait into a strategic maritime link between the Gulf of Mannar and the Bay of Bengal, India's position may come under considerable strain. Increased international navigation through the Palk Strait might lend support to the U.S. view that the Palk Strait meets the definition of an international strait and is subject to the right of transit passage defined in Part III of the LOS Convention. It would also undoubtedly increase Washington's resolve to defend the freedom of navigation through the Strait and protest against any unilateral and sovereign assertion of control by India.

6. The Kerch Strait

The Kerch Strait enables ships to access the Sea of Azov from the Black Sea. In a 2003 Joint Statement, the Russian and Ukrainian governments formally declared that the Sea of Azov and the Kerch Strait were part of their historic internal waters.¹⁰⁷ According to U.S. documents, while Washington has protested Russia's internal waters claims in regards to other maritime zones "on numerous occasions", no such statement appears respecting the Kerch Strait.¹⁰⁸ The Kerch Strait thus appears to qualify for what could be termed the "dead-end exception" in Part III of the LOS Convention. Indeed, as provided in article 45(1)(a) of the Convention, a regime of non-suspendable innocent passage rather than the right of transit passage applies in straits which begin in a part of the high seas or an exclusive economic zone but end up in the territorial sea of another State. However, the American position on the appropriate navigational regime within the Kerch Strait is not entirely clear. The U.S. Navy Commander's Handbook lists the Kerch Strait among those straits that connect the high seas or an exclusive economic zone with "claimed" historic waters, the qualifier seemingly implying that the Russian and Ukrainian claims are not entirely accepted.¹⁰⁹ The strategic value of this strait for the United States is, however, minimal since the Kerch Strait merely gives access to a small enclosed sea.

7. Head Harbour Passage

Head Harbour Passage within Passamaquoddy Bay, at the western entrance of the Bay of Fundy, is the principal navigation route to Eastport, Maine and has been used by vessels to access the port of Bayside in New Brunswick. At its narrowest, Head Harbour Passage is less than one nautical mile wide. It is approximately 4-n. miles in length and "runs between the islands south of Deer Island and Campobello Island (both of which are Canadian) before reaching U.S. waters east of Eastport, Maine."¹¹⁰ As McDorman explains, "[a]s a result of 1908 and 1910 maritime boundary agreements, there is no question that the waters of the Head Harbour Passage are Canadian as opposed to being waters under the jurisdiction of the United States."¹¹¹

While the Passage may be on the Canadian side of the boundary line, the United States has always maintained that it is an international strait used for international navigation through which there exists a right of non-suspendable innocent passage. While Canada's position has not

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been publicly articulated, Canada claims the Bay of Fundy as historic internal waters and as McDorman explains, “it is presumed that the Bay of Fundy includes the Canadian waters in Passamaquoddy Bay and the Head Harbour Passage.”¹¹² Though the disagreement has been less prominent than that of the Northwest Passage, the dispute has periodically flared over proposals for the construction of infrastructure which would entail increased shipping through the passage.

The Canada-U.S. dispute regarding the Head Harbour Passage resurfaced in 2006 to 2007 as a result of proposals to site liquefied natural gas (LNG) facilities near Eastport, Maine, that would necessitate LNG tanker traffic through the Passage. The dispute had previously arisen in the 1970s and 1980s as a result of a proposed oil refinery near Eastport and consequent proposed oil tanker traffic through the Head Harbour Passage.¹¹³

8. Summary

The seven cases discussed in this section represent situations where the United States has protested respecting what it considers to be illegal inclusion of an international strait within a coastal State’s internal waters, thus defending the principle of freedom of navigation. As noted above, in the case of Japan, there appears to be little threat to the vital interests of the United States. By ensuring that significant portions of the La Pérouse/Soya, Osumi, Tsugaru and Tsushima Straits remain outside not only of its internal but also its territorial waters, Japan has maintained access to the major shipping routes in the region and has guaranteed international mobility.

In three other cases, the Palk Strait, the Kerch Strait and the Piombino Strait, the waterways are of little practical value to the United States and the international community. Whether by virtue of physical constraints (shallow water and the presence of reefs in the Palk Strait), or strategic limitations (access to a small inner sea in the case of the Kerch Strait), or the proximity of more advantageous shipping lanes (west of Elba Island for the Piombino Strait), these three maritime routes are of little use to international stakeholders. It is highly unlikely that a resolution of the Northwest Passage dispute would have any effect on the activities within these straits.

The Northeast Passage, now better known as part of the Northern Sea Route (NSR), the Qiongzhou Strait and Head Harbour Passage not only raise some of the same legal concerns as the Northwest Passage over the drawing of straight baselines and/or claims to historic title but also present an undeniable and very real strategic interest for the United States. While the United States has made its position clear in these three cases, it is interesting to note that none of the leading academic works that have looked at or mentioned the precedent argument mention these three straits. Only a handful of straits are habitually mentioned in the literature: Gibraltar, Hormuz and Malacca being the usual suspects. One can only speculate as to the reasons for this lack of interest in the Northeast Passage or Qiongzhou Strait. It may be that the same argument relating to proximate alternative routes also applies to the Northeast Passage. Some are now in fact predicting that transpolar shipping in the Arctic Ocean will soon be a reality, significantly diminishing the attraction of the Northern Sea Route for non-Russian companies and stakeholders. In the Chinese case, there may be a tacit acknowledgment that China does exercise exclusive sovereignty over the Qiongzhou Strait and that this situation is not about to change. As

for Head Harbour Passage, its importance is more local in character and thus unlikely to feature in any global strategic assessment. It may be simply lumped in with the Northwest Passage dispute, its features bearing so many similarities to the stalemate over the Arctic waterway.

However, there can be no denying that India, Sri Lanka, Russia, Ukraine, Italy, Japan and China, might seize upon any concessions made by Washington in resolving the Northwest Passage dispute to bolster their own claims. Canada would also most likely invoke any compromise over the Passage in negotiations over the status of Head Harbour Passage. The stakes, on a political and legal level, are high for the United States; the weight afforded its interpretation of the various international rules would be severely weakened if its legal position was seen to vary on a case-by-case basis. Governments must be seen to be acting coherently lest they lose credibility in future diplomatic, political and legal negotiations.

The conclusion is that there are situations around the world which might be influenced by a resolution of the Northwest Passage dispute in favour of Canada. However, they are relatively small in number and are not the cases usually identified to sound alarm bells. Moreover, in four of the seven potential situations, freedom of navigation and world-wide maritime mobility are not at risk.

IV. Straits Enclosed within Internal Waters and the Role of International Treaties

Other straits enclosed within the internal waters of particular States have not been the subject of U.S. protests because they are governed by specific international treaties or agreements.

1. The Turkish Straits

The Bosphorus and the Dardanelles Straits connect the Black Sea with the Mediterranean. They can be easily and effectively blockaded as shown by the ill-fated French-British attempt to use force in 1915 during World War I.¹¹⁴ In the early decades of the Twentieth Century, their status was a constant source of friction, especially between the then Soviet Union and Turkey, until the issue was largely settled with the Montreux Convention of July 26, 1936.¹¹⁵

While the 1936 Convention granted Turkey a wide measure of control over the Straits, it also recognized and affirmed in Article 1 the principle of freedom of transit and navigation for all ships, including the right to transit through the Straits without a local pilot.¹¹⁶ Turkey's position in regards to the Straits was consolidated decades later by the drawing of straight baselines in May 1964 (Law 476) which enclosed the Straits within Turkey's internal waters.¹¹⁷ The United States did not protest the 1964 Turkish act, no doubt convinced that the right of transit was adequately protected by the Montreux Convention. Washington considers that the Bosphorus and Dardanelles fall within the category of straits defined by article 35(c) of the LOS Convention which are exempted from the general straits regime.¹¹⁸

As maritime traffic steadily increased, so did Turkey's disenchantment with the Montreux regime, which it came to regard as inherently unsafe for shipping. Of particular concern was the risk of accidents within the narrow straits (700 meters wide at the narrowest point of the Bosphorus in the vicinity of crowded Istanbul and 1.3 kilometres in the Dardanelles) particularly in light of the huge number of transits. In 2007, about 56,000 merchant ships crossed the Turkish Straits, including 10 000 tankers.¹¹⁹ Statistics bear out Turkey's concerns: between 1988 and 1992, there were 155 collisions in the Bosphorus alone.¹²⁰

In March 1994, the crude oil tanker *M/T Nassia* was engulfed in flames in the Bosphorus after a collision with a smaller vessel, the *M/V Shipbroker*: 9,000 tons of petroleum were discharged, a further 20,000 tons burnt over the course of four days and the ship itself was

completely destroyed. Traffic in the Strait was suspended for a week and the disaster is estimated to have caused 30 deaths and about 1 billion dollars in damages.¹²¹

Following the *Nassia* accident, the Turkish government established in 1994 a traffic separation scheme in both Straits with the International Maritime Organization's (IMO) approval.¹²² Van Dyke reports that Turkey also promulgated that year, "without complete IMO endorsement, the Turkish Straits Maritime Regulations, which established rules on ship reporting and the use of pilots and tugs."¹²³ This Turkish initiative was severely criticized by a number of IMO members. Indeed, the Legal Committee of the IMO noted that "a substantial number of States considered the Turkish regulations to be inconsistent with the Montreux Convention and the IMO rules and regulations" and recommended that the matter should be further investigated.¹²⁴

In defence of its legislation, Turkey stressed that the 1982 LOS Convention grants coastal States the right to take measures in order to ensure the safe transit of ships and that it had sought and secured the IMO's approval.¹²⁵ Although Turkey's avowed intention was not to call the right of transit through the straits into question, but rather to guarantee the safety of such transits, nevertheless the United States and Russia felt compelled to challenge Turkey's regulatory measures, particularly, from the U.S. perspective, as they pertained to military vessels.¹²⁶ However, despite U.S., Greek, Ukrainian, Romanian and especially Russian protests,¹²⁷ the regulatory measures promulgated by the Turkish government are still in place and are rigorously enforced.

2. The Danish Straits

On March 14, 1857, Denmark signed a treaty with several European States guaranteeing freedom of navigation through the Danish Straits and a few weeks later, on April 11, 1857, a similar treaty was concluded with the United States.¹²⁸ Article 1 of the March 1857 Treaty provides for the freedom of navigation of merchant ships through Danish territorial waters, the suppressing of all levies and impediments to navigation, especially in the three Danish straits connecting the Baltic Sea with the North Sea, the Sound, the Great Belt and the Little Belt.¹²⁹ The creation of this specific regime for freedom of navigation through the Danish Straits did not, however, prevent Denmark from including the Little Belt within Danish internal waters when in 1966, Copenhagen established a straight baseline system.¹³⁰ The United States does not appear to have protested the Danish claim to the Little Belt, no doubt because the widest and deepest Straits, the Sound and the Great Belt, remained international straits though within Denmark's territorial waters. The Great Belt Strait is the one most used for international maritime traffic. In any case, Denmark shows no inclination to enclose these larger straits within its baselines. And even if it were to entertain such a move, it is likely that many States would argue that the 1857 Treaties were tantamount to an admission that the Danish Straits are international straits used for international navigation subject to the regime of transit passage.

Figure 6 The Danish Straits



In 1969, Denmark and Sweden established a traffic separation scheme for segments of both the Sound and the Great Belt,¹³¹ and more recently, in 2007, instituted a mandatory reporting system in the Great Belt with a vessel traffic service system (monitoring and navigation assistance), and a voluntary reporting system in the Sound.¹³² This assertion of jurisdiction to regulate maritime traffic within the two Straits did not seem to elicit a protest from the United States. No doubt Washington considered it to be consistent with article 41 of the LOS Convention and general customary principles, which allow States bordering straits to prescribe traffic separation schemes for the safe passage of ships.

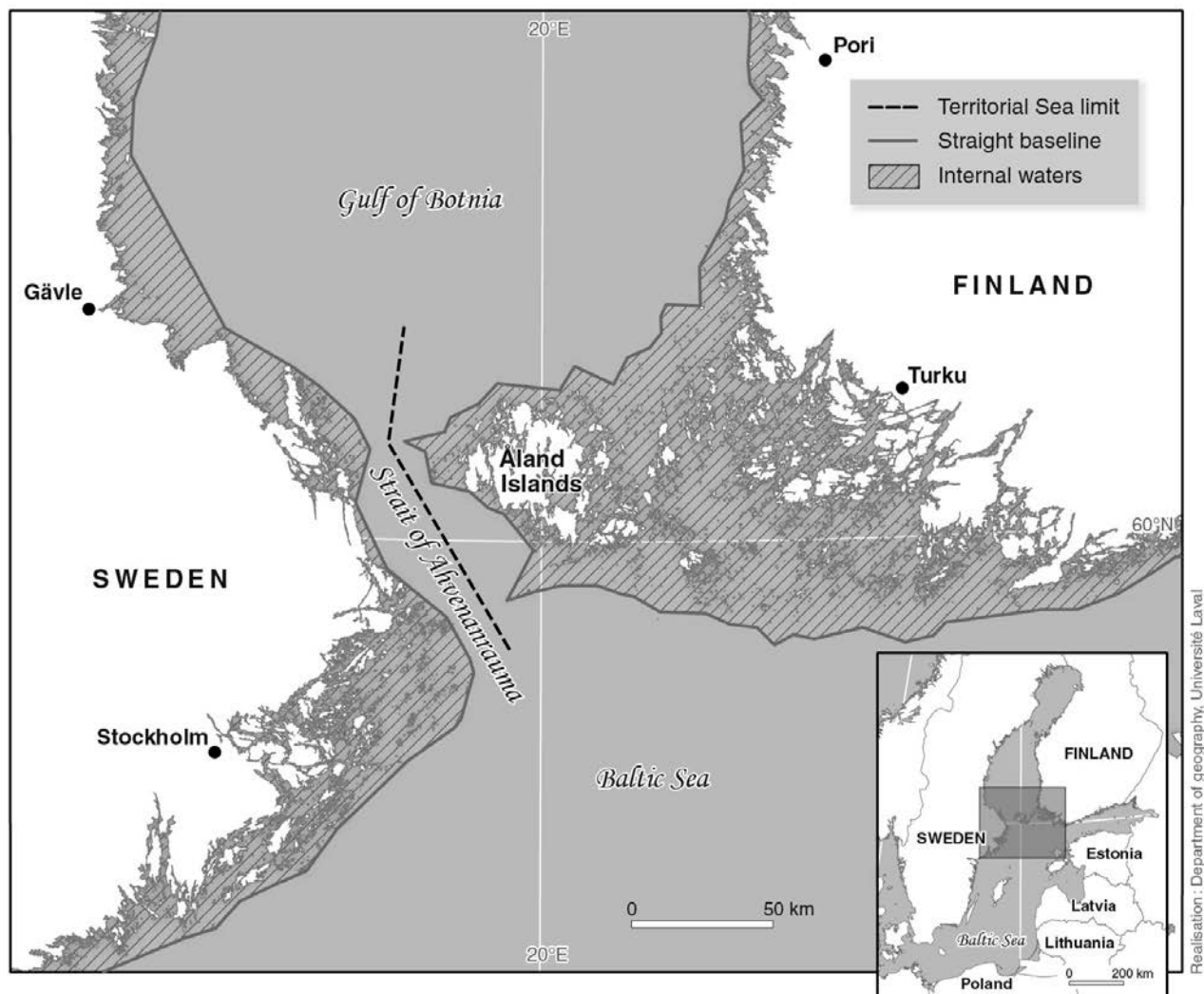
3. The Åland/Ahvenanrauma Strait

The Strait of Åland connects the Baltic Sea with the Gulf of Bothnia which lies between the Swedish coast and the Finnish Åland archipelago. Finland enclosed the archipelago within

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straight baselines as early as August 18, 1956, and promulgated a new law with revised baselines in July of 1995. Finnish law mandates a periodic review of Finland's base points and baseline system; the coordinates must be corrected every 30 years and as such, the present baselines are valid until 2024.¹³³ The United States does not appear to have questioned the Finnish straight baselines, even though to the west and south of the Åland islands, they enclosed part of the waters of the strait within Finland's internal waters. This may be because the Finnish baselines leave the main channel of the Åland Strait within the territorial waters of either Sweden or Finland. The precise delimitation of the waters and the continental shelf between the two neighboring States was negotiated in an agreement signed on September 29, 1972.¹³⁴

Figure 7 The Finnish straight baseline around the Åland archipelago and the Swedish-Finnish territorial seas



However, Washington has protested Finland and Sweden's position to the effect that the Åland/Ahvenanrauma Strait is an article 35(c) exception strait.¹³⁵ Relying on the 1921 Convention on the Demilitarization and Neutralization of the Åland Islands,¹³⁶ which regulates the status of the Åland archipelago, both Helsinki, by a Declaration on June 21, 1996,¹³⁷ and

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Stockholm by a Declaration on June 25, 1996,¹³⁸ claim that the Strait is exempted from the general regime and is rather governed exclusively by the 1921 Convention. Finland and Sweden do not deny that a right of passage exists through the Åland Strait; they merely specify that, in their view, this transit regime is regulated by the 1921 Convention rather than by Part III of the 1982 LOS Convention.¹³⁹ The two Nordic countries argue that the Åland Strait has been habitually classified in the literature as a strait which comes within the purview of article 35(c), much like the Danish Straits, the Turkish Straits or the Strait of Magellan.

Despite these arguments, the United States has never recognized the views of Sweden and Finland on the status of the Ahvenanrauma Strait, citing the fact that it is not a party to the 1921 Convention.¹⁴⁰ This argument appears, however, rather weak, nothing in article 35(c) of the LOS Convention predicates its effect on a universal participation in a “long-standing international convention” which regulates a strait; and furthermore, the United States has accepted that the Turkish Straits are governed by the 1936 Montreux Convention and that the Strait of Magellan is regulated by the 1881 Treaty between Chile and Argentina,¹⁴¹ even though the United States is not a party to either of those two treaties. However, in these two situations, the “long-standing conventions in force” appear to serve U.S. interests, demonstrated in the discussion below.

4. The Straits of Magellan and Le Maire

The Strait of Magellan, between South America’s mainland and the archipelago of Tierra del Fuego, was of major strategic importance before the Panama Canal was built, as it enabled ships to avoid plying the rough waters of the Cape Horn. Both Chile in 1977,¹⁴² and Argentina in 1966, and 1991,¹⁴³ have promulgated straight baselines along their coasts, with Chile’s system being by far the more extensive. As the Magellan Strait lies almost entirely within Chile’s landmass, it is mainly the Chilean legislation which is of relevance. The Strait of Le Maire is between the Argentinean Staten Island and the main island of the Tierra del Fuego archipelago: it gives access to Cape Horn. To date, Buenos Aires has not shown any intention of extending its straight baseline system so as to enclose the Le Maire Strait within its internal waters.

Figure 8 The Magellan and Le Maire Straits



The U.S. Department of State notes that while Chile's straight baseline system has been drawn so as to include all of the Chilean coastal islands, it "has been deliberately constructed so as to exclude the Strait of Magellan from within the system of internal waters. The strait is subject of an international treaty (July 23, 1881) which guarantees free navigation through its waters."¹⁴⁴ It is article 5 of the 1881 Treaty between Chile and Argentina which provides for the neutralization of the strait and the freedom of navigation¹⁴⁵ and which fulfilled the promise made by Chile in 1873 to the United States,¹⁴⁶ who, together with the United Kingdom, had pressured the two parties to guarantee free passage through the strategic strait.¹⁴⁷ The terms of the 1881 Treaty regarding the status of the Strait of Magellan were subsequently confirmed in the Lalonde, Suzanne et Frédéric Lasserre, "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

November 29, 1984 Treaty of Peace and Friendship between Chile and Argentina,¹⁴⁸ which put an end to an era of severe tension between the two countries over possession of islands in the Beagle Channel.¹⁴⁹ Thus, not only is the Strait of Magellan in Chilean territorial waters, and not in its internal waters, but a long-standing convention dating back to 1881, recently reaffirmed by both Chile and Argentina, also guarantees the freedom of navigation across the Strait.

5. Summary

This section has highlighted that while several strategic straits may be included, wholly or partially, in internal waters, or could have been, they are regulated by international treaties that limit the sovereignty of the States bordering such straits. Although the coastal States involved have, in some cases, adopted measures to regulate maritime traffic, for instance in the Danish and Turkish Straits, these practices have not called the regime of transit passage into question. With respect to the Strait of Magellan, Chile has publicly pledged, through its treaty practice and governmental policies, its commitment to guaranteeing freedom of navigation through the waterway. It is difficult to envisage that what happens respecting the Northwest Passage could be considered as a precedent which might unsettle or weaken such long-established and successful regimes.

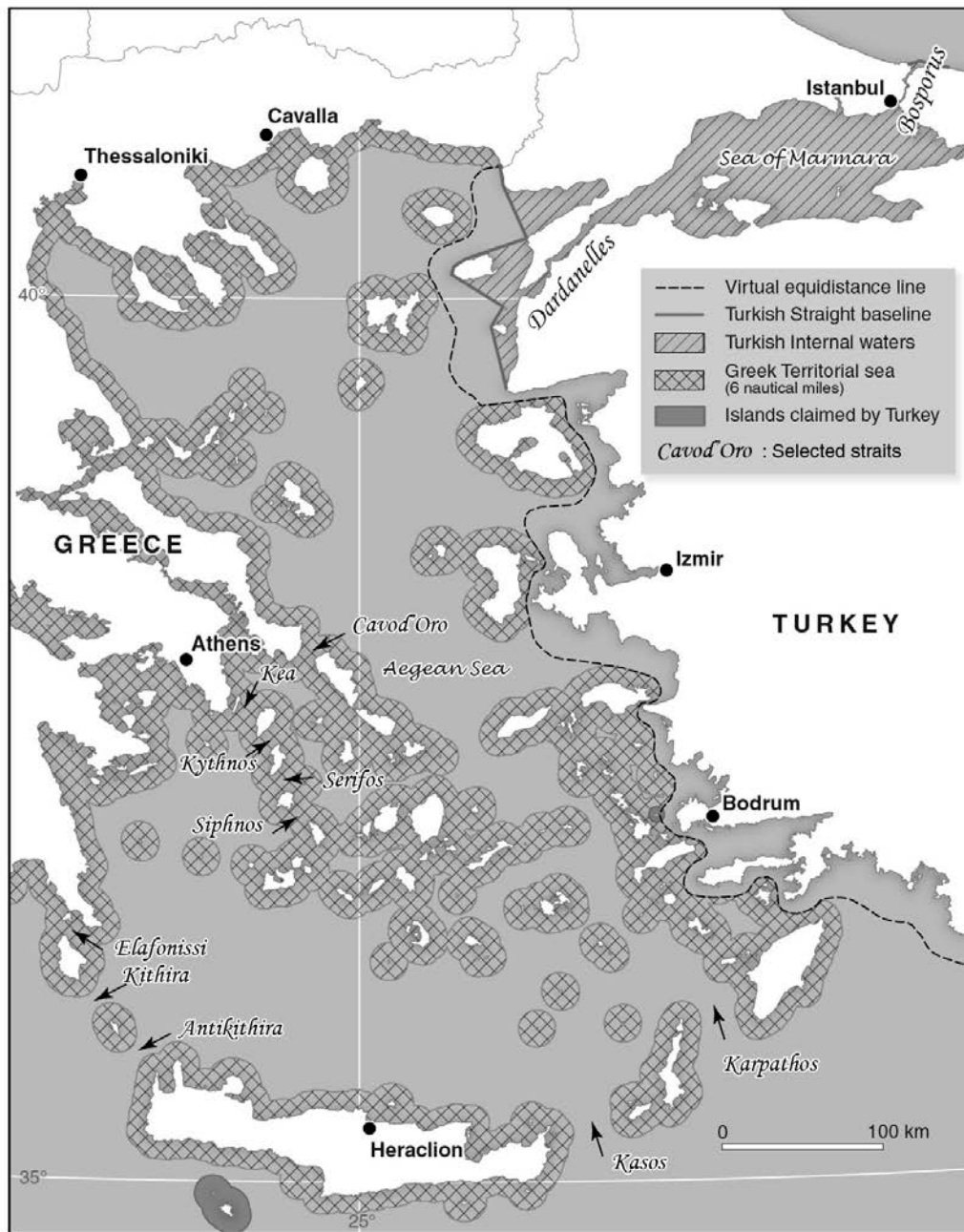
V. Straits where the Freedom of Navigation is Maintained as a Result of Specific UNCLOS Rules and State Policies

There is a third category of cases where straight baselines have been drawn but do not restrain navigation, or could have been drawn but were not, because of the State choices.

1. The Greek Islands in the Aegean Sea

The Greek archipelago of Aegean Islands comprises more than a hundred islands scattered across the sea, right up to the Turkish coast and major sea lanes wind their way through the various straits between the Greek islands.¹⁵⁰ This geographical situation has greatly complicated the process of delimiting the territorial sea and the continental shelf between Greece and Turkey, a question still unresolved, and has been the source of tension between the two States.¹⁵¹ Athens and Ankara are also involved in a territorial dispute over ownership of two small islands, Imia/Kardak and Gavdos.¹⁵² Both the Greek and Turkish territorial waters in the Aegean Sea are limited to 6-n. miles. The possibility that such waters might be extended to 12-n. miles has fuelled Turkish concerns over a concomitant disproportionate increase in Greek-controlled maritime space.¹⁵³

Figure 9 The Aegean Islands and the Turkish



Turkey established straight baselines in May 1964,¹⁵⁴ but to date, Greece has refrained from following suit. The drawing of straight baselines around the perimeter of the Greek islands would have the effect of including most of the Aegean Sea within Greece's internal waters. Is there a risk that at some point in the future, Athens might consider drawing such baselines?

A number of reasons militate against such a situation. First, it would not be to Greece's political advantage. Athens is well aware that the promulgation of such a system of baselines would be interpreted negatively by Turkey and would hinder boundary negotiations. And at a more fundamental level, it would not be in line with the Greek maritime policy. Greece has

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officially stated on two separate occasions that the territorial sea is measured “from the coast”, thus adhering to the normal baseline method. The first instance was in 1936 in the Compulsory Law 230/1936 and the second was in Law 1182 in 1972.¹⁵⁵ Greece’s ratification instrument to the 1958 Territorial Sea Convention explicitly states in two separate paragraphs that Greece will apply “the system of the normal baselines”.¹⁵⁶ Furthermore, the 1995 Greek ratification instrument to the LOS Convention makes no mention of straight baselines,¹⁵⁷ contrary to the view expressed by some authors.¹⁵⁸ There is no technical impediment preventing Greece from resorting to the use of straight baselines: its coast is deeply indented and fringed by several islands in close proximity as mandated by the rules defined in the LOS Convention. Some authors have speculated that Greece’s reluctance stems from concern that the rules of the LOS Convention not be used so as to unduly restrict the freedom of navigation and its fear that it might itself create a precedent which might impinge on free navigation.¹⁵⁹ This last fear appears, however, unwarranted to the extent that article 8(2) of the LOS Convention provides that where the drawing of a straight baseline encloses maritime areas as internal waters which were not previously considered as such, a right of innocent passage through those waters is preserved. Besides, the Aegean Sea lanes are busy and many Greek straits would certainly be considered international straits. It must, therefore, be concluded that Greece’s reluctance rests on both the desire not to further strain its already tense relations with Turkey and its long-established policy in favour of normal baselines.

2. The Minches Strait

On September 24, 1964, the United Kingdom drew a series of straight baselines joining the Hebrides Islands to the west coast of Scotland, thus enclosing the Minches, the strait between the main coast of northern Scotland and the island chain, within British internal waters.¹⁶⁰ The United Kingdom recognizes that a right of innocent passage, rather than the regime of transit passage, applies in the Minches Strait. According to the United Kingdom, the Minches Strait is exempted from the right of transit passage under the rule set out in article 38(1) of the LOS Convention as a deep water alternative route exists west of the Hebrides which has been surveyed and approved through the IMO as a traffic routing scheme.¹⁶¹ Tankers and larger vessels, in the aftermath of the disaster of the *MV Braer* in 1993,¹⁶² are recommended to use this alternate route which lies outside Britain’s internal waters but even this alternative lane is closed off to oil tankers weighing more than 10,000 gross tonnage.¹⁶³ As an official of the British government asserted,¹⁶⁴ this position is consistent with articles 5(2) of the 1958 Territorial Sea Convention and 8(2) of the 1982 LOS Convention: “where the establishment of a straight baseline... has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage ... shall exist in those waters.” This position is in line with the U.S. view that where a right of passage exists, it is not terminated by the promulgation of straight baselines.

Figure 10 The United Kingdom Straight baseline and the Minch



3. The Strait of Messina

Italy's baseline system was not drawn so as to enclose the Strait of Messina within Italian internal waters, although it does include the Strait of Piombino.¹⁶⁵ Rome, concerned about the risk posed by traffic across the narrow Piombino Strait, was well aware that the level of international traffic through the Strait of Messina precluded its enclosure within its internal waters. Instead, it negotiated a special clause within LOS Convention, article 38, which is often referred to as the Messina clause.¹⁶⁶ Not surprisingly, the Strait of Messina is cited as an example of the third category of straits exempted from the right of transit passage defined by Part III of the LOS Convention because an alternate route exists to the south and west of Sicily. It should be noted, however, that article 45(1) stipulates that a non-suspendable right of innocent passage

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applies to those straits excluded from the application of the regime of transit passage under article 38(1).

As a result of a series of accidents in the Messina Strait which culminated in the collision of Greek and Spanish tankers on March 21, 1985 and a major oil spill,¹⁶⁷ Italy has claimed the right to close the Strait to ships over 50,000 tons carrying oil or other toxic substances and has imposed mandatory pilotage for ships over 15,000 tons.¹⁶⁸ This assertion of control over shipping within the Strait of Messina is contested by the United States. A diplomatic note sent on April 5, 1985, a month before the adoption of the Italian decree concerning passage within the Strait, stressed Washington's view that the Strait of Messina was a strait used for international navigation to which the regime of non-suspendable innocent passage applied.¹⁶⁹ However, despite repeated protests, particularly from the United States, the partial closure of the Strait has been maintained.¹⁷⁰

4. Summary

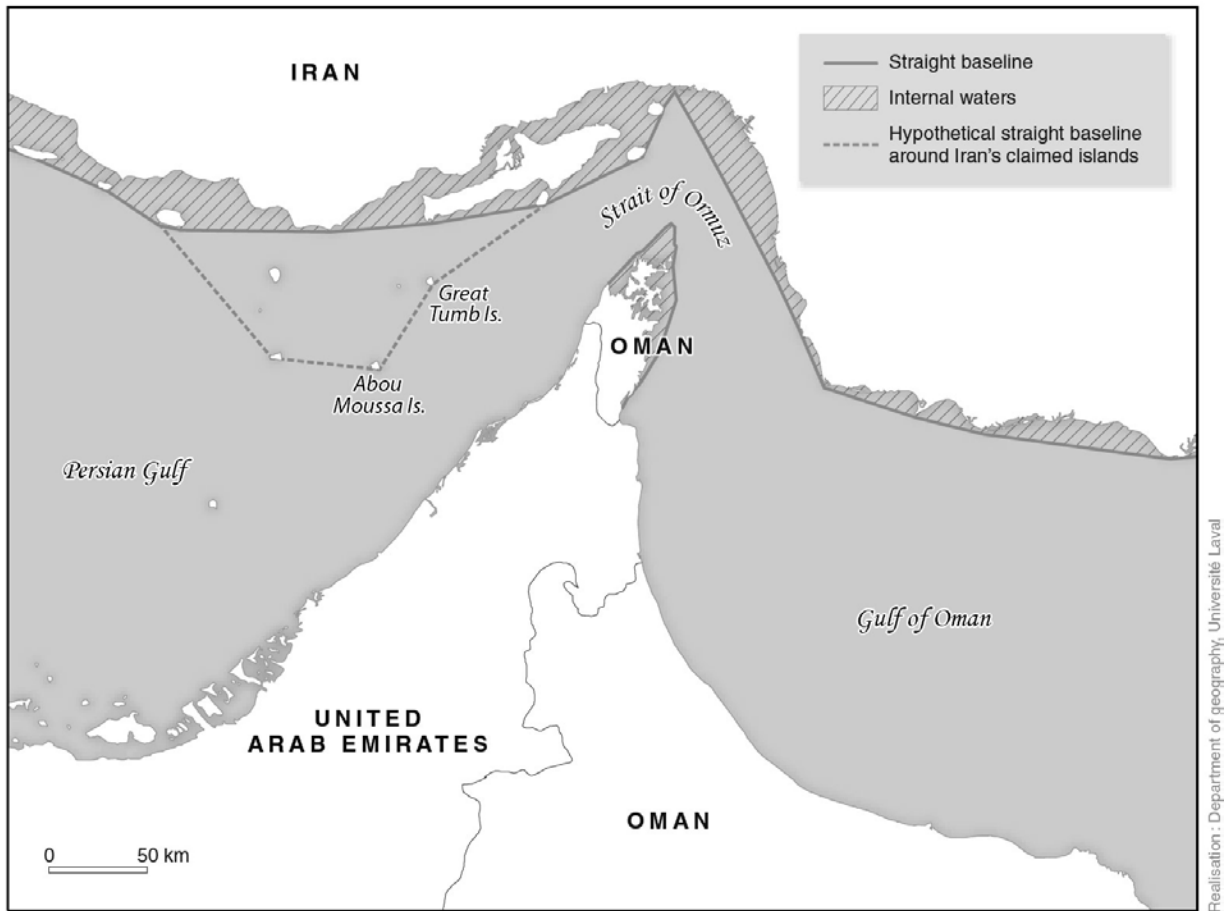
The three cases examined in this section seem to be immune from any Northwest Passage spillover effect. The United Kingdom recognizes that a right of innocent passage exists in the Minches, though it is considered to be within British internal waters. Greece, for its part, seems steadfast in its reluctance to resort to straight baselines, although its coastline could very well justify them. It is highly unlikely that Greece would abandon its traditional legal position and sacrifice its political interests on the basis of developments in the Northwest Passage case. Both the United Kingdom and Greece have been long term and steadfast advocates of the principle of freedom of navigation. As for the Strait of Messina, Italy's national interests were perceived to be adequately protected with the inclusion of article 38 in the LOS Convention. The Italian government has officially recognized through its policies (refraining from enclosing the Strait of Messina within its baselines for example) that a right of innocent passage exists through the Strait, while invoking its right to regulate maritime traffic to ensure safety of navigation.

VI. Major Straits

Most of the key strategic straits around the world, including between islands, cannot be wholly enclosed within the internal waters of the States bordering such straits. Rather, they fall within their territorial sea or archipelagic waters and often even have high seas corridors. Sunda or Lombok Straits, for instance, are within Indonesian archipelagic waters;¹⁷¹ the Straits of Gibraltar, Hormuz, Malacca, Singapore, Torres, Bass, Dover and Bab el-Mandeb are within the territorial waters of the bordering States.¹⁷² Even if Iran tried to extend its straight baseline system so as to include disputed islands, it could not wholly control the Strait of Hormuz as part of its internal waters.¹⁷³ Similarly, even though Australia has expended considerable efforts since 2004 to develop a specific transit regime with mandatory pilotage for the Torres Strait,¹⁷⁴ it remains within Australia's territorial waters and exclusive economic zone. More importantly, these critical maritime arteries are "used for international navigation" on a massive scale: Malacca, 70,700 transits in 2007;¹⁷⁵ the Strait of Dover, about 146,000 ships annually;¹⁷⁶ Lombok, about 4,000 per year;¹⁷⁷ Gibraltar, about 80,000 ships yearly;¹⁷⁸ Torres Strait, 3,000 vessels annually.¹⁷⁹ Their status as international straits, on the basis of both the geographical and functional criteria, is beyond question. They are, therefore, subject to the regime of transit passage defined by the LOS Convention which guarantees freedom of navigation and overflight without impediment. Any eventual resolution of the Northwest Passage dispute could not impinge on these established international straits and the recognized legal regime that applies to them.

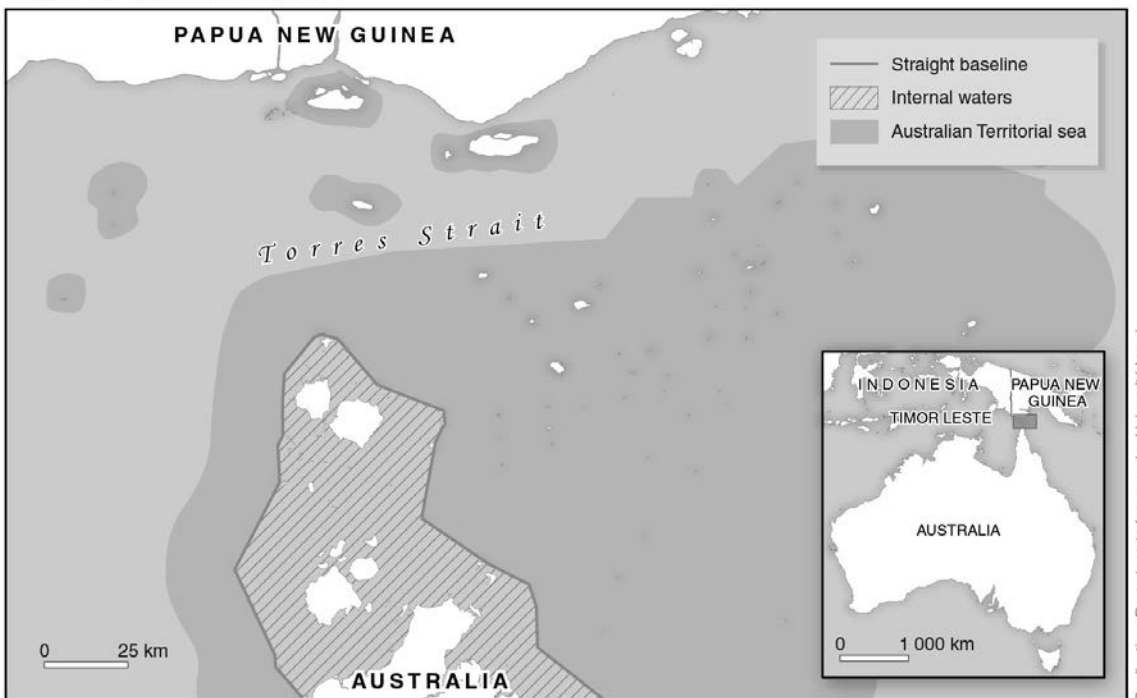
Lalonde, Suzanne et Frédéric Lasserre, "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

Figure 11 The Strait of Ormuz



Lalonde, Suzanne et Frédéric Lasserre, "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

Figure 12 The Torres Strait



There is no doubt that a number of measures restricting freedom of navigation through straits have been adopted in the last few decades, including in Europe and North America. Relying on the powers and prerogatives conferred by articles 41 and 42 of the LOS Convention, States bordering straits have invoked environmental protection and accident prevention as justifications for these measures. At the very heart of this trend are issues related to what Douglas Johnston, an eminent Canadian legal scholar, described as the “greening” of the law of the sea.¹⁸⁰ This tension between coastal State control and the freedom of navigation, often decried as a phenomenon of “creeping jurisdiction,” is not, however, specific to the strait’s regime. It is a fundamental issue which confronts the law of the sea as a whole.¹⁸¹

VII. Conclusion

The United States appears to have consistently protested against regulations or limitations imposed on the transit regime of straits around the world, whether such straits involve internal waters or not. The United States has also repeatedly criticized what it considers to be an abusive reliance on article 7 of the LOS Convention which provides for the drawing of straight baselines.¹⁸² The U.S. position appears to have garnered some support from the International Court of Justice, which recently declared that coastal States do not have unfettered discretion in drawing straight baselines. In its 2001 decision in the *Qatar v. Bahrain* case, the Court affirmed that the rules for drawing straight baselines in article 7 should be “applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.”¹⁸³

However, U.S. protests have been managed in different ways, hinting at the possible influence of political considerations. For example, as far as the right of transit through straits is concerned, it appears to have taken nine years for the United States to publicly protest against the inclusion of the Tuscan archipelago within Italian straight baselines; whereas the United States Lalonde, Suzanne et Frédéric Lasserre, “The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted? », *Ocean Development and International Law*, 44(1), 2013, p.28-72.

wasted no time in dispatching Coast Guard icebreakers to challenge the Soviet claim regarding the Northeast Passage during the Cold War era.

Similarly, when in 1972 Iceland revised its baselines and created long segments in obvious disregard for the criteria of article 4 in the 1958 Territorial Sea Convention, the measure did not elicit any immediate public U.S. response; it appears that a protest was only formally lodged in 1974.¹⁸⁴ It may also be noted that while Washington promptly rebuffed China and Vietnam for their excessive baseline systems,¹⁸⁵ it seems to have taken eight years for the United States to send a protest to Thailand after a remarkable extension of its straight baselines in 1992.¹⁸⁶ Straight baselines along smooth coasts, as in the case of mainland Spain, the Norwegian island of Jan Mayen or Madagascar, have also not been the subject of U.S. protest though such baselines are seen as being in clear breach of article 7(1) of the LOS Convention.¹⁸⁷ V. Prescott and C. Schofield have concluded that “inconsistencies of this kind reduce the force of the United States’ undoubtedly correct criticism of some straight baselines”.¹⁸⁸

Nevertheless, and even if, generally speaking, the United States has been consistent in protesting limitations to shipping in major straits throughout the world, a number of points must be noted.

- There are, in fact, very few cases where recognition of Canadian sovereignty over the Northwest Passage or some other type of jurisdictional arrangement could be invoked as a precedent and as such, unsettle or cast doubt on existing regimes. The only potential areas of concern appear to be the Northeast Passage, the Qiongzhou Strait and Head Harbour Passage, and to a lesser extent, the Japanese, Piombino, Palk and Kerch Straits.
- Most of the strategic straits referred to in the academic literature as potentially influenced by the Northwest Passage precedent, are simply not relevant. Such straits are not within the internal waters of the States bordering them and are therefore not subject to their exclusive control. More importantly, these major maritime highways are now unquestionably considered to be international straits to which the regime of transit passage applies. Their designation as international straits, and the legal rights which flow from such a designation, can no longer be reasonably questioned, irrespective of the outcome of the Northwest Passage case.
- The discrepancy between those cases where the Northwest Passage could be used as a precedent in favor of a coastal State, but are not referred to in the literature, and those cases put forth but which appear to be irrelevant regarding a possible precedent remains problematic. Political reasons might well be the driving factor. Another possible explanation could be that Washington is not in fact worried about creating a potential precedent for specific cases, but has rather chosen to adopt a general, conservative policy, fearing that a Northwest Passage under Canadian sovereignty could be another illustration of “creeping jurisdiction”, an undesirable infringement on the freedom of navigation.

Table 1: Selected straits around the world, status and potential impact of a NWP precedent

Strait	Bordering countries	Between...	...and	Claimed status of the waters	Possibility of including the strait within a potential straight baseline system?	Special clause limiting regime of transit passage?	Strategic value¹⁸⁹	Possibility of it being affected by “NWP precedent”?
Åland	Finland, Sweden	Gulf of Botnia	Baltic Sea	Territorial	Finland, Sweden: SBS No I beyond present baseline	Art. 35	Medium Leads to an enclosed sea	No
Danish Straits	Denmark, Sweden	North Sea	Baltic Sea	Territorial and internal	Denmark, Sweden: SBS	Art. 35	Major	No
Minches	United Kingdom	North Sea	Atlantic Ocean	Internal with transit regime and shipping regulations	SBS	Art. 38	Medium : AR	No
Dover	UK, France	Channel	North Sea	Territorial	France, UK: SBS No I	No	Major	No
Tsushima, east and west	Japan, South	Sea of Japan	East Sea China	EEZ	SBS Japan reduced	No	Major	No

channels	Korea				breadth of territorial sea			
Osumi	Japan	East China Sea	Pacific Ocean	EEZ	SBS Japan reduced breadth of territorial sea	No	Medium : Several AR	No
La Pérouse	Japan, Russia	Sea of Japan	Sea of Okhotsk	EEZ	Japan: SBS Japan reduced breadth of territorial sea	No	Major AR Service to Korea and Japan easier through Tsugaru Strait	No
Tsugaru	Japan	Sea of Japan	Pacific Ocean	EEZ	SBS Japan reduced breadth of territorial sea	No	Major AR	No
Shimonoseki; Hoyo; Bungo Channel	Japan	Sea of Japan	Pacific Ocean	Internal	SBS	No	Medium AR	Yes
Malacca	Indonesia, Malaysia	Indian Ocean	South China Sea	Territorial	Indonesia: archipelagic baseline No I	No	Major	No

Balabac	Malaysia, Philippines	South China Sea	Sea of Sulu	Territorial	Philippines: archipelagic baseline, not recognized by the USA	Art. 53	Major AR	No
Lombok	Indonesia	Indian Ocean	Java Sea	Archipelagic	Archipelagic baseline	Art. 53	Major AR	No
Sunda	Indonesia	Indian Ocean	Java Sea	Archipelagic	Archipelagic baseline	Art. 53	Major AR	No
Qiongzhou	China	Gulf of Tonkin	South China Sea	Internal	SBS	No	Medium AR south of Hainan Is.	Yes
Taiwan	China, Taiwan	South China Sea	East China Sea	EEZ	China : SBS Taiwan : SBS	No	Major AR with Bashi Channel	No
Bashi	Philippines, Taiwan	South China Sea	Pacific Ocean	EEZ	SBS	No	Major AR with Taiwan Strait	No
Palk	India, Sri Lanka	Gulf of Mannar	Indian Ocean	Internal as historic waters	No I	No	Minor : - Shallow depth (5 to 9 m) - AR east of Sri	Yes

							Lanka	
Torres	Australia, Papua New- Guinea	Coral Sea	Arafura Sea	Territorial with shipping regulations (mandatory pilotage)	Australia: SBS PNG: archipelagic baseline	No	Medium : - Rough seas - Shallow depth (11 to 13 m) ¹⁹⁰	No
Bass	Australia	Tasman Sea	Antarctic Ocean	Territorial	SBS	No	Major	No
Hormuz	Iran, Oman	Arabo-Persic Gulf	Indian Ocean	Territorial	Oman, Iran: SBS No possibility even if extension of baseline	No	Major	No
Bab el Mandeb	Djibouti, Eritrea, Yemen	Red Sea	Gulf of Aden	Territorial	No I	No	Major	No
Kerch	Russia, Ukraine	Sea of Azov	Black Sea	Internal as historic waters	Ukraine: SBS	No	Minor : leads to an enclosed sea	Yes
Turkish Straits	Turkey	Black Sea	Mediterranean	Internal with transit regime and shipping regulations	SBS	Art. 35	Major	No
Aegean	Greece,	Mediterranean	Aegean and Turkish	Territorial	Possible on the Greek side, but	No	Major	No

Straits	Turkey		Straits		very unlikely : Inconsistent with Greek doctrine Probably <i>casus belli</i> with Turkey			
Gibraltar	Morocco, Spain, UK	Atlantic Ocean	Mediterranean	Territorial	Spain and Morocco : SBS No I	No	Major	No
Piombino	Italy	Tyrrhenian Sea	Ligurian Sea	Internal	SBS	No	Minor : mainly local traffic Much easier AR west of Elba Is.	Yes
Messina	Italy	Tyrrhenian Sea	Ionian Sea	Territorial with shipping regulation	SBS	Art. 38	Medium AR west of Sicily	No
Pemba or Zanzibar Channel	Tanzania	Indian Ocean	Indian Ocean	Unclear, for now territorial	Unclear	Art. 38	Minor AR east of Zanzibar Is. Shallow depth (12 m) ¹⁹¹	Possibly
Le Maire	Argentina	Atlantic Ocean	Cape Horn	Territorial	SBS	No	Medium AR east of	No

					No I		Staten Is. Shallow depth (12 m) ¹⁹²	
Magellan	Chile	Pacific Ocean	Atlantic Ocean	Territorial	SBS	Art. 35	Major AR around Cape Horn	No
Mona Passage	Dominican Republic, Puerto Rico (US)	Atlantic Ocean	Caribbean Sea	EEZ	No	No	Major	No
Windward Passage	Cuba, Haïti	Atlantic Ocean	Caribbean Sea	EEZ	No	No	Major	No
Northeast Passage	Russia	Sea of Barents	Bering Sea	Internal	SBS for the Arctic coastline (Feb. 1984)	No	Status as international strait debated as very little international traffic	Yes

Legend :

AR : Alternate route with mileage difference under 500 km

SBS : Strait baseline system already published

No I: No islands that could be used to include the strait in internal waters

¹ For example, the United States responded to the adoption of Canada's 1970 Arctic Waters Pollution Prevention Act by making a public statement, "Statement on Government of Canada's Bills on Limits of the Territorial Sea, Fisheries and Pollution," 15 April 1970, 9 *I.L.M.* 605-606 and sending a diplomatic note, "Note from the Secretary of State to Embassy of Canada," 14 April 1970, in *Gulf of Maine Pleadings*, Vol. 5, Annex 8 to Reply of the United States, 529-530, para. 4, cited in T.L. McDorman, *Salt Water Neighbours* (New York: Oxford University Press, 2009), 58, fn. 53. Years later, in 1978, a Canadian official acknowledged that a "drawer full of protests" had been received concerning the Arctic Waters legislation. See: Erik Wang, Director of Legal Operations, Department of External Affairs, Canada, House of Commons, Standing Committee on External Affairs and National Defence, Proceedings, No. 16, April 27, 1978, at p. 16, cited in T.L. McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the Continental Shelf" (1983), 14 *Journal of Maritime Law and Commerce* 195, 215, fn. 64.

² Positing that environmental changes were altering the "geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests," the Commission of the European Communities released in 2008 an official Communication setting out E.U. interests and proposals for action by Member States in the region. Under section 3.3 entitled "Transport", Member States and the Community are specifically tasked with defending "the principle of freedom of navigation and the right of innocent passage in the newly opened routes and areas". Section 4 of the Communication on "Enhanced Arctic Multilateral Governance", specifically targets the Northwest Passage in its introductory paragraph which highlights unresolved legal issues in the region: "Moreover, there are different interpretations of the conditions for passage of ships in some Arctic waters, especially in the Northwest Passage." Communication from the Commission to the European Parliament and the Council, "The European Union and the Arctic Region", Brussels, 20 November 2008, COM (2008) 763 final, available at <eeas.europa.eu/arctic_region/docs/com_08_763_en.pdf> (accessed 13 February 2012). The Council of the European Union welcomed the Communication and issued "Council Arctic Conclusions" in December 2009, which provide at Article 16: "With respect to the gradual opening, in the years to come, of trans-oceanic Arctic routes for shipping and navigation, the Council reiterates the rights and obligations for flag, port and coastal states provided for in international law, including UNCLOS, in relation to freedom of navigation, the right of innocent passage and transit passage, and will monitor their observance." Council of the European Union, "Council Conclusions on Arctic Issues", 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009, online at <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/111814.pdf> (accessed 13 February 2012).

³ R. Dufresne, "Controversial Canadian Claims over Arctic Waters and Maritime Zones", (2008) Library of Parliament, Ottawa, PRB 07-47^E, 2-3; D.R. Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment", (1993), 26 *Cornell International Law Journal* 331; E. Elliot-Meisel, "Politics, Pride and Precedent: The United States and Canada in the Northwest Passage", (2009), 40 *Ocean Development and International Law* 204; D. Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit", (2007), 38 *Ocean Development and International Law* 38; T.L. McDorman, "In the Wake of the 'Polar Sea': Canadian Jurisdiction and the Northwest Passage", (1986), 27 *Cahiers de Droit* 623; N.C. Howson, "Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage", (1988), 26 *Columbia Journal of Transnational Law* 337.

⁴ See sources above.

⁵ Compromise solutions might include: considering the waters of the Northwest Passage as Canadian internal waters pursuant to articles 7 and 8(1) of the 1982 LOS Convention, 1833 *U.N.T.S.* 397, and thus possibly subject to article 8(2) navigation rights or that the waters of the Northwest Passage are a mixture of Canadian territorial waters (subject to the right of innocent passage) and exclusive economic zone (EEZ) (freedom of navigation for all ships) or even, that the Passage does not meet the legal criteria that define a strait used for international navigation.

⁶ J. Kraska, "The LOS Convention and the Northwest Passage", (2007), 22 *International Journal of Marine and Coastal Law* 279.

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- ⁷ J. Kraska, “A Way Out of Diplomacy”, (2009), 5 *Canadian Naval Review* 20 and J. Kraska, “International Security and International Law in the Northwest Passage”, (2009), 42 *Vanderbilt Journal of Transnational Law* 1109, 1128.
- ⁸ E. Elliot-Meisel, “Politics, Pride, and Precedent: The United States and Canada in the Northwest Passage”, (2009), 40 *Ocean Development and International Law* 204, 212.
- ⁹ Cited in “A Northern Dimension for Canadian Foreign Policy,” in Canada, Special Joint Committee on Canada’s International Relations, *Independence and Internationalism: Report of the Special Joint Committee of the Senate and of the House of Commons on Canada’s International Relations*, (Ottawa: Supply and Services Canada, 1986), consulted online at <www.carc.org/pubs/v14no4f6.htm> (accessed 17 March 2012).
- ¹⁰ N. Howson, “Breaking the Ice: the Canadian-American Dispute over the Arctic’s Northwest Passage”, (1987-88), 26 *Columbia Journal of Transnational Law* 353, 373.
- ¹¹ D.L. Larson, “United States Interests in the Arctic Region”, (1989), 21 *Ocean Development and International Law* 167, 179.
- ¹² L. Petersen, “International Strait or Internal Waters? The Navigational Potential of the Northwest Passage”, (2009), 66 *Proceedings of the Marine Safety & Security Council, The Coast Guard Journal of Safety at Sea* 48.
- ¹³ S. J. Birchall, “Canadian Sovereignty: Climate Change and Politics in the Arctic”, (2006), 59 *Arctic* iv.
- ¹⁴ R. Dube, “As ice melts, debate over Northwest Passage heats”, *USA Today*, 4 April 2006.
- ¹⁵ C.M. MacNeill, “Gaining Command and Control of the Northwest Passage: Strait Talk on Sovereignty”, (2007), 34 *Transportation Law Journal* 355, 365.
- ¹⁶ Press Release^o 121, issued 15 April 1970, quoted by Howson, *supra* note 10, at 353.
- ¹⁷ “Note from the Secretary of State to Embassy of Canada”, 14 April 1970, *supra* note 1, cited in McDorman, *supra* note 1, at 227, fn. 114.
- ¹⁸ Quoted by T.L. McDorman, “In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage”, (1986), 27 *Les cahiers de droit* 623, 637.
- ¹⁹ B. Mulroney, *Memoirs* (Toronto: McClelland and Stewart, 2007) 495, quoted in McDorman, *Salt Water Neighbours*, *supra* note 1, at 227, fn. 114.
- ²⁰ U.S. Department of the Navy, “Strategic Objectives for the U.S. Navy in the Arctic Region”, (2010) Ser. N00/100063, consulted online at <greenfleet.dodlive.mil/files/2010/09/US-Navy-Arctic-Strategic-Objectives-21-May-2010.pdf> (accessed 17 March 2012).
- ²¹ Quoted by R. Dube, “As ice melts, debate over Northwest Passage heats”, *USA Today*, 4 April 2006.
- ²² L.M. Alexander, “Exceptions to the Transit Passage Regime: Straits with Routes of ‘Similar Convenience’”, (1987), 18 *Ocean Development and International Law* 420, quoted in A. Lopez Martin, *International Straits. Concept, Classification and Rules of Passage*, (Heidelberg: Springer, 2010) 63.
- ²³ Cited in K.-L. Koh, *Straits in International Navigation: Contemporary Issues* (New York: Oceana Publications Inc., 1982) 24-26.
- ²⁴ S.H. Lay, R. Churchill and M. Nordquist, *New Directions in the Law of the Sea*, Vol. 2 (London: Oceana Publications, 1973) 885-891.
- ²⁵ D.L. Larson, “Security, Disarmament and the Law of the Sea”, (1979), 1 *Marine Policy* 56.
- ²⁶ LOS Convention; *supra* note 5. Described by the President of the Third United Nations Conference on the Law of the Sea as “a constitution for the oceans”, the 1982 LOS Convention is today “the globally recognized regime dealing with all matters relating to the law of the sea”. See the U.N. Division for Ocean Affairs and the Law of the Sea website: <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm> (accessed 19 April 2011).
- ²⁷ See, for example, article 8(1) of the LOS Convention, *supra* note 5, for the definition of a coastal State’s internal waters; article 3 in regards to the breadth of the territorial sea; article 33 for the definition of the contiguous zone; article 57 with respect to the exclusive economic zone; and article 76(1) for the definition of the juridical continental shelf.

²⁸ “Au fur et à mesure que l’on s’éloigne de ses côtes, les compétences de l’État diminuent, pour disparaître presque totalement dans la haute mer.” P. Vincent, *Droit de la mer* (Bruxelles : Éditions Larcier, 2008) 12.

²⁹ Article 2(1) of the LOS Convention, supra note 5, states: “[t]he sovereignty of a coastal State extends, beyond its land territory and *internal waters* and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”. Emphasis added.

³⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] *I.C.J. Reports*, 14, at p. 111, paragraph 212. Emphasis added.

³¹ “La présomption est dans le sens de l’ouverture des ports; mais présomption et non obligation.” G. Gidel, *Le droit international public de la mer*, tome II (Châteauroux : Établissements Mellottée, 1932) 45, quoted in L. Lucchini and M. Voelckel, *Droit de la mer*, tome 2, volume 2 (Paris: Pédone, 1990) 287, fn. 598.

³² Article 7 of the LOS Convention, supra note 5, provides that a coastal State can only resort to the use of straight baselines “[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity...” In its 1951 decision in the *Norwegian Fisheries* case, the International Court held that the use of straight baselines was permitted in only two geographically defined circumstances: “Where a coast is deeply indented and cut into, as is that of Eastern Finmark, or where it is bordered by an archipelago, such as the ‘skjaergaard’ along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction.” *Fisheries Case (United Kingdom v. Norway)*, [1951] *I.C.J. Reports*, 116, at pp. 128-29.

³³ In the *Anglo-Norwegian Fisheries* case, supra note 32, the International Court considered three criteria in evaluating the legality of Norway’s straight baseline system. These criteria were subsequently integrated in article 7 of the LOS Convention, supra note 5. Paragraph 3 of article 7 stipulates that the “drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast” [the general direction criterion], “and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters” [the close line between land and sea criterion]. Paragraph 5 of article 7 provides however that where the threshold geographical criteria have been met, “account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage” [the economic interests criterion].

³⁴ J.A. Roach and R.W. Smith, “United States Responses to Excessive Maritime Claims” (The Hague: Martinus Nijhoff Publishers, 1996).

³⁵ In May 1985, the Canadian government was informed that the U.S. Coast Guard icebreaker *USCGC Polar Sea* would sail through the Northwest Passage at the beginning of August on her way home to Seattle from Thule, Greenland. In the exchange of diplomatic notes which followed, both Canada and the United States reiterated their official positions regarding the status of the Northwest Passage but eventually came to an agreement that the summer transit by the *Polar Sea* would in no way prejudice the legal position of either party. See R. Huebert, “Steel, Ice and Decision-Making: The Voyage of the Polar Sea and its Aftermath. The Making of Canadian Northern Foreign Policy” (Ph.D. thesis, Dalhousie University, 1994) (unpublished).

³⁶ See Territorial Sea and Fishing Zones Act, *R.S.C.*, c. T 7 (1970) (Can.).

³⁷ Canada, House of Commons, *Debates*, 33rd Parliament, 1st Session, vol. V (1985), September 10, 1985 (Ottawa, 1985), 6463.

³⁸ *Anglo-Norwegian Fisheries Case*, supra note 32, at 115.

³⁹ Territorial Sea and Contiguous Zone Convention, 516 *U.N.T.S.* 205.

⁴⁰ McDorman, supra note 1, at 249.

⁴¹ United Nations Secretariat, “Juridical Regime of Historic Waters, Including Historic Bays”, 1962, Doc. A/CN.4/143, (1962) 2 *Yearbook of the International Law Commission* 1, 23. Emphasis added.

⁴² D. Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: University Press, 1988) 113 states: “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”.

⁴³ See *ibid.*, Chapter 8, “Historic waters applied to the Canadian Arctic Archipelago”.

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- ⁴⁴ M. Byers and S. Lalonde, "Who Controls the Northwest Passage?", (2009), 42 *Vanderbilt Journal of Transnational Law* 1133, 1154-1155.
- ⁴⁵ United Nations Secretariat, "Juridical Regime of Historic Waters," *supra* note 41, at 13.
- ⁴⁶ D. Pharand, *Canada's Arctic Waters in International Law* (Cambridge: University Press, 1988) 113, 121-125.
- ⁴⁷ Territorial Sea Convention, *supra* note 39.
- ⁴⁸ LOS Convention, *supra* note 5, Article 18(2).
- ⁴⁹ *Ibid.*, Article 19(1).
- ⁵⁰ The activities listed in *ibid.*, article 19(2) include: any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, the loading or unloading of any commodity, currency or person, any act of wilful and serious pollution, any fishing activities.
- ⁵¹ *Corfu Channel Case*, [1949] *I.C.J. Reports*, 4.
- ⁵² D. Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit", (2007), 38 *Ocean Development and International Law* 3, 30.
- ⁵³ *Corfu Channel Case*, *supra* note 51, at 28.
- ⁵⁴ See R.J. Grunawalt, "United States Policy on International Straits", (1987), 18 *Ocean Development and International Law* 445, 456 and Kraska, *supra* note 6, at 274.
- ⁵⁵ *Corfu Channel Case*, *supra* note 51, at 28.
- ⁵⁶ Pharand, *supra* note 52, at 35. See also: R.R. Baxter, *The Law of International Waterways* (Cambridge, Mass.: Harvard University Press, 1964) 3; D.P. O'Connell (I.A. Shearer, ed.), *The International Law of the Sea* (Oxford: Clarendon Press, 1982) 497; and R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) 106.
- ⁵⁷ Reply of the United Kingdom, *Fisheries Case (United Kingdom v. Norway)*, *I.C.J. Pleadings* 1951, vol. II, at p. 555.
- ⁵⁸ LOS Convention, *supra* note 5, Article 42(1).
- ⁵⁹ *Ibid.*, Article 44, emphasis added.
- ⁶⁰ Montreux Convention Regarding the Regime of the Turkish Straits, 20 July 1936, 173 *L.N.T.S.* 214.
- ⁶¹ The Florida Strait or Strait of Havami, which is ninety miles wide, connects the Gulf of Mexico with the Atlantic Ocean. Churchill and Lowe, *supra* note 56, at 105.
- ⁶² *Ibid.*
- ⁶³ *Ibid.*
- ⁶⁴ *Ibid.*
- ⁶⁵ *Ibid.*, at 121.
- ⁶⁶ *Ibid.*, at 123.
- ⁶⁷ LOS Convention, *supra* note 5, Article 53.
- ⁶⁸ Decreto del Presidente della Repubblica 26 aprile 1977, n. 816, <<http://unmig.sviluppoeconomico.gov.it/unmig/norme/816dpr77.htm>> (accessed 12 June 2012).
- ⁶⁹ A. de Guttry, "The Delimitation of Territorial Waters in the Mediterranean Sea", (1984), 11 *Syracuse Journal of International Law and Commerce* 377, 397.
- ⁷⁰ U.S. Navy Judge Advocate General's Corps and Department of Defense, "Italy", DoD 2005.1-M, *Maritime Claims Reference Manual*, Washington, DC, 1997, revised June 2005 and June 2008, 315, available online at <www.dtic.mil/whs/directives/corres/html/20051m.htm>.
- ⁷¹ N. Ronzitti, *The Law of the Sea and Mediterranean Security*, Mediterranean Paper Series 2010 (Washington: German Marshall Fund of the United States, 2010) 9.
- ⁷² See T. Scovazzi, "Management regimes and responsibility for international straits, with special reference to the Mediterranean Straits", (1995), 19 *Marine Policy* 137, 151. Scovazzi adds that the Piombino Strait could not qualify for the Messina clause, (Article 38(1) of the LOS Convention, *supra* note 5), because seaward of Elba there is a route of similar convenience, but it does not pass through the high seas. This route utilizes the Corsica Channel, another international strait, between the Italian archipelago of Tuscany and the French island of Corsica. In this area the 12-mile territorial seas of France and Italy overlap.
- ⁷³ W.E. Butler, "Pollution Control and the Soviet Arctic", (1972), 21 *International and Comparative Law Quarterly* 557 and P. Horensma, *The Soviet Arctic* (London: Routledge, 1991) 113.

⁷⁴ W. Dunlap, "Transit Passage in the Russian Arctic Straits," *Maritime Briefing* 1(7) (Durham: International Boundary Research Unit, 1996) 39.

⁷⁵ "United States Aide-memoire to the Soviet Union dated June 22, 1965"; "Diplomatic note dated August 30, 1967" from the United States to the Soviet Union; as stated in US Department of State, *Limits in the Seas* 112, 9 March 1992, 71-73, <www.state.gov/e/oes/ocns/opa/c16065.htm> (accessed 12 June 2012).

⁷⁶ The American diplomatic note stated that the US government "...strongly protests the position taken by the Soviet government with regard to the peaceful circumnavigation of the Arctic by the United States Coast Guard icebreakers Edisto and Eastwind", Diplomatic note dated August 30, 1967" from the United States to the Soviet Union; as stated in US Department of State, *Limits in the Seas* 112, *ibid.* See also Butler, *supra* note 73, at 558 and R.D. Brubaker and W. Østreng, "The Northern Sea Route Regime : Exquisite Superpower Subterfuge?", (1999), 30 *Ocean Development and International Law* 299, 305.

⁷⁷ R.D. Brubaker and W. Østreng, *supra* note 76, at 305. D. Pharand, "Soviet Union Warns United States Against Use of Northeast Passage", (1968), 62 *The American Journal of International Law* 927, 927-929.

⁷⁸ Horensma, *supra* note 73, at 110-112.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Washington sent "operational assertions". Department of Defense, "Russian Federation", DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 489 ; Diplomatic Note 86/82, 2 August 1982; and Diplomatic Note 10/86, January 1986.

⁸³ Department of Defense, "Japan", DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 327.

⁸⁴ U.S. Department of State, "Straight Baseline and Territorial Sea Claims: Japan," *Limits in the Seas*, No. 120 (Washington, 1998), 13.

⁸⁵ D. Ortolland and J.-P. Pirat, *Atlas géopolitique des espaces maritimes*, (Paris: Éditions Technip, 2010) 220.

⁸⁶ *Ibid.* See also Kyodo News, "Japan left key straits open for U.S. nukes", *Japan Times*, 22 June 2009.

⁸⁷ Kyodo News, *ibid.*

⁸⁸ Department of Defense, "Japan", DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 327.

⁸⁹ "Straight Baseline and Territorial Sea Claims: Japan," *supra* note 84, at 9.

⁹⁰ J.A. Roach and R.W. Smith, "Straight Baselines: The Need for a Universally Applied Norm", (2000), 31 *Ocean Development and International Law* 47, 65.

⁹¹ See: Z. Gao, "China and the LOS Convention", (1991), 15 *Marine Policy* 202; M. Carr, "China and the Law of the Sea Convention", (1983), 9 *The Australian Journal of Chinese Affairs* 35, 38; D. Dzurek, "The People's Republic of China Straight Baseline Claim", (1996), 4 *IBRU Boundary and Security Bulletin* 77; and K. Zou, "Redefining the Legal Status of the Taiwan Strait" (2000), 15 *International Journal of Marine and Coastal Law* 255.

⁹² The Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, May 15, 1996, is reprinted in UN, *LOS Bull.* No. 32, at 37-40 (1996) and *Limits in the Seas* No. 117, Straight Baseline Claim: China (19 July 1996).

⁹³ Department of Defense, "China", DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 133-134.

⁹⁴ Ji Guoxing, *Asian Pacific SLOC Security: the China Factor*, Working Paper 10 (Sea Power Center, Royal Australian Navy, 2002) 45.

⁹⁵ D.J. Dzurek, "The People's Republic of China Straight Baseline Claim", (1996) 4 *Boundary and Security Bulletin* 81.

⁹⁶ U.S. Department of State, "Straight Baseline Claim: China," *Limits in the Seas* No. 117 (Washington, 1996) 4-8.

⁹⁷ Dzurek, *supra* note 91, at 84 and K. Zou, *Law of the Sea in East Asia: Issues and Prospects* (London: Routledge, 2005) 167.

⁹⁸ M. Herriman, "China's Territorial Sea Law and International Law of the Sea", (1997), 92 *Maritime Studies* 16 and S. Bateman and C. Schofield, "State Practice Regarding Straight Baselines in East Asia- Legal, Technical and Political Issues in a Changing Environment", presented at the conference "Difficulties in Implementing the Provisions of UNCLOS," organized by the Advisory Board on the Law of the Sea (ABLOS), in Monaco on 16-17 October 2008, <www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session7-Paper1-Bateman.pdf> (accessed 31 January 2011).

⁹⁹ LOS Convention, supra note 5, Article 38(1) provides that "... if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone or similar convenience with respect to navigational and hydrographical characteristics." In the case of Qiongzhou Strait, ships can bypass Hainan Island to the south.

¹⁰⁰ K. Zou, supra note 97, at 167 and Department of Defense, "China, People's Republic of", DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70, 126.

¹⁰¹ J. Guoxing, supra note 94, at 45.

¹⁰² Sri Lanka and India agreed on 26-28 June 1974 to the delimitation of a boundary through the "historic waters" of Palk Bay. The agreement, which came into force on 8 July 1974, has been printed in the Government of India's *Notice to Mariners*, Edition No. 9, Notices 133 to 156, April 15, 1975; see also reprint in U.S. Department of State, "United States Responses to Excessive National Maritime Claims," *Limits in the Seas* No. 112 (Washington, 1992) 67. Department of Defense, "India", p. 275, and "Sri Lanka", p. 572, DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70; and Martin, supra note 22, at 71.

¹⁰³ Department of Defense, "India", p. 275, and "Sri Lanka", p. 572, DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70.

¹⁰⁴ *Ibid.*

¹⁰⁵ Department of Defense, "India", p. 275, and "Sri Lanka", p. 572, DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70.

¹⁰⁶ S. Sivalingam, "General Features and Fisheries Potential of Palk Bay, Palk Strait and its Environs", (2005), 33(4) *Journal of Nat'l Science Foundation Sri Lanka* 225 and A. Louchet, *La planète océane. Précis de géographie maritime* (Paris: Armand Colin, 2009) 158.

¹⁰⁷ Department of Defense, "Russian Federation", p. 489, and "Ukraine", p. 628, DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70. The Soviet Union already considered the Sea of Azov as internal waters: see J. Darby, "The Soviet Doctrine of the Closed Sea", (1986), 23 *San Diego L. Rev.* 685-700.

¹⁰⁸ *Ibid.*

¹⁰⁹ *US Navy Commander's Handbook Annotated Supplement*, Washington, DC, 1997, p.214.

¹¹⁰ McDorman, *Salt Water Neighbors*, supra note 1, at 254.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at 257.

¹¹³ *Ibid.*

¹¹⁴ During the Gallipoli or Turkish Straits campaign of the First World War, between 19 February 1915 and 9 January 1916, a joint British and French operation was mounted to capture the Ottoman capital of Istanbul and secure a sea route to Russia through the seizure of the Turkish Straits. Naval and later land attempts to force the straits ended up with Allied defeats. D Fromkin, *A Peace to End All Peace*, (London: Holt Paperback, 2001) 311-315.

¹¹⁵ Montreaux Convention, supra note 60. The parties to the 1936 Montreaux Convention are: Turkey, Great Britain, France, the Soviet Union, Bulgaria, Greece, Germany, Yugoslavia, and with reservations, Japan.

¹¹⁶ The third paragraph of *ibid.*, article 2 provides that "[p]ilotage and towage remain optional."

¹¹⁷ U.S. Department of State, "Straight Baselines: Turkey," *Limits in the Seas* No. 32 (Washington, 1971) 4-5.

¹¹⁸ U.S. Department of State, "United States Responses to Excessive National Maritime Claims," *Limits in the Seas* No. 112 (Washington, 1992), 67.

¹¹⁹ J. Daly, “Tankers, Pipelines and the Turkish Straits”, *Eurasian Daily Monitor* 5(122), 26 June 2008, <[www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=33755](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=33755)> (accessed 1 February 2011).

¹²⁰ Energy Information Administration, “Turkey: Environmental Issues”, March 2000, <www.nuce.boun.edu.tr/turkey.html>.

¹²¹ J. Daly, *supra* note 120.

¹²² The vessel traffic separation schemes for the Turkish Straits were subsequently updated in 1998. Turkish Straits Maritime Traffic Scheme Regulations, adopted in 1994, amended in 1998, Official Gazette, 6/11/1998 No: 23515. For the most updated version of the schemes, see International Maritime Organization (IMO), *Ships’ Routeing*, 2010 ed., (London, 2010), B.III, 17-23.

¹²³ J.M. Van Dyke, “Transit Passage Through International Straits”, in Aldo Chicop et al. (eds.), *The Future of Ocean Regime-Building* (The Hague: Martinus Nijhoff Publishers, 2009) 177, 205-206.

¹²⁴ Van Dyke, *ibid.* See also N. Ünü, *The Legal Regime of the Turkish Straits* (The Hague: Martinus Nijhoff Publishers, 2002) 74.

¹²⁵ P. Vincent, *Droit de la Mer*, (Bruxelles : Larcier, 2008) 66 and Van Dyke, *ibid.*, 204-205.

¹²⁶ S.V. Pavlyuk, “Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region,” (1998), 22 *Fordham International Law Journal* 962.

¹²⁷ *Ibid.*

¹²⁸ Treaty for the Redemption of Sound Dues, March 14, 1857, 116 *C.T.S.* 357. The Convention for the Discontinuance of the Sound Dues between Denmark and the United States, 11 April 1857, 116 *C.T.S.* 465.

¹²⁹ See: W.L. Schachte and J.P.A. Bernhardt, “International Straits and Navigational Freedoms,” (1993), 33 *Virginia Journal of International Law* 546 and A. Oude Elferink, “The Regime of Passage of Ships through the Danish Straits”, *NILOS Papers Online* No. 3, p. 2, <www.uu.nl/uupublish/content/straits.pdf> (accessed 5 October 2010) and (2000), 15 *International Journal of Marine and Coastal Law* 555.

¹³⁰ Royal Decree No. 437 of 21 December 1966, as amended by Decree No. 189 of 19 April 1978. Executive Order No. 242 of May 1st replaced them, amended by Executive Order n°680 of August 2003. See Department of Defense, “Denmark”, DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 167.

¹³¹ See: *Ships’ Routeing*, *supra* note 123, at B. I-19.

¹³² See: *Ships’ Routeing*, *supra* note 123, at G. I-3 and “Order on the mandatory ship reporting system BELTREP and navigation under the East Bridge and West Bridge in the Storebælt (Great Belt)”, *Order No 488 of 31th May 2007; Navigation through Danish Waters*, Danish Maritime Authority & The Danish Maritime Safety Administration, March 2011.

¹³³ Department of Defense, “Finland”, DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 227-233 and U.S. Department of State, “Straight Baselines: Finland,” *Limits in the Seas*, No. 48, (Washington, 1972) 2-6.

¹³⁴ U.S. Department of State, *Continental Shelf Boundary: Finland-Sweden*, *Limits in the Seas*, No. 71, (Washington, 1976) 2.

¹³⁵ Article 35 of the LOS Convention, *supra* note 5, provides: “Nothing in the Part affects: (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.”

¹³⁶ The Convention Relative à la Non-Fortification et à la Neutralisation des Îles d’Åland/Convention relating to the Non-fortification and Neutralization of the Åland Islands 20 October 1921, original French text of the convention is available at <www.kulturstiftelsen.ax/traktater/eng_fr/1921c_fr.htm>. The parties are Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Poland, Sweden and the United Kingdom. A similar separate treaty was concluded between Finland and the Soviet Union in 1940: Treaty between Finland and the Union of Socialist Soviet Republics concerning the Åland Islands, October 11, 1940, <www.kulturstiftelsen.ax/traktater/eng_fr/1940_en.htm>.

The 1921 Convention follows a convention signed on March 30, 1856, annexed to the Paris Peace Treaty, the Convention on the Demilitarization of the Åland Islands: <<http://mjp.univ-perp.fr/constit/aland1856.htm>>. The three treaties are still in force and are now considered to be a

foundings block of international law in the region. The provisions of the Treaties include the permanent demilitarization of the islands and a 3 nm territorial sea around them. No naval force may enter the neutralized zone; but innocent passage across the territorial waters is permitted. See M. Koskenniemi and M. Lehto, "Finland and the Law of the Sea", in L. Pineschi and T. Treves (eds.), *The Law of the Sea: The European Union and its Member States* (The Hague: Martinus Nijhoff, 1997) 147-148.

¹³⁷ Van Dyke, *supra* note 124, at p.197.

¹³⁸ W. Otto Lampe, "The Kiel Canal", in R. Platzöder and P. Verlaan (eds), *The Baltic Sea: New Developments in National Policies and International Cooperation* (The Hague: Martinus Nijhoff, 1996) 144-145.

¹³⁹ *Ibid.* See also Koskenniemi and Lehto, *supra* note 136, 132-133; and E.J. Molenaar, "Navigational Rights and Freedoms in a European Context", in D. Rothwell and S. Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2000) 33.

¹⁴⁰ "United States Responses to Excessive National Maritime Claims," *supra* note 118, at 67.

¹⁴¹ Reports of International Arbitral Awards, *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, vol. XXI; reproducing the 1881 Boundary Treaty p.15-111, <http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf>.

¹⁴² Decree No. 416 of July 14, 1977, Department of Defense, "Chile", DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 121 and US Department of State, "Straight Baselines: Chile," *Limits in the Seas*, No. 80 (Washington, 1978), 1-5.

¹⁴³ Law 17 094 of December 29, 1966 and Law 23 968, August 14, 1991, Department of Defense, "Argentina," DoD 2005.1-M, *Maritime Claims Reference Manual*, *supra* note 70, 29; U.S. Department of State, "Straight Baselines: Argentina," *Limits in the Seas*, No. 44, (Washington, 1972) 1-2.

¹⁴⁴ "Straight Baselines : Chile," *supra* note 142, at 5.

¹⁴⁵ Chile-Argentina Treaty, *supra* note 141 and see Vincent, *supra* note 125, at 67.

¹⁴⁶ M.A. Morris, *The Strait of Magellan* (The Hague: Martinus Nijhoff Publishers, 1988) 68 and 104.

¹⁴⁷ E. Brüel, *International Straits*, Vol. II (London: Sweet and Maxwell, 1947) 225, quoted in *ibid.*, at 65.

¹⁴⁸ Treaty of Peace and Friendship between Chile and Argentina, 1984, <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/CHL-ARG1984PF.PDF>.

¹⁴⁹ "United States Responses to Excessive National Maritime Claims," *supra* note 118, at 69.

¹⁵⁰ For instance, the Kea Strait between Kea and Makronisos Islands; Siphnos Strait between Sifnos and Sérifos Islands; and Kafireas Strait between Eubea and Andros Islands.

¹⁵¹ Y. Acer, *The Aegean Maritime Disputes and International Law*, (Darmouth: Ashgate, 2003).

¹⁵² M. Pratt and C. Schofield, "The Imia/Kardak Rocks Dispute in the Aegean Sea", *IBRU Boundary and Security Bulletin*, Spring 1996, pp.61-66.

¹⁵³ Acer, *supra* note 154 at 45-55; D. Ortolland and J.-P. Pirat, *Atlas géopolitique des espaces maritimes* (Paris: Éditions Technip, 2010) 82-85.

¹⁵⁴ US Department of State, "Straight Baselines: Turkey," *Limits in the Seas*, No. 80 (Washington, 1971), 2-4. A move Greece protested that same year. International Court of Justice, *Aegean Sea Continental Shelf Case (Greece vs Turkey): Pleadings, Oral Arguments, Documents* (The Hague: Minutes of the Public Sitzings, August-September 1976) 89.

¹⁵⁵ K. Ioannou, "The Greek Territorial Sea", in Theodore Kariotis, (ed.) *Greece and the Law of the Sea* (The Hague: Kluwer Law International, 1997) 138; Acer, *supra* note 154 at 24-25.

¹⁵⁶ See A. de Guttry, *supra* note 69, at 387; Ioannou, *ibid.*; E. Roucounas, "Greece and the Law of the Sea", in Pineschi and Treves, *supra* note 136, at 230; and Acer, *supra* note 154, at 24-25.

¹⁵⁷ "Table of claims to maritime jurisdiction," (as at 31 July 2010), U.N. Division of Ocean Affairs and the Law of the Sea, <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf> (accessed 15 February 2011).

¹⁵⁸ For example, Martin, *supra* note 22, at 74.

¹⁵⁹ A. Strati, "Greek Shipping Interests and the Law of the Sea", in Kariotis, *supra* note 156, at 279 and Acer, *supra* note 154, at 25.

- ¹⁶⁰ U.S. Department of State, “Straight Baselines : United Kingdom,” *Limits in the Seas*, No. 23 (Washington, 1970), 2-8. The baselines were subsequently slightly corrected in 1979 and then with the Territorial Sea (Amendment) Order 1996 (No. 1628). See: Department of Defense, “United Kingdom”, DoD 2005.1-M, *Maritime Claims Reference Manual*, supra note 70, at 636.
- ¹⁶¹ C. Whomersley, Deputy Legal Adviser, Foreign and Commonwealth Office, British Government, London, correspondence with the authors, 6 January 2011 and 9 June 2011.
- ¹⁶² The *MV Braer* was a tanker carrying 85 000 tonnes of crude oil which ran aground in hurricane force winds off the Scottish Shetland Islands in January 1993. A total of 84 700 tonnes of crude oil spilled into the North Sea causing huge damage. BBC, “Oil tanker runs aground off Shetland”, online: <news.bbc.co.uk/onthisday/hi/dates/stories/january/5/newsid_2506000/2506223.stm> (accessed 24 May 2011).
- ¹⁶³ D. Anderson, *Modern Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2008) 166-167 and Vincent, supra note 125, at 27. The limitation on heavy oil tankers is in IMO SN/Circ.159, quoted in Martin, supra note 22, at 140.
- ¹⁶⁴ Whomersley, supra note 164.
- ¹⁶⁵ See above.
- ¹⁶⁶ See supra note 62 and J. Antonio de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective*, (Dordrecht: Martinus Nijhoff Publishers, 1991) 13; W. Schachte, “International Straits and Navigational Freedoms”, presentation at the 26th Law of the Sea Institute Annual Conference, Genoa, 2-26 June 1992, 12; and T. Scovazzi, “Management Regimes and Responsibility for International Straits: With Special Reference to the Mediterranean Straits”, (1995), 19 *Marine Policy*, 137, 143.
- ¹⁶⁷ T. Scovazzi, “Evolution of International Law of the Sea”, in *Collected Courses of the Hague Academy of International Law* (The Hague: Martinus Nijhoff, 2001) 181.
- ¹⁶⁸ Decree of the Minister of Merchant Marine of 8 May 1985 relating to the Strait of Messina (in Official Gazette of the Italian Republic of 11 May 1985, No. 110); Ministry of Infrastructure and Transport, Comando Generale Del Corpo Delle Capitanerie Di Porto, VTS Messina Straits, *User Manual* (Rome, December 2009) 5.
- ¹⁶⁹ “United States Responses to Excessive National Maritime Claims,” supra note 118, at 70. See also A. Gioia, *Manuale Breve. Diritto Internazionale*, (Milan: Giuffrè Editore, 2010) 195 and Ronzitti, supra note 71, at 9.
- ¹⁷⁰ T. Treves, “Italy and the Law of the Sea”, in Pineschi and Treves, supra note 136, 335.
- ¹⁷¹ D. Ortolland and J.-P. Pirat, *Atlas géopolitique des espaces maritimes* (Paris: Éditions Technip, 2010) 200-201.
- ¹⁷² *Ibid.*, at 86-87 and 220-230.
- ¹⁷³ The authors of this article tested this hypothesis with a GIS software.
- ¹⁷⁴ See R.C. Beckman, “PSSAs and Transit Passage - Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS”, (2009), 38 *Ocean Development and International Law* 325.
- ¹⁷⁵ Marine Department of Malaysia, <www.ialathree.org/iwrap/index.php?title=Malacca_Strait_Traffic_Volume_and_Incident_Rates> (accessed 21 February 2011).
- ¹⁷⁶ Department of Transport, “The Dover Strait”, London, <www.dft.gov.uk/mca/mcga07-home/emergencyresponse/mcga-searchandrescue/mcga-theroleofhmcoasguard/mcga-_hm_coastguard_-_the_dover_strait.htm> (accessed 15 June 2011).
- ¹⁷⁷ J. Ho, “The Security of Sea Lanes in Southeast Asia”, (2006), XLVI *Asian Survey* 560.
- ¹⁷⁸ Gibraltar Ferry, <www.aferry.to/Gibraltar-ferry.htm> (accessed 15 June 2011).
- ¹⁷⁹ Australian Maritime Safety Authority, “Torres Strait: Strait Facts/Risk Assessment,” <www.amsa.gov.au/marine_environment_protection/torres_strait/risk.asp> (accessed 15 June 2011).
- ¹⁸⁰ D.M. Johnston, “The Challenge of International Ocean Governance – Institutional, Ethical and Conceptual Dilemmas,” in D.R. Rothwell and D.L. VanderZwaag (eds.), *Towards Principled Oceans Governance – Australian and Canadian Approaches and Challenges* (London and New York: Routledge, 2006) 379.
- ¹⁸¹ Beckman, supra note 174, at 349; S. Bateman, “Coastal State Regulation of Navigation in Adjacent Waters – the Example of the Torres Strait and Great Barrier Reef”, paper presented at the ABLOS

2010 Conference, "Contentious Issues in UNCLOS - Surely Not?", Monaco, 25-28 October 2010, <www.gmat.unsw.edu.au/ablos/ABLOS10Folder/ABLOS.htm>.

¹⁸² See: V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World* (The Hague: Martinus Nijhoff Publishers, 2005) 143.

¹⁸³ Case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, [2001] *I.C.J. Reports*, 103, para. 212.

¹⁸⁴ Prescott and Schofield, *supra* note 185, at 149-150.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Evaluation made on the basis of Robert Smith, « An Analysis of the Strategic Attributes of International Straits », *Maritime Policy & Management*, 2(2), 1974, p.88-101 ; and Frederic Lasserre, « Les détroits maritimes : des enjeux stratégiques majeurs », *Études internationales*, 34(2), 2003, p.189-194 ; F. Lasserre, « Les détroits maritimes : réflexion sur des enjeux stratégiques majeurs », *Cahiers de géographie du Québec*, 48(135), 2004, p. 279-286

¹⁹⁰ André Louchet, *La planète océane. Précis de géographie maritime*, Paris, Armand Colin, 2009, p.158; Australian Maritime Safety Authority, "Strait Facts/Risk Assessment", www.amsa.gov.au/marine_environment_protection/torres_strait/risk.asp, undated, accessed Feb. 18, 2011.

¹⁹¹ Synopsis, "Sediment distribution and transport in the Zanzibar Channel", *Ambio* 24(7-8), 1995, p.519-520.

¹⁹² Keith Johnston, *Dictionary of Geography*, Longmans, London, 1868, p.723