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The Canadian-U.S. Northwest Passage Dispute: A Reassessment

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Introduction

Throughout much of this century Canada has sought to establish conclusively its sovereignty over the islands and waters which lie immediately north of continental Canada. The Canadian claim to the islands, commonly known as the "Arctic Archipelago," is a vital link to Canada's Arctic presence. Canadians regard themselves as much more Arctic-orientated than their United States neighbours. This is no doubt partly a result of the large areas of continental Canada—spanning the Yukon, North-West Territories and part of Quebec—which are sub-Arctic and face the Arctic Ocean and North Pole. The Arctic Archipelago and the fabled Northwest Passage are, however, also a significant part of the Canadian national psyche. As such, any threat to Canada's sovereignty over this region is considered just as significant a threat to the Canadian national interest as would be a claim to the Canadian Rockies.[1] The first positive evidence of a Canadian claim to these lands and waters came in 1909 in an assertion by Senator Poirier that Canada could draw a series of straight lines from its eastern and western extremities due north to the Pole. Since that time, various Canadians and successive Canadian Governments have sought to positively assert variations of this claim, the most recent expression of which was in 1986 when Canada pro-

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1. During 1991, Canadian public and media interest in the Arctic was once again stirred when it was reported that United States and British submarines, which had been operating in Arctic waters, surfaced near the North Pole. This resulted in a host of newspaper comment about "threats to Canadian sovereignty" and Canada's inability to effectively enforce its Arctic territorial and sovereignty claims. *See Subs Continue to Cruise the Pole*, GLOBE & MAIL (TORONTO), Aug. 1, 1991, at A5; Olivia Ward, *U.S. Runs Silent, Runs Deep in Arctic*, TORONTO STAR, Aug. 11, 1991, at H2; M. Cernetig, *1-800 Call First Line of Defence*, GLOBE & MAIL (TORONTO), Aug. 17, 1991, at A1, A6. This, however, is not the first time such claims have been made. *See Canadian Practice in International Law—Parliamentary Declarations in 1986*, 25 CAN. Y.B. INT'L L. 438 (1987). The former Soviet Union had a history of deploying submarines in the Arctic. *See* W. Harriet Critchley, *Polar Deployment of Soviet Submarines*, 39 INT'L J. 828-865 (1984).

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claimed straight baselines around the islands of the Arctic Archipelago. This enclosed the waters of the Northwest Passage so that they effectually became Canadian "internal waters."

Canada's efforts to conclusively establish its sovereignty over the Northwest Passage, and to a lesser extent the Arctic Archipelago, have not been readily accepted by the United States. This has not been because the United States asserts a rival claim to the Arctic Archipelago, but rather because of a belief that the waters of the Northwest Passage should remain open to international navigation and not be subject to the exclusive sovereignty of one state. This United States concern has intensified since the 1960s because of technological developments that have improved shipping and navigation through the ice-bound polar waters. These advancements make the Northwest Passage a potential commercial shipping route from Alaska to the East Coast of the United States. Additionally, creeping coastal state jurisdiction has allowed littoral states to exercise more extensive sovereignty and jurisdiction over navigation by foreign shipping within their territorial seas and internal waters. The United States continued refusal to recognize absolute Canadian sovereignty over the Northwest Passage has made this dispute one of the most significant bilateral legal issues in the Canadian-United States relationship.

Recently, developments have occurred which could pose renewed threats to Canada's Arctic sovereignty. All of the Arctic nations, including Canada and the United States, are engaged in negotiations towards the formation of a new environmental regime for the Arctic. The initiative for these negotiations is the worldwide concern over environmental degradation and the emerging recognition of the importance of both the north and south polar regions to the world environment and its climate. In 1991 the Arctic states took the first steps towards the creation of a more comprehensive environmental regime with the signing of an Agreement at Rovaniemi, Finland.[2] This first truly northern multilateral agreement amongst the Arctic states raises the question as to whether an "Antarctic type" regime may eventually come into being in the Arctic.

The Antarctic Treaty, which in 1991 celebrated its thirtieth year since entry into force, has proved a successful basis for the management of the Antarctic continent and surrounding Southern Ocean. In particular, the Treaty, which in its original form had no particular emphasis on environmental protection, has been used to develop the Antarctic Treaty System, under which various environmental instruments have been adopted. The most significant of these instruments is the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty, which effectively prohibits mining activities in Antarctica and implements for the first time an environmental impact assessment mechanism

2. *See* Arctic Environmental Protection Strategy, June 14, 1991, Can.-Den.-Fin.-Ice.-Nor.-Swed.-U.S.S.R.-U.S., 30 I.L.M. 1624 (1991) [hereinafter 1991 Rovaniemi Agreement]; Rudy Platiel, *Canada to Join Eight-Nation Arctic Protection Body*, GLOBE & MAIL (TORONTO), June 10, 1991, at A8.

for all Treaty regulated activities in Antarctica. One major reason for the success of the Treaty is that it removed any question of sovereignty for the life of the Treaty. Given that at the time of its implementation there were seven territorial claims in Antarctica which had not been recognized by other members of the international community, including the United States and the former Soviet Union, the "resolution" of the sovereignty issue for the duration of the Treaty was a major achievement.

The Antarctic example and the growing concern about environmental issues in the Arctic have raised the issue of whether Canada's efforts to solidify its Arctic claim will be overtaken by a push to "internationalize" the Arctic. There have already been a large number of international fora at which the development of specific international regimes to cope with Arctic issues have been discussed. Pollution control, management of wildlife, native rights, and the law of the sea are examples of the issues subjected to multilateral discussion amongst Arctic rim nations.[3] The larger issue of whether a true international regime should be created has until now been avoided. Nevertheless, some commentators suggest that the time has now arrived to seriously consider the possibility of a comprehensive Arctic regime. In a provocative 1988 editorial in the journal, *Arctic*, Gordon Hodgson asked: "Are the Arctic islands north of Canada owned by Canada? Yes, but since the islands are largely unpopulated, why not have an Antarctic-type treaty in the North, with reasonable and shared access for everyone in a peaceful sort of way?"[4]

The suggestion brought an angry response from readers who argued that there was no comparison between the two polar areas and that it was inappropriate to suggest that a Treaty such as the Antarctic Treaty could be successfully negotiated and implemented in the Arctic.[5] However, should such a suggestion be completely dismissed out of hand? While there are substantial geographic differences between the two polar regions, from political and legal perspectives they do have some common characteristics. One of these is that sovereignty remains an issue in both regions. However, whereas in the Arctic sovereignty disputes continue to exist over territory and maritime boundaries, in Antarctica such disputes have been successfully resolved by Article IV of the Antarctic Treaty.

This article will focus on the question of Canada's sovereignty over the waters of the Northwest Passage. As there is currently no dispute over Canada's ownership and title to the islands of the Canadian Arctic

3. This question has also raised much academic debate. *See* Barnaby J. Feder, *A Legal Regime for the Arctic*, 6 ECOLOGY L.Q. 785 (1978); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT 165-188 (1989); GAIL OSHERENKO & ORAN R. YOUNG, THE AGE OF THE ARCTIC: HOT CONFLICTS AND COLD REALITIES (1989).

4. Gordon Hodgson, *Editorial: Who Owns the Land?*, 41:4 ARCTIC at iii (1988).

5. *Letters to the Editor*, 42 ARCTIC 183-84 (1989).

Archipelago, it is the Northwest Passage and the conflicting views of Canada and the United States which have been the focus of debate during the past twenty-five years. Accordingly, this Article attempts to find a basis for resolving that dispute. First, the background to the current debate will be considered, followed by a review of the legal arguments. In particular, emphasis will be given to the question of whether the Passage is an international strait for the purposes of the law of the sea and, if it is, what has been the effect of Canada's 1986 straight baselines proclamation. Consideration will then be given to the question of sovereignty in Antarctica and how Article IV of the Antarctic Treaty sought to resolve sovereignty issues throughout the duration of the Treaty. Could an Article IV-type solution to the dispute over the Northwest Passage be adopted by Canada and the United States? If such a solution was adopted, what existing law of the sea provisions could also be relied upon? Would such a solution meet Canada's concerns? Would it guarantee access to the Passage by United States shipping? This Article considers these issues in an effort to determine whether an Antarctic solution to this Arctic problem could open the door for further international cooperation in the Arctic and thereby further the development of a more cohesive Arctic legal regime.

I. Efforts to Solidify Canada's Arctic Sovereignty

A. Canadian Sovereignty up to 1969

As is the case with most claims to sovereignty over polar areas, Canada's sovereignty claim to the islands of the Canadian Arctic Archipelago is based on traditional grounds. That is, a series of territorial claims and legislative acts over a period of time which, when combined, are evidence of Canadian sovereignty as against the claims of other states. The basis for much of the Canadian claim to North America lies in various acts of discovery by English and French explorers as they travelled across the northern part of the continent and sailed through arctic waters. They range from Sebastian Cabot's initial voyage to the northern coast of Labrador in 1497 to McClure's first crossing of the Northwest Passage over both land and water in 1850-1854. While most of these expeditions were voyages of discovery, not all were accompanied by the raising of the sponsoring sovereign's flag. Nevertheless, as a great majority of the expeditions were English, there was a substantial basis for Britain's sovereignty claims to the land based upon discovery.

The Canadian claim also finds a substantial basis in various treaties. In 1763, the Treaty of Paris ceded to Great Britain all of France's possessions in British North America with the exception of the islands of St. Pierre and Miquelon.[6] The 1825 Boundary Treaty between Russia and Great Britain is also important. It establishes the now Canadian-United States boundary along the 141st meridian. The Treaty provides that at

6. Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, 42 C.T.S. 279.

the terminus of the land frontier between what is now Alaska and the Yukon, the boundary extends as far as "the Frozen Ocean."[7] In the negotiations between Canada and the United States over their maritime boundary in the Beaufort Sea, Canada has partly relied upon the words of this Treaty to assert a claim over Arctic waters due north of the land boundary terminus. This reading is especially significant, because it would also go to support a Canadian territorial and maritime claim due north to the Pole.[8]

Following Canadian Confederation in 1867, there was a desire to ensure that the legal status of all Canadian territory was settled. In 1875, an Order-in-Council was passed requesting that Great Britain transfer all the lands north of the Dominion to Canada. There was no doubt that the Parliament at Westminster considered these lands to be British possessions and that it was competent to transfer sovereignty over them. Accordingly, an 1880 Order in Council provided for the transfer to Canada of "all the British possessions on the American continent, not hitherto annexed to any colony."[9] This proclamation included "all British territories and possessions in North America, not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions . . . with the exception of Newfoundland and its dependencies."[10] Canada also took steps independent of Great Britain to complete its legal title over the Arctic lands. In 1869, it purchased from the Hudson's Bay Company the area known as Rupert's Land which, in conjunction with the region known as the North-Western Territory, subsequently became the "Northwest Territory" which is the largest of all the political units within the Canadian Confederation and includes the islands of the Canadian Arctic Archipelago.[11]

While this patchwork acquisition of sovereignty through the transfer of title from previous administering powers was a useful mechanism for the young country, there was little indication of what Canada believed the full extent of its claims to the north could actually be. This

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7. Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, Feb. 16, 1825, art. 3, 75 C.T.S. 95.

8. For a discussion of the interpretation of the Treaty and the impact it has had on the delimitation of the Beaufort Sea maritime boundary, see Karin L. Lawson, *Delimiting Continental Shelf Boundaries in the Arctic: The United States—Canada Beaufort Sea Boundary*, 22 VA. J. INT'L L. 221 (1981); DONALD R. ROTHWELL, MARITIME BOUNDARIES AND RESOURCE DEVELOPMENT: OPTIONS FOR THE BEAUFORT SEA 25-40 (1988); Donald M. McRae, *Canada and the Delimitation of Maritime Boundaries*, *in* CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA 145, 148 (Donald McRae & Gordon Munro eds., 1989).

9. Ivan L. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L.J. 200, 212 (1963) (quoting C. Gaz, Oct. 9, 1880).

10. Adjacent Territories Order, 1880 (U.K.) (formerly Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, July 31, 1880); for a comment on this transfer, see Head, *supra* note 9.

11. WILLIAM H. MCCONNELL, COMMENTARY ON THE BRITISH NORTH AMERICA ACT 28 (1977).

all changed in 1907 when Senator Pascal Poirier, in a speech to the Canadian Senate, recommended that Canada make a declaration proclaiming possession of all the lands and islands lying between its northern coast and the Pole. As the basis for this assertion, Poirier argued:

> in future partition, of northern lands, a country whose possession today goes up to the Arctic regions . . . has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from the western extremity north. All the lands between the two lines up to the north pole should belong and do belong to the country whose territory abuts up there.[12]

Poirier thus became one of the first Canadians to advocate that the "sector" theory could be used by sovereign states adjacent to polar areas to justify a claim from the limits of their land mass along sector lines which met at the Pole. This attitude towards Canada's Arctic sovereignty was apparently shared by the Canadian explorer Captain J.E. Bernier, who took "formal possession" of the whole Arctic Archipelago on July 1, 1909 by unveiling and depositing a plaque on Melville Island. The inscription on the plaque read: "This Memorial is erected today to commemorate the taking possession for the Dominion of Canada of the whole Arctic Archipelago lying to the north of America from longitude 60°W. to 141°W. up to the latitude 90°N."[13] Despite the Poirier speech and Bernier's proclamation, however, there is no conclusive evidence of Canadian support for a sector claim in the Arctic. The truth is, that since the Poirier speech, legal academics have cast considerable doubt over the validity of the sector theory, and public statements from Canadian officials have never adopted the wide approach towards Canada's Arctic claims.[14] Nevertheless, the sector theory has provided a basis for Canada's assertion of sovereignty over the Arctic and especially Arctic waters, though it has rarely been relied upon as the sole justification for the Canadian claim in modern times.[15]

Canada's equivocation over the sector theory did not result in an abandonment of its claims to the Arctic. Rather, throughout the Twentieth Century there have been varying Ministerial statements concerning Canada's territorial claims towards the islands in the Archipelago and over the waters between the islands and the Northwest Passage itself. While some of these statements are contradictory on the actual extent of the Canadian claim, there is no dispute that Canada claimed title to the

12. Canada, Senate, *Debates*, 271 (Feb. 20, 1907).

13. Canada, House of Commons, *Debates*, Vol. 1, at 1730 (1909-10), *reprinted in* Head, *supra* note 9, at 211.

14. *See* GUSTAV SMEDAL, ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS 54-76 (C. Meyer trans., 1931); Head, *supra* note 9, at 202-210; DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 1-88 (1988).

15. This is true despite the fact that numerous maps seem to indicate a "boundary" line running from the eastern and western extremities of the Canadian mainland north to the pole.

islands of the Archipelago.[16] In fact, one commentator noted that by 1947 the Canadian claim to the territory of the Canadian Arctic became so uncontentious that ". . . it could be assumed that Canada's title had been perfected to most of the arctic islands."[17] Nevertheless, partly because of Canadian reliance upon the suspect sector theory plus the international law of the sea concerning internal waters, territorial seas and navigation through straits, the same cannot be said regarding the apparent Canadian position with respect to the waters around the Archipelago or the Northwest Passage. The true status of these waters remained in doubt.

B. The 1969 *Manhattan* Voyage

In 1969, Canada faced an unexpected foreign policy crisis that seemed to directly threaten its Arctic sovereignty. The catalyst for this crisis was the voyage by the *SS Manhattan* from the Beaufort Sea through the Northwest Passage to Davis Strait. The *Manhattan*, carrying a small cargo of oil, was intentionally sent through the Passage by its owners to demonstrate that an icebreaking bulk carrier was capable of year-round sailings between Alaska and the East Coast of the United States. The voyage was only the eleventh complete transit of the Northwest Passage, and the first since the end of World War II by a non-government vessel.[18] While the purpose of the voyage was innocent enough, the trip had great implications in Canada because the *Manhattan* passed through waters traditionally considered to be Canadian. Consequently, despite the presence of a Canadian Government representative on board the tanker during the passage and an accompanying Canadian Coast Guard vessel, the *J. A. Macdonald*,[19] the voyage created considerable public controversy in Canada. The controversy resulted primarily from the media-created perception that the United States had refused to consult Canada over the voyage. Concern was also expressed over the potential maritime and environmental disaster which would occur if an oil tanker was involved in an accident while in Arctic waters. This anxiety, combined with the realization that Canada's legal position regarding the waters of the Northwest Passage and the Canadian Arctic was inconclusive, allowed the *Manhattan*'s voyage through these waters to be portrayed as a direct threat to Canadian sovereignty which required an immediate

16. *See* Head, *supra* note 9, at 201-210; Robert S. Reid, *The Canadian Claim to Sovereignty over the Waters of the Arctic*, 12 CAN. Y.B. INT'L L. 111, 112-14 (1974); V. Kenneth Johnston, *Canada's Title to the Arctic Islands*, 14 CAN. HIST. REV. 24 (1933). For a review of Canadian perspectives on territorial sovereignty, see Gerald Goldstein, *Perspectives canadiennes de droit international public et privé relatives à la maîtise du territoire*, 28 CAN. Y.B. INT'L L. 29 (1990).

17. N. D. Bankes, *Forty Years of Canadian Sovereignty Assertion in the Arctic, 1947-87*, 40 ARCTIC 285, 287 (1987). This does not mean that sovereignty was never a "live" issue in the Arctic. *See* Nancy Fogelson, *The Tip of the Iceberg: The United States and International Rivalry for the Arctic, 1900-25*, 9 DIPL. HIST. 131 (1985).

18. For details of the voyage, see Thomas C. Pullen, *What Price Canadian Sovereignty?*, PROCEEDINGS, U.S. NAVAL INSTITUTE, Sept. 1987, at 66, 69-71.

19. *Id.* at 71.

Canadian response.[20]

The difficulty which Canada faced was that, apart from the proclamation of a three-mile territorial sea around the islands of the Canadian Arctic Archipelago,[21] there had been no formal assertion of Canadian sovereignty over all the Passage waters or those surrounding the Archipelago.[22] Consequently, apart from where Canadian waters overlapped in the narrow McClure Strait, the *Manhattan* was passing through high seas during its navigation of the Passage.[23]

The Canadian Government's public response to the *Manhattan* voyage came in the way of a Parliamentary statement on Canadian policy concerning sovereignty in the north. Prime Minister Trudeau assured Canadians that Canada's claim to sovereignty over its northern lands was unquestionable and void of competing claims.[24] He stated, with respect to the waters between the islands of the Canadian Arctic Archipelago:

> The area to the north of Canada, including the islands and the waters between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is national terrain.[25]

The Prime Minister went on to add: "It is also known that not all countries would accept the view that the waters between the islands of the archipelago are internal waters over which Canada has full sovereignty. The contrary view is indeed that Canada's sovereignty extends only to the territorial sea around each island."[26]

The Government, however, refrained from taking any further action which might be interpreted as a positive assertion of Canadian sovereignty.[27] Despite the then official Canadian position, the legal reality with respect to the waters of the archipelago was that, apart from the proclamation of a three-mile territorial sea, Canada had not asserted any additional jurisdiction or sovereignty claim over the Archipelago's waters. Consequently, the right of high seas navigation through the Northwest Passage remained in place except in narrow stretches of water subject to Canada's overlapping territorial sea.

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20. EDGAR J. DOSMAN, THE NATIONAL INTEREST: THE POLITICS OF NORTHERN DEVELOPMENT 46-47 (1975).

21. Territorial Sea and Fishing Zones Act, ch. 22, 1964-65 S.C. 153 (1964) (Can.).

22. *See* Bankes, *supra* note 17, at 285-86 (distinction made between territorial claims to the islands of the Arctic Archipelago and claims to waters within the Archipelago and navigation routes such as the Northwest Passage).

23. DONAT PHARAND, THE LAW OF THE SEA OF THE ARCTIC WITH SPECIAL REFERENCE TO CANADA 57 (1973).

24. Canada, House of Commons, *Debates*, Vol. 8, at 8720 (May 15, 1969).

25. *Id.*

26. *Id.*

27. *See generally* PHARAND, *supra* note 23, at 55-57.

C. The Response to the *Manhattan* Voyage

Following its successful 1969 voyage, the *Manhattan*'s owners announced that the ship would attempt a second voyage in 1970. A different route was to be used, though the *J. A. Macdonald* would once again accompany the tanker.[28] This second voyage further raised public fears about the status of the Passage. Public pressure on the government to reaffirm Canada's Arctic sovereignty and to ensure that future voyages did not pose a threat to that sovereignty increased.[29] Although the *Manhattan* voyages demonstrated that passage through Arctic waters by oil tankers was possible, concerns were also raised about the potential construction of a fleet of super ice-breakers which had the ability to keep the Northwest Passage open all year, allowing United States corporations to continually ship oil from Alaska to the East coast of the United States.[30]

The Canadian response in 1970 had three bases. First was the implementation of the Arctic Waters Pollution Prevention Act,[31] which extended Canadian jurisdiction 100 nautical miles from the low-water mark in order to enforce certain pollution standards on vessels using Canada's arctic waters. The Act applied to proclaimed "arctic waters" which extended 100 miles out into the Beaufort Sea and Arctic Ocean along the coastlines of the Yukon and Northwest Territories, including the islands of the Arctic Archipelago.[32] This extended jurisdiction was intended to enforce pollution control regulations on all shipping passing through such arctic waters. Under the Act, standards could be prescribed for vessel construction, navigation, and operation. Failure to comply with these standards would result in the prohibition of passage by such vessels.[33] Given that enforcement of pollution standards by coastal states upon foreign-flagged vessels had up until this time only been accepted within internal waters and the territorial sea, asserting such jurisdiction 100 miles offshore was a very extensive claim which exceeded existing conventions and customary international law.

The second Canadian response was to extend the territorial sea from three to twelve nautical miles.[34] This action effectively gave Canada full sovereignty over all waters twelve miles offshore the Canadian

28. *See generally* PHARAND, *supra* note 23, at 48 and references thereat; *see also* John Kirton & Don Munton, *The* Manhattan *Voyages and Their Aftermath, in* POLITICS OF THE NORTHWEST PASSAGE 67, 84-85 (Franklyn Griffiths ed., 1987).

29. Maxwell Cohen, *The Arctic and the National Interest*, 26 INT'L J. 52, 67-68 (1970).

30. *Id.*

31. Arctic Waters Pollution Prevention Act, ch. 47, 1969-70 S.C. 653 (1970) (Can.).

32. *Id.* Section 3(2) defines "arctic waters" as waters "adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by the sixtieth parallel of the north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles . . . ."

33. *See* PHARAND, *supra* note 23, at 224-32; Reid, *supra* note 16, at 117-29.

34. Act to Amend the Territorial Sea and Fishing Zones Act, ch. 68, 1969-70 S.C. 1243 (1970) (Can.).

coastline, including the Arctic islands. More importantly, the extension of the territorial sea to twelve miles resulted in a great deal of the Northwest Passage becoming enclosed within Canadian territorial sea so that any transit of the Passage would now see vessels coming more frequently under Canadian jurisdiction.

The final step taken by Canada was to withdraw its acceptance of the compulsory jurisdiction of the International Court of Justice regarding matters dealing with Canada's Arctic jurisdiction.[35] This move ensured that no claim could be made against the new Canadian measures, especially the validity of the Arctic Waters Pollution Prevention Act, before the Court unless Canada agreed to submit to the Court's jurisdiction.[36]

In justifying its action, Canada relied upon the growing concern for ecological protection of the Arctic. The nation argued that because international law had not at that time developed sufficient measures to protect the area from the dangers of pollution, it was appropriate for Canada to take unilateral action. Prime Minister Trudeau argued:

> [W]e're saying somebody has to preserve this area for mankind until international law develops. And we are prepared to help it develop by taking steps on our own and eventually, if there is a conference of nations concerned with the Arctic, we will of course be a very active member in such a conference and try to establish an international regime. But, in the meantime, we had to act now.[37]

Mitchell Sharp, Canadian Minister for External Affairs, also noted the "gap" which existed in international environmental law, and how the Canadian action sought to overcome this deficiency:

> We are determined to discharge our own responsibilities for the protection of our territory. We are equally determined to act as pioneers in pushing back the frontiers of international law so that the laissez-faire regime of the high seas will no longer prevent effective action to deal with a pollution threat of such a magnitude that even the vast seas and oceans of the world may not be able to absorb, dissolve or wash away the discharges deliberately or accidently poured into them.[38]

But it should be noted that Canada did not seek to absolutely bar international navigation. Rather, the Canadian action would "make clear that the Northwest Passage is to be opened for the passage of shipping of all nations subject to the necessary conditions required to protect the

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35. *Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, reprinted in* 9 I.L.M. 598 (1970).

36. Mitchell Sharp, Canadian Minister for External Affairs, frankly admitted that Canada was "not prepared to litigate with other states on vital issues concerning which the law is either inadequate, non-existent or irrelevant to the kind of situation Canada faces, as in the case of the Arctic." Canada, House of Commons, *Debates*, Vol. 6, at 5952 (Apr. 16, 1970).

37. Pierre E. Trudeau, *Canadian Prime Minister's Remarks on the Proposed Legislation*, 9 I.L.M. 600, 601 (1970).

38. *Debates*, *supra* note 36, at 5951.

delicate ecological balance of the Canadian Arctic."[39]

The Canadian response to the second voyage by the *Manhattan* was not welcomed in the United States. The Department of State argued that "[i]nternational law provides no basis for these proposed unilateral extensions of jurisdictions on the sigh [sic] seas, and the USA can neither accept nor acquiesce in the assertion of such jurisdiction."[40] It was also asserted that "[t]he enactment and implementation of these measures would affect the exercise by the USA and other countries of the right to freedom of the seas in large areas of the high seas and would adversely affect our efforts to reach international agreement on the use of the seas."[41] The United States response also indicated that if Canada had not withdrawn acceptance of the International Court of Justice's compulsory jurisdiction, a legal challenge would have arisen before the Court on this question. While Canada's attitude towards a Court challenge may have effectively halted a potential United States challenge, it also contributed to lingering doubts over the legal validity of its action.[42]

Despite Canada's efforts in 1970 to more actively assert extensive sovereignty and jurisdiction over the waters of the archipelago and surrounding islands, the legal validity of these claims remained uncertain. The law of the sea was also in some flux at the time with the Third United Nations Conference on the Law of the Sea about to commence its meetings in an effort to reach agreement on unresolved matters following the First and Second Conferences. These circumstances contributed to uncertainty over the true legal position of the Northwest Passage waters, and acted as a catalyst for continuing Canadian-United States tension.[43]

D. The Post-*Manhattan* State of the Sovereignty Claim: 1971-1985

Following the voyage of the *Manhattan* and the events of 1970, Canada continued to assert that the waters of the Arctic Archipelago and Northwest Passage were "Canadian." In a letter of December 17, 1973, the

39. *Debates*, *supra* note 36, at 5938 (statement by Jean Chretien).

40. J. A. Beesley & C. B. Bourne eds., *Canadian Practice in International Law during 1970 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 9 CAN. Y.B. INT'L L. 288 (1971).

41. *Id.* at 287-88.

42. For details on the development of Canada's response to the *Manhattan*, see Reid, *supra* note 16, at 117-26. For another comment on the status of the Passage at this time, see Walter G. Reinhard, *International Law: Implications of the Opening of the North-west Passage*, 74 DICK. L. REV. 678 (1970); J. A. Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MAR. L. & COM. 1 (1971).

43. The relative positions of Canada and the United States on the law of the sea were additionally complicated by the differing positions taken towards the four Geneva Conventions on the Law of the Sea negotiated in 1958. The United States ratified all four of the Conventions by 1961 while Canada, despite signing all of the Conventions, only ratified one, the Convention on the Continental Shelf in 1970. Canada and the United States also had differing agendas for the Third United Nations Conference on the Law of the Sea. *See* DOUGLAS M. JOHNSTON, CANADA AND THE NEW INTERNATIONAL LAW OF THE SEA 73-76 (1985).

Bureau of Legal Affairs stated that, in addition to certain historic claims over the waters of Hudson Bay, Canada also claimed the waters of the Canadian Arctic Archipelago as "internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation."[44] This view of the Government was further confirmed in May 1975 when the Secretary of State for External Affairs noted that the Arctic waters were considered to be Canadian "internal waters."[45] Further, in a 1980 legal memorandum, the Department of External Affairs stated: "Canada continues to maintain the position that the Northwest Passage is not an international strait; that the waters making up the passage are internal; and that any navigation in the Passage will be subject to Canadian control and regulation for safety and environmental purposes."[46] Despite these statements, however, the legal position with respect to Canada's actual assertion of sovereignty and jurisdiction over these waters did not support such claims. The combined effect of the Arctic Waters Pollution Prevention Act and Canada's extended territorial sea did not provide a basis for a claim that the waters of the passage were internal. As noted above, some of the Passage waters were now enclosed by Canada's territorial sea, which extended out from the islands in the archipelago. Patches of high seas, however, still remained within which high seas freedoms of navigation still existed, with the exception of the pollution provisions of the Arctic Waters Pollution Prevention Act. Additionally, Canadian commentators were skeptical over the possible validity of an historic claim to the Archipelago's waters.[47] While many more supported the view that the Northwest Passage was not an international strait, the position still remained that until Canada had taken every step possible to positively assert its sovereignty and jurisdiction over these Arctic waters, any Canadian claim of sovereignty would be contestable.

This remained the position of one of Canada's leading experts on the Arctic, Professor Donat Pharand, who continued to doubt the legality of the Canadian position with respect to the Archipelago's waters. Pharand urged the Canadian government to consider proclaiming a series of baselines around the outer limits of the Canadian Arctic Archipelago. In contrast to the official Canadian position, Pharand argued that the Northwest Passage was an area of water over which the right of innocent passage still existed, and that foreign warships had a right of transit through these waters. He concluded:

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44. *Canadian Practice in International Law during 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 12 CAN. Y.B. INT'L L. 272, 279 (comp. Edward G. Lee 1974).

45. Canada, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defense*, No. 24, at 6 (22 May 1975).

46. *Canadian Practice in International Law during 1980 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 19 CAN. Y.B. INT'L L. 320, 322 (comp. L. H. Legault 1981).

47. *See* PHARAND, *supra* note 23, at 99-144; D. M. McRae, *Arctic Waters and Canadian Sovereignty*, 38 INT'L J. 476, 480-82 (1983); Reid, *supra* note 16, at 133.

> [I]t would seem more urgent than ever for Canada to draw straight baselines around its Arctic archipelago. Only then would Canada be in a position to ensure that it could exercise the necessary control adequately to protect its Arctic marine environment, the local Inuit population, and its national security.[48]

E. The 1985 *Polar Sea* Voyage and Canadian Response

Controversy arose again over the status of the Northwest Passage when in the summer of 1985 it was announced that the United States icebreaker *Polar Sea* would sail through the Passage from east to west.[49] The United States informed Canada of the planned voyage, but did not seek official permission. Two Canadian Coast Guard captains accompanied the *Polar Sea* as "invited observers," however no attempt was made by either Canada or the United States to interpret this as a grant of official permission for the voyage.[50] Despite calls for Canada to issue a formal protest over the voyage, the Canadian Minister for External Affairs, Joe Clark, stated that the voyage "does not compromise in any way the sovereignty of Canada over our northern waters, or affect the quite legitimate differences of views that exist between Canada and the United States on that question."[51] Thus, Canada's response to this voyage was to again reassert its right of sovereignty over the waters of the passage. This was, however, not a legal right which Canada was prepared to positively assert so as to prohibit navigation by foreign flagged vessels.[52]

The Canadian media took a strongly nationalistic view of the proposed voyage and, as had occurred in 1969 and 1970 with the *Manhattan*, saw the *Polar Sea* as a direct threat to Canadian sovereignty. This sentiment, combined with the apparent disregard by the United States for Canadian sensitivities, provided the media with an opportunity to condemn the voyage. In reference to the United States approach to freedom of navigation through the Northeast Passage, at that time controlled by the USSR, one Canadian national newspaper noted that the active assertion of freedom of navigation through the Northwest Passage, but not through the Northeast Passage, was a "predatory policy, one based on respect for a rival superpower and contempt for a feckless

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48. Donat Pharand, *The Legal Regime of the Arctic: Some Outstanding Issues*, 39 INT'L J. 742, 797 (1984). This was the position Pharand had adopted for some time. *See also* Donat Pharand, *The Waters of the Canadian Arctic Islands*, 3 OTTAWA L. REV. 414, 432 (1969); Donat Pharand, *Canada's Arctic Jurisdiction in International Law*, 7 DALHOUSIE L.J. 315, 330-32 (1983). For a further review of Canadian Arctic policy during this time, see Hal Mills, *Ocean Policy Making in the Canadian Arctic*, *in* NATIONAL AND REGIONAL INTERESTS IN THE NORTH: THIRD NATIONAL WORKSHOP ON PEOPLE, RESOURCES AND THE ENVIRONMENT NORTH OF 60, at 491-527 (1984).

49. Pullen, *supra* note 18, at 71.

50. *Bilateral Relations USA—Arctic Sovereignty*, INT'L CAN. 1 (June/July 1985).

51. Canada, House of Commons, *Debates*, Vol. 4, at 6043, (June 20, 1985).

52. *See Inuit Fear, Voyage of U.S. Icebreaker Harms Sovereignty*, GLOBE & MAIL (TORONTO), July 10, 1985, at 8; *No Plan to Protest Against Voyage*, GLOBE & MAIL (TORONTO), Aug. 3, 1985, at 1.

friend."[53]

Canada's formal response to the *Polar Sea* voyage came on August 1, 1985, when the government announced that it would launch an "intensive review" of Canadian Arctic sovereignty.[54] The review culminated on 19 September with a comprehensive statement on Canadian Arctic sovereignty to Parliament. In his speech to the House of Commons, Joe Clark stated:

> Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward-facing coasts of the Arctic islands. Those islands are joined, and not divided by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land. The policy of the Government is to maintain the national unity of the Canadian Arctic archipelago and preserve Canada's sovereignty over land, sea and ice undiminished and undivided.[55]

Clark then proceeded to give the most definitive statement to date on Canadian policy over the waters of the Northwest Passage and the Arctic Archipelago: "[t]he policy of the Government is to exercise full sovereignty in and on the waters of the Arctic Archipelago and this applies to the airspace above as well. We will accept no substitute."[56] This statement eventually saw six major policy initiatives announced. They were:

1) the establishment of straight baselines around the Canadian Arctic Archipelago, effective from 1 January 1986;
2) the adoption of new legislation to enforce Canadian Civil and Criminal laws in the offshore areas enclosed by the straight baselines;
3) talks with the United States on co-operation in Arctic waters on the basis of full respect for Canadian sovereignty;
4) increased aircraft surveillance and Naval activity in the Eastern Arctic;
5) the withdrawal of Canada's reservation to the International Court of Justice; and
6) the construction of a Polar Class 8 ice-breaker to operate in the enclosed waters and a review of the other means available through which effective control could be exercised over Canadian arctic waters.[57]

The Clark statement, for the first time, effectively removed all doubts about Canada's intentions in the Arctic and fully clarified Canada's legal position over the region. By the proclamation of straight baselines around the Arctic Archipelago, Canada had in one swift action made all the waters that fell within the baselines "internal waters" of Canada over which it had complete sovereignty and jurisdiction. The measures which

53. *Editorial: All in the Family*, GLOBE & MAIL (TORONTO), Aug. 8, 1985, at 6.
54. *Canada to Launch Sovereignty Review*, GLOBE & MAIL (TORONTO), Aug. 2, 1985, at 1.
55. Canada, House of Commons, *Debates*, Vol. 5, at 6463 (Sept. 10, 1985).
56. *Id.*
57. *Id.* at 6464. This statement also initiated a review of other aspects of Canada's Arctic policies. *See* Gerald Graham, *An Arctic Foreign Policy for Canada*, INT'L PERSP., Mar./Apr. 1987, at 11.

accompanied the proclamation of the baselines were also designed to ensure that the Canadian action was not hollow and that it would be supported by positive evidence of Canadian sovereignty and jurisdiction over the waters.

The United States responded with expressions of "regret" over the Canadian decision to expand its Arctic sovereignty and jurisdiction and, along with other states, formally objected in writing to the Canadian action.[58] Nevertheless, in an effort to resolve the differences of opinion that existed between the two states, the United States indicated a willingness to engage in bilateral discussions over the status of the Northwest Passage waters.[59] The discussions did in fact take place and resulted in agreement on several issues, though not with respect to Canadian Arctic sovereignty.

F. 1988 Arctic Cooperation Agreement

In January 1988, following two years of negotiations, Canada and the United States entered into an "Arctic Cooperation Agreement."[60] The Agreement sought to reaffirm the need for Canadian-United States cooperation in the Arctic in order to advance "their shared interests in Arctic development and security."[61] It acknowledged the importance of protecting the unique environment of the Arctic, the well-being of its habitants, and the uniqueness of ice-covered maritime areas. Both states also acknowledged their shared interests in safe and effective icebreaker navigation off their Arctic coasts and the need for increased knowledge on how to protect the Arctic marine environment. To that end, the Agreement specifically provided:

a) that both states would facilitate and develop cooperative measures for navigation by their icebreakers in their respective Arctic waters;
b) that in accordance with international law both states would take advantage of their icebreaker navigation to share research information so as to advance their understanding of the marine environment; and,
c) that navigation by United States icebreakers within waters claimed by Canada to be internal would be undertaken with the consent of Canada.[62]

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58. *Sovereignty—Arctic Region*, INT'L CAN. 9 (Aug. and Sept. 1985); Ronald G. Purver, *Aspects of Sovereignty and Security in the Arctic, in* CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA 165, 170 (Donald McRae & Gordon Munro eds., 1989).

59. For a discussion of United States policy concerning the *Polar Sea* voyage, see Ted L. McDorman, *In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage*, 10 MARINE POL'Y 243, 252-53 (1986). For a further review of the Canadian reaction to the voyage, see also Nicholas Hewson, *Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage*, 26 COLUM. J. TRANSNAT'L L. 337 (1988); Roy A. Perrin, *Crashing Through the Ice: Legal Control of the Northwest Passage or Who Shall be the "Emperor of the North,"* 13 TUL. MAR. L.J. 139 (1988).

60. Agreement on Arctic Cooperation, Jan. 11, 1988, U.S.-Can., *reprinted in* 28 I.L.M. 142 (1989) [hereinafter 1988 Arctic Cooperation Agreement].

61. 1988 Arctic Cooperation Agreement, *supra* note 60, cl. 2.

62. 1988 Arctic Cooperation Agreement, *supra* note 60, cl. 3.

In addition, Clause 4 of the Agreement sought to ensure that the respective positions of both states concerning the law of the sea in the Passage and in other maritime areas would not be affected by the Agreement.[63]

The Agreement created a special bilateral regime on icebreakers and their Arctic use, navigation, and impact upon the environment. It was not intended to deal with all types of navigation, with the exception of Clause 2, which states that navigation should not adversely affect the environment or local inhabitants. The Agreement, therefore, did not cover navigation through the Northwest Passage by vessels similar to the *Manhattan*. That both parties specifically reserved their respective positions on other law of the sea issues affecting the region is a further indication that the Agreement was limited to icebreakers. Thus, by entering into the Agreement, the United States is not viewed as making any concession towards Canada's claim of sovereignty over the Northwest Passage.[64] The Canadian position that the Passage is not an international strait also remains intact. Therefore, while the Agreement could be interpreted as a step towards cooperation on an issue-specific problem, the instrument could not be seen as a reconciliation of the nations' conflicting views with respect to navigation through the Northwest Passage.[65] Canada and the United States, through Clause 4, in effect acknowledged that only navigation by icebreakers was covered by the Agreement, leaving unresolved the more substantial areas of disagreement between the nations over other aspects of navigation through the Passage.

The operation of the 1988 Arctic Cooperation Agreement was put to the test in October of that year. In September, the United States Coast Guard *Polar Star* assisted two Canadian icebreakers in the early stages of a transit of the Northwest Passage. Upon completion of this task the *Polar Star* found that returning through the Beaufort Sea was impossible and, with winter fast approaching its only option was to transit the Northwest Passage as soon as practicable.[66] Consequently, in accordance with the 1988 Agreement, the United States requested per-

63. Clause 4 of the 1988 Arctic Cooperation Agreement provides: "Nothing in this Agreement of cooperative endeavor between Arctic neighbors and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties." 1988 Arctic Cooperation Agreement, *supra* note 60.

64. Legally this may be the position, however, politically the Canadian Government saw the Agreement as a significant step "in emphasizing Canada's control over our North." *See* Statement by the Secretary of State for External Affairs, Joe Clark, in *Canadian Practice in International Law—Parliamentary Declarations in 1987-1988*, 26 CAN. Y.B. INT'L L. 335, 350 (1988).

65. For a review of the Agreement, see John Honderich, *Canada-U.S. Agreement on the Northwest Passage: Compromise or Cop-out?*, 14:4 INFORMATION NORTH: NEWSLETTER OF THE ARCTIC INSTITUTE OF NORTH AMERICA 1 (1988); Purver, *supra* note 58, at 170-73. In regard to icebreaking operations in the Arctic, see Lawson W. Brigham, *Arctic Icebreakers: U.S., Canadian, and Soviet*, 29:1 OCEANUS, Spring 1986, at 47.

66. B. McAllister, *U.S. Breaks Diplomatic Ice to Aid Ship*, WASH. POST, Oct. 11, 1988, at A1.

mission to send the icebreaker through the Northwest Passage. Officials in the State Department, however, insisted that this action was not to be interpreted as a recognition of Canadian sovereignty.[67] The formal United States request also noted that:

> *Polar Star* will operate in a manner consistent with the pollution control standards and other standards of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations. Costs incurred as a result of a discharge from the vessel, including containment, cleanup and disposal costs incurred by the United States or Canada and any damage that is an actual result, will be the responsibility of the United States Government, in accordance with international law.[68]

The Canadian Government consented to the *Polar Star* voyage, assigning a Canadian Coast Guard icebreaker to accompany it during its transit of the Northwest Passage and placing a Canadian officer on board during the journey.[69] After diplomatic correspondence resolved these matters, the voyage proceeded without incident.

II. The Legal Status of the Northwest Passage

The above review has sought to provide some background to the position which Canada has taken with regard to its claims over the islands of the Arctic Archipelago and the Northwest Passage. The United States response to Canada's position has consistently been that the waters of the Passage are part of an "international strait" through which the freedom of navigation prevails. In this regard the United States attitude towards the exercise of the freedom of navigation remains consistent with the approach it has taken in a number of international fora and in bilateral discussions with many coastal states.[70] Despite being a significant coastal state, the United States attitude towards navigation has essentially been that of a maritime nation, reflecting not only the importance of maritime commerce to the United States, but also the importance it attaches to guaranteed freedom of navigation for its navy.[71]

These are the issues which form the basis of the disagreement. Understanding the relative positions adopted by each side, however, requires consideration of the legal status of the Northwest Passage.

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67. *Id.* at A1. The U.S. request also suggested that the presence of a Canadian scientist and Canadian Coast Guard officer on board during the voyage would be welcomed, and that there would also be no objection if Canada chose to send an icebreaker to accompany the *Polar Star* during the passage. *See U.S. Note No. 425*, Oct. 10, 1988, *reprinted in* 28 I.L.M. 144 (1989).

68. *U.S. Note No. 425*, *supra* note 67.

69. *See Canadian Response to U.S. Note No. 425*, Oct. 10, 1988, *reprinted in* 28 I.L.M. 145 (1989).

70. *See* David L. Larson, *Innocent, Transit, and Archipelagic Sea Lanes Passage*, 18 OCEAN DEV. & INT'L L. 411, 420-26 (1987).

71. *See* John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992).

A. Straits in International Law

Straits have increasingly attained significance in the law of the sea due to the further extension of maritime zones from the low-water marks of coastal states. The debate that has occurred over the legal status of straits has also been dominated by the traditional concerns of the rights of coastal states to exercise sovereignty over their territorial sea and the rights of maritime states to exercise the freedom of navigation.[72] Because straits were seen as "choke points" through which international shipping, by necessity, had to pass through, some argued that an exception to the rule of coastal state sovereignty over the territorial sea should exist in certain cases. If an exception did not exist for straits, with the extension of coastal state jurisdiction over the waters of the territorial sea, many straits would become subject to the navigational regimes imposed by the coastal state, possibly resulting in severe limitations on international maritime commerce and navigation by all vessels. Accordingly, the concept of "innocent passage" through the territorial sea was developed as a compromise to resolve this problem. Under this regime, passage through a strait where there was no high seas corridor was to be granted if it was "innocent."[73]

1. The Corfu Channel *Case*

Although the development of the right of innocent passage through the territorial sea assisted navigation through international straits, some uncertainty as to the exact scope of the right still existed.[74] It was under these circumstances that in 1949 the International Court of Justice decided the *Corfu Channel* case.[75] In this case, the Court was asked to consider the extent of navigation rights by United Kingdom warships through the North Corfu Channel, which was controlled by Albania and over which Albanian territorial sea had been proclaimed. In its judgment, the Court upheld the right of innocent passage through straits used for international navigation. The decisive criteria for the application of this right were that the strait connect two parts of the high seas, and that the strait be used for international navigation.[76] The Court had no difficulty in finding that the Corfu Channel met the geographical requirement. There was more concern, however, over whether the functional requirement that the strait was being used for international navi-

72. For a discussion of the traditional freedom of navigation through the seas, see Ruth Lapidoth, *Freedom of Navigation—Its Legal History and Its Normative Basis*, 6 J. MAR. L. & COM. 259 (1974-75).

73. *See* FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA 38-43 (1990).

74. In some cases, specific treaties were negotiated to regulate navigation through certain straits. *See* 2 ERIK BRÜEL, INTERNATIONAL STRAITS (1947) (discussing the position of the Danish Straits, Strait of Gibraltar, Strait of Magellan and Turkish Straits).

75. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4.

76. *Id.* at 28.

gation was established.[77] To decide this question, the Court referred to various statistics on the number of foreign flagged vessels that had passed through the Channel in previous years.[78] The Court concluded that the Channel provided a "useful route" for navigation and this was sufficient to meet the functional requirement. As to whether this test of usage depended on volume of traffic or importance of the strait for international navigation, the Court responded that "the decisive criterion is rather its geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation."[79]

2. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone

The decision by the International Court of Justice in *Corfu Channel* resulted in a much greater understanding of how the right of innocent passage could apply to straits. Importantly, the judgment identified that the right only applied in straits used for international navigation and laid down criteria for determining such straits.[80] Despite the Court's clarification of the law on navigation through straits, however, uncertainty still remained as to the extent of the right of innocent passage through international straits. This became a matter for consideration at the 1958 Geneva Conference on the Law of the Sea which resulted in the Convention on the Territorial Sea and Contiguous Zone (1958 Geneva Convention).[81] Given that much of the 1958 Geneva Convention codified existing customary international law, it is not surprising that the International Court's ruling in *Corfu Channel* concerning international straits was adopted.

The right of innocent passage through the territorial sea was recognized in Article 14. According to the provision, innocent passage was defined as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters."[82]

Innocent passage through the territorial sea of a coastal state could

77. *Id.* The Court noted that Albania denied that the Corfu Channel:
> belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

Id.

78. *Id.* at 29. It was noted that the British Navy regularly used the Channel for more than eighty years.

79. *Id.* at 28.

80. For a further comment on this decision, see 1 DANIEL P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 306-14 (Ivan A. Shearer ed., 1982).

81. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 [hereinafter 1958 Geneva Convention] (entered into force on 10 Sept. 1964).

82. *Id.* art. 14(2).

only be prohibited where the passage was not innocent,[83] or if the coastal state had temporarily suspended the right of innocent passage to protect its own security.[84] Passage through an international strait, however, could not be suspended. Article 16(4) provided that "[t]here shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

Despite the considerable advances in the law of the sea that resulted from the 1958 Geneva Convention, there remained many unresolved issues concerning the right of innocent passage through straits. The most significant problem was that it failed to adequately define the term "international strait." While Article 16(4) provided a geographic requirement that shipping pass to and from high seas or be en route to the territorial sea of a foreign State, no explicit reference was made for a functional requirement that a certain volume of shipping pass through the strait.[85] Consequently, customary international law on straits continued to develop beyond the basic provisions of the 1958 Geneva Convention. Thus, when the Third United Nations Conference on the Law of the Sea convened in 1973, the agenda included the issue of passage through straits.[86]

3. The 1982 United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[87] is the most significant multilateral convention adopted on the law of the sea. Not only did it codify many areas of the law of the sea, but it also considerably developed certain areas of the international law. Article 3 of UNCLOS recognized that coastal states could proclaim a territorial sea of up to twelve nautical miles. Consequently, straits through which there previously existed a high seas corridor were enclosed by territorial sea. Rather than applying the right of innocent passage through these newly enclosed waters, UNCLOS adopted "transit passage" as a new navigation regime for shipping through inter-

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83. *Id.* art. 14(4) (outlined what was required for passage to be innocent).

84. *Id.* art. 16(3).

85. *See* CHRISTOS L. ROZAKIS & PETROS N. STAGOS, THE TURKISH STRAITS 64-67 (1987).

86. For a review of some of the problems which existed with the regime of passage through straits during that time, see O'CONNELL, *supra* note 80, at 317-27; Richard B. McNees, *Freedom of Transit through International Straits*, 6 J. MAR. L. & COM. 175 (1974-1975).

87. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter UNCLOS]. The Convention has yet to enter into force, but as of January 1993 the Convention had a total of 52 instruments of ratification and two of accession, providing a total of 54 of the required 60 state parties which must under Article 308 have ratified or acceded to the Convention before it will enter into force. *See* 22 LAW OF THE SEA BULL. 1-2 (Jan. 1993).

national straits.[88]

UNCLOS devotes all of Part III to straits used for international navigation, recognizing four types of passage through straits. First, the normal freedoms of navigation, as prescribed in UNCLOS, still apply through straits used for international navigation through which there exists a high seas or exclusive economic zone corridor.[89] Second, it also does not affect already existing convention-based regimes that provide for passage by shipping through specific international straits.[90] Third, the newly created right of transit passage applies in straits used for "international navigation" which connect one part of the high seas or exclusive economic zone with another part of the high seas or exclusive economic zone.[91] In the fourth case, a non-suspendable right of innocent passage applies where a strait is formed by an island of a State bordering the strait and its mainland and there exists to seaward of the island a route through the high seas or exclusive economic zone of similar convenience.[92] Article 38 of UNCLOS details the rights associated with transit passage, providing that transit passage shall be unimpeded in cases 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."[93] Nevetheless, as was the case with the 1958 Geneva Convention, UNCLOS fails to define precisely to which straits "used for international navigation" the right of transit passage applies.[94]

B. Is the Northwest Passage an International Strait?

The above discussion of the status of straits in international law demonstrates the progressive development of the law during the latter part of this century. Much of the catalyst for this development has been the recognition that straits used for international navigation are a special category because of the role they play in international maritime traffic. Moreover, with the expansion of the territorial sea regime to a twelve nautical mile limit, many straits are now completely enclosed by territorial waters and are without high seas corridors through which international shipping can pass without coming under the jurisdiction of the adjacent coastal state or states. The question now becomes whether it is possible to apply the navigation regime of international straits to the

88. Said Mahmoudi, *Customary International Law and Transit Passage*, 20 OCEAN DEV. & INT'L L. 157, 165-66 (1989) (argues that the acceptance at the Third United Nations Conference on the Law of the Sea of a 12 mile territorial sea was dependent upon the development of the transit passage regime).

89. UNCLOS, *supra* note 87, art. 36.

90. UNCLOS, *supra* note 87, art. 35(c). Examples of this are the Bosphorus and Dardanelles.

91. UNCLOS, *supra* note 87, arts. 37 and 38.

92. UNCLOS, *supra* note 87, arts. 38(1) and 45.

93. UNCLOS, *supra* note 87, art. 38.

94. UNCLOS, *supra* note 87, art. 37.

Northwest Passage. This assessment, however, requires an understanding of the Passage's complexity from a navigational perspective.

1. The Geography of the Passage

As a shipping route, the Northwest Passage is in reality a series of connected straits passages. From the east, it allows shipping to pass from the North Atlantic Ocean up Davis Strait between Canada and Greenland, through the Arctic Archipelago to the Beaufort Sea, and then to the Chukchi Sea and the Bering Strait into the North Pacific. Given the large number of islands that make up the Arctic Archipelago, there exist many potential shipping routes from east to west and west to east. The practical reality, however, is that because of the heavy ice found in these polar waters, and the shallow draught that exists in some of the straits, there are only a handful of viable combinations of straits and channels which can be used to make the complete crossing.

According to Pharand, there are five possible routes, with some variations that can be used to navigate the Passage.[95] They are as follows:

Route 1 From east to west runs through Davis Strait into Baffin Bay and then west into Lancaster Sound, Barrow Strait, Viscount Melville Sound, Prince of Wales Strait and then Amundsen Gulf. With Canada's present twelve mile territorial sea, high seas corridors only exist in Lancaster Sound, Viscount Melville Sound and Amundsen Gulf on this route. Barrow Strait does have a substantial high seas corridor through it, but islands lie across the strait south of Bathurst Island so as to create a chain of linking territorial sea across to Russell Island. Prince of Wales Strait is the most narrow of all the straits which would be used in this passage, and with an average width of 10 miles is enclosed by territorial sea from Banks Island and Victoria Island.

Route 2 This route, commonly known as the "Parry Channel," substitutes McClure Strait for Prince of Wales Strait as described in Route 1. McClure Strait has a high sea corridor between the territorial sea from islands to the north and Banks Island to the south.

Route 3 This route follows the Parry Channel (Route 2) till Barrow Strait where it heads south through Peel Sound, Franklin Strait, Larsen Sound, Victoria Strait, Queen Maud Gulf, Dease Strait, Coronation Gulf, Dolphin and Union Strait and finally Amundsen Gulf. After leaving Barrow Strait, most of this route is through Canadian territorial sea, with only Larsen Sound, Victoria Strait and Amundsen Gulf having substantial high sea corridors.[96]

Route 4 This is a variation of Route 3 in which vessels leave Lancaster Sound to pass to the east of Somerset Island through Prince

95. PHARAND, *supra* note 14, at 187-201.

96. A variation of this route is to pass on the east side of King William Island instead of the west, passing through James Ross Strait, St. Roch Basin, Rae Strait, Rasmussen Basin and Simpson Strait—the waters of which are all overlapped by Canadian territorial sea.

Regent Inlet and then use Bellot Strait to rejoin Route 3 in Franklin Strait. Only Prince Regent Inlet has a substantial high seas corridor through it.

Route 5 This route does not utilize Davis Strait and Lancaster Sound when approaching from the east but rather approaches Somerset Island through Hudson Strait, Foxe Basin, Fury and Hecla Strait and then through the Gulf of Boothia to Bellot Strait where it connects with Route 3. Only in Foxe Basin and the Gulf of Boothia are there substantial areas of high sea.

These are the major navigation routes through the Canadian Arctic Archipelago that represent the various options available for navigation through the Northwest Passage. Not all of these routes though are suitable for all vessels due to limitations caused by water depth and shoals. Of course, the polar conditions and presence of ice also impose severe limitations upon shipping. Thus, even during the summer months a vessel may require some ice breaking capacity to successfully complete the passage.[97]

2. *Legal questions regarding the Passage*

When considering whether the Northwest Passage is an international strait through which a right of navigation exists, the first issue that arises is whether it is possible to equate the Passage with a single strait. As described above, the Northwest Passage is a series of connecting straits which when combined offers a variety of navigation routes through the Canadian Arctic Archipelago. This is unlike the situations covered by both customary international law and the conventions, which provide only for a regime based on passage through an "international strait" and not a series of straits. There is no evidence that much consideration has even been given to this question in the past, though it should be noted that UNCLOS does provide for a navigational regime within the waters of an archipelagic state.[98] While there has been no suggestion that this particular regime applies to the waters under consideration here,[99] there has been some debate over whether for the purposes of applying a regime of freedom of navigation through straits which connect areas of high seas or exclusive economic zones, the straits that make up such a navigation route through an archipelago should be looked at in isolation or as a whole.[100] Irrespective of the approach taken, the "straits" which make up the Northwest Passage are certainly

97. On the difficulties of navigation in the Passage, see Donat Pharand, *The Northwest Passage in International Law*, 17 CAN. Y.B. INT'L L. 99, 100-01 (1979).

98. See the regime of Archipelagic States adopted in Part IV of UNCLOS.

99. It was never intended that the provisions of Part IV of UNCLOS apply in the case of offshore archipelagoes such as those of Canada and the United States (Hawaii). *See* UNCLOS, *supra* note 87, art. 46.

100. *See* K. L. KOH, STRAITS IN INTERNATIONAL NAVIGATION: CONTEMPORARY ISSUES 18 (1982).

"geographic straits" consistent with the interpretation of the term,[101] and do indeed connect areas of high seas and exclusive economic zones.[102] The Northwest Passage under either of these approaches therefore meets the geographic requirement of an international strait as found in the *Corfu Channel* case, the 1958 Geneva Convention and UNCLOS.[103]

As to the second requirement, that the strait actually be used for international navigation, there has been considerable debate over the status of this requirement—how it is to be applied, and whether the criterion is fulfilled in the case of the Northwest Passage. Brüel, in his major 1947 treatise on international straits, argued that the importance of the strait to international sea commerce was the decisive factor.[104] The International Court of Justice, however, adopted a different approach in the *Corfu Channel* case. The Court chose to emphasize the geographic qualities of the strait, while making the amount of maritime traffic which passed through the strait only a subsidiary consideration. Nevertheless, the court referred to various figures on shipping movement through the strait, and seemed to imply that if any requisite standard existed, such criterion had been met in the case of the *Corfu Channel*.[105]

Despite the Court's equivocal stance on this question, there has been continuing emphasis since the decision upon the requirement that, at the very least, the strait through which the right of passage is being claimed be used for "international navigation."[106] The question that still remains, however, is what volume of usage for international navigation is required. Nandan and Anderson, both delegates at the Third United Nations Conference on the Law of the Sea, take the view that potential use is insufficient; there must be actual use, although it does not have to be "regular or . . . reach any predetermined level."[107] They

101. On the question of the geographic conception of a strait, see 1 ERIK BRÜEL, INTERNATIONAL STRAITS 17-20 (1947); JOSE A. DE YTURRIAGA, STRAITS USED FOR INTERNATIONAL NAVIGATION: A SPANISH PERSPECTIVE 4-6 (1991).

102. If one views the Passage as a series of interconnecting straits which are so substantially related so as to form one long strait, then clearly the Passage connects the waters of the Beaufort Sea and the North Atlantic Ocean. If, on the other hand, the straits are viewed in isolation, they connect isolated patches of high seas corridors, which in the cases of the Viscount Melville Sound, Amundsen Gulf, the Gulf of Boothia, and Foxe Basin, are substantial bodies of water.

103. This is a conclusion which has also been reached by other commentators. *See* J. Bruce McKinnon, *Arctic Baselines: A Litore Usque Ad Litus*, 66 CAN. BAR REV. 790, 816 (1987); PHARAND, *supra* note 14, at 223-24. *See also* Donat Pharand, *Sovereignty in the Arctic: The International Legal Context*, *in* SOVEREIGNTY AND SECURITY IN THE ARCTIC 145, 153-55 (Edgar J. Dosman ed., 1989).

104. 1 BRÜEL, *supra* note 101, at 42.

105. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 28-29.

106. *See* KOH, *supra* note 100, at 19-22; DE YTURRIAGA, *supra* note 101, at 8-12; S. N. Nandan & D. H. Anderson, *Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982*, 60 BRIT. Y.B. INT'L L. 159, 167-69 (1989).

107. Nandan & Anderson, *supra* note 106, at 169.

make the point that efforts at the Conference to insert terms such as "normally," "customarily," or "traditionally" into the text of "straits used for international navigation" were all rejected, stressing that any type of use may be relevant.[108] Tommy Koh, President of the Conference from 1981 to 1982, agrees that potential use of a strait is not enough and that actual use is necessary.[109] According to Koh, because the UNCLOS provisions dealing with transit passage in international straits adopt the same interpretation of straits as used in the 1958 Geneva Convention, both a geographic and functional requirement must be met. Because the provisions do not provide a clear definition of the functional requirement, he believes that the approach used in the *Corfu Channel* case still applies. Interpreting the decision as one in which the Court rejects the view that a certain volume of traffic is necessary, Koh argues that what UNCLOS requires is evidence "that a strait is actually being used, the volume of such usage being irrelevant, for international navigation."[110]

Pharand takes a different view of the functional requirement laid down in the *Corfu Channel* case, consistently arguing that the Court required not only that a strait have a history of usage for international navigation, but also that the volume of the traffic was important.[111] Thus, while admitting that the Court did not give an exact indication of the degree of use necessary,[112] Pharand argues that, at the very least, the strait must be a "useful route for international maritime traffic."[113] For the purposes of applying this test, Pharand suggests that:

> The sufficiency of the use is determined mainly, but not exclusively, by reference to two factors: the number of ships using the strait and the number of flag states represented. Both of these figures should normally reach the order of magnitude shown to exist in the *Corfu Channel* case. There, the ships using the North Corfu Channel averaged 137 a month, during a twenty-one-month period, and represented seven flag states.[114]

Accordingly, the Northwest Passage would fail to be classified as a "strait used for international navigation" because of the low number of recorded transits.[115] However, is it possible that because of the presence of ice which makes it physically impossible for most conventional shipping to use many of the straits in the Passage not only during the winter but also the summer, that a special polar standard could be applied in the case of straits such as the Northwest Passage? Pharand

108. *Id.* For a discussion of how this issue was dealt with at the Conference, see also DE YTURRIAGA, *supra* note 101, at 3-4.

109. Tommy B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea*, 29 MALAYA L. REV. 163, 178 (1987).

110. *Id.* at 180.

111. Donat Pharand, *Canada's Sovereignty over the Newly Enclosed Arctic Waters*, 25 CAN. Y.B. INT'L L. 325, 337 (1987); PHARAND, *supra* note 14, at 224.

112. Pharand, *supra* note 97, at 106-07.

113. *Id.* at 107; PHARAND, *supra* note 14, at 224.

114. Pharand, *supra* note 97, at 107.

115. *See* PHARAND, *supra* note 14, at 202-14.

concedes that allowances should be made in such cases, and that a "brief history of transporting oil and gas by a few flag states" may be sufficient.[116] Butler takes a similar view in his study of the Northeast Arctic Passage, favouring a broad interpretation of the functional requirement in the case of the polar regions. He argues that not only will patterns of world commerce affect the usage of particular straits, but in the case of the polar regions, "the very possibility of Arctic navigation is the direct consequence of impressive achievements in vessel design, icebreaking methods, greater knowledge of the polar environment, weather forecasting, human fortitude, and the like."[117]

How should this functional criteria then be applied to the Northwest Passage? To begin with, it is useful to know how many transits of the passage have actually occurred. From the time of the very first transit of the Passage in 1903-6 by Amundsen until 1988, there had been fifty-six complete transits.[118] Of these, only twenty had been completed by non-Canadian foreign flagged vessels, thirteen of which were American.[119]

Relying upon the actual degree of usage of the Northwest Passage since the first successful navigation, Pharand consistently maintains that the Passage is not an international strait.[120] He argues that those who contend otherwise have confused potential use with actual use, and that mere capacity is not what is required, but rather, actual use.[121] The few examples of crossings by foreign-flagged vessels are not considered by Pharand to alter this assessment, especially as he points out that none were made for commercial navigation.[122] Other Canadian-based commentators have also adopted a similar view.[123] However, whether the

116. Pharand, *supra* note 97, at 114.

117. WILLIAM E. BUTLER, NORTHEAST ARCTIC PASSAGE 135 (1978). For a further discussion of navigation rights in the Northeast Passage, see Erik Franckx, *Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo*, 151:24 POLAR REC. 269 (1988).

118. Donat Pharand, *Canada's Sovereignty over the Northwest Passage*, 10 MICH. J. INT'L L. 653, 676-78 (1989); *cf.* Thomas C. Pullen & Charles Swithinbank, *Transits of the Northwest Passage, 1906-1990*, 27 POLAR RECORD 365-67 (1991) (noting 50 transits during 1906-1990; though it seems that this figure did not include return journeys by the same vessel during the same season; neither sets of figures include instances of submarine navigation of the Passage which though strongly suspected have not been documented).

119. Pullen & Swithinbank, *supra* note 118, at 365 (recording 23 transits by foreign vessels, 15 of which were by United States flagged vessels).

120. Pharand, *supra* note 118, at 669-70; PHARAND, *supra* note 14, at 225; Pharand, *supra* note 97, at 112-13.

121. PHARAND, *supra* note 14, at 225; Pharand, *supra* note 97, at 113.

122. Pharand, *supra* note 97, at 112-13.

123. McDorman, *supra* note 59, at 251, notes that "[t]he amount of known traffic through the Northwest Passage has been insignificant." McKinnon, *supra* note 103, at 816, argues that "[t]he Northwest Passage . . . does not meet the second, or functional criterion since it has not been sufficiently used for international navigation." McRae, *supra* note 47, at 488, argues that "[t]he lack of use of the Northwest Passage for international shipping has prevented it from achieving the status of an international strait." *See also* Robert R. Roth, *Sovereignty and Jurisdiction over Arctic Waters*, 28

customary international law regime of *Corfu Channel*, or of the 1958 Convention or UNCLOS applies, one must concede that, potentially, considerable difference of opinion on this question exists. Certainly, the amount of traffic through the Northwest Passage is not comparable to that of the Corfu Channel, or of other commonly accepted international straits. The need to apply different standards in the polar regions, however, has been recognized.[124] Accordingly, the presence of ice in the Passage and the polar weather conditions, should, in combination, allow for a test requiring a lower volume of international navigation to use the Passage in order to classify it as an international strait.[125]

Applying the functional criterion to the Northwest Passage, one is struck by the very low number of transits that have occurred since its discovery. Most international navigation since 1945 has been conducted by government vessels; although no consensus exists on whether navigation by commercial vessels is essential to constitute "international navigation." The Court in *Corfu Channel* noted, however, how often the British navy used the channel.[126] Accordingly, voyages by various United States Coast Guard vessels could similarly be viewed as evidence of international navigation through the Passage.

Whether, taking into account the *Corfu Channel* test, the views of various commentators, and making allowance for polar conditions, there has been a sufficient number of transits by ships engaged in international navigation through the Passage so as to meet the functional criterion is difficult to determine. There is evidence of increasing usage of the Passage, with twenty-three transits—eight by non-Canadian flagged vessels—recorded during the 1980s.[127] Nevertheless, without further judicial guidance on the question of international straits, the determination of whether the Passage is or is not an international strait is extremely difficult. Those commentators who argue that the Northwest Passage is not an international strait rely upon an interpretation of the *Corfu Channel* case which is not universally accepted. They fail to adequately take into account that, because of polar conditions, a lesser volume of navigation through the Passage may still be sufficient to classify the strait as international.

ALBERTA L. REV. 845, 864 (1990); Paul A. Kettuner, *The Status of the Northwest Passage under International Law*, 4 DET. C.L. REV. 929, 979 (1990).

124. *See Legal Status of Eastern Greenland* (Nor. v. Den.), 1933 P.C.I.J. (Ser. A/B) No. 53, at 22 (Apr. 5).

125. One commentator has even suggested that the functional criterion is "so inexact as to [be] almost meaningless" and that "perhaps one foreign-flagged vessel a decade would suffice" to evidence international navigation. *See* Lewis M. Alexander, *Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience,"* 18 OCEAN DEV. & INT'L L. 479, 480 n.3 (1987).

126. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 80.

127. Pharand, *supra* note 118, at 677-78. Pullen & Swithinbank also recorded 23 transits up until 1990, 11 by foreign-flagged vessels, five of which were United States flagged. Pullen & Swithinbank, *supra* note 118.

C. The Effect of Canada's Arctic Baselines on the Passage

Before leaving the issue of Canada's claims over the Northwest Passage some consideration must be given to the 1986 declaration of straight baselines around the outer limits of the islands which make up the Canadian Arctic Archipelago. This action was taken in response to the voyage of the *Polar Sea*, and had been suggested as an effective means for Canada to assert sovereignty over the waters of the archipelago.[128] Under the law of the sea, coastal states may, in certain instances, use a baseline rather than the low-water mark of their coastline as the point from which their maritime zones are delimited. Well recognized examples of this accepted practice are demonstrated by bays, river mouths and deltas, and low-tide elevations which are adjacent to the coastline.[129] In the 1951 *Anglo-Norwegian Fisheries* case, the International Court of Justice recognized that where the coastline of a coastal state is deeply indented or where there is a cluster of offshore fringing islands, baselines can be drawn in such a way that the outer points of these geographic features may be connected.[130] Both the 1958 Geneva Convention and UNCLOS recognized this practice. Not only will the drawing of these baselines result in the coastal state being able to exert more extensive offshore jurisdiction and sovereignty but it also has the effect of enclosing all waters on the landward side of the baseline as "internal waters."[131] Because of the impact that baselines have upon the outer limits of a coastal state's maritime zones and its sovereignty over the enclosed internal waters, both the 1958 Geneva Convention and UNCLOS sought to guard against excessive baseline claims. In particular, UNCLOS provides in Article 7(3): "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."[132] In addition, UNCLOS recognized the concept of an archipelagic state around which archipelagic baselines could be drawn to connect the islands, a first in international law.[133] Article 47 creates a series of technical rules to follow in drawing these special baselines. Importantly for Canada, the UNCLOS archipelagic regime does

128. Reid, *supra* note 16, at 130-33; McRae, *supra* note 47, at 482-89; Pharand, *supra* note 48, at 330-32.

129. *See* UNCLOS, *supra* note 87, arts. 5, 7, 10, 13.

130. Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

131. *See* 1958 Geneva Convention, *supra* note 81, art. 5; UNCLOS, *supra* note 87, art. 8.

132. *Cf.* 1958 Geneva Convention, *supra* note 81, art. 4(2).

133. Indonesia and the Philippines were primarily responsible for the adoption of the archipelagic concept at the Third United Nations Conference on the Law of the Sea. The practice adopted by both states in subsequently adopting this regime is the best example of how the archipelagic provisions of UNCLOS operate. *See* Mochtar Kusumaatmadja, *The Concept of the Indonesian Archipelago*, 10 INDONESIAN Q. 12 (1982); B. A. Hamzah, *Indonesia's Archipelagic Regime*, 8 MARINE POL'Y 30 (1984); Barbara Kwiatkowska, *The Archipelagic Regime in Practice in the Philippines and Indonesia—Making or Breaking International Law?*, 6 INT'L J. ESTUARINE AND COASTAL L. 1 (1991).

not apply to all geographic archipelagos, but only to "a State constituted wholly by one or more archipelagos and may include other islands."[134] The effect of this definition is to exclude geographic archipelagos which lie offshore of a continental mainland such as the Hawaiian Islands and the Canadian Arctic Archipelago. Canada cannot therefore rely upon these more generous baseline rules to justify its Arctic Archipelago baselines, but instead, must seek to support its actions on the principles of baseline delimitation accepted in both customary international law and the Conventions.

Considerable academic debate exists over the validity of Canada's Arctic baselines. Professor Pharand, who had urged the Canadian Government for many years to proclaim such baselines, has thoroughly reviewed their validity as have others.[135] It is not the intention of this writer to give detailed consideration to this point. Suffice to say, that under the rules for baseline delimitation developed in the 1958 Geneva Convention and UNCLOS, in conjunction with the authority of the *Anglo-Norwegian Fisheries* case, Canada's claim to validity for its actions is strong.[136] Despite the possible validity of the baseline claims, however, navigation regimes in existence prior to the baseline proclamations still have some standing. Both Article 5(2) of the 1958 Geneva Convention and Article 8(2) of UNCLOS recognized the continuation of certain pre-existing navigation rights following the proclamation of baselines. Thus, when newly proclaimed baselines enclose as internal waters areas which had not been previously considered as such, any previously existing right of innocent passage continues to apply in those waters.

An exception to the continuation of pre-existing navigation rights applies to certain historic waters over which a coastal state traditionally exercised sovereignty or jurisdiction.[137] The International Court of Justice accorded special status to such "historic waters" in the *Anglo-Norwegian Fisheries* case. The Conventions similarly recognizing this special status.[138] While some commentators occasionally argue that Canada can justify its claim over the waters of the whole archipelago on the basis of historic title,[139] many commentators doubt the validity of Canada's claim to such a degree that they wholly disregard it on the grounds of legal impossibility.[140]

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134. Art. 46.

135. *See* Pharand, *supra* note 111, at 328-35; McKinnon, *supra* note 103.

136. This view has been adopted by other commentators. *See* Pharand, *supra* note 111, at 328-33; McKinnon, *supra* note 103, at 809-11; Mark Killas, *The Legality of Canada's Claims to the Waters of the Arctic Archipelago*, 19 OTTAWA L. REV. 95 (1987); *cf.* Kettuner, *supra* note 123, at 986-89.

137. *See* 1 O'CONNELL, *supra* note 80, at 417-38.

138. 1958 Geneva Convention, *supra* note 81, art. 7(6); UNCLOS, *supra* note 87, art. 10(6). An example of the application of historic title would be Hudson Bay. *See* Nigel Bankes, *The Status of Hudson Bay*, 15:3 N. PERSP. 14 (1987).

139. *See supra* note 44 and accompanying text.

140. PHARAND, *supra* note 14, at 125; Bankes, *supra* note 17, at 290; McKinnon, *supra* note 103, at 800-01; Kettuner, *supra* note 123, at 989; Roth, *supra* note 123, at 959.

If, therefore, it is not possible to argue that the waters of the Northwest Passage are historic internal waters of Canada, what is the true effect of the 1986 baselines? Both the 1958 Geneva Convention and UNCLOS preserve previously existing rights of passage despite the subsequent proclamation of baselines which may convert high seas into internal waters. Article 5(2) of the Geneva Convention provides that rights of innocent passage under Article 16, including passage through international straits, remain in place despite the waters' conversion to internal waters as a result of the baselines. However, Article 35(a) of UNCLOS expressly deals with internal waters of a strait,[141] clearly implying that the provisions dealing with the new regime of transit passage through international straits still apply to situations where waters have only become "internal" following the establishment of straight baselines under the provisions of the Convention.

Thus, in order to determine whether the Northwest Passage is a strait through which the right of transit passage exists, the status of the Passage prior to the declaration of the baselines in 1986 must first be ascertained. Various commentators have similarly recognized that if Canada's claim that transit passage cannot be exercised through the waters of the Archipelago is to succeed, Canada must first demonstrate that the waters of the Northwest Passage are not and have never been considered an international strait.[142] The waters of the Canadian Arctic Archipelago may therefore be properly classified as internal waters. If a pre-existing right of navigation did exist through the strait, however, then United States flagged vessels are still entitled to claim a right of passage through the Northwest Passage.

III. Antarctic Sovereignty and the Arctic

Despite Canada's best efforts, it has been unable to conclusively assert its sovereignty over the waters of the Canadian Arctic Archipelago and, in particular, the Northwest Passage, resulting in a continuing dispute with the United States. This dispute, however, does not relate to Canadian sovereignty over the islands of the archipelago, or even to Canada's privilege to assert sovereignty over some of the Passage waters as the relevant littoral state. Rather, the dispute concerns the extent of Canadian jurisdiction and whether the Passage can truly be classified as an international strait. For Canadians, every transit by a United States flagged vessel through the Passage is considered a threat to Canadian sovereignty. For Americans, Canada's refusal to acknowledge that the Passage is an international strait impacts upon the freedom of naviga-

141. UNCLOS, *supra* note 87, art. 35(a), provides: "Nothing in this Part affects: (a) any areas of internal waters within a strait, except where 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 . . . ."

142. Pharand, *supra* note 111, at 335-42; McKinnon, *supra* note 103, at 816-17; Kettuner, *supra* note 123, at 982.

tion. Given this impasse, the question arises whether there is any potential solution to this problem. As the Antarctic Treaty has been particularly successful in dealing with questions of sovereignty, some consideration should be given to whether that portion of the Treaty expressly dealing with sovereignty could be applied in the Northwest Passage to overcome the current deadlock between Canada and the United States.

A. The Antarctic Experience

Despite centuries-old belief in its existence, the Antarctic remained an unexplored frontier until the Nineteenth century. It was not until the 1820s that the continent's existence was actually confirmed when three explorers, Branfield (Britain), Palmer (United States) and Bellingshausen (Russia), all individually sighted the continent.[143] Despite its discovery, however, explorers showed little real interest in Antarctica until the beginning of the Twentieth Century when explorers began a "race for the Pole."[144] It was only at this stage of Antarctica's modern history that assertions of territorial sovereignty became an issue. Suddenly, in the span of forty years, seven territorial claims were made to the Antarctic continent, forming the basis of the modern territorial claims to Antarctica.[145]

The United Kingdom's claim dates from acts of discovery by various explorers and proclamations of sovereignty over the Falkland Islands and South Georgia.[146] British claims and discoveries eventually formed the basis for claims made by New Zealand and Australia. Encouraged by the United Kingdom to assert sovereignty over the continent, and enthused by the success of their own expeditioners in Antarctic exploration, Australia and New Zealand made extensive sovereignty claims to Antarctica in the years following World War I.[147] The Ross Dependency was declared as part of the then Dominion of New Zealand on July 30, 1923,[148] and the Australian Antarctic Territory as part of an Austra-

143. F. M. AUBURN, ANTARCTIC LAW AND POLITICS 2 (1982).

144. "Race for the Pole" was a phrase commonly used in the early Twentieth Century by the media to describe expeditions to both the Arctic and Antarctic which had the objective of being the first to reach the geographic North and South Poles.

145. The first positive assertion of a territorial claim in Antarctica were the Letters Patent issued by Great Britain in 1908. *See* Letters Patent for the Government of the Falkland (Malvinas) Island Dependencies, July 21, 1908, *reprinted in* 3 W. M. BUSH, ANTARCTICA AND INTERNATIONAL LAW 25-54 (1988). Further claims by Great Britain and the other six territorial claimants were made up until 1947 when Argentina made an expanded claim. *See* 1 W. M. BUSH, ANTARCTICA AND INTERNATIONAL LAW 624-31 (1982).

146. *See* C. H. M. Waldock, *Disputed Sovereignty in the Falkland Islands*, 25 BRIT. Y.B. INT'L L. 311 (1948); AUBURN, *supra* note 143, at 6-7.

147. *See* GILLIAN TRIGGS, INTERNATIONAL LAW AND AUSTRALIAN SOVEREIGNTY IN ANTARCTICA 102-11 (1986); F. M. AUBURN, THE ROSS DEPENDENCY (1972).

148. New Zealand, *Gazette*, 1923, vol. II, at 2211 (16 August 1923), *reprinted in* 3 BUSH, *supra* note 145, at 44; *see also* AUBURN, *supra* note 147.

lian claim during 1933.[149] In addition, the French, who also had a historic interest in Antarctica following the voyage of Durville in 1840, claimed the area known as Adelie Land in 1933. This claim lay between the two sectors which had been subject to the Australian proclamation earlier in the year. There was some uncertainty, however, as to the exact extent of the French claim; and correspondence between France and Britain (representing Australia at the time) continued until 1938 before the exact limits of the claim were settled.[150] Norway, whose Ronald Amundsen had been the first explorer to reach the South Pole,[151] also began to assert various Antarctic claims from 1928 onwards.[152] These claims, though, were limited to offshore islands.[153] When Germany also began to show an interest in the area during the 1930s, Norway took action to confirm its claim to the continent, issuing a proclamation on January 14, 1939, over what is now known as Dronning Maud Land.[154] The final territorial claims to Antarctica were made by Chile and Argentina during the 1940s. These claims overlap each other and also that made by the United Kingdom over the Antarctic Peninsula area. Chile's proclamation came in November 1940,[155] with Argentina following in 1941.[156] The claims made by the two South American neighbours are notable because they partly rely upon the Papal Bulls of 1493 which declared the former boundaries of the Spanish colonies,[157] and because they impact upon their own territorial dispute over Tierra Del Fuego and the Beagle Channel,[158] and the dispute between Argentina and the United Kingdom over the Falkland Islands.[159]

Despite the various sovereignty claims to Antarctica during this time, few countries expressed interest in the continent. Antarctica was viewed as a frozen wasteland with no foreseeable economic potential and no immediate strategic significance. There were no people to colonize and no immediate resource potential to realize. With respect to acquiring territorial rights in international law, Antarctica was treated in the same way as other discovered and settled lands. Occasional concern

149. *See* Australian Antarctic Territory Acceptance Act 1933 (Aust.); A. C. Castles, *The International Status of the Australian Antarctic Territory, in* INTERNATIONAL LAW IN AUSTRALIA (D. P. O'Connell ed., 1965); TRIGGS, *supra* note 147, at 1-96.

150. J. R. V. Prescott, *Boundaries in Antarctica, in* AUSTRALIA'S ANTARCTIC POLICY OPTIONS 83, 87-89 (Stuart Harris ed., 1984).

151. Amundsen was also the first to actually sail through the Northwest Passage in 1903-1906.

152. *See* AUBURN, *supra* note 143, at 29-30.

153. 2 W. M. BUSH, ANTARCTICA AND INTERNATIONAL LAW 114-24 (1982).

154. *Norwegian Sovereignty in Antarctica: Proclamation of 14 January 1939, reprinted in* 34 AM. J. INT'L L. SUPP. 83 (1940).

155. *See* 2 Bush, *supra* note 153, at 311.

156. 1 BUSH, *supra* note 145, at 608. The Argentine claim was subsequently adjusted in 1943, 1946 and 1957. *See* Prescott, *supra* note 150, at 91.

157. The Papal Bulls of 1493 declared the former boundaries of the Spanish colonies. AUBURN, *supra* note 143, at 49-50.

158. *See* D.W. Grieg, *The Beagle Channel Arbitration*, 7 AUSTL. Y.B. INT'L L. 332 (1976-1977).

159. *See* Waldock, *supra* note 146.

was expressed about the potential for sovereignty disputes to develop between the claimant states or with third parties.[160] Apart from an aborted claim before the International Court of Justice by the United Kingdom to resolve its conflicting claims with Argentina and Chile, however, nothing came of this concern.[161]

The deepening of the Cold War during the 1950s, however, did become a catalyst for concern over Antarctic territorial claims. Both the United States and the Soviet Union had a long historical interest in Antarctica, yet neither sought to assert a formal claim.[162] American explorers and sealers were very active in the region during the nineteenth century, but no attempt was made at sending an "official" American expedition to the continent during the period from 1900-1920 when expeditions to Antarctica were numerous.[163] Consequently, when other nations initially asserted territorial claims to the Antarctic, the United States was not in a position to contest those claims. The United States did, however, begin to have a more substantial presence on the continent during the 1930s, and became especially active during the 1950s when scientific interest in Antarctica heightened.[164] United States influence in Antarctic affairs reached its peak during the 1957-58 International Geophysical Year when American scientists, with infrastructure assistance from the United States military, played a dominant role in the scientific program.[165]

The Soviet Union also had an Antarctic heritage, with the Russian explorer, Bellingshausen, being one of the first to sight the continent in 1821. The Soviets established a number of scientific bases in Antarctica during the 1950s, many of which were located within the Australian Antarctic Territory.[166] The substantial presence of the United States and the U.S.S.R. in Antarctica during this time raised concerns about the future of existing territorial claims if either of the superpowers made a conflicting claim,[167] and the potential for the continent to become the scene of Cold War tensions over territorial claims and strategic scientific research. These were some of the factors which lead to the 1959 Antarctic Treaty.

160. *See* Philip C. Jessup, *Sovereignty in Antarctica*, 41 AM. J. INT'L L. 117, 117-19 (1947); *see also* 2 BUSH, *supra* note 153, at 187-88, with respect to Australian concern over the establishment of a Soviet base within the Australian Antarctic Territory during the 1950s.

161. Application Instituting Proceedings Against the Argentine Republic (U.K. v. Arg.; U.K. v. Chile), 1956 I.C.J. Pleadings (Antarctica Cases) 12 (May 1955).

162. AUBURN, *supra* note 143, at 61-83.

163. AUBURN, *supra* note 143, at 62.

164. AUBURN, *supra* note 143, at 62-63.

165. AUBURN, *supra* note 143, at 87-89.

166. John Hanessian, Jr., *Antarctica: Current National Interests and Legal Realities*, PROC. OF THE AM. SOC'Y OF INT'L L., Apr. 24-26, 1958, at 145, 157-58.

167. Robert D. Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349, 353 (1960).

B. The Antarctic Sovereignty Solution

The International Geophysical Year in Antarctica demonstrated the importance of the continent to scientific research. The successful cooperation between the twelve participating nations encouraged those who believed that a regime could be negotiated which would both ensure continued scientific cooperation amongst nations in Antarctica and solve the emerging political problems.[168] Accordingly, the United States invited participants to a Conference in Washington, D.C. in October 1959.[169] The Conference concluded with the signing of the Antarctic Treaty on December 1, 1959.[170] The Treaty was eventually ratified by all of the twelve states which attended the Conference - Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States.

The Antarctic Treaty addressed all the major issues confronting Antarctica at that time. Article I provided that the continent was to be used for peaceful purposes only, and in combination with Article V, ensured that Antarctica was to be both demilitarized and denuclearized. Articles II and III sought to guarantee the scientific freedom of the International Geophysical Year. In addition, Article IX provides for Antarctic Treaty meetings to allow Treaty parties to discuss matters of mutual interest and address emerging environmental issues. These provisions sought to capture the spirit of cooperation which had grown in Antarctica during the 1950s. But for the Treaty to truly succeed, it had to consider the issue of sovereignty, to which a most inventive solution was adopted.

Article IV of the Antarctic Treaty deals with sovereignty. It provides as follows:

> Article IV
> 1. Nothing contained in the present Treaty shall be interpreted as:
> (a) A renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
> (b) A renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
> (c) Prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
> 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

168. TRIGGS, *supra* note 147, at 133-36.
169. 3 BUSH, *supra* note 145, at 473-75.
170. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961). There are presently 41 parties to the Treaty.

Article IV(1) considers the seven existing territorial claims, the potential claims of the United States and U.S.S.R., and the consequences of these claimant and non-claimant states entering into a multilateral Treaty that impacts upon Antarctic sovereignty. Under this provision, all principal parties to the Treaty can unite under the control of a single regime without compromising their position on their sovereignty, or potential sovereignty claims. Sub-paragraph (a) considers the seven claimants, while sub-paragraph (b) accommodates the United States and U.S.S.R.[171] Sub-paragraph (c) addresses the non-recognition of existing claims amongst some of the claimants and between claimants and non-claimants.[172]

Because the Treaty covers pre-existing territorial claims, Article IV(2) expressly focuses on any issues of sovereignty which could arise after the Treaty entered into force. The Article provides that no new territorial claim, not even the enlargement of an existing claim, can be asserted while the Treaty is in force. This is an attempt to maintain the status quo for the duration of the Treaty such that Treaty parties, especially the seven claimant states, do not continually suspect other Treaty parties of planning to encroach upon their claims in the future. In addition, acts and activities which take place while the Treaty is in force cannot form the basis for any future assertions of sovereignty. The consequence of all this is that the Treaty effectively froze the status of all sovereignty claims and potential claims as of June 23, 1961.

Article IV of the Antarctic Treaty has rightly been described as the "cornerstone of the Antarctic Treaty."[173] As the New Zealand diplomat, Chris Beeby, noted, Article IV "represented, and it still represents, an assurance—and the only assurance available—that Antarctica will remain peaceful and stable, will not become, in the words of the Treaty, 'the scene or object of international discord.' "[174] The significance of Article IV to the Treaty regime is demonstrated by its continual reaffirmation in later instruments which have expanded the regime to address protection of the environment and resource management.[175] Despite the obvious and continuing importance of Article IV, its true legal effect has provoked considerable debate. One commentator asserts that Arti-

171. Donald R. Rothwell, *The Antarctic Treaty: 1961-1991 and Beyond*, 14 SYDNEY L. REV. 62, 67-68 (1992).

172. 1 BUSH, *supra* note 145, at 58.

173. Rolph Trolle-Anderson, *The Antarctic Scene: Legal and Political Facts*, *in* THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES 57, 59 (Gillian D. Triggs ed., 1987).

174. Christopher D. Beeby, *The Antarctic Treaty System as a Resource Management Mechanism—Non-Living Resources*, *in* ANTARCTIC TREATY SYSTEM 269, 270 (1986).

175. *See* Convention for the Conservation of Antarctic Seals, June 1, 1972, art. 1, 29 U.S.T. 441, T.I.A.S. No. 8,826 (entered into force Mar. 11, 1978); Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1980, art. IV, 80 Stat. 271, T.I.A.S. No. 10,240 (entered into force on April 7, 1982) [hereinafter CCAMLR].

cle IV(1) can "mean all things to all states,"[176] while another argues that the provision was "deliberately drafted to enable States with conflicting interests to adopt differing views as to its meaning."[177] There is certainly no question that parts of Article IV are extremely vague and do not adequately address all the potential legal issues which could arise.[178]

Whatever its true legal effect may be, Article IV has allowed the Antarctic Treaty to successfully function for the past thirty years without any sovereignty disputes arising between any of the parties. Given that at the time of its negotiation there was considerable discussion about the status, validity and extent of the territorial claims in Antarctica, this has been a remarkable achievement. That the Treaty was able to hold firm in spite of a military dispute concerning territorial sovereignty between Argentina and the U.K. over the Falkland Islands is further evidence of its success in dealing with Antarctic sovereignty. The Treaty parties' resolution of both living and non-living resource exploitation in the 1980s is further evidence of Article IV's ability to be effective in the face of a potential challenge to sovereignty. In both instances, reliance upon Article IV allowed for the successful negotiation of conventions to deal with the exploitation and management of resources over which territorial claimants in normal circumstances would have had sovereign rights.[179]

Article IV of the Antarctic Treaty is therefore a combination of "legal fiction" and political compromise. Concerned treaty parties knew in 1959 that if any Antarctic regime was based on territorial claims, considerable dispute would arise over the validity of those claims. This controversy would not have been in any State's best interests. Under the Article IV approach, sovereignty questions could be set aside for the duration of the Treaty to allow further cooperation on scientific research and the peaceful use of Antarctica. Given its success, the question arises whether an Article IV-type solution can be used in the Arctic.

IV. A Northwest Passage Treaty?

Since the voyages of the *Manhattan* in 1969-1970, Canada has sought to solidify its sovereignty claim to the Arctic Archipelago. If there were any doubts as to Canada's intention to assert a claim over the islands of the Archipelago at the time of the *Manhattan* voyage, Canada's subsequent

176. Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity"?*, 17 CASE W. RES. J. INT'L L. 195, 210 (1985).

177. AUBURN, *supra* note 143, at 104.

178. Some of these issues include whether a non-claimant state is precluded from asserting a territorial claim which relies upon activities occurring while the Treaty was in force after the Treaty is no longer operative, and what effect Article IV has upon non-Treaty parties. *See* TRIGGS, *supra* note 147, at 140-50.

179. CCAMLR, *supra* note 175, art. IV; Convention for the Regulation of Antarctic Mineral Resource Activities, June 2, 1988, art. 9, *reprinted in* 27 I.L.M. 868 (1988) (the Convention has yet to enter into force).

legislative acts and government decrees have conclusively dispelled them. Asserting sovereignty over land, however, is different from asserting sovereignty over water and maritime areas because of specialized rules under the law of the sea. There can be no doubt that following the International Court of Justice decision in the *Corfu Channel* case, and subsequent recognition in the 1958 Geneva Convention and then UNCLOS, that international law has recognized a special regime for international straits. Throughout this period, the consensus has been that both a geographical and functional requirement must be met if a strait is to be classified as international. The regime of transit passage in international straits created by UNCLOS is a much more recent development in international law, and because of the uncertain status of the Convention it is doubtful whether it can be said to represent customary international law.[180] Yet, irrespective of the exact state of the law and the position of Canada and the United States with respect to the various Conventions, the Northwest Passage debate hinges on whether the Passage is an international strait.

The Canadian position with respect to the Passage can be summarized as follows:

1) the Northwest Passage has never been a strait used for international navigation;
2) the waters of the Northwest Passage are internal waters of Canada because:
   a) they are historic waters; or alternatively,
   b) they have become internal waters following Canada's declaration of baselines around the edges of the Canadian Arctic Archipelago; and,
3) coastal states have complete sovereignty over internal waters and can regulate or prohibit passage by international vessels as they see fit.

While the Canadian position has certain strengths, absent judicial determination, the question still remains whether the Northwest Passage is an international strait and, if so, at what point it became such. This question is at the hub of the dispute between Canada and the United States and has been at issue ever since the voyage of the *Manhattan*. Given the strong views of the United States on freedom of navigation through the territorial sea, straits, and archipelagoes, it is understandable that it refuses to accept the Canadian position.[181] This is especially so given that the Northwest Passage has the potential of becoming economically viable for commercial transit as new technology allows navigation through ice clogged waters by a greater range of shipping on a more

180. On the question of whether non-parties to UNCLOS may claim a right of transit passage, see Gerard J. Mangone, *Demarcation of International Straits, in* RIGHTS TO OCEANIC RESOURCES: DECIDING AND DRAWING MARITIME BOUNDARIES 101, 110-11 (Dorinda G. Dallmeyer & Louis DeVorsey, Jr. eds., 1989).

181. *See, e.g.*, Richard J. Grunawalt, *United States Policy on International Straits*, 18 OCEAN DEV. & INT'L L. 445 (1987).

regular seasonal basis.[182]

Given the divergent views of Canada and the United States over the legal status of the Northwest Passage, what possibilities exist to resolve the dispute? One option would be to have the matter referred to the International Court of Justice. Not all states, however, are keen to have their disputes adjudicated in such a legalistic fashion, or to allow them to inevitably become a battle of national prestige. Both Canada and the United States dissatisfaction after the decision in the *Gulf of Maine* case[183] also suggests that resolution of the dispute by the International Court is unlikely to be a preferred option. Given the history of cooperation between these two neighbours, a more preferable resolution might be through negotiation of an agreement or Treaty similar to the 1988 Arctic Cooperation Agreement.[184]

The Canada-United States Northwest Passage dispute appears to be ready-made for the application of an Article IV Antarctic Treaty-type solution. Canada and the United States contest the extent of Canada's sovereignty and jurisdictional reach over the waters of the passage. Should Canada's claim that the waters are internal Canadian waters be accepted, then an automatic right of passage would not exist for foreign flagged vessels. The United States does not contest Canada's ability as the littoral state to exert some form of sovereignty and jurisdiction over the waters of the passage. Rather, the United States asserts that its vessels are entitled to exercise normal freedoms of navigation through the waters of the Passage. The claim does not extend any further. There has never been any suggestion, despite speculative claims by the Canadian media,[185] that the United States is threatening Canadian sovereignty over the islands of the archipelago, or that it is contesting Canada's resource jurisdiction over the waters and seabed of the Archipelago. Instead, the United States claims that, like other coastal states which border international straits, Canada is under an obligation to allow transit passage of the waters of the strait subject to Canadian laws and regulations which implement internationally recognized standards under international law.

Applying an Article IV Antarctic Treaty-type solution to this problem would allow the sovereignty issue to be resolved in favour of the existing sovereign, Canada, while permitting international navigation in the Passage without affecting the status of that sovereign. By implementing this device, nothing prevents Canada and the United States from reaching agreement on a "Northwest Passage Treaty." This Treaty would specifically include an Article IV Antarctic Treaty-type clause which would recognize the existing positions of Canada and the

182. *See* Stephen Hazell, *The Icetanker Cometh*, ARCTIC CIRCLE, July/Aug. 1990, at 47.

183. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

184. *See* ARCTIC OCEAN ISSUES IN THE 1980's 22 (Douglas M. Johnston ed., 1982).

185. *See supra* text accompanying note 53.

United States towards the Passage and would maintain the status quo. The Treaty could then specifically provide for navigation through the Passage based upon an UNCLOS transit passage regime through international straits.

Such a Treaty would effectively allow Canada's pre-existing sovereignty claim over the waters of the Passage to remain intact.[186] Any activities of the United States or its nationals which took place throughout the duration of the Treaty would not impact at all upon the status of Canada's pre-existing, present or future sovereignty over the Passage. By entering into such a Treaty, neither Canada or the United States actions would prejudice their previous positions, or be viewed as a recognition of the validity of each other's differing claim. The United States and its flagged vessels would be able to use the waters of the Northwest Passage without permission from Canada, thereby overcoming any impression that the United States acknowledges the Canadian claim. The only limitation upon United States vessels would be an obligation to respect Canadian laws and regulations dealing with transit passage as recognized by UNCLOS.

By incorporating into the Treaty the express transit passage provisions of UNCLOS, Canada as the coastal state could rely upon the provisions of Article 42 to implement various laws and regulations concerning the conduct of transit passage by foreign flagged vessels. Though such coastal state regulation must not have the practical effect of hampering or denying the right of transit passage, there is provision for the implementation of laws and regulations which adopt applicable international regulations addressing the control of pollution.[187] Given Canada's long-expressed concern with the protection of the Arctic marine environment, it may well be the case that it would not consider existing international standards to be appropriate for the Arctic waters. In this situation, Canada would have strong grounds in negotiating with the United States that the provisions of Article 234 of UNCLOS apply in this instance. Article 234 provides:

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to

186. In addition, by incorporating the provisions of UNCLOS addressing transit passage into such a Treaty, Canada would also have the benefit of UNCLOS, *supra* note 87, art. 34, which provides that the regime of transit passage does not "affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil." *See* V. D. Bordunov, *The Right of Transit Passage under the 1982 Convention*, 12 MARINE POL'Y 219, 223-24 (1988).

187. UNCLOS, *supra* note 87, art. 42(1)(b).

navigation and the protection and preservation of the marine environment based on the best available scientific advice.

It is commonly accepted that Canada was primarily responsible for the adoption of Article 234.[188] By relying upon this Article Canada would have the ability to implement wide ranging marine pollution regulations upon ships engaged in transit passage. Canada's position would be further strengthened by the fact that Article 233, which exempts international straits from the application of certain sections of UNCLOS addressing protection of the marine environment, does not extend to Article 234. Therefore, by relying upon the terms of UNCLOS as the basis for the agreed navigation regime through the Passage, Canada could, under the terms of any negotiated Treaty, justifiably adopt more stringent pollution standards than those which would apply to international straits in more temperate climates.

By negotiating a Treaty based upon these terms Canada and the United States would go a long way towards solving their dispute over the Northwest Passage. Canada could be content in the knowledge that a workable solution to sovereignty had been used which would not threaten its current claim over the waters of the archipelago. The UNCLOS transit passage regime, in conjunction with Article 234, would also provide Canada with ample jurisdiction to enforce stringent pollution standards commensurate with the pollution risks that exist in Arctic waters. For the United States, such a Treaty would ensure guaranteed freedom of navigation which could not be suspended.[189] Commercial shipping of the Passage could accordingly be developed without fear that every transit would be considered a threat to Canadian national security and sovereignty.

Conclusion

The Arctic is undergoing fundamental change. Once considered a region dominated by individual territorial claimants and disparate legal regimes, the negotiation of UNCLOS was seen as a catalyst for a new Arctic regime based on the law of the sea.[190] Moreover, during the last

188. *See* BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 176-77 (1989); for a comment on the full extent of Article 234, see D. M. McRae & D. J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, 16 U. BRIT. COLUM. L. REV. 197 (1982).

189. UNCLOS, *supra* note 87, art. 44, provides for the non-suspension of transit passage through an international strait.

190. For suggestions concerning Arctic ocean management and an Arctic law of the sea regime, see B. J. THEUTENBERG, THE EVOLUTION OF THE LAW OF THE SEA: A STUDY OF RESOURCES AND STRATEGY WITH SPECIAL REGARD TO THE POLAR REGIONS (1984); David L. Vanderzwaag & Cynthia Lamson, *Ocean Development and Management in the Arctic: Issues in American and Canadian Relations*, 39 ARCTIC 327 (1986); Cynthia Lamson & David L. Vanderzwaag, *Arctic Waters: Needs and Options for Canadian-American Cooperation*, 18 OCEAN DEV. & INT'L L. 49 (1987); David L. Vanderzwaag et al., *Towards Regional Ocean Management in the Arctic: From Co-existence to Cooperation*, 37 U.N.B. L.J. 1 (1988).

twenty years, the native peoples of the region have played an important role in educating the Arctic rim nations of their presence and concern for the protection of their heritage and environment. Some of these developments have already borne fruit as is evidenced by the 1991 Rovaniemi Agreement. Canada has also called for the creation of an "International Arctic Council" from amongst the Arctic nations in order to enhance international cooperative efforts within the region.[191] These developments demonstrate the increasing inter-relationship which exists amongst the Arctic nations and the growing momentum for greater Arctic cooperation.

The dispute between Canada and the United States over the Northwest Passage exists against this backdrop. Given that the dispute has continued for over twenty years and has involved fundamental issues of territorial sovereignty and national security, resolution will not be simple. UNCLOS does partially succeed in furthering Canada's claim to enforce special pollution regulations over vessels using its Arctic waters. The 1988 Arctic Cooperation Agreement also resolves one area of disagreement, but by sidestepping the much larger question of commercial navigation of the Passage, the major issue of the dispute still simmers. Under these circumstances, it seems appropriate to consider whether solutions to other territorial and sovereignty problems may be applicable.

The "solution" to the problem of disputed sovereignty in the Antarctic allowed the seven territorial claimants to come together with other interested states in a Treaty which sought to benefit all mankind. This was despite the fact that many of the claimant states possessed a proud polar heritage in which their Antarctic claims were an integral part of their national identity. The Antarctic Treaty was, however, based on the underlying assumption that Antarctica was too scientifically important to be a continual scene of sovereignty disputes. Instead, it should be opened to all mankind as the world's largest scientific laboratory.

Similarities exist between Antarctica and the current situation in the Northwest Passage. A sovereignty dispute stands in the way of further international cooperation between two Arctic states which have a long history of being good neighbours. If the sovereignty question can be resolved, then it is more than likely that an agreement can be reached over the future use of the Northwest Passage. In these circumstances, it seems appropriate that an effort be made to use an Article IV Antarctic Treaty-type solution to solve the impasse which exists over the Northwest Passage. A Treaty relying upon this device, however, would not completely resolve the dispute. Negotiation must take place to decide if a Treaty would adopt certain provisions of UNCLOS concerning transits

191. *See A Clean Arctic*, TORONTO STAR, June 17, 1991, at A20; John Cruickshank, *Diplomacy among the Ice Floes*, GLOBE & MAIL (Toronto), Oct. 11, 1991, at A19. For further background, see *Arctic Council: Canada Prepares for a New Era in Circumpolar Relations*, 19 N. PERSP. 1 (1991).

through the Passage. If an Article IV/UNCLOS based Treaty was agreed upon, many of the problems concerning the use of the Passage might be resolved. This is not to imply that a complete Antarctic Treaty-type solution can be employed in the case of the Northwest Passage or the Arctic generally.[192] Rather, techniques used to resolve some international legal and political problems may be used as a precedent for resolving similar problems elsewhere. By adopting such a bipolar approach to the resolution of the Northwest Passage dispute and incorporating provisions of UNCLOS into the settlement, Canada and the United States would go a long way in resolving their differences on this matter and promote further bilateral and multilateral Arctic cooperation.

192. *See* O. S. Stokke, *The Relevance of the Antarctic Treaty System as a Model for International Cooperation*, *in* THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS 357, 360-61 (A. Jorgensen-Dahl & W. Ostreng eds., 1991); *cf.* YOUNG, *supra* note 3, at 166, 182.