The Law of the Sea Convention and the Northwest Passage

James Kraska*
Oceans Policy Adviser, International Negotiations, Joint Staff,
The Pentagon, Washington, DC

ABSTRACT

Concern over the loss of sea ice has renewed discussions over the legal status of the Arctic and sub-Arctic transcontinental maritime route connecting the Atlantic and the Pacific, referred to as the "Northwest Passage." Over the last thirty years, Canada has maintained that the waters of the Passage are some combination of internal waters or territorial seas. Applying the rules of international law, as reflected in the 1982 United Nations Law of the Sea Convention, suggests that the Passage is a strait used for international navigation. Expressing concerns over maritime safety and security, recognition of northern sovereignty, and protection of the fragile Arctic environment, Canada has sought to exercise greater authority over the Passage. This article suggests that Canada can best achieve widespread global support for managing its maritime Arctic by acknowledging that the passage constitutes an international strait and then working through the International Maritime Organization to develop a comprehensive package of internationally accepted regulations.

Introduction: Loss of Sea Ice

Over the past thirty years, the annual average sea-ice extent has decreased about 8 percent, or nearly one million square kilometers—an area larger than all of Norway, Sweden, and Denmark combined.[1] The extent of sea ice has declined more dramatically in summer than the annual average, with the loss amounting to 15–20 percent of late-summer ice coverage.[2] Moreover, a

* James Kraska (james.kraska@gmail.com) is a U.S. Navy Judge Advocate assigned to the Joint Staff as the Oceans Policy Adviser. He holds an appointment as a Guest Investigator at the Marine Policy Center, Woods Hole Oceanographic Institution, Woods Hole, Massachusetts, where he was a post-doctoral fellow from 1992–93. An earlier version of this article was developed for the Conference of Defence Associations Institute in Ottawa, Canada. The author would like to thank CAPT J. Ashley Roach, JAGC USN (Ret.) and one anonymous reviewer for their valuable comments. The views expressed are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

1 Susan Joy Hassol, Impacts of a Warming Arctic: Arctic Climate Impact Assessment (2005) at pp. 12–13, available at: http://amap.no/acia/.

2 *Id.*

consensus is building that the melting trend is accelerating, as Arctic temperatures have increased over the last few decades.[3] Winter temperatures in Alaska and Western Canada, for example, are 3–4° C higher over the past fifty years, and there is an expectation that larger increases will be projected.[4] The five Global Climate Models (GCMs) utilized in the Arctic Climate Impact Assessment (ACIA) project a decline in the maximum extent of winter ice over the next hundred years; the models vary in their conclusions about the extent of summer ice, providing a range of predictions—from indicating it will remain relatively constant to indicating summers will be ice-free.[5] Scientists believe these changes are one major reason for dramatic environmental events, such as the recent detachment of a 66-square-mile giant ice shelf from Ellesmere Island, about 800 kilometers from the North Pole.[6] Coupled with other environmental stresses such as illegal fishing, over-fishing, and pollution, there is concern that the trends in Arctic climate change may overwhelm the adaptive capacity of some Arctic ecosystems and reduce or even eliminate populations of living resources.[7]

The policy implications for these changes could be enormous, and much of the attention has focused on the role of the Northwest Passage. The passage is comprised of a collection of alternative maritime transit routes linking Europe and the Atlantic Ocean with Asia and the Pacific Ocean, routed through the northern tier of the North American continent.[8] The route is 9,000 kilometers shorter than transiting the Panama Canal and 17,000 km shorter than the Cape Horn route.[9] Some suggest the decline in sea ice will spur a dramatic increase in shipping through the passage, raising concerns that the traffic will generate harmful external effects, and impose additional stress on the natural environment. Technological advances in shipping design and construction and navigation also could improve the safety and feasibility of the passage for more routine traffic. The expected inflow of shipping traffic has revived debate over the legal status of the route, with Canada suggesting the

[3] *Id.*

[4] *Id.*

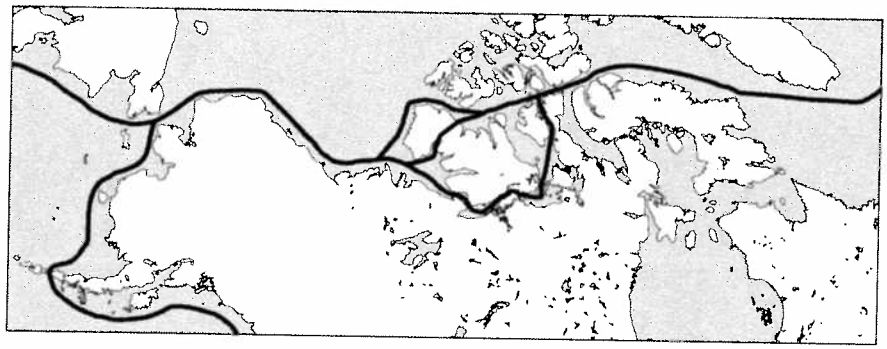
[5] See generally, John E. Walsh and Michael S. Timlin, Northern Hemisphere Sea Ice Simulations by Global Climate Models, vol. 22 no. 1 Polar Research (June 2003), pp. 75–82.

[6] The ice had floated on the sea, but been connected to land. Some scientists believe the separation of the ice from land is the largest event of its kind in Canada in 30 years. Steve Lillebuen, Ancient Ice Shelf Snaps and Breaks Free From Canadian Arctic, Canoe News (CNEWS Network), 28 December, 2006, available at: http://cnews.canoe.ca/CNEWS/Science/2006/12/28/3041440-cp.html.

[7] Susan Joy Hassol, Impacts of a Warming Arctic: Arctic Climate Impact Assessment (2005) at p. 5, available at: http://amap.no/acia/.

[8] Thomas C. Pullen, What Price Canadian Sovereignty?, U.S. Naval Institute Proceedings pp. 66–72, at p. 68 (Sep. 1987).

[9] John Falkingham, Dr. Humfrey Melling and Katherine J. Wilson, Shipping in the Canadian Arctic: Possible Climate Change Scenarios, Weathering Change (Newsletter of the Northern Climate Exchange, 2002), at p. 4, available at: http://yukon.taiga.net/knowledge/initiatives/NCE_Newsletter_Fall2002.pdf.



passage lies within territorial or even internal waters, and the United States and the European Union viewing the passage as an international strait open to all nations.[10] The outcome of the debate may not be as critical as some would believe, since acceptance of the passage as an international strait would permit Canada to seek development of internationally accepted standards for protecting the strait at the International Maritime Organization (IMO). Additionally, even if the climate becomes warmer, it is not clear whether the change necessarily will increase the attractiveness of the passage to routine international shipping. If warming summers decrease the amount of first-year fast ice, it could permit old ice to drift into the passage and block narrow channels.[11] Old ice is extremely strong, posing a hazard even to icebreakers. Even a relatively ice-free Arctic may create a false optimism for a large amount of commercial shipping, as the passage could become inhospitable to routine traffic due to local congestion caused by mounting dangerous winds and currents.[12]

Canadian Claims

The potential effect of climate change on the islands and waters which lie immediately north of continental Canada, an area commonly referred to as the "Canadian Arctic," occupies a more significant part of the national consciousness in Canada than in the United States. Canadians consider themselves more oriented toward the Arctic than their American neighbors, although ever since the purchase of Alaska, the United States also has been an Arctic nation.

[10] Doug Struck, Dispute Over NW Passage Revived; U.S. Asserts Free Use by All Ships; Canada Claims Jurisdiction, The Washington Post, November 6, 2006, at p. A18.

[11] K.J. Wilson *et al.*, Shipping in the Canadian Arctic, available at: http://www.arctic.noaa.gov/detect/KW_IGARSS04_NWP.pdf.

[12] *Id.*

Analysis of the Northwest Passage by Canadian scholars typically is approached from the entire spectrum of cultural, historical, economic and policy arguments, supplemented by legal claims.[13] This article focuses particularly on the issue of the Northwest Passage from the perspective of international law generally, and applies the rules reflected in the 1982 United Nations Law of the Sea Convention (Law of the Sea Convention or the Convention) specifically. Doing so in an article necessarily bypasses some of the other valuable and more nuanced approaches to the issue, many of which are grounded in the social sciences. On the other hand, a sharper focus permits more detailed exploration of the international law piece of the inquiry than otherwise may be possible in less than a book-length study.

The legal debate over the status of the passage is colored by the historical and contemporary political context and the dynamic nature of Canadian claims. Thirty-five years ago, for example, Canada suggested that it had authority to assert sovereignty over regions of the Arctic Sea, while the United States rejected claims that the waters constituted the internal waters of Canada.[14] More recently, the Globe and Mail newspaper caused a stir when it reported that the passage could be navigable by regular ships for part—or even all—of the year within the next decade.[15] There is an apprehension that the area would become the "Panama Canal of the north," with the ecologically sensitive area trashed by "cringing prosperity."[16]

This article suggests that the Law of the Sea Convention does not support some of these excessive claims to the passage, particularly those predicated on a liberal interpretation of straight baselines and that take broad license with internal waters. More importantly, however, this author believes that Canada could achieve all its most important policy goals for the passage, and particularly widespread acceptance of and compliance with Canadian regulations for enhanced safety, security, and environmental protection of the passage, by crafting those regulations through the International Maritime Organization.

The Honorable Pierre Pettigrew, Minister of Foreign Affairs, delivered a speech in 2005 in which he laid out Canada's assessment of its claims of sovereignty in the Canadian Arctic. Among his major points, he first suggested that Canada has done well in consolidating and affirming title to its Northern land territory—with the dispute involving Denmark over Hans Island being the

[13] See, e.g., Politics of the Northwest Passage (Franklyn Griffiths, ed., Kingston: McGill-Queen's University Press, 1989).

[14] Theodore L. Eliot, Jr., United States Department of State, Information Memorandum for Mr. Kissinger—The White House, 12 March 1970. Foreign Relations 1969–1976, vol. E-1, Documents on Global Issues 1969–1972, available at: http://www.state.gov/r/pa/ho/frus/nixon/e1/53180.htm.

[15] Alanna Mitchell, The Northwest Passage Thawed, The Globe and Mail, 5 February 2000 at p. A9, available at: http://www.carc.org/whatsnew/writings/amitchell.html.

[16] *Id.*

notable exception. This point is critical, since it is not always apparent that all Canadians understand that there are no challenges to Canadian territorial sovereignty in the Arctic (except for Denmark and Hans Island). Second, he offered the point that no nation disputes Canada's authority over resources or environmental protection. This contention is well settled, as the Law of the Sea Convention already guarantees Canadian jurisdiction over living and non-living resources out to 200 nautical miles[17] (nm) measured from lawfully drawn baselines. Third, he expressed concern over increasing shipping in the Canadian Arctic, but indicated that Canada does not oppose international navigation, "so long as conditions and controls established by Canadians to protect the security, environmental and economic interests of our northerners are met." This assertion is not contentious so long as Canadian regulations reflect internationally accepted standards, are applied in a manner that does not discriminate among foreign flag states, and are endorsed by the International Maritime Organization. Finally, he indicated that Canada intended to work to ensure that it exercised control over foreign vessels traversing the Northwest Passage.[18] This statement hinges on the definition of "control." With careful crafting and active international engagement, it is likely that all of these goals could be met, so long as regulation of the Northwest Passage is pursued through the International Maritime Organization, in addition to the Parliament in Ottawa, the capital of Canada.

The exact nature of Canada's claims over the waters of the Canadian Arctic has shifted over time between regarding them as internal waters or territorial waters, or a mixture thereof.[19] The claims are dependent on the application of straight baselines that project into the sea, purporting to enclose international waters. The often-repeated assertion of Canadian "sovereignty" has acquired an elusive definition; in the media it has become a rhetorical vessel containing varying elements of control, authority, and perception.[20] There is the sense that Canada would like to exercise sovereignty over the waters and have them recognized as internal waters, but Canada has never really decided how to do this or precisely what theory might be most effective in obtaining the support

[17] A nautical mile equals one minute of latitude at the equator: 1,852 meters or 6,076.03 feet. In comparison, the statute mile on land is 5,280 feet.

[18] Pierre Pettigrew, Canada's Leadership in the Circumpolar World, Notes for an Address by the Hon. Pierre Minister of Foreign Affairs, at the Northern Strategy Consultations Roundtable on Reinforcing Sovereignty, Security and Circumpolar Cooperation, 22 March 2005, available at: http://www.dfait-maeci.gc.ca/circumpolar/sec06_speeches_003-en.asp.

[19] Canadian External Affairs Legal Bureau briefing of May 21, 1987, in C.S. Bourne, ed., 1987 Canadian Yearbook of International Law (Vancouver: University of British Columbia Press) at p. 406 and Legal Bureau paper of March 29, 1988, in C.S. Bourne, ed., 1988 Canadian Yearbook of International Law (Vancouver: University of British Columbia Press) at p. 314.

[20] Matthew Carnaghan and Allison Goody, Canadian Arctic Sovereignty, Political and Social Affairs Division, Parliamentary Information and Research Service, Library of Parliament, PRB 05-61E, 26 January 2006 at p. 2, available at: http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.htm.

of the international community.[21] Relying on cultural and policy arguments augmented by a series of claims and legislative acts over a period of time, Canadians typically view these efforts as having coalesced into a convincing package of evidence to support claims of sovereignty.

Outside of government, some of the rhetoric from Canada is particularly undisciplined, with nongovernmental organizations and media making seemingly self-evident assertions that the waters are under Canadian "control," "oversight," "jurisdiction," or "sovereignty." Some believe that an increased level of sovereignty-affirming activities by the Canadian government will secure Canadian claims.[22] Paradoxically, rather than focusing their efforts on multilateral efforts to protect Arctic ecology, Canadian environmental groups are among the most strident in unilateral assertion of Canadian sovereignty over the passage in order to avert what they see as impending ecological catastrophe from increased shipping.[23]

The position of the European Union and the United States is that the Northwest Passage is a strait used for international navigation.[24] It is useful to take a fresh look at the issues, beginning with the inseparable relationship between Canada and the United States and then returning to the basic sources of applicable international law. The Law of the Sea Convention, which is regarded as an accurate reflection of oceans law excepting primarily the seabed mining provisions, clarifies the legal issues involved. Recent developments at the International Maritime Organization in the area of safety, security and marine environmental protection, particularly with regard to vital sea lanes, provide a practical model for resolving the dispute.

Agreeable Neighbors

In 1906, Canada claimed the Hudson Bay as historic waters; the United States did not recognize the claim and protested it that same year.[25] From 1906 to 1987, there were only 36 recorded transits through the passage. In 1952 and again in 1957, U.S. Coast Guard cutters transited the passage. In October,

[21] Dr. Rob Huebert, International Law, Geopolitics and Diplomacy in the Northwest Passage, The Journal of Ocean Technology, vol. 1 no. 1 (Summer 2006) pp. 16–18, at p. 16.

[22] Rob Huebert, Renaissance in Canadian Arctic Security, Canadian Military Journal (Winter 2005–06), pp. 17–29, at pp. 22–25 and see generally, Rob Huebert, The Shipping News: Part II: How Canada's Arctic Sovereignty is on Thinning Ice, vol. 58 no. 3 International Journal (Summer 2003), pp. 295–308.

[23] Rob Huebert, The Coming Arctic Maritime Sovereignty Crisis, Arctic Bulletin-World Wildlife Federation No. 2.04 (July 2004), pp. 22–24.

[24] Matthew Carnaghan and Allison Goody, Canadian Arctic Sovereignty, Political and Social Affairs Division, Parliamentary Information and Research Service, Library of Parliament, PRB 05–61E, 26 January 2006 at p. 3, available at: http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.htm.

[25] Maritime Claims Reference Manual (MCRM), DoD 2005.1-M (June 2005), at p. 96. The electronic version of the MCRM, which reprints most coastal state regulations, inclusive of tables of longitude and latitude, but exclusive of charts, is publicly available at: http://www.dtic.mil/whs/directives/corres/html/20051m.htm.

1967, Canada established straight baselines around Labrador and Newfoundland.[26] The United States protested the claims that same year.[27] Two years later, a similar order, which the United States also protested, claimed straight baselines for Nova Scotia, Vancouver Island, and Queen Charlotte Islands.[28]

The modern disagreement over the passage crystallized around the voyage of the SS *Manhattan* from the Beaufort Sea through the Northwest Passage to the Davis Strait in 1969. Without receiving prior permission from Canada, the vessel, accompanied by two U.S. Coast Guard icebreakers, made the transit.[29] The voyage was only the eleventh complete transit of the passage and the first since World War II by a non-government vessel.[30] The *Manhattan*'s transit was intended to demonstrate the economic feasibility of icebreaking bulk cargo carriers to steam year round from Alaska to the East Coast of North America.

At the time, Canada claimed a 3-nm territorial sea, so the transit was through international waters except where Canadian waters overlapped the McClure Strait. The voyage highlighted the inconclusive legal status of the Passage, resulting in several Canadian responses. Most importantly, in response to the transit, Canada implemented the Arctic Waters Pollution Prevention Act, which extended Canadian environmental enforcement out to 100 nm from the claimed baselines and into the Arctic Ocean and Beaufort Sea. That law made reference to the "new Canadian North" and is an important signpost on Canada's journey to assert more control in the Arctic.[31] In 1997, Canada also extended its territorial sea from 3 nm to 12 nm, aligning the outer limits of the Canadian territorial sea with the limit permitted under the Law of the Sea Convention.[32] Extending the territorial sea gave Canada sovereignty over the waters seaward of lawfully drawn baselines, generally measured from the low-water mark on the land. As a result of the new 12-nm limit, much of the Northwest Passage became enclosed in Canadian territorial seas. But it must be remembered that international shipping remained entitled to innocent passage through territorial seas, as well as to the more robust right of non-suspendable transit passage in international straits.[33]

[26] Order-in-Council 1967–2025, reprinted in MCRM at p. 96. Latitude and longitude coordinates for the Canadian straight baseline system for Newfoundland are provided in Table C1.T34 at pp. 100–103.

[27] MCRM, p. 96.

[28] Order-in-Council P.C. 1969–1109, reprinted in MCRM, p. 96. Canadian straight baseline systems for Nova Scotia are reprinted in Table C1.T33, for Vancouver Island at Table C1.T35, both on p. 104, and for Queen Charlotte Islands at Table C1.T36, p. 105 of the MRCM.

[29] J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims (The Hague: Martinus Nijhoff Publishers, Kluwer Law International, 2d ed., 1996) at p. 339.

[30] Thomas C. Pullen, What Price Canadian Sovereignty, U.S. Naval Institute Proceedings (September 1987) pp. 66–72, at p. 69.

[31] Trevor Lloyd, Canada's Arctic in the Age of Ecology, Foreign Affairs (July, 1970), pp. 726–740, at p. 740.

[32] An Act Respecting the Oceans of Canada (Oceans Act), January, 1997, reprinted in Maritime Claims Reference Manual, DoD 2005.1-M (2005) at p. 96.

[33] Articles 44 and 45, Law of the Sea Convention.

These claims set the stage for the establishment of straight baselines around the Canadian Arctic Islands in 1986.[34] The regulation purporting to do so, the Territorial Sea Geographical Coordinates Order, asserted:

> Whereas Canada has long maintained and exercised sovereignty over the Waters of the Canadian archipelago;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Secretary of State for External Affairs, pursuant to subsection 5(1) [R.S.C. 1970, c.45 (1st Supp.) § .3] of the Territorial Sea and Fishing Zones Act, is pleased hereby to make the annexed order respecting the geographical coordinates of points from which baselines may be determined, effective January 1, 1986.[35]

Like the others before it, this Arctic claim was not recognized by the United States, and the United States protested the new order in 1985 and 1986.[36] The "internal waters" claim is the most tenuous under international law, constituting an appropriation of international navigational rights that have been reserved for the global community.[37] Three factors are to be considered in determining whether a body of water may be considered historic internal waters: (1) the exercise of authority over the area of the claiming nation; (2) the continuity of this exercise of authority; and, (3) the acquiescence of foreign nations.[38] This 3-part test makes historic claims notoriously difficult to maintain and has been adopted by the U.S. Supreme Court.[39] The European and American view of the passage as an international strait suggests that based on the requirement of foreign state acquiescence alone, the waters of the passage do not constitute internal Canadian waters.[40] Several U.S. Supreme Court cases provide additional interesting factual context for the rule.

In *United States v. Massachusetts*, the state argued that Nantucket Sound formed part of an "amphibious resource region" that supported a claim that the sound constituted historic state waters. The state maintained that colonists had engaged in "intensive and exclusive exploitation" of the resources of Nantucket

[34] Order-in-Council P.C. 1985–2739 in January 1986, reprinted in MCRM at p. 96. Coordinates for the Canadian Arctic Islands are provided in Tables C1.T37, C1.T38 and C1.T39, reprinted in MRCM at pp. 106–113.

[35] Reprinted in MCRM, at p. 105–106.

[36] MCRM at p. 96.

[37] Canada is not alone among coastal states in asserting more generous maritime coastal state claims that purport to control or impede international navigation and overflight. In fact, there are more than 100 illegal, excessive claims worldwide that declare limitations on vital navigational and overflight rights and freedoms.

[38] Juridical Regime of Historic Waters, Including Historic Bays, U.N Doc A/CN.4/143 (1962) at p. 56.

[39] See, e.g., *United States v. California*, 381 U.S. 172 (1965). Historic bays are recognized as those over which "a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *Id.* at pp. 172–173. See also, *United States v. Louisiana*, 394 U.S. 11, at p. 23 (1969).

[40] Donat Pharand, Canada's Arctic Waters in International Law (New York: Cambridge University Press, 1988) at p. 251.

Sound sufficient to establish a claim of historic occupation.[41] There was no doubt that the state's culture and economy had a close historic association with the water.[42] An historical geographer for the state was able to demonstrate an "intimate relationship" between the people of the state and the adjacent coastline and sea. Beach sand supported local industry, including glassmaking, stone polishing and farming. Colonists built mills powered by the tides, made salt from the seawater and collected seaweed for fertilizer and for insulation used in building construction. Water-based pursuits included harvesting oysters and clams and whaling. Still, the Court held that these activities failed to establish the state's "occupation" of Nantucket Sound.[43]

Similarly, in *U.S. v. Alaska*, the U.S. Supreme Court overruled lower courts and held that Alaska did not establish state sovereignty over Cook Inlet, which extends into Alaska for more than 150 miles.[44] The city of Anchorage is near the head of the inlet. Although Alaska was able to demonstrate successful historical exclusion of all foreign vessels and navigation in the waters, the court was unwilling to recognize Alaskan state sovereignty.[45] The presence of historical Russian settlements and active U.S. traders operating in the area was insufficient to demonstrate an historic exercise of state governmental authority over the vast area of the bay and was considered of little relevance to the question of whether the state government could claim continuous exercise of authority over the waters.[46]

Although the Alaska case focused on rights of the state vis-à-vis the federal government, the court also noted that the U.S. government's enforcement of fish and wildlife regulations in Cook Inlet was insufficient, as a matter of law, to establish U.S. title or dominion to the inlet as internal waters since nations may exercise resource jurisdiction over areas of the high seas adjacent to their coastlines.[47] Finally, the Court observed a fairly robust interpretation of foreign state acquiescence in historic claims. "The failure of other countries to object," the Court ruled, "is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted."[48]

The straight baseline and historic waters claims were retained by the Oceans Act of January 1987, although the Territorial Sea and Fishing Zone Act was

[41] *United States v. Massachusetts*, 475 U.S. 89, at p. 98 (1986).
[42] *Id.* at p. 101.
[43] *Id.* at pp. 98–99.
[44] *United States v. Alaska*, 422 U.S. 184, at pp. 186–87 (1975).
[45] *Id.*
[46] *Id.*, at pp. 190–91 (1975).
[47] *Id.*, at pp. 198–99. The Court applied Art. 6 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and noted that coastal states may exercise resource jurisdiction over areas of the high seas adjacent to their internal waters and territorial seas. See Art. 6, Convention on Fishing and Conservation of the Living Resources of the High Seas, 1 U.S.T. 138, 141, T.I.A.S. 5659 (1966).
[48] *United States v. Alaska*, 422 U.S. 184, p. 200 (1975).

repealed.[49] The next year, the United States and Canada signed a treaty on Arctic cooperation in which they sought to "facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures" for doing so.[50] In the treaty the United States undertook to request Canadian consent for navigation by U.S. icebreakers within waters claimed by Canada to be internal,[51] although the parties stated that the treaty does not affect the respective position of either government on the Law of the Sea Convention in the Arctic. The treaty also invokes the value of cooperation for research conducted by icebreakers during Arctic voyages, establishing that the United States is seeking Canadian permission, not for the actual transit or the activity of icebreaking, but rather to obtain Canadian consent for the conduct of "marine scientific research," which coastal states may regulate throughout their territorial sea and exclusive economic zone (EEZs) under the Law of the Sea Convention.[52] Coast Guard icebreakers are multi-mission platforms,[53] so regulating one fairly occasional activity—marine scientific research—may be seen as a subterfuge for regulating the entire transit. On the other hand, the treaty only purports to coordinate marine scientific research in the Arctic marine environment during icebreaker voyages, and it does not affect the rights of passage by other warships, other government vessels or commercial shipping.[54]

The unilateral promise extended by the United States in the 1988 agreement and the ensuing state practice of seeking permission for icebreaking transits that conduct marine scientific research can be viewed as in tension with other U.S. navigational assertions and diplomatic protests. The United States maintains that all states are entitled to freedom of navigation through the passage. At the same time, it has agreed to submit requests for transits by the class of vessel most likely to conduct passage.[55] Furthermore, although the accord applies only to icebreakers, some have erroneously argued that it implies *de facto* coverage of commercial vessels.[56]

[49] MCRM at p. 96 and p. 106.

[50] Article 3, Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, January 11, 1988 (TIAS 11565).

[51] *Id.*

[52] Articles 245 & 246, Law of the Sea Convention.

[53] See, e.g., http://www.uscg.mil/pacarea/healy/.

[54] J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims (The Hague: Martinus Nijhoff Publishers, Kluwer Law International, 2d ed., 1996) at pp. 348–349.

[55] Marianne Nash Leich, U.S. Practice: Contemporary Practice of the United States Relating to International Law, 83 American Journal of International Law 63–85, at pp. 63–64 (January 1989). The United States submitted the first request under the Agreement on October 10, 1988 to request Canada's consent for the transit of a U.S. Coast Guard cutter, *Polar Star*. In conveying the request, the United States submitted, in a note, an invitation for a Canadian scientist and officer of the Canadian Coast Guard to be on board the *Polar Star*. The United States also indicated that the icebreaker would comply with all Canadian pollution control standards. *Id.* at pp. 63–64. See http://www.uscg.mil/pacarea/pstar/pstar.html.

[56] Oran R. Young, Arctic Politics: Conflict and Cooperation in the Circumpolar North (Hanover, N.H.: University Press of New England, 1992) at p. 163.

The Law of the Sea Convention defines the term "warship" broadly, to include Coast Guard cutters.[57] "[W]arship means a ship belonging to the armed forces of a State bearing external marks distinguishing such ships of its nationality, under command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."[58] The accepted status of Arctic waters in large part turns on the development of state practice and customary law, and therefore conceding to a voluntary consent regime for one class of state vessels, particularly those regarded as "warships," regardless of their activities, would not bode well for promoting the objective of freedom of navigation. However, while conducting transit passage foreign vessels must obtain the prior authorization of the states bordering the strait before conducting marine scientific research, and hydrographic survey activities do not affect freedom of navigation.[59]

In sum, the last thirty years have been punctuated by a series of Canadian archipelagic, straight baseline, and historic claims that the United States has not recognized and often protested. Canada asserts that the waters constitute its internal waters, having drawn a series of straight baselines that enclose these waters, whereas the United States considers the passage to be subject to the regime of transit passage through a strait used for international navigation.[60] In November 2006, while speaking at a conference in Canada, the former U.S. Ambassador to Canada, Paul Cellucci, was quoted in the Canadian media as saying, "It is in the security interests of the United States that [the Canadian Arctic] be under the control of Canada."[61] Soon thereafter, the current U.S. Ambassador, David Wilkins, restated the longstanding U.S. position that the passage is an international strait.[62]

The disagreement between the United States and Canada, although amicable, stretches for decades. Despite evidence of thinning sea ice that has brought the issue of the passage out of hibernation, it is unlikely to cause significant friction between Canada and the United States. As well as sharing close proximity, Canada and the United States share an ingrained cultural respect for promotion of the rule of law. Both the United States and Canada are founding members of the United Nations and the North Atlantic Treaty Organization (NATO). Under the North Atlantic Treaty, parties are required to consult

[57] *See*, Bernard H. Oxman, The Regime of Warships in the Law of the Sea, vol. 24 no. 4 Virginia Journal of International Law (Summer 1984) pp. 809–862 at pp. 812–813, and http://www.hazegray.org/worldnav/usa/guard.htm.

[58] Article 29, Law of the Sea Convention.

[59] Article 40, Law of the Sea Convention.

[60] R.R. Churchill and A.V. Lowe, The Law of the Sea (Huntington, NY: Juris Publishing, 3rd ed., 1999) at p. 106.

[61] Doug Struck, Dispute Over Northwest Passage Revived: U.S. Asserts Free Use by All Ships; Canada Claims Jurisdiction, Washington Post, 6 November 2006, p. A18.

[62] *Id.*

whenever, in the opinion of one of them, the territorial integrity, political independence, or security of any party is threatened.[63] Not only do the two democracies occupy the same hemisphere of the planet, they also share the longest peaceful border in the world. Their foreign relations are immensely productive and mutually beneficial, the two economies are inextricably bound, and the two sovereign states share deep social, cultural, and familial ties. President John F. Kennedy, when asked about America's northern neighbor, said, "Geography has made us neighbors. History has made us friends. Economics has made us partners and necessity has made us allies."[64] These realities lend confidence to the contemporary assessment of one Canadian scholar, who wrote, "[T]his particular dispute is not only off the back burner, but off the stove. It will be altogether out of the kitchen if Canada and the United States can find their way to new [post-911] North American security cooperation."[65]

Codifying Customary International Law

In the years preceding the negotiation of the Law of the Sea Convention, customary international law recognized and developed an approach carefully balanced between coastal state authority and global freedom of navigation. This approach represents the central bargain that later was codified in the final text of the Convention, which was opened for signature in 1982. Consequently, the Law of the Sea Convention reflects a functional model that balances coastal state rights and jurisdiction over water adjacent to the coastline with the rights of the international community to exercise maritime freedom of navigation and overflight.

Some are attracted to the idea that there is one simple formula for determining sovereignty and jurisdiction throughout areas adjacent to the coastal state, but that perspective is erroneous. Seaward of the baseline, there are different functional areas in the Law of the Sea Convention, including the territorial sea, the contiguous zone and the EEZ. Each of these areas permits the coastal state to exercise some amount of jurisdiction over transiting vessels, but all of them permit the international community the right of navigational freedoms.

The Law of the Sea Convention serves as the most useful point of departure for analyzing the status of the waters of the Canadian Arctic. Canada ratified the Law of the Sea Convention in November 2003. As a matter of law, Canada is bound to the rules contained in the Convention and has encouraged other countries to accede to the Convention.[66] In a Declaration pursuant

[63] Article 4, North Atlantic Treaty, 4 April 1949, available at www.nato.int/docu/basictxt/**treaty**.htm..
[64] President John F. Kennedy, as quoted in Joshua Kurlantzick, Oh. Canada. The Washington Monthly, June 2001, pp. 21–24, at p. 24.
[65] Franklyn Griffiths, Pathetic Fallacy: That Canada's Arctic Sovereignty is on Thinning Ice, Canadian Foreign Policy vol. 11, No. 3 (Spring 2004) pp. 1–16, at p. 5.
[66] Prime Minister Stephen Harper, Securing Canadian Sovereignty in the Arctic, 12 August 2006, available at: http://www.pm.gc.ca/eng/media.asp?id=1275.

to Article 310 of the Convention made at the time of ratification, Canada declined to accept compulsory dispute settlement provisions contained in Section XV, part 2 concerning, *inter alia*, historic claims.[67]

The United States is not yet a party to the Convention. In 1983, the United States declined to sign the Convention, citing concern that the Convention's deep sea-bed mining provisions were contrary to the principles and interests of industrialized nations and would impede the aspirations of developing states.[68] At the same time, however, the United States recognized that those portions of the Convention relating to navigation and overflight reflect customary international law.

> The United States will assert its navigation and overflight rights and freedoms on a world-wide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.[69]

Freedom of navigation is the core U.S. oceans interest, deeply embedded in the American conscience. For more than two hundred years, the U.S. economy and national security have been dependent on maritime maneuverability and mobility. The very first war fought by the new republic was against the Barbary States over the right to transit the Mediterranean without paying tribute. Freedom of navigation comprised the second of President Wilson's progressive Fourteen Points delivered in a speech to a joint session of Congress in January 1918. During the lengthy negotiations in the Third United Nations Conference on the Law of the Sea in the 1970s which resulted in the Law of the Sea Convention, the United States displayed a willingness, even at the height of the Cold War, to partner with the Soviet Union to address common concerns by preserving freedoms of navigation.[70] The two superpowers led a majority of states into recognizing the right of transit passage through international straits. Through years of negotiations, the United States joined the Soviet Union on the issue, even going against some Allied straits states.[71]

The Law of the Sea Convention is the most comprehensive oceans treaty ever, containing unsurpassed breadth and a high degree of complexity. With

[67] Declaration made upon ratification (Canada), 7 November 2003, available at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Canada.

[68] Presidential Oceans Policy Statement, 10 March 1983.

[69] *Id.*

[70] See, e.g., John Norton Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, vol. 74 no. 1 American Journal of International Law, pp. 77–121 (1980) at pp. 82–83.

[71] See, for example, General Alexander Haig, Memorandum for the President of the United States—The White House, UN Law of the Sea Conference: Formulation of Straits Item on Agenda, Foreign Relations 1969–1976, vol. E-1, Documents on Global Issues 1969–1972, available at: http://www.state.gov/r/pa/ho/frus/nixon/e1/53299.htm.

more than 150 member states, the Convention has become an essential restatement of much of accepted oceans law, excepting primarily the controversial provisions relating to seabed mining in Part XI. The Convention reflects the development of customary international law relating to oceans freedom, jurisdiction, and sovereignty in a carefully calibrated balance of the interests of coastal states and states bordering straits with the rights of the international community to freedom of navigation and overflight throughout the world's oceans.

In exchange for generous provisions preserving freedom of navigation by all nations, coastal states were afforded the right to protect certain forms of sovereignty and certain sovereign rights, authority and jurisdiction seaward, affecting the legal status of the surface of the ocean waters, the water column, the seabed and the airspace above the water. Strategists seeking a correct and sophisticated understanding of the legal status of these areas of water should eschew simplistic shortcuts or predetermined policy preferences if they are to conduct an analysis supportable by the Convention.

Analysis of oceans claims and jurisdictions under the Law of the Sea Convention begins from properly drawn, normal or straight baselines. Typically, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast of the territory.[72] Waters landward of the baselines are internal waters, an area in which the coastal state exercises complete and absolute sovereignty.[73]

Some governments have taken the view that the ice itself can be occupied, converting frozen water into a sort of "ice territory" with attendant rights.[74] This is a purely theoretical invention that has no basis in either customary international law or the Law of the Sea Convention. There is no authority or provision in the Convention to assimilate ice-covered water as "territory" and thereby claim a baseline at the point where the ice meets liquid water. Moreover, there is an impracticality to such an approach, since the location and shape of the ice is constantly changing.

Straight baselines may be drawn in localities where the coastline is deeply indented and deeply cut into, or if there is a fringe of islands along the coast in its immediate vicinity.[75] Bays may be enclosed with straight baselines, converting those waters to the status of internal waters, but only so long as the closing line from the low-water mark from one side of the bay and connecting to the other does not exceed 24 nm.[76] When closing lines are used to

[72] Article 5, Law of the Sea Convention.
[73] Article 8(1), Law of the Sea Convention.
[74] Ian Brownlie, Principles of Public International Law (New York: Oxford University Press, 5th ed., 1999) at p. 148.
[75] Article 7(1), Law of the Sea Convention.
[76] Article 10, Law of the Sea Convention. It is noteworthy that this closing rule does not apply in the case of an historic bay, such as the Hudson Bay. In such a case, however, the coastal state would still apply the rules for determining straight baselines contained in Article 7 of the Convention. See Article 10(6).

enclose bays, additional rules apply. A bay is defined under the Law of the Sea Convention as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters. . . ."[77] "An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation."[78] Where, because of islands, the entrance to the bay has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.[79] Whether one or several closing lines are drawn, the sum total of the length of the closing line(s) may not exceed 24 nm.[80]

Straight baselines must fulfill two additional criteria: they 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.[81] It is particularly important to note that, within the context of the Canadian Arctic, where straight baselines are established that have the effect of enclosing as internal waters areas that had not previously been considered as such, the international community retains the right of innocent passage through those waters.[82]

The 1967 and 1968 Canadian straight baselines in the Arctic, both in the East and West, project at numerous points tens of miles into the high seas, violating virtually every rule governing lawfully drawn baselines. The effect is to enclose the entire Canadian Arctic as internal waters. Even if one accepts the series of straight baselines, the international community would still enjoy the right of innocent passage through those newly-enclosed internal waters. This is because the Law of the Sea Convention provides that where the establishment of straight baselines has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage still exists in those waters.[83] Some suggest that straight baselines made by a nation before 1982 have special status and should be considered permissible. This approach is unconvincing; otherwise, the entire range of excessive maritime claims predating the 1982 Convention similarly would be permissible—creating a global crazy quilt of conflicting maritime claims and defeating the purpose of the Convention as "one gigantic package deal."[84]

[77] Article 10(2), Law of the Sea Convention.
[78] Article 10(2), Law of the Sea Convention.
[79] Article 10(3), Law of the Sea Convention.
[80] Article 10(4), Law of the Sea Convention.
[81] Article 7(1), Law of the Sea Convention.
[82] Article 8(2), Law of the Sea Convention.
[83] Article 8(2), Law of the Sea Convention and Article 5(2) of the Convention on the Territorial Sea and Contiguous Zone, U.N.T.S. 7477, vol. 516 at 205–225.
[84] Statement by C.A. Stavropoulos, in Myron H. Nordquist, ed., United Nations Convention on the Law of the Sea: A Commentary, vol. I (Dordrecht: Martinus Nijhoff Publishers, 1985) at p. lxv.

Coastal states may adopt a territorial sea extending at each point from the baseline seaward to a breadth of no more than 12 nm.[85] The coastal state, subject to important *caveats*, may exercise sovereignty in the territorial sea, but the exercise of authority is not absolute. Coastal states may enact a broad range of laws and regulations pertaining to the territorial sea, including safety of navigation, protection of living and non-living marine resources, preservation of the environment, and customs, fiscal, immigration, and health-related regulations.[86]

Vessels of all states enjoy the right of innocent passage through the territorial sea.[87] Perhaps the most important *caveat* for regulation in the territorial sea is that coastal state laws and regulations shall not apply to the design, construction, manning, or equipment (CDEM) of foreign ships, unless those regulations are giving effect to internationally accepted standards.[88] This prevents coastal states from imposing varying, arbitrary, unreasonable, or discriminatory standards on transiting vessels that would hamper world shipping and undermine the interests of all states. As a balance to the limits on coastal state authority, vessels exercising innocent passage also must observe specific limits on their activities during innocent passage. Vessels conducting innocent passage shall not conduct activities that are prejudicial to the peace, good order, or security of the state.[89] Foreign ships may not conduct any activity that does not have a direct bearing on passage.[90] Foreign ships must comply with all laws and regulations relating to the prevention of collision at sea, and they are obligated to comply with coastal state environmental laws, so long as those laws do not relate to CDEM.[91] At the same time, coastal states shall not hamper innocent passage.[92] Specifically, coastal states may not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage.[93]

Both the scientific and legal-policy literature refers often to the Canadian "Arctic archipelago." A geographic archipelago is an island chain, such as that encountered throughout the Northwest Passage. In the legal sense, however, there is not a Canadian (or Russian or an American) Arctic archipelago. The definition of a legal archipelago is well settled, and the criteria for an "archipelagic State" are clearly set forth in the Convention. An "archipelagic State" is defined in Part IV of the Law of the Sea Convention as "a State constituted wholly by one or more archipelagos and may include other islands." "Archipelago"

[85] Articles 3 and 4, Law of the Sea Convention.
[86] Article 21(1), Law of the Sea Convention.
[87] Article 17, Law of the Sea Convention.
[88] Article 21(2), Law of the Sea Convention.
[89] Article 19(1) and 19(2)(a)-(l), Law of the Sea Convention.
[90] Article 19(2)(l), Law of the Sea Convention.
[91] Article 21(4), Law of the Sea Convention.
[92] Article 24, Law of the Sea Convention.
[93] Article 24(1)(a), Law of the Sea Convention.

is defined as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[94]

The ratio of the area of water to the area of land must be between 1 to 1 and 1 to 9, and the length of the straight baselines may not exceed 100 nm, or in rare circumstances, 125 nm.[95] A continental State, such as the United States, may not claim the status of "archipelagic State" merely because some territory of that State, such as the Hawaiian Islands, would, by themselves, be eligible for archipelagic status. The territory of the entire State is part of the equation in Article 46 of the Convention. There are specific rules for drawing archipelagic straight baselines.[96] States may draw such baselines in order to join the outermost points of the outermost islands and drying reefs, provided that the enclosed area includes the main islands and meets a strict numerical ratio. If a state is unable to meet the discrete numerical ratio, it may not claim legal archipelagic status.

Under Part V of the Law of the Sea Convention, Canada has the right to exercise exclusive control and sovereign rights over all of the living and non-living resources throughout the Northwest Passage in areas extending out to 200 nm from each point extending seaward along lawfully drawn baselines.[97] This means that Canada controls conservation and exploitation of fishing as well as the development (or non-development) of oil and natural gas and other resources contained in those waters. Moreover, Canada may lawfully exercise jurisdiction over the preservation of the marine ecosystem and the conduct of marine scientific research in this area.[98]

One of the key provisions of the Convention relating to those portions of the EEZ that are at various times "ice-covered" is Article 234. The Article buttresses coastal state authority to adopt and enforce non-discriminatory laws and regulations to control vessel-source pollution in ice-covered areas of the EEZ.[99] As a result of collaboration among Canada, Russia, and the United States,[100] Article 234 was included as part of the bargain struck while negotiating the Convention to permit coastal states some level of authority to prevent pollution from vessels. The Article is directed at preserving the fragile ecology of ice-covered areas, but only within the limits of a coastal state's EEZ, such as the American, Canadian or Russian EEZs that extend into the Arctic.

[94] Article 46, Law of the Sea Convention.
[95] Article 47(1) and (2), Law of the Sea Convention.
[96] Article 47, Law of the Sea Convention.
[97] Article 56(1)(a), Law of the Sea Convention.
[98] Article 56(1)(b), Law of the Sea Convention.
[99] Article 234, Law of the Sea Convention.
[100] Myron H. Nordquist, Shabtai Rosenne and Alexander Yankov, eds., vol. IV United Nations Convention on the Law of the Sea: A Commentary (Dordrecht: Martinus Nijhoff Publisher, 1991) at § 234.5(g).

In depositing its instrument of accession to the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78), Canada deposited a declaration concerning Arctic waters in which it asserted a right to "adopt and enforce non-discriminatory laws" to prevent pollution in the Canadian Arctic.[101] In response, the United States filed with the Secretary-General of the IMO its understanding of Canada's declarations, emphasizing, *inter alia*, that those laws may be enforced against foreign shipping only if they are consistent with Articles 234 and 236 of the Law of the Sea Convention.[102] On this issue, the comprehensive University of Virginia Commentary concludes that Article 234 "has no implication for any claims to sovereignty or other aspects of jurisdiction" in those areas.[103]

Straits Used in International Navigation

Under international law, the Northwest Passage, as well as its Eurasian counterpart, the Northeast Passage, fall within the classic definition of a strait used for international navigation.[104] The definition of a strait used for international navigation is quite simple—a strait connects one part of the high seas or EEZ to another part of the high seas or EEZ.[105] There is nothing in the Law of the Sea Convention to suggest additional tests or requirements for recognition as an international strait, so there is no authority for the idea that a strait is only a strait if it meets a certain minimum threshold of shipping traffic, a specific number of transits, a timetable or regularity of transits, transit by certain types of vessels, or whether the vessel is accompanied or not accompanied by icebreakers. The test is geographic, not functional—if the water connects one part of the high seas or EEZ to another part of the high seas or EEZ, it is a

[101] IMO Doc. PMP/Circ.105 dated Dec. 7, 1992, *as cited in* Roach and Smith, United States Responses to Excessive Maritime Claims (The Hague: Martinus Nijhoff Publishers, 2d ed. 1996) at pp. 456–57.

[102] State Department telegram 349386, Nov. 18, 1993; American Embassy London telegram 20793, Nov. 18, 1993, *as cited in id.*, at pp. 457–58.

[103] Myron H. Nordquist, Shabtai Rosenne and Alexander Yankov, eds., vol. IV United Nations Convention on the Law of the Sea: A Commentary (Dordrecht: Martinus Nijhoff Publisher, 1991) at § 234.5(g).

[104] Ian Brownlie, Principles of Public International Law (New York: Oxford University Press, 5th ed., 1999) at p. 276. Although attempts were made in the negotiation of the Law of the Sea Convention to include a precise definition of "strait," that term is left undefined in the Convention, which merely indicated in general terms those straits to which the section applies. Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne, eds., vol. II United Nations Convention on the Law of the Sea: A Commentary (Dordrecht: Martinus Nijhoff Publishers, 1993) at ¶ 37.4. at p. 319. Straits used for international navigation, however, contain both a geographic and functional component. *Id.*, ¶ 37.7(b) at p. 320. At the second session of the Law of the Sea Conference in 1974, states rejected a Canadian version which read, "a natural passage between land formations. . . . [which] [h]as traditionally been used for international navigation." *Id.*, ¶ 37.3, at p. 318.

[105] Article 37, Law of the Sea Convention.

strait.[106] Unlike innocent passage, transit passage through international straits may not be suspended by a state bordering the strait.[107]

All ships and aircraft enjoy the right of transit passage through international straits, and vessels and aircraft are entitled to unimpeded transit solely for the purpose of continuous and expeditious transit. Vessels and aircraft conducting a transit of the transcontinental Northwest Passage are exercising transit passage when they are within overlapping territorial seas; otherwise, those vessels and aircraft are entitled to exercise high seas freedoms throughout the Canadian EEZ. The regime of transit passage through straits used for international navigation does not in other respects affect the legal status of the waters forming the straits or the exercise by the States bordering the straits or their sovereignty or jurisdiction over such waters and their airspace, bed and subsoil.[108]

The areas of the Northwest Passage narrower than 24 nm, as measured from lawfully drawn baselines, fit squarely within the definition in the Law of the Sea Convention as a strait used for international navigation since the Passage connects one part of the high seas or EEZ to another part of the high seas or EEZ.[109] Before we turn to the implications of this conclusion, including the obligations of both coastal states as well as maritime states, it is useful to cover a few additional rules that apply to straits.

There are a few additional rules that apply to transit passage through international straits. First, areas of the Northwest Passage in which the strait is more than 24 nm wide, as measured from lawfully drawn baselines, would constitute a geographic but not juridical international strait. In such cases, a corridor or route through the high seas or EEZ in that area creates an "exception" to the regime of transit passage in that complete high seas freedoms, rather than the more limited transit passage regime, would apply to those areas.[110] The Taiwan Strait is an example of a high seas corridor running through a geographic strait, obviating the need for applying the rules of transit passage regime in those areas in which the territorial seas on each side of the strait do not overlap. Second, transit passage does not affect the legal regime in straits in which passage is regulated by "long-standing international conventions in force" that specifically relate to such straits.[111] There is no such convention governing the Northwest Passage, but an example of such a convention is the Montreux Convention of 1936, which contains provisions governing the Bosporus and Dardanelles, forming the Turkish Straits. Third, no

[106] Note that the Law of the Sea Convention does not affect additional rules for specific historic straits established under long-standing international conventions relating to such straits. See Article 35(c), Law of the Sea Convention.
[107] Article 44, Law of the Sea Convention.
[108] Article 34(1), Law of the Sea Convention.
[109] Article 37, Law of the Sea Convention.
[110] Article 36, Law of the Sea Convention.
[111] Article 35(c), Law of the Sea Convention.

right of transit passage exists through a strait that contains a route through the high seas or EEZ that is of similar convenience to the strait, so long as the alternative route meets the test with respect to navigational and hydrographical characteristics.[112] This last provision is unlikely to have much effect in application through the Passage, however. The entire purpose of transiting the Northwest Passage is to take advantage of a transcontinental route that is superior to other alternatives. Even if the provision were to apply, it would not permit more than slight detours through the passage since this special consideration still preserves the right of freedom of navigation and overflight and the alternatives must offer similar convenience. Fourth, there is a "dead-end strait" exception, which applies to geographic circumstances in which high seas or EEZs connect with the territorial seas of a state by means of a strait bordered by one or more straits.[113] Ships entering the state in the "cul-de-sac" at the end of the strait are entitled to non-suspendable innocent passage so that the port state is not "landlocked" with a territorial sea leading to nowhere.[114] Freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of a strait does not preclude passage through the strait for the purpose of entering, leaving, or returning from a state bordering the strait, subject to conditions of port entry set by the state.[115] Fifth, transit passage does not apply in straits that are formed by an island of the state bordering the strait and its mainland and where there exists seaward of the island a route through the high seas or EEZ of similar convenience with respect to navigational and hydrographical characteristics.[116] This provision might be of value for Canada to use to make minor adjustments in the routing of particular legs through the passage that cut between the mainland and individual islands, but it would not support a claim that had the practical effect of restricting or redirecting traffic more generally.

Ships and aircraft exercising the right of transit passage through or over a strait are required to proceed without delay.[117] Vessels and aircraft also shall refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of states bordering the strait. These obligations reflected in the Law of the Sea Convention replicate general duties contained in the U.N. Charter.[118] Ships and aircraft also shall refrain from

[112] Article 36, Law of the Sea Convention.
[113] Article 38(1) and 45(1)(b), Law of the Sea Convention.
[114] See, e.g., Rear Admiral William L. Schachte, Jr., International Straits and Navigational Freedoms, Remarks prepared for presentation at the 26th Law of the Sea Institute Annual Conference, Genoa, Italy, 22–26 June 1992, pp. 12–13 and p. 18, available at: http://www.state.gov/documents/organization/65946.pdf. The classic example of the dead-end strait is Harbor Head Passage.
[115] Article 38(2), Law of the Sea Convention.
[116] Article 38(1), Law of the Sea Convention. The Strait of Messina, bordered by Sicily and Calabria, Italy, is the classic example of this exception.
[117] Article 39(1)(a), Law of the Sea Convention.
[118] Article 39(1)(b) and Article 2(4), United Nations Charter.

activities except for those incident to normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.[119] Ships have the obligation to comply with generally accepted international regulations and practices for ensuring the safety of life at sea, including the International Regulations for Preventing Collisions at Sea (COLREGs). While conducting transit passage, ships also shall comply with generally accepted international regulations and practices for the prevention, reduction, and control of pollution from ships.[120] Civil aircraft are bound to adhere to Rules of the Air established by the International Civil Aviation Organization (ICAO).[121] The ICAO Convention does not apply to state aircraft, which includes those used in military, customs and police services.[122]

Coastal states that border international straits benefit from a number of provisions that help them better manage their responsibilities and protect their natural resources. These provisions permit states bordering straits to exercise a degree of control, with the important stipulation that the rules must be in accord with international standards and applied in a manner that is nondiscriminatory. First, states bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in the straits when such regulations are necessary to promote the safe passage of ships.[123] These regulations must be in conformity with generally accepted international regulations in order to prevent straits states from imposing excessive or unreasonable requirements on international shipping.[124] Additionally, state vessels, such as Coast Guard vessels and Navy vessels, are exempt from such regulations.[125] Before states bordering straits may designate or prescribe regulations, however, they shall refer their proposals to the International Maritime Organization for adoption.[126] Once the IMO has adopted the proposals and they are duly designated and publicized by the state bordering the strait, ships in transit passage have a duty to respect the sea lanes and traffic separation schemes.[127]

Within some limitation, states bordering straits may adopt additional laws and regulations relating to transit passage through straits. In addition to the authority to adopt laws relating to the safety of navigation and to institute traffic separation schemes, states bordering straits have several authorities to help to protect and preserve the ocean environment. State provisions may prevent, reduce,

[119] Article 39(1)(c), Law of the Sea Convention.
[120] Article 39(2) (b), Law of the Sea Convention.
[121] Article 39(3), Law of the Sea Convention.
[122] Article 3, International Convention on Civil Aviation, available at: http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf.
[123] Article 41(1), Law of the Sea Convention.
[124] Article 41(3), Law of the Sea Convention.
[125] The flag State of a ship entitled to sovereign immunity which acts in a manner contrary to such laws bears "international responsibility for any loss or damage" which results to the States bordering straits. Article 42(5), Law of the Sea Convention.
[126] Article 41(4), Law of the Sea Convention.
[127] Article 41(7), Law of the Sea Convention.

and control pollution by giving effect to international regulations regarding "discharge of oil, oily waste and other noxious substances" in the strait.[128] This provision permits regulation solely of vessel discharge that already is regulated by international instruments and does not entitle the state bordering the international strait to develop regulations relating to CDEM. States bordering straits also may adopt laws and regulations relating to fishing and the stowage of fishing gear and a wide range of customs, fiscal, immigration, and sanitary laws and regulations to enhance state security and better protect the public health.[129] Foreign ships exercising the right of transit passage shall comply with all of these regulations, but the regulations must not discriminate in form or in fact among foreign-flagged vessels.[130] Moreover, the application of such laws and regulations shall not have the practical effect of denying, hampering, or impairing the right of transit passage.[131] Last, unlike innocent passage through territorial seas, states bordering international straits may not suspend transit passage.[132]

Conclusion: Considering the Malacca Straits Model

Some Canadian authors appear somewhat nonplussed at the lack of acceptance of Canada's sovereignty over the passage, particularly by the United States. There is the view that the United States may not fully appreciate the benefits to the United States of Canadian sovereignty over the Arctic and that the United States does not realize the potential impact on North American safety and security arising out of increased and unimpeded international shipping through the passage. This view undervalues concerns among other maritime powers over the negative precedent for worldwide freedom of the seas arising from unilateral assertions of excessive claims. For the United States in particular, maintaining a stable regime that ensures global maritime maneuverability and mobility is considered a cornerstone of the nation's economic and national security.[133]

Prior to 1982, the legal status of international straits was controversial. In one example, Malaysia and Indonesia sought to claim the Strait of Malacca as territorial waters.[134] At the time, the United States and other maritime states, including our Cold War adversary, the Soviet Union, as well as Japan and the United Kingdom, were worried that straits states may begin to try to limit ton-

[128] Article 42(1)(b), Law of the Sea Convention.
[129] Article 42(1)(c) and (d), Law of the Sea Convention.
[130] Article 42(2) and (4), Law of the Sea Convention.
[131] Article 42(2), Law of the Sea Convention.
[132] Article 44, Law of the Sea Convention.
[133] See, e.g., The White House, United States of America, National Strategy for Maritime Security (September 2005), which says, "*preserving freedom of the seas is a top national priority.*" (italics in original) *Id.* at p. 7. See also, *Id.*, at pp. 2, 8, available at: http://www.whitehouse.gov/homeland/maritime-security.html.
[134] William D. Hartley, "When is a Strait International, When Territorial? No One is Quite Sure, and Therein Lies a Dispute," The Wall St. J., 30 November 1972, p. 40.

nage through the straits, stop traffic or impose tolls for passage, or even close the straits in some extreme cases. If the waters of the strait were determined to be territorial waters, submarines could be required to surface and civil and military aircraft could be denied passage. Of course, Malaysia and Indonesia and other straits states, including Canada, ultimately accepted the careful balance of equities between straits states and the international community that is reflected in the Law of the Sea Convention. Leveraging the full extent of authorities for straits states in the Law of the Sea Convention, the states bordering the Straits of Malacca and Singapore continue to work through the IMO to accomplish their legitimate interests in safety, security, and environmental protection. At the same time, states regularly using the straits and international shippers both have been supportive of these efforts to make the transit safer and more efficient.

Over the last decade, in particular, the littoral straits states of Indonesia, Singapore, and Malaysia (the Straits States) have gained international acceptance for instituting real improvement in the Straits of Malacca and Singapore (the Straits). After close work among states bordering the straits, industry bodies, and maritime states, the IMO adopted amendments to refine the routing measures and the traffic separation scheme in the Straits of Malacca and Singapore to improve vessel safety.[135]

In 2005, 31 user states and the three Straits States met in Jakarta, Indonesia to develop further improvements in the management of the Straits. The "Jakarta Initiative" launched a program of regular meetings and increased cooperation among littoral Straits States, user states, the international shipping industry and non-governmental organizations.[136] The three Straits States pledged to increase cooperation and share information, and the user states expressed a willingness to assist the Straits States in providing technical support and building capacity for ensuring the safety, security, and environmental protection of the Straits. The Straits States will cooperate more closely to increase maritime patrols through the Straits and the user states are focusing on providing training and equipment. The agreement in Jakarta was groundbreaking in developing a framework for cooperation among stakeholders in the Straits of Malacca and Singapore. A follow-up meeting was held in Kuala Lumpur.[137]

Throughout this process, the IMO established a mandatory ship reporting system in the Straits for vessels 300 tons and above.[138] The IMO, the user

[135] "Routeing Measures other than Traffic Separation Schemes," SN/Circ.198, 26 May 1998, available at: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8752/198.PDF.

[136] Kuala Lumpur Statement on Enhancement on Safety, Security and Environmental Protection in the Straits of Malacca and Singapore, September 20, 2006, available at: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D15677/kualalumpurstatement.pdf.

[137] See UN doc. A/61/584, Nov. 17, 2006 for a report of the Kuala Lumpur meeting.

[138] "Mandatory Ship Reporting Systems," SN/Circ.201, 26 May 1988, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8753/201.PDF. Warships and other government vessels normally comply with such rules, so long as they are consistent with the Law of the Sea Convention. Articles 29–32, Law of the Sea Convention.

states, and the Straits States have worked together to enhance maritime domain awareness in the Straits. One of the primary components of this effort is the Marine Electronic Highway (MEH) project. The MEH project partners the Straits States with assistance from the United States and the United Kingdom, under the auspices of the IMO.[139] It couples emerging information technology and electronic charts with real-time communications to promote safer navigation and protection of the marine environment.[140] The project is focused on provision of real-time navigation information, tide and current data, and establishing Automatic Identification System (AIS) shore stations. During one of the first demonstrations, more than 60 oil tankers were outfitted with an advanced Electronic Chart and Display and Information System (ECDIS).[141]

The work of the IMO in the Straits is directly promoting sustainable development and environmental preservation. The IMO submitted the MEH project as a signature accomplishment for strengthening partnerships in support of Agenda 21, the capstone document adopted at the United Nations Conference on Environment and Development, also known as the "Earth Summit," in 1992.[142] Along with the Rio Declaration, Agenda 21 was one of the five major agreements to be adopted by the 178 countries represented in Rio de Janeiro.[143] In 2002, the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, brought together more than 100 heads of state and nearly 25,000 governmental, business, and NGO representatives at the Sandton Convention Centre to move toward a strategy for implementing Agenda 21.[144]

The multilateral approach, which is successfully being applied in one of the busiest international straits on the planet, is an ideal model for the Northwest Passage, the world's longest and perhaps most environmentally sensitive international strait. It has been more than a decade since Oran Young asked

[139] Marine Electronic Highway in the Straits of Malacca and Singapore, available at: http://webapps01.un.org/dsd/partnerships/public/partnerships/131.html.

[140] Koji Sekimizu, The Marine Electronic Highway in the Straits of Malacca and Singapore, Tropic Coasts (July 2001) at pp. 24–31, available at: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D3668/marineelectronichighwayarticle.pdf. The system utilizes the Electronic Navigation Chart—Electronic Chart Display and Information System (ENC-ECDIS). The original ECDIS testbed was conducted at the Woods Hole Oceanographic Institution nearly fifteen years ago.

[141] Electronic Highway Project Takes Major Step Forward," IMO News, no. 2 (2002), at p. 35, available at: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D5716/issue2.pdf.

[142] International Maritime Organization submission, Marine Electronic Highway in the Straits of Malacca, Partnerships/initiative to Strengthen Implementation of Agenda 21, available at: http://www.un.org/jsummit/html/sustainable_dev/p2_managing_resources/marine_electronic_imo_0207.pdf.

[143] Agenda 21 is a blockbuster 40-chapter volume spanning 800 pages of goals and potential programs outlining sustainable development for the world. The full text of Agenda 21 is available on the Internet website of the UN Department of Social and Economic Affairs (http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm) (last visited Nov. 19, 2004).

[144] Paul Wapner, World Summit on Sustainable Development: Toward a Post Jo-burg Environmentalism, vol. 3 no. 1 Global Environmental Politics, pp. 1–10, at pp. 1–2 (Feb. 2003).

whether Arctic issues generally would be addressed within the local geographic context, posing a distinct set of problems and opportunities, or whether instead the region was peripheral to larger global politics. Canada, he suggested, was more inclined to view the Arctic as a distinctive outpost; the United States, by contrast, as a superpower with global interests, could be expected to respond skeptically to arguments emphasizing the distinctiveness of the Arctic.[145] The answer, of course, is that the Arctic has special geographic, ecological, and cultural features that make it distinct. At the same time, no area is disconnected in the contemporary age, and regional approaches do not unfold in a vacuum.

In the era of globalization, the multilateral successes in the Straits of Malacca and Singapore provide a framework for promoting Canada's goals of preserving the fragile Arctic environment, maintaining maritime domain awareness in Arctic waters and exercising appropriate jurisdiction and oversight over the Northwest Passage. This approach would open the door to widespread international recognition of Canada's status as a strait state and attract support for appropriate measures to protect the Arctic ecosystem, ensure Canadian security and sovereignty, and promote safe navigation through designated routes through the vast northern expanse. Doing so would achieve a major success for Canada and would offer the best means for Canada to achieve its goal of obtaining widespread international acceptance of Canadian prerogatives in the maritime Arctic.

[145] Oran R. Young, The Arctic: Distinctive Region or Policy Periphery? In Arctic Politics: Conflict and Cooperation in the Circumpolar North ((Hanover, N.H.: University Press of New England, 1992) at pp. 231–234.