1987

Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage

Nicholas C. Howson

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage, 26 Colum. J. Transnat'l L. 337 (1987)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage

The object in annexing these unexplored territories to Canada is to prevent the United States from claiming them, and not from the likelihood of their proving of any value to Canada.¹

—Late 19th century memorandum by a British colonial official.

Of course we recognize Canada’s sovereignty. At the same time, there are problems about straits and passages that are important to us.²

—U.S. Secretary of State George Shultz.

I. INTRODUCTION

On January 11, 1988, fast upon the heels of an historic Free Trade Agreement, Canada and the United States signed a four-clause Agreement on Arctic Cooperation (the Agreement).³ Initialed by the Canadian Minister of External Affairs and the U.S. Secretary of State, the Agreement purported to calm a turbulent aspect of the two North American neighbors’ generally harmonious relationship: the long-running dispute over the legal status of the Northwest Passage (the Passage) and the waters of the Arctic archipelago. The Agreement formally requires the United States to seek the consent of the Canadian government when sending U.S. icebreakers through the Passage.⁴ However, the Agreement does not attempt to resolve the long-

⁴. This is specifically aimed at remedying the Polar Sea incident, discussed infra text accompanying notes 7-21. The Agreement states:

standing difference in legal positions on the question of sovereignty over the waterways of the Arctic archipelago. Thus, as has been the case for several decades, the United States continues to maintain that the Passage is an international strait, while Canada declares it and all the waters of the Arctic archipelago to be "internal waters." Furthermore, under the Agreement, both nations reserve the right to take the dispute to international arbitration or the International Court of Justice (ICJ).

Sections II and III of this note examine in some detail the background of the Northwest Passage controversy, particularly the Canadian and American positions as they have evolved over time. Sections IV and V undertake a critical analysis of Canadian and American legal claims and the theories underlying them. Given crucial flaws in those divergent legal positions, Section VI argues for a bolder agreement on the Northwest Passage and Arctic waters that takes full account of the law of the sea, Canadian sovereignty concerns, and U.S. security interests.

II. THE POLAR SEA CONTROVERSY

The Agreement represents the culmination of negotiations trig-

The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.

Agreement on Arctic Cooperation, supra note 3, clause 3, para. 3. As the Canadian Minister of External Affairs said, several weeks before the signing, the Agreement is designed to ensure "there will be no more Polar Sea's." Arctic Access Deal Nears Signing, Canadian Press dispatch, Dec. 31, 1987 (copy on file with the Columbia Journal of Transnational Law, courtesy of Canadian Consulate, New York). The Minister's confidence may be misplaced: a close reading reveals that the U.S. undertakes to obtain consent from Canada, not prior consent.

5. Nothing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Government 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.

Agreement on Arctic Cooperation, supra note 3, clause 4. This was reaffirmed in the press conference after the signing when Canadian Minister of External Affairs Joe Clark stated:

This agreement is a particular practical step that leaves the differing views of Canada and the United States on the question of sovereignty intact. The United States has its view. We have a different view. They have not accepted our view. They have not accepted theirs.

Shultz Won't Budge on Acid Rain Issue, supra note 3, at A2, col. 1. For the United States, President Reagan was quoted as saying that the Agreement "is without prejudice to our respective legal positions and it sets no precedent for other areas." U.S.-Canada Treaty Doesn't Recognize Arctic Sovereignty, Gazette (Montreal), Jan. 12, 1988, at A2, col. 1. Thus, as Canadian officials admitted, Canada at most gained "de facto but not de jure" acknowledgement of its sovereignty. Deal with U.S. on Arctic Sailing Will Be Signed Soon, Clark Says, Globe and Mail, Dec. 12, 1987, at A1, col. 2.

6. See infra text accompanying notes 137-167 for a discussion of the U.S. position, and text accompanying notes 84-136 for an examination of Canadian claims.
gered by the voyage of a U.S. Coast Guard icebreaker. On August 1, 1985, without consulting Canada, the Polar Sea left Thule, Greenland to traverse the Arctic’s Northwest Passage to Point Barrow, Alaska.\(^7\) The vessel, one of the two largest polar icebreakers in the world outside of the Soviet fleet,\(^8\) entered Alaskan waters ten days later,\(^9\) after facing six feet thick ice sheets which slowed the 60,000 horsepower ship to a meager two knots.\(^10\) The Canadian government granted an unsolicited “authorization” for the voyage the evening before the Polar Sea’s departure, making clear that “the waters of the Arctic archipelago, including the Northwest Passage, are [the] internal waters of Canada and fall within Canadian sovereignty.”\(^11\)

The Canadian announcement noted that although the United States had “made known that it does not share Canada’s view regarding the status of these waters, it [had] assured the Government of Canada that the purpose of the voyage [was] solely operational . . . [and] . . . without prejudice to the position of either country regarding the Northwest Passage.”\(^12\) In addition, the statement declared that the Polar Sea complied “with standards substantially equivalent to those prescribed under Canadian regulations” as required by the Canadian Arctic Waters Pollution Prevention Act (AWPPA),\(^13\) that Canadian observers would be on board, and that Canadian military

\(^7\) “Passage” is a misnomer. In reality, the “Northwest Passage” through the archipelago of islands north of the Canadian mainland consists of eight different routes, only two of which are suitable for navigation by deep draft ships. See Figure 1, overleaf; Pullen, What Price Canadian Sovereignty?, PROCEEDINGS, Sept. 1987, at 66, 68-70. The most navigable route stretches from Davis Strait (between Greenland and Baffin Island) in the Eastern Arctic, west through Lancaster Sound, Barrow Strait and Viscount Melville Sound, southwest through Prince of Wales Strait (between Banks and Victoria Islands) and finally along the northern coast of the mainland into Prudhoe Bay in the Beaufort Sea. See O’Brien & Chapelli, The Law of the Sea in the “Canadian Arctic,” 19 MCGILL L.J. 477, 517 (1973). It is this route that the Polar Sea followed during its August, 1985 voyage, thereby avoiding the heavy ice that obstructs the other major deep-draft route, through M’Clure Strait north of Banks Island.


\(^10\) Id. at 18.

\(^11\) Id. at 2. A U.S. Coast Guard spokesperson declared that the purpose of the voyage was not to challenge Canada’s sovereignty but merely to traverse a shorter route to the U.S. west coast than through the Panama Canal. See The New Race for the North, supra note 9, at 18. This is analogous to the U.S. position at the time of the Manhattan crossing in 1970, when the U.S. Department of State informed Canada that it “had no intention of staking a claim to the Northwest Passage,” and was merely undertaking a “feasibility study.” Oil Stirs Concern Over Northwest Passage Jurisdiction, N.Y. Times, Mar. 15, 1969, at 12, col. 1. See infra text accompanying notes 61-62.

\(^12\) Arctic Waters Pollution Prevention Act, CAN. REV. STAT. ch. 2 (1st Supp. 1970) [hereinafter AWPPA]. For the background to its enactment, see infra text accompanying
Despite the tone of Canada's announcement, her politicians were outraged by the *Polar Sea*’s successful transit. Prime Minister Brian Mulroney forcefully asserted that the Passage “belongs to Canada lock, stock, and barrel.” More substantively, on September 10, 1985, Joe Clark, Canada’s Minister of External Affairs, rose in the House of Commons to propose actions designed to reinforce Canada’s claim to the waters of the Arctic archipelago, while simultaneously emphasizing Canadian willingness to bring the dispute before the ICJ. Declaring that “the policy of this government is to exercise Canada’s full sovereignty in and over the waters of the Arctic archipelago,” Mr. Clark proposed six measures:

(1) The immediate adoption of an order-in-council, effective January 1, 1986, establishing straight baselines around the Arctic archipelago to define the outer limit of Canada’s “historic internal waters.”

(2) The immediate adoption of the Canadian Laws Offshore Application Act, designed to extend the application of Canadian civil and criminal law to offshore areas in the Arctic and elsewhere.

(3) Talks with the United States on co-operation in Arctic waters, “on the basis of full respect for Canadian sovereignty.”

notes 62-67. Section 12(1) of the AWPPA allows the Canadian government to set construction, equipment and staffing standards for Arctic-going vessels. Section 12(2) provides that:

The Governor in Council may by order exempt from the application of any regulations made under subsection (1) any ship or class of ship that is owned or operated by a sovereign power other than Canada where . . . satisfied that appropriate measures have been taken by or under the authority of that sovereign power to ensure the compliance of such ship, with, or with standards substantially equivalent to, standards prescribed by regulations . . .

AWPPA, *supra*, § 12(2).


(4) An increase of surveillance overflights of Arctic waters by aircraft of the Canadian Forces, and immediate planning for Canadian naval activity in the Eastern Arctic in 1986.

(5) The immediate withdrawal of the 1970 reservation to Canada's 1929 acceptance of the compulsory jurisdiction of the ICJ (which had barred the Court from hearing disputes that might arise concerning the jurisdiction exercised by Canada for the prevention of pollution in Arctic waters).

(6) The construction of a Polar Class 8 icebreaker and "urgent consideration of other means of exercising more effective control over our Arctic waters."\(^{18}\)

Clark concluded his speech with a ringing invitation to World Court litigation:

We challenge no established rights, for none have been established except by Canada. We set no precedent for other areas, for no other area compares with the Canadian Arctic archipelago. We are confident in our position. We believe in the rule of law in international relations. We shall act in accordance with our confidence and belief . . . . We are prepared to uphold our position in [the World Court], if necessary, and to have it freely and fully judged there.\(^{19}\)

Canadian reaction to the speech was enthusiastic and congratulatory,\(^{20}\) even though many warned that the measures had come too late.\(^{21}\)

Subsequently, the Canadian government introduced the Cana-

---

18. Clark Statement, supra note 17, at 1.
19. Id. at 4.
20. Typical was the lead column by Jeffrey Simpson on the editorial page of the Globe and Mail, English Canada's national newspaper of record. He exulted:

The Canadian Government has finally put its money where its mouth has been on Arctic sovereignty.

Twenty-two years after Prime Minister Lester Pearson announced that Canada would draw base lines around the Arctic archipelago—a crucial test of sovereignty—Canada has finally acted . . . .

[W]e've been waiting twenty-two years for this kind of action to force an end to the ambiguity in the Arctic.

Test of Sovereignty, Globe and Mail, Sept. 11, 1985, at 6, col. 1.

21. Jean Chrétien, previously Minister of External Affairs in the Trudeau government, who had also introduced the AWPPA in the House of Commons, summed up the Polar Sea voyage and subsequent governmental action: "My only objection is that [Clark's statement] is exactly three months too late . . . . Today [the Minister for External Affairs] rose in the House to propose a series of measures that would have been unnecessary if the government had been truly in control of the situation last summer . . . . Now that the horses have left, it is attempting to close the gate." CAN. H.C., DEBATES, Sept. 10, 1985, at 6464.
dian Laws Offshore Application Act\textsuperscript{22} into Parliament, explicitly asserting jurisdiction over offshore areas. The Act sought to replace section 5(3) of the Canadian Territorial Sea and Fishing Zones Act with a new clause giving Canada jurisdiction over historic waters within its newly-drawn baselines.\textsuperscript{23} In addition, the same Act would amend section 2 of the Northwest Territories Act so that the Canadian Northwest Territories are now defined to include "those portions of land territory and fresh waters of Canada . . . north of the sixtieth parallel"\textsuperscript{24} and "the waters of the Arctic archipelago."\textsuperscript{25}

In addition to the legislation asserting its sovereignty, the Canadian government acted on Clark's other proposed measures. It reaffirmed its commitment to the $450 million construction of the world's largest icebreaker;\textsuperscript{26} established an Arctic administrative region for

\begin{itemize}
\item 22. Canadian Laws Offshore Application Act, Bill C-104, House of Commons, 1\textsuperscript{st} Sess., 33d Parl., 1\textsuperscript{st} Reading, Apr. 11, 1986. The Bill was not passed into law, but may be re-introduced in subsequent sessions.
\item 23. "[B]aselines are the outer limits of any area, other than the territorial sea of Canada, over which Canada has historic or other title of sovereignty." Canadian Laws Offshore Application Act, \textit{supra} note 22, art. 16. The Cabinet order establishing straight baselines is at Territorial Sea Geographical Coordinates (Area 7) Order, P.C. Order 1985-2739, Sept. 10, 1985, SOR/85-872, \textit{reprinted in} 119 CAN. GAZ., part II, no. 20, at 3996.
\item 24. \textit{Id.} art. 14(2)(a) (emphasis added).
\item 25. \textit{Id.} art. 14(2)(c) (emphasis added). The day after the Bill's first reading, John Crosbie, then the Canadian Minister of Justice, explained the rationale behind the amendments:
\begin{quote}
We are going to include in the boundaries of the Northwest Territories the Arctic archipelago and the islands and all the waters in between those islands . . . because of the historical use of those waters and the ice, and what lives under and on the ice.
\end{quote}
\end{itemize}

Long thought to be the cornerstone of Canada's future exercise of sovereignty over Arctic waters, the Polar 8 icebreaker was originally proposed after the \textit{Manhattan} voyage in September, 1969. Plans envision a fossil-fuel ship able to penetrate ice eight feet thick, twenty-five per cent more powerful than the world's largest existing icebreaker, the Soviet Union's nuclear-powered \textit{Arktika}. It is expected that the Polar 8 will remain on patrol for 300 days a year, in contrast to Canada's largest existing icebreaker, the \textit{Louis St. Laurent}, which can only navigate the Northwest Passage between July and November. \textit{See Polar 8 Icebreaker Designed to Guard Arctic Sovereignty}, Globe and Mail, Sept. 12, 1985, at B1.

The Polar 8 was originally intended to escort oil tankers and other commercial craft through Northern waters. However, in the wake of the \textit{Polar Sea} incident, a secret memorandum delivered to the Canadian cabinet from the Department of External Affairs declared: "The commitment of funds, construction and deployment of the Polar 8 will be a dramatic signal to Canadians and to the rest of the world that the government is serious about Canadian
the Canadian Coast Guard;\textsuperscript{27} decided to maintain the nation’s first semi-permanent ice research station;\textsuperscript{28} undertook electronic surveillance experiments directed at underwater submarines;\textsuperscript{29} and increased the number of Canadian “show the flag” overflights from 16 to 20 per year.\textsuperscript{30} The Canadian Forces also announced the regular deployment of CF-18 fighter aircraft in the Arctic, and plans for three new airfields in the far North by 1992.\textsuperscript{31} The commanding officer of Canada’s North American Air Defense Command (NORAD) headquarters indicated that the new deployment was necessary because: “It is a simple statement of nationhood to know who is penetrating or probing your airspace. Having our fighters there is a demonstration of Canadian sovereignty.”\textsuperscript{32}

In the most dramatic move, Canada announced in June, 1987 that it would spend Can $10 billion over twenty years to buy up to twelve nuclear-powered submarines to enforce its claim to the Pas-
While receiving strong support in Canada, the proposed purchase has also been attacked by environmentalists and arms control groups. Ironically, because American technology is needed for the submarine fleet, the U.S. government may move to block crucial Canadian purchases from Britain and France.

The Canadian government proved to be as serious in its determination to seek a resolution at the World Court as in its quest to exercise more effective control over Arctic waters. On September 10, 1985, Canada's Ambassador to the United Nations formally withdrew his government's 1970 reservation to ICJ jurisdiction, which had denied the Court's ability to hear disputes arising from Canada's uni-

---


34. See, e.g., Rearmimg Canada, Globe and Mail, June 6, 1987, at D6, col. 1.


Notwithstanding the technical and political difficulties, Canada's proposed use of nuclear submarines to patrol the Arctic is deemed important legally as well as militarily. As the Canadian Defense Ministry White Paper explained: "The military role in sovereignty is that of the ultimate coercive force available when the capabilities of the civil authorities are inadequate to enforce Canadian laws and regulations or when Canada's right to exercise jurisdiction is challenged by other states." Defense White Paper, supra note 26, at 23-24.

The Canadian Defense Minister has stated that Canada would never torpedo a U.S. submarine in waters it claims as its own, even if the vessel refused to leave. Instead, the Canadian submarine would track the foreign submarine to collect evidence of the intrusion to take to the ICJ. Subs Viewed as Ultimate Force, supra note 33.

38. Letter from Ambassador Lewis to the Secretary-General, Sept. 10, 1985, reprinted in 24 I.L.M. 1729-30 (1985). The original reservation sought to avoid ICJ jurisdiction over:

[Disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management and exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.


The Canadian government continued to threaten recourse to the ICJ even during the negotiations that led up to the present Agreement. In April, 1987, the Canadian Minister of External Affairs declared in Parliament: "We are trying to work out an arrangement which will . . . involve a mutual respect for sovereignty but will also take account of other interests. If that fails, we will be prepared, if challenged, to go to the International Court of Justice." Can. H.C., Debates, Apr. 7, 1987, at 4927.
lateral extension of jurisdiction over pollution prevention to 100 miles off its coast, as embodied in the AWPPA of 1970.

Finally, the United States and Canada commenced serious negotiations which, bolstered by a summit meeting, resulted in the Agreement signed two and one half years later. However, the negotiations did not produce what the Canadians, in the words of the Leader of the Opposition, wanted most urgently: "[A]n unconditional commitment from the President of the United States recognizing in clear terms Canada’s sovereignty over our Arctic, our waters, our land and our air—complete sovereignty, unequivocal and unchallenged." In fact, Secretary of State George Shultz indicated clearly that such a position would not be included in any future agreement. Asked if the United States would ever consider conceding sovereignty over the disputed waters in exchange for blanket permission for travel there by U.S. warships and submarines, the Secretary replied with a firm no.

III. HISTORICAL AND LEGAL BACKGROUND

The voyage of the *Polar Sea* was not the first American action to be viewed by Canada as a challenge to its sovereignty over the Northwest Passage, nor was Canada’s reaction to the incident unique. Both events were strikingly similar to the September, 1969 voyage of the U.S. oil tanker *Manhattan* and the response of Canada’s then-Prime Minister Trudeau and his government. At the base of both incidents lies a dispute which, while often cloaked in the mantle of international law, is influenced by geopolitics, nationalism, powerful commercial interests, and rapidly advancing technology.

No nation, including the United States, challenges Canada’s territorial sovereignty over the ice-covered islands of the Arctic archipelago. The theories invoked to support Canada’s claim are discovery,
acquisition by treaty and effective occupation. In this legal context, the most important historical events are the 1869 purchase of "Rupert's Land," the Arctic explorations of Canadian explorer Captain J.E. Bernier between 1884-86, and the British government's grant to the newly constituted Dominion of Canada of "all the British possessions on the North American continent, not hitherto annexed to any colony" on July 31, 1880. The Permanent Court of International Justice's ruling in the Eastern Greenland Case, that settlement or local administration are not necessarily required for the exercise of sovereignty over uninhabited territory, further strengthened Canada's claim.

Thus, in his 1970 statement on Arctic sovereignty, Prime Minister Trudeau was able to say: "Canada's sovereignty over . . . the islands of the Arctic archipelago, is well established and . . . there is no dispute concerning this matter." Minister of External Affairs Clark echoed that certainty in his September 10, 1985 statement, flatly asserting: "The international community has long recognized that the Arctic mainland and islands are a part of Canada like any


The sector theory, once invoked and repudiated by equal numbers of Canadian politicians, has finally been put to rest. As described by Professor Head, it allowed a claim of sovereignty over both land and water in a given "sector" which was:

[C]ompounded of only two ingredients: a base line or arc described along the Arctic Circle through territory unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic pierced by the state.

46. Head, supra note 45, at 211-12.


48. Position Respecting Arctic Archipelago, Continental Shelf and Inter-Island Waters, CAN. H.C., DEBATES, May 15, 1969, at 8720. The Prime Minister declined to make the same claim regarding the water between the islands.
other." Instead, the controversy—solely between the United States and Canada—has raged over the status of the passageways and straits that cut between these Canadian islands. A quarter-century ago, the Arctic waters sovereignty dispute could be characterized as a "fascination which attracts international lawyers." Only recently have demands for the right of innocent passage through the Arctic waters become of more than academic interest.

A. Strategic and Commercial Interests

The discovery of oil at Prudhoe Bay, Alaska in the summer of 1968, and the anticipation of similar finds in the Canadian sector of the Beaufort Sea, summarily shattered what might otherwise have been solely an academic dispute. Should navigation through it become feasible, the Northwest Passage would be the shortest route between Alaskan oil fields and the markets or refineries of Europe and the east coast of the United States. Canadian concern over increased commercial navigation of the Northwest Passage was heightened by the Manhattan incident and led directly to the enactment of the Arctic Waters Pollution Prevention Act. In the wake of the Polar Sea's 1985 transit, commercial concerns served as one of the major rationales for Canada's perceived need "to exercise . . . control over the Northwest Passage and [the] other Arctic waters."

49. Clark Statement, supra note 17, at 2.
50. Prime Minister Trudeau, formerly a law professor, admitted this in 1969:

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. The law of the sea is a complex subject which, as can be understood, may give rise to differences of opinion.

51. Head, supra note 45, at 220.
52. Oil Stirs Canadian Concern Over Northwest Passage Jurisdiction, N.Y. Times, Mar. 15, 1969, at 12, col. 1. A recent conservative estimate held that the Arctic Basin might have as much as twenty-five times the reserves presently known to exist in the North Sea. See The Polar Regions, N.Y. Times, Dec. 8, 1985, § 6 (Magazine) at 44, 45. 8.5 billion barrels of oil are thought to be in the Beaufort Sea alone, with 65 trillion cubic feet of natural gas throughout the High Arctic. See A Questionable Claim, supra note 1, at 21. The U.S. Department of the Interior recently announced plans to develop an area of 1.5 million acres just east of Prudhoe Bay for oil production. The government estimates that up to 9.2 billion barrels of oil are recoverable from the area. See U.S. Proposing Drilling for Oil in Arctic Refuge, N.Y. Times, Nov. 27, 1986, at A1, col. 1, A23, col. 1. Should this project go forward, it will only make the Northwest Passage an even more attractive and viable commercial route.

53. See Tanker Leaves to Conquer Fabled Northwest Passage, N.Y. Times, Aug. 25, 1969, at 1, col. 3; see also infra text following note 61.
54. AWPPA, supra note 13.
55. Clark Statement, supra note 17, at 2. Mr. Clark also reported:

Many countries, including the United States and the Federal Republic of Germany,
A second development that thrust the status of the Northwest Passage into the calculations of policy planners was also referred to in Mr. Clark's September 10, 1985 speech: "Soviet submarines are being deployed under the Arctic ice pack, and the U.S. Navy has in turn identified a need to gain operational experience to counter new Soviet deployments." This was the first explicit statement by any Canadian government regarding the presence of Soviet submarines in the Arctic, though defense analysts have long suggested that Soviet submarines regularly ply the waters there, and U.S. Navy officers admit that their own submarines have negotiated the passage—but will not say when or where. In an era of rapid technological advancement, with cruise missiles able to navigate over featureless Arctic terrain, an American Strategic Defense Initiative calling for "pop up" missile interception systems that can only be launched from the Arctic, and the new Soviet Typhoon class submarine able to smash through the ice pack and launch nuclear missiles, the Arctic is an increasingly important strategic theater. Just as the 1969 voyage of the Manhattan, an oil tanker, accentuated the commercial potential of the Passage, the transit of the Polar Sea, a Coast Guard vessel, increased Canadian fears of the Arctic becoming—in the words of one Canadian Member of Parliament—"the new battle line of fortress America toward the Soviet Union."
B. The Voyage of the Manhattan and the Enactment of the Arctic Waters Pollution Prevention Act

The September, 1969 experimental transit of the Passage by the Manhattan, an American oil tanker carrying a cargo of water, touched off the first major clash between the United States and Canada over the Arctic waters. Although the Manhattan made its round-trip voyage with the co-operation of the Canadian government and the aid of a Canadian icebreaker, it caused a rush of popular anxiety among Canadians. The likelihood that the Passage would become a commercially navigable route cast doubt both on Canada's claims to exclusive jurisdiction over the waters and on its ability to enforce those claims. In addition, concern was voiced about the potential for massive oil spills in the delicate Arctic environment and Canada's inability to take preventive protection measures, as opposed to after-the-fact damage control.

The Canadian government's reaction was not explicitly to assert sovereignty over the waters of the Arctic archipelago, nor declare that they were "internal" or "historical" waters, but to pass two bills—the Arctic Waters Pollution Prevention Act (AWPPA), which sought to unilaterally claim competence to regulate shipping in zones up to 100 miles north of Canadian Arctic coasts, and a bill extending Canada's territorial sea from three to twelve miles. The AWPPA represented the broad assertion of a new kind of jurisdiction under international law that Canada justified on the basis of the Arctic's unique environment, both in terms of the hazards of navigation and the ecological effect of oil spills, and the protection of her national security interests. Aware that the principle of the legislation might not be defen-

experiments thought to be linked to anti-submarine warfare operations. The New Race for the North, supra note 9.

62. Concern was especially keen in Canada when in February, 1970 a Liberian oil tanker, the Arrow, went aground in Chedabucto Bay, Nova Scotia, causing extensive pollution damage. See Morin, Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Artique, 8 CAN. Y.B. INT'L L. 158, 206-08 (1970).

63. AWPPA, supra note 13.


65. The Canadian Note in response to the U.S. State Department note of protest stated: Traditional principles of international law . . . are peculiarly irrelevant . . . to an area having the unique characteristics of the Arctic, where there is an intimate relationship between the sea, the ice and the land, and where the permanent defilement of the environment could occur and result in the destruction of whole species. CAN. H.C., DEBATES, Apr. 17, 1970, at 6028 (tabled in the House of Commons) [hereinafter Canadian Note].

66. Id. at 6027. For an articulation of the two-pronged theoretical basis for the AWPPA, see Gotlieb & Dalfen, National Jurisdiction and International Responsibility: New Canadian
sible under international law at that time, Canada submitted to the United Nations a declaration amending its article 36(2) acceptance of the compulsory jurisdiction of the ICJ and denying the Court’s jurisdiction over any disputes that might arise because of enforcement of the legislation.67

In light of the Polar Sea transit and the recent Agreement, it is interesting to note that in 1969 the Canadian government’s position merely recognized its claim that the waters of the Arctic archipelago were “internal,” but emphasized that such a claim was not the legal basis for its extension of jurisdiction. Thus, as Canadian officials acknowledged at the time, the AWPPA was used by Ottawa to make an oblique claim of sovereignty over the Arctic waters in such a way as not to antagonize or provoke denials from other maritime nations.68 Mitchell Sharp, Minister of External Affairs in the Trudeau cabinet, articulated Canada’s position during the House debates following the introduction of the Bills:

[C]anada has always regarded the waters between the islands of the Arctic archipelago as being Canadian waters. The present government maintains that position . . . . This exercise of jurisdiction for the purposes of pollution control can in no way be construed to be inconsistent with a claim of sovereignty over the waters between the islands or otherwise . . . .

[T]he Arctic waters bill represents a constructive and functional approach to environmental preservation. It asserts only the limited jurisdiction required to achieve a specific and vital purpose. It separates a limited pollution control jurisdiction from the total bundle of jurisdictions which together constitute sovereignty.69

Then-Prime Minster Trudeau compared the partial jurisdiction the Canadian government envisioned with the non-exclusive jurisdiction


67. See Canadian Declaration, supra note 38; see also supra text accompanying note 38.


69. CAN. H.C., DEBATES, Apr. 16, 1970, at 5948, 5949, 5951. Prime Minister Trudeau elaborated at a press conference:

[I]t is not an assertion of sovereignty, it is an exercise of our desire to keep the Arctic free of pollution and by defining 100 miles as the zone within which we are determined to act, we are indicating that our assertion is not one aimed towards sovereignty but aimed towards one of the very important aspects of our action in the Arctic.

over seas gained by the United States as a result of President Truman's Continental Shelf Doctrine:

[T]he distinction between the absolute claim of sovereignty which means that you own everything, the land, the water, the resources in the water and so on, which is the case for the international [sic] waters of any nation—this is the sovereignty aspect of it—against the other aspect which is not an assertion of sovereignty, but an assertion of determination to control certain aspects of what is happening there.  

The U.S. government reacted to the introduction of the AWPPA with a diplomatic note entitled "U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction." Pointedly, the United States avoided any discussion of Canada's claim that the waters of the Arctic archipelago were "Canadian," and focused its attack on the unilateral nature of Ottawa's extension of jurisdiction, and the effect it would have on the freedom of the seas:

International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction. We are concerned that this action by Canada, if not opposed by us, would be taken as precedent in other parts of the world for the other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. Merchant shipping would be severely restricted, and naval mobility would be seriously jeopardized. The potential for serious international dispute and conflict is obvious.

Spokesmen for the State Department also reiterated the United States' basic policy: that coastal states could only establish a territorial sea of three miles, and some kinds of limited jurisdiction only up to twelve

---

72. The note attacked both extensions: the first, from three to twelve miles for the territorial sea, and the second, over all shipping in the Arctic waters for one hundred miles. Id. at 610.
73. Id. at 610-11. In addition, the statement "urged" that the dispute be taken to the ICJ. Id. at 611.
miles.74

The flood of literature that followed Canada's actions mirrored the emphasis of the official Canadian-American exchanges and focused on the unilateral nature of the Canadian moves, their effect on the formation of international law, and the extension of the "protective" jurisdiction doctrine to include pollution prevention.75 Some articles expressed concern that the Canadian actions would augment the Soviet Union's expansive claims in its own High Arctic.76 Somewhat surprisingly, a few voices in the American press wholeheartedly endorsed the Canadian legislation.77

The legal controversy, as framed in 1969-70, has grown less relevant with the adoption of the United Nations Convention of the Law of the Sea (UNCLOS)78 in 1982—in particular, with UNCLOS' recognition of a 200 mile exclusive economic zone for coastal states and its inclusion of article 234, the "ice-covered areas" provision.79 Article 234 grants coastal states the right to:

[A]dopt 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

75. See, e.g., Henkin, Arctic Anti-Pollution: Does Canada Make—or Break—International Law? 65 AM. J. INT'L L. 131 (1971). The author summed up:

Canada has struck a blow against pollution and for today's crusade for the environment, but it is a blow also at international law and its law of lawmaking. A blow at international law by Canada is perhaps the most unkindest cut of all; for if the Canadas[sic] teach that coastal states can decide where their interests must prevail over those of others, other coastal states, and non-coastal states too, will better the instruction.

Id. at 135.


77. See, e.g., Canada's Arctic Claims, N.Y. Times, Apr. 20, 1970, at 38, col. 2.
79. The "ice-covered areas" provision first appeared in the 1976 UNCLOS Negotiating Text, and was kept without change in the Texts of 1977, 1979 and 1980. See Pharand, La contribution du Canada au développement du droit international pour la protection du milieu marin: Le cas spécial de l'Arctique, 11 ETUDES INTERNATIONALAES (Quebec) 441 (1980), for a detailed description of how the provision was received at international meetings from 1971 to 1980. It is useful to note that the Soviet Union, with its own substantial claims to sovereignty in the Arctic (and its "Northeast Passage"), has consistently supported Canada's 1970 legislation.
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.\textsuperscript{80}

Article 234 explicitly legitimized the theory and scope of the AWPPA. Notwithstanding the United States' 1970 protest note to Canada,\textsuperscript{81} the United States did not cite article 234 as one of its reasons for not signing the Law of the Sea Treaty.\textsuperscript{82} Arguably, it has acquiesced to the Canadian assertion of pollution prevention jurisdiction in the Arctic. In any event, the existence of article 234 in UNCLOS is evidence that the Canadian concept has independently passed into the corpus of customary international law.\textsuperscript{83}

More importantly, Canada's unequivocal assertion of exclusive jurisdiction over Arctic waters in 1986 as "historic internal waters," and its drawing of baselines, has since overshadowed the "partial jurisdiction" claim of 1970. Thus, the more contentious "internal waters" claim, which neither Canada nor the United States chose to wrestle with in 1970, was finally brought to the forefront of the dispute.

IV. CANADA'S CLAIM

A. Introduction

The present Canadian claim to the exercise of exclusive sovereignty over its Arctic ocean space (and thus the Northwest Passage) has been articulated fully only once.\textsuperscript{84} In his September, 1985 speech

\begin{itemize}
  \item \textsuperscript{80} UNCLOS, \textit{supra} note 78, art. 234. The ice-covered areas provision exists independently of the rights of innocent passage (articles 17 to 32) and transit passage (articles 37 to 44), and is subject to its own less stringent standard of "due regard to navigation." \textit{Id}.
  \item \textsuperscript{81} U.S. Note, \textit{supra} note 71.
  \item \textsuperscript{83} This is the Canadian position. In his September 10, 1985 address, External Affairs Minister Clark stated: "To protect the unique ecological balance of the region, Canada also exercises jurisdiction over a 100-mile pollution prevention zone in the Arctic waters. This too has been recognized by the international community, through a special provision in the United Nations Convention on the Law of the Sea." Clark Statement, \textit{supra} note 17, at 2.
  \item \textsuperscript{84} The Canadian government had previously indicated, without elaboration, why it considered the waters internal. In a letter dated December 17, 1973, the Bureau of Legal Affairs of the Canadian Department of External Affairs declared: "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on an historical basis, although they have not been declared as such in any treaty or by any legislation." \textit{See} 12 CAN. Y.B. INT'L L. 277, 279 (1974). That unembellished statement was reiterated in a memoran-  
\end{itemize}
Joe Clark explained the theory behind Canada's assertion of sovereignty and its extent:

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. These 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 . . . . That sovereignty has long been upheld by Canada. No previous government, however, has defined its precise limits or delineated Canada's internal waters and territorial sea in the Arctic. This government proposes to do so. An order-in-council establishing straight baselines around the outer perimeter of the Canadian Arctic archipelago has been signed today . . . . These baselines define the outer limit of Canada's historic internal waters.85

The key phrase in this statement is "historic internal waters." With this formulation, it is clear that Canada views all of the waterways between the islands of the Arctic archipelago as subject to Canadian sovereignty on two distinct theories: first, because they are internal waters as subsequently defined by baselines (part of the "natural unity of the Canadian Arctic archipelago"), and second, because they are "historic waters" ("from time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land"). These theories will each be discussed in turn.

Clark's statement is also important for the assertion he did not make. Clark carefully did not point to the overlap of twelve mile territorial waters between the Arctic islands—the "gate of territorial waters" theory that was so often invoked as Canada's legal basis for controlling access to the Northwest Passage.86 Canada's current lack...
of interest in the “gate of territorial waters” theory is explained by the fact that it would still not allow Canada to exclude vessels like the Manhattan or the Polar Sea, which might justifiably have invoked the long-standing right of “innocent passage” through territorial waters, and because the United States does not recognize anything beyond a three mile limit territorial sea unless the foreign state “accord[s] to the U.S. its full rights under international law in the territorial sea”—which, among other things, includes “innocent passage.”

B. Straight Baselines

The so-called “straight baselines” approach to coastal delimitation was developed by Norway in Royal Decrees between 1812 and 1935, when the Norwegian government attempted to define an inner boundary to its territorial sea by drawing straight lines along the most seaward points on the islands off its fragmented and indented coast. In 1951, the ICJ upheld Norway’s 1935 Decree against a challenge by the United Kingdom, and declared the straight baseline method valid where three basic conditions were met:

[T]he drawing of base-lines must not depart to any appreciable extent from the general direction of the coast . . . . [C]ertain sea areas lying within these lines are suffi-
ciently closely linked to the land to be subject to the regime of internal waters . . .

[There are] . . . certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.90

The Court also emphasized that the delimitation applied by the Norwegian authorities was consistent and uninterrupted from 1869 to 1906, when the dispute arose,91 and that it had never provoked the opposition of foreign states, despite its “notoriety.”92 Importantly, the ICJ explicitly repudiated the British suggestion that there be a limit to the length of straight baselines.93 Lastly, the Court seemed to add a “historic waters” component to the third prong of its above-cited criteria (“economic interests . . . clearly evidenced by a long usage”). At the end of its opinion, the Court cited “historic title” and “ancient concessions,” which “lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom . . .”.94 The straight baselines method was codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (Geneva Convention), and in UNCLOS,95 both of which preserved almost the exact language of the three-part Norwegian Fisheries holding.

Canadian legal scholars had long advocated the drawing of straight baselines around the Arctic archipelago,96 as Jacques-Yvan

90. Id. at 133.
91. Id. at 138.
92. Id. at 138-39.
93. Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles. In this connection, the practice of States does not justify the formulation of any general rule of law . . . . Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection. Id. at 131.
94. Id. at 142. It concluded: “Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.” Id.
95. Geneva Convention, supra note 87, art. 4; UNCLOS, supra note 78, art. 7. This note’s analysis of the law of the sea regarding baselines draws on the identical articles in the Geneva Convention and UNCLOS.
96. The first and most important measure which Canada could take would be to establish straight baselines around the archipelago, in order to provide an adequate basis for its sovereignty claim over the waters within the baselines from which it would then draw its territorial waters. The baselines being established under customary international law, as applied by the Court in the Anglo-Norwegian Fisheries Case, Canada would be in a position to exercise appropriate control over all foreign shipping.
Morin wrote in 1970, "pour donner la consécration juridique à la réalité géographique." 97 One factor often invoked in favor of Canada's baseline drawing was that neither the Norwegian Fisheries case nor the 1958 or 1982 Conventions declared a maximum length for baselines. 98 However, Norwegian Fisheries laid out clear criteria for the validity of baselines, and Canada's recent efforts stretch the limits and application of the case to an extent probably not foreseen by the Court.

The first requirement is that the baselines not depart from the general direction of the coast. Prior to 1986, criticism directed against the very idea of baselines around the archipelago focused on the character of the area the Canadian government might seek to enclose. 99 Writers questioned whether the system conceived for the Norwegian coast would even be relevant in the case of a coastal archipelago:

The Canadian Arctic Archipelago can hardly be described as a "fringe of islands along the coast in its immediate vicinity," despite considerations of geographic scale, and [straight baselines would] depart to an "appreciable extent from the general direction of the coast." The description "where the coastline is deeply indented and cut into" would not seem to apply to an archipelago. 100

The second of the Norwegian Fisheries criteria is that certain areas be sufficiently "closely linked" to land to be "internal waters." Because the waters of the Arctic archipelago are often frozen, some Canadian

---

Pharand, Sovereignty, supra note 86, at 157. The Canadian press has implied a connection between Pharand's submission and Canadian actions after the Polar Sea voyage. See Globe and Mail, Sept. 11, 1985, at 5, col. 3.

Canadian politicians have also long agitated for the same step. For example, Prime Minister Trudeau was asked in the House of Commons: "When will baseline co-ordinates be drawn around the rim of the Arctic archipelago to enclose it, and when will maps be issued so that it will be clear to other nations where Canada's boundaries are?" CAN. H.C., DEBATES, May 15, 1969, at 8720. See also CAN. H.C., DEBATES, Apr. 16, 1970, at 5953 (questions following the statement of Minister of External Affairs Mitchell Sharp in the House of Commons); infra text accompanying note 108. After the Polar Sea voyage, the Canadian press joined the chorus for straight baselines. See, e.g., For the Defense of Sovereignty (2), Globe and Mail, Aug. 2, 1985, at 6, col. 3.

98. See, e.g., id. at 242. This is crucial to the Canadian case because some of the baselines drawn in 1985 connect headlands many miles apart, such as 93 miles across Amundsen Gulf, and 108 miles across M'Clure Strait.
99. See Byrne, supra note 86, at 8; Reid, supra note 68, at 131.
100. Byrne, supra note 86, at 8. Thus Canadian academics have grappled with the "general direction" criteria. See, e.g, one writer's rather circular reasoning, Pharand, Sovereignty, supra note 86, at 152: "The 'general direction' criteria is met, because the straight baselines follow 'general direction.' What really constitutes the Canadian coastline is the outer line of the archipelago, and the straight baselines follow such an outer line."
scholars have asserted that they are more like land than water, and thus that the "close link" requirement is almost certainly met.\textsuperscript{101} The Canadian position is strongest with regard to the third criteria, where they invoke the long-standing "economic interests of the local Inuit population, whose livelihood has depended exclusively on fishing, hunting and trapping in [the Arctic waters] since time immemorial."\textsuperscript{102}

Should the Canadian baseline-drawing action announced in 1985 be challenged immediately by the United States or any other maritime nation, it is likely too novel to be deemed "consistent and uninterrupted" in accord with the \textit{Norwegian Fisheries} standard. Moreover, the action's legitimacy is questionable in light of the inconsistency of Canada's line-drawing efforts. In 1963, when Canada drew baselines along its East and West coasts, it completely omitted any application of the system to the Arctic archipelago.\textsuperscript{103}

Whether or not Canada's straight baselines delimitation would survive a challenge before the ICJ, it remains somewhat tangential to the actual determination of rights of passage in the Arctic waters. This is because both the 1958 Geneva Convention and the 1982 UNCLOS sharpened the reach of the \textit{Norwegian Fisheries} decision. UNCLOS' article 8 reads as follows:

Where the establishment of a straight baseline in accordance with the method set forth in Article 7 ["Straight Baselines"] has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those

\begin{itemize}
\item \textsuperscript{101} See, e.g., Head, \textit{supra} note 45, at 223. See also Byrne, \textit{supra} note 86, at 4-5. Former Prime Minister Trudeau's External Affairs Minister Mitchell Sharp found this an appealing argument after the \textit{Manhattan} voyage and the introduction of the AWPPA, stating: "from a practical point of view, ice is more like land than water in certain parts of the world, such as the Canadian Arctic." Sharp, \textit{A Ship and Sovereignty in the North}, Globe and Mail, Sept. 18, 1969, at 7, col. 1. See also Canadian Note, \textit{supra} note 65, at 6028. This argument recurs in Clark's statement about the waters, "joined and not divided by the waters between them. They are bridged for most of the year by ice." Clark Statement, \textit{supra} note 17, at 2.

\item Other academics have attempted to quantify the "close link." See, e.g., Pharand, \textit{Sovereignty}, \textit{supra} note 86, at 152-52 ("close link" requirement related to the overall ratio of sea to land in target area; Canadian archipelago, with ratio of 0.822:1, more compelling case than Norwegian coast's 3.5:1 ratio); accord Morin, \textit{supra} note 62, at 240.

\item Pharand, \textit{Sovereignty}, \textit{supra} note 86, at 152. These are virtually the same words used by Joe Clark in justifying the straight baselines. See Clark Statement, \textit{supra} note 17, at 2 ("From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land."). See also Vanderzwaag & Pharand, \textit{Inuit and the Ice: Implications for Canada's Arctic Waters}, 21 CAN. Y.B. INT'L L. 53 (1983).

\end{itemize}
waters.\(^{104}\)

Thus, the inquiry shifts from the validity of Canada’s baseline legislation under international law to a determination of the status of the Arctic waters prior to their enclosure.

1. Rights of Innocent Passage for Foreign Vessels

The existence of the right of innocent passage depends on the legal status of the Arctic waters before Canada drew its baselines. If they were previously “internal waters,” then there was no need to draw baselines in order to curtail the right of innocent passage; conversely, if the waters enclosed were “high seas” or part of Canada’s territorial waters, and even if the shape of the baselines was deemed valid under the *Norwegian Fisheries* standard, a right of innocent passage for foreign vessels would remain through those waters. If the latter characterization were found to be true, the Canadian government could regulate maritime traffic in the Arctic only if it relied on the two relatively novel notions that underlay the AWPPA:\(^{105}\) first, passage that is potentially environmentally catastrophic is *not* “innocent;” and second, the expanded powers of control the coastal state possesses.\(^{106}\)

In order for the Canadian government to gain the label and the resulting exclusive sovereignty of an “internal waters” designation, it must prove that the waters of the Arctic archipelago have “not previously been considered” as anything but internal waters. This requirement explains Mr. Clark’s insistence that these internal waters are also “historic.” It also highlights the weakest part of the Canadian claim to exclusive sovereignty—the inconsistency over time of Canada’s pronouncements and actions regarding the Arctic waters and the Northwest Passage.

In April, 1970, during the House of Commons debate on the AWPPA and the extension of Canada’s territorial sea,\(^{107}\) the following question was raised:

104. *UNCLOS*, *supra* note 78, art. 8. Substantially the same language appears in article 5(2) of the Geneva Convention. *Geneva Convention, supra* note 87, art. 5(2).

105. *See supra* text accompanying notes 65 and 66. Although novel, these notions were nevertheless implicitly affirmed in *UNCLOS*. *See UNCLOS, supra* note 78, art. 234.

106. With that eventuality in mind, the U.S. strategy of challenging the Canadian claim was extremely subtle. The voyage of another oil tanker (like the *Manhattan*) through the Northwest Passage might credibly have been cast as “non-innocent” in 1985, given *UNCLOS* article 234’s “maritime pollution” emphasis and Canada’s consistent concern for the very delicate ecology of the Arctic. However, the transit of the *Polar Sea*—a Coast Guard icebreaker which posed no risk of catastrophic pollution—makes the theoretical basis of Canada’s unilateral curtailment of innocent passage almost irrelevant.

Regarding the Arctic Islands, will Bill C-202 draw geographic lines of the 12 mile-limit around each island, or is it intended to draw a line enclosing all the Arctic islands? In other words, will the territorial sea as defined in Bill C-203, include areas between Arctic Islands of more than 24 miles?  

The response from the Minister of External Affairs was consistent with the position he articulated earlier in the same debate, that “Canada has always regarded the waters between the islands of the Arctic archipelago as being Canadian waters.” He continued: “Since obviously we claim these waters to be Canadian internal waters we would not draw such lines, Mr. Speaker.”

A decade and a half later, Canada drew baselines around the Arctic archipelago; though the action may buttress or make legally more cognizable Canada’s claim that the waters are internal, it directly contradicts the position of successive Canadian governments that the waters have always been internal. Most importantly, the drawing of baselines around the archipelago in 1986, as was recognized in 1970, “has the effect of enclosing as internal waters areas which had not previously been considered as such” and thus preserves the right of innocent passage for all foreign vessels under either UNCLOS or the Geneva Convention. Were the Polar Sea to set off once again through the Northwest Passage, the new baselines around the archipelago would support, not hinder, its right to complete an “innocent” passage.

The “gate of territorial waters” theory, noted above, and not properly repudiated until 1973, is a second inconsistency which severely weakens the Canadian position that the Arctic waters have always been considered “internal.” By implying that territorial waters at either end of the Northwest Passage gave Canada the basis for “undisputed control . . . over two of the gateways to the Northwest Passage,” the Canadian government created the negative inference that whatever ocean space in the archipelago lay between the two limits of territorial waters should be considered “high seas.”

109. Id. at 5948. See also Canadian Note, supra note 65, at 6029.
110. CAN. H.C., DEBATES, Apr. 16, 1970, at 5953 (statement of Mr. Sharp).
111. See supra text accompanying note 104.
112. Id.
113. See supra note 86 and accompanying text.
114. Pharand, Sovereignty, supra note 86, at 149.
115. This would apply primarily to the Viscount Melville Sound, bordered by M'Clure
In sum, under any theory presented by its government, Canada's power to deny innocent passage to foreign vessels (that are not oil tankers) is extremely tenuous in view of article 5(2) of the Geneva Convention, article 8 of UNCLOS, and the foregoing analysis. Nevertheless, the breadth of the United States' position encompasses more than the right of innocent passage. The United States claims that the Northwest Passage is an international strait\(^{116}\) and thus not subject to unreasonable restrictions from Canada, the coastal state. Therefore, even the limited rights Canada gains by making the waters "internal" (or, at best, the strong basis it gains for exercising protective anti-pollution jurisdiction over oil tankers) are crucially important to the Canadian interest. Consequently, as support for its newly assertive approach, the Canadian government has also made the claim that it possesses "historic title" over the Arctic waters.

C. Canada's Historic Title

The concept of "historic waters" is a creation of customary international law, and has been, confusingly, both limited\(^{117}\) and untouched\(^{118}\) by recent efforts at drafting the law of the sea. Essentially, it is an extension of theories regarding the acquisition and appropriation of *res nuiius* in the territorial sphere. Though water is the paradigm *res communis*, international law has recognized that some bodies of water can be subjected to the sovereignty of a state through historical use.\(^{119}\) As noted previously,\(^{120}\) such a claim also helped ensure the legality of Norway's 1935 baselines.

Professor Pharand has articulated three requirements that a state must meet to succeed in a claim of historic waters.\(^{121}\) First, the state

---

116. *See infra* text accompanying notes 137-140.

117. The 1958 Geneva Convention reduces the role of "historic waters" with the validation of the *Norwegian Fisheries* baseline system in article 4, and by limiting any new closing of bays to "the maximum area of water that is possible with a line of" twenty-four miles. *Geneva Convention*, supra note 87, arts. 4, 7(5).

118. The 1982 UNCLOS repeats essentially the same rules as the 1958 Geneva Convention, but also mentions "historic title" without defining what it is, or how it is determined. *See UNCLOS*, supra note 78, arts. 15, 298(1)(a)(i).

119. In *Norwegian Fisheries*, the ICJ declared: "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have had that character were it not for the existence of an historic title." 1951 I.C.J. 115, at 130.

120. *See supra* note 94 and accompanying text.

must exercise exclusive authority and control over the maritime area claimed, by the expulsion of foreign ships if necessary. Second, the passage of a long period of time or long usage of the waters must be evidenced, with the length of time depending upon the circumstances. And third, foreign states, especially those nations directly affected by the claim, must acquiesce. Thus, an effective protest on the part of interested states will prevent historic title from materializing.  

Official Canadian advocacy of the "historic waters" claim represents a marriage of politics and the academe. In 1963, Ivan Head, then a member of Canada’s Department of External Affairs, published his master’s thesis, entitled “Canada’s Claims to Territorial Sovereignty in the Arctic Regions.” In that essay, he made the case for Canada’s assertion of sovereignty over its Arctic terra nullius, while including the frozen water of the Arctic channels and straits under the rubric of “terra.” Six years later he was a special adviser to Prime Minister Pierre Trudeau, whose speech to the Commons in October, 1969 regarding the Northwest Passage echoed almost word for word Head’s arguments regarding “historic title.” Successive Canadian governments have since pursued a strategy directed at the gradual perfection of title, or “historical consolidation,” articulated as follows: “As the years pass and as the occupation becomes more effective, always in the absence of any foreign claim, the title assumes those characteristics of continuity and peaceful lack of disturbance which international law requires to be present in a valid territorial

122. Pharand, Sovereignty, supra note 86, at 148.
123. See Head, supra note 45, at 201.
124. Official Canadian opinion on this point has been consistent. A quarter-century later, Canadian External Affairs Minister Joe Clark stated: “Whether terra firma or acqua firma, Canada claims sovereignty over this entire area. The shoreline is where open water meets solid ice, not where water meets land.” Deal with U.S. on Arctic Sailing Will be Signed Soon, Clark Says, Globe and Mail, Dec. 12, 1987, at A1, col. 2, A2, col. 1. See also supra text accompanying notes 85 and 101.
125. The Prime Minister said:

Canada’s activities in the northern reaches of this continent have been far-flung but pronounced for many years, to the exclusion of the activities of any other government. The Royal Canadian Mounted Police patrols and administers justice in these regions on land and ice, in the air and in the water. The Canadian Armed Forces carry out continuous surveillance activities. Canadian postal services, health services and communications networks criss-cross these territories to serve those who live and work there. Among these persons are the Canadian Eskimos, who pursue their food and conduct their activities over the icy waters without heed to whether that ice is supported by land or by water. In all these activities, and in others, ranging from geophysical exploration to the distribution of family allowance cheques, Arctic North America has, for 450 years, progressively become the Canadian Arctic.

Assuring historic title has become a fixation of Canadian governments, beginning as early as 1953, and continuing to the present. The potential for consolidation of title over the waters of the Arctic explains the timing of the *Polar Sea* voyage in 1985, Canada’s unilateral “grant of authority” and escort once the U.S. icebreaker had entered the Northwest Passage, and the tremendous Canadian activity and expenditure of funds since directed at exercising *de facto* control over the waterways. The Canadian government has declared in word and deed that historic title has been perfected, while the U.S. Coast Guard, with one simple expedition, both challenged Canada’s “exclusive control and authority” and offered a protest that made effective its diplomatic objection of 1970. The U.S. refusal to grant acquiescence in the recent Agreement is consistent with its denial of historic title.

126. Head, *supra* note 45, at 225 (emphasis added). It is beyond the scope of this note to list in exhaustive detail the many activities, stray bits of legislation and unchallenged exercises of jurisdiction cited by the Canadian government as the basis for its perceived consolidation of historic title over the waters of the Arctic archipelago. *See, e.g.*, D. PHARAND, *supra* note 121; Byrne, *supra* note 86; Head, *supra* note 45; Pharand, *Historic Waters in International Law*, *supra* note 121; Vanderzwaag & Pharand, *supra* note 102. Two general areas are cited as the basis of title: affirmative Canadian activities, and the acquiescence of foreign nations. Most commonly noted in the first category are: discovery and exploration by both the British and Canadians, Royal Canadian Mounted Police patrols starting in 1895, the adoption and enforcement of whale hunting legislation in 1905, creation of the Arctic Islands Preserve in 1926, regulation of the fur trade, licensing of explorers and marriages, the forced resettlement of Inuvialuit and Inuit in Resolute and Grise Fiord in the 1950s (to counter the American presence connected with the “Distant Early Warning” (DEW) Line), the collection of customs duties, and the exercise of judicial jurisdiction over acts committed on the Arctic ice beyond the three mile territorial sea. *See* R. v. Tootalick E4-321, 71 W.W.R. 435 (1969). In the second category, the fact that U.S. vessels servicing the joint Canadian-American DEW Line in 1957 were required to apply to the Canadian government for waivers of the provisions of the Canada Shipping Act of 1952 before entering Arctic waters is most often invoked. *See* Head, *supra* note 45, at 218.

127. Then-Prime Minister St. Laurent’s government’s concern is evident from the content of Cabinet documents released in 1984, showing then-External Affairs Minister Pearson’s concern regarding “the de facto exercise of U.S. sovereignty” such that “U.S. activity in the Arctic would present risks of misunderstanding, incidents and infringements on the exercise of Canadian sovereignty.” *See* Canada’s Claim to North was on Thin Ice, Globe and Mail, Jan. 12, 1984, at 10, col. 1.

128. *See* supra note 11 and accompanying text.

129. *See* supra notes 18-37 and accompanying text.

130. *See* Clark Statement, *supra* note 17, at 2; *see also* supra text accompanying note 85.


132. *See* supra notes 3-6 and accompanying text.

133. Jean Chrétien, Pierre Trudeau’s last Minister of External Affairs, described how the voyage of *The Polar Sea* delivered a blow to Canada’s consolidation of historic title:

For 15 years the Americans have protested the Bill that I introduced in the House of Commons in 1970 concerning the prevention of Arctic pollution. For 15 years the
Clearly, a series of events over the past two decades—the 1970 U.S. diplomatic note objecting to the enactment of the AWPPA,\textsuperscript{134} the unwelcome 1985 transit of the Polar Sea, and Canada's inability even to monitor adequately Russian and American submarine traffic through the Passage\textsuperscript{135}—all serve to deal a serious, if not mortal, blow to the perfection of Canada's "historic title" over the waters of the Arctic archipelago.\textsuperscript{136}

V. AMERICAN CLAIMS

A. Introduction

The United States has long held that the Northwest Passage, and those bodies of water that lie within the Arctic archipelago but outside Canada's three mile limit, are part of the "high seas."\textsuperscript{137}

Americans did not want to challenge the sovereignty of Canada which was reinforced at that time. They never sent a ship through our waters for 15 years . . . .

There was a strategy behind what took place in the past with regard to our sovereignty because the key in international affairs was the exercising of jurisdiction and we have had that jurisdiction and we have exercised it. This began under Louis St. Laurent when we insured for many years that there were RCMP, Armed Forces and viable Inuit villages in these areas in order to inform the world that it was Canadian land.

Time is a very important element. When sovereignty is exercised for 100 years, no one can challenge it . . . . Our sovereignty would have been greater in 50 or 100 years.

\textsuperscript{134} U.S. Note, supra note 71.

\textsuperscript{135} See supra notes 57-58. Doctrine regarding submarine passage, coastal state rights, and the status of territorial waters is presently unsettled. Similar circumstances exist in the Baltic. In both situations, given the lack of suitable technology to pinpoint submarines, it seems unlikely that a nation's inability to prevent or monitor submarine traffic, standing alone, would prejudice that coastal state's traditional sovereign powers. See Sadurska, \textit{Foreign Submarines in Swedish Waters: The Erosion of an International Norm}, 10 \textit{YALE J. INT'L L.} 34 (1984).

Aside from the difficulty in monitoring submarine traffic, it is evident that Canada at present cannot defend the Arctic alone. Canada currently maintains 65 men in Yellowknife and Whitehorse, with 500 other members of the Canadian Forces scattered along the DEW line, whose task is to defend the Northwest Territories and the Yukon as well as the Arctic archipelago. Canada's dependence on the United States for defense of the area is underlined by the fact that every major defense initiative undertaken in the area since World War II (the DEW line, NORAD) has been effected at the behest of the United States. In March, 1985, Canada agreed to pay $511 million to build, with the United States, the new North Warning System that will replace the DEW line. See \textit{The New Race for the North}, supra note 9, at 19.

\textsuperscript{136} The Canadian government seemed to explicitly recognize this in its Defense Ministry White Paper of June, 1987:

\textit{[A]n} important manifestation of sovereignty is the ability to monitor effectively what is happening within areas of Canadian jurisdiction, be it on land, in the air or at sea, including under the ice. But monitoring alone is not sufficient. To exercise effective control, there must also be a capability to respond with force against incursions.

\textsuperscript{137} This was evident from the title of its protest note to the Canadian government after...
Together with the U.S. insistence on a three mile territorial sea, and its refusal to ask for permission when the Polar Sea entered the Northwest Passage, the implied U.S. position is that the Passage is an "international strait." While the American government has not clearly enunciated this position, it was referred to obliquely in the U.S. Note: "With respect to the 12-mile limit on the territorial sea, we have publicly indicated our willingness to accept such limit, but only as part of an agreed international treaty also providing for freedom of passage through and over international straits." However oblique the American position, the Canadian government has continually viewed it as requiring urgent and emphatic denial. Canada's response to the U.S. Note was straightforward: "The Canadian government is aware of USA interest in ensuring freedom of transit through international straits, but rejects any suggestion that the Northwest Passage is such an international strait." In 1985, Joe Clark reiterated Canada's 1970 rebuttal of the U.S. claim.

B. An "International Strait"?

1. The Corfu Channel Case and the UNCLOS "Transit Passage" Regime

If the American position is accurate, and the Northwest Passage is an "international strait" between two parts of the high seas, then, as the ICJ stated in the Corfu Channel Case: “[S]tates in time of the introduction of the AWPPA—U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction—and from its text: “The enactment and implementation of these measures would affect the exercise by the United States and other countries of the right to freedom of the seas in large areas of the high seas . . . .” U.S. Note, supra note 71, at 610.

138. See supra text accompanying note 74.

139. As a State Department spokesman has said: "We look at the Northwest Passage as a strait linking two parts of the high seas, and it is of extreme importance to us to have free transit through straits in normal modes of passage." Canada to Launch Sovereignty Review, Globe and Mail, Aug. 2, 1985, at 1, col. 4, 2, col. 4.

140. U.S. Note, supra note 71, at 611.

141. Canadian Note, supra note 65, at 6028. The Note continued:

The widespread interest in opening up the Northwest Passage to commercial shipping and the well-known commitment of the Canadian Government to this end are themselves ample proof that it has not heretofore been possible to utilize the Northwest Passage as a route for shipping. The Northwest Passage has not attained the status of an international strait by customary usage nor has it been defined as such by conventional international law.

142. "[T]he policy of this government is also to encourage the development of navigation in Canada's Arctic waters. Our goal is to make the Northwest Passage a reality for Canadian and foreign shipping, as a Canadian waterway." Clark Statement, supra note 17, at 3 (emphasis added).

peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent."  

This absolute right of innocent passage through international straits, also described in article 16(4) of the Geneva Convention, was expanded with the introduction of a new "transit passage" regime in the 1982 UNCLOS. Applying to straits "which are used for international navigation," as well as to "international straits," articles 34-45 of UNCLOS guarantee all vessels navigating such straits rights akin to those accorded navigation on the high seas. Moreover, UNCLOS restricts the power of coastal states to regulate or interfere, and widens the right of passage to include overflying aircraft. The United States sought the inclusion of "transit passage" as a *quid pro quo* for its ratification of UNCLOS and acceptance of the twelve mile territorial sea. Subsequently, the United States has declared "transit passage" to be part of "customary international law," although it did not sign the Convention.

More important with regard to the Northwest Passage, the transit passage formula does away with the Geneva Convention's stipulation that submarines must navigate on the surface and show their flag. It declares only that vessels must: "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit." Because transit passage applies to "all ships and aircraft," the thrust of the new rule is that submarines can now

---

144. *Id.* at 28 (original emphasis). Substantially the same formulation, with the addition of a final phrase that facilitated passage through straits leading into ports, was transcribed into the 1958 Geneva Convention: "There shall be no suspension of the innocent passage of foreign ships through the 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." Geneva Convention, *supra* note 87, art. 16(4). *See also infra* note 163.

145. UNCLOS, *supra* note 78, art. 37.

146. *Id.* art. 42.


148. *See L. Henkin et al., supra* note 45, at 1264; U.S. Oceans Policy, *supra* note 88, at 462 ("The President . . . is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to traditional uses of the oceans, such as navigation and overflight."). *See also* *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* (Tent. Final Draft, July 15, 1985), introductory note to part V and § 513, reporter's note 8.


150. UNCLOS, *supra* note 78, art. 39(1).

151. *Id.*
navigate submerged through "international straits,"152 even where a part of the strait falls wholly within the territorial waters of a state. Given the increasing strategic importance of the Arctic and accelerated submarine traffic under the Arctic ice cap,153 this newly-formulated freedom of passage for submarines would be of immense benefit to the American government.

2. "Actual Use" versus "Potential Use"

Whether the new right of "transit passage" can be claimed by the United States despite its refusal to sign UNCLOS,154 or the United States is limited to the already substantial rights afforded by customary international law155 and by the 1958 Geneva Convention,156 no rights can be asserted unless the Northwest Passage first meets the requirements of an "international strait." The crucial question for the legal status to be conferred upon the Northwest Passage is whether an "international strait" is a strait connecting portions of the high seas that has been used by foreign vessels ("actual use"), or merely could be used by foreign vessels ("potential use").157

The customary international law definition is based on the Corfu Channel Case holding. In a rather Delphic paragraph, the Court laid down a standard that touches on both "actual use" and "geographical situation:"

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geo-

152. This is a right submarines do not enjoy for innocent passage through territorial waters. Id. art. 20.
153. See supra notes 56-61 and accompanying text.
154. See supra text accompanying note 148. This is a most complex aspect of the uncertain interaction between principles of customary international law and treaty law. For a discussion of the problem, see Note, United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage, 84 COLUM. L. REV. 1032 (1984), where the author concludes:

[T]he mandate of the Conference, the use of consensus in negotiations, the prohibitions on reservations to the Convention, and the intent of state parties—all lend strong support to the argument that the new legal rights created by the treaty cannot be claimed individually by non-parties as customary.

Id. at 1057.
155. See supra text accompanying notes 143-144.
156. Geneva Convention, supra note 87, art. 16(4). See supra note 144.
157. See Pharand, Canada's Arctic Jurisdiction in International Law, 7 DALHOUSE L.J. 315, 334 (1983) ("Those who maintain that the Northwest Passage may already be classified as an international strait obviously confuse actual use with potential use. The latter is a criterion used by the American courts to determine whether a waterway is navigable or not." (citation omitted)).
graphical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.\textsuperscript{158}

Thus, while repudiating the argument that “volume of traffic” and “importance of navigation” were the sole criteria for an international strait, the Court went on to note “the fact of its being used for international navigation” and its role in the past as “a useful route for international maritime traffic.”\textsuperscript{159}

Notwithstanding the Court’s language, those advocating the “potential use” standard of definition have relied on the manner in which the \textit{Corfu Channel Case} was codified in the 1958 Geneva Convention, and copied in UNCLOS. Both article 16(4) of the Geneva Convention and article 34(1) of UNCLOS address “straits used for international navigation,” without any requirement that the straits have been “normally” or “traditionally” used for such navigation—\textit{i.e.}, “actual use.” The argument is seemingly supported by the fact that the International Law Commission’s final version of its own article 17(4) (the basis for the Geneva Convention’s article 16(4)) originally included the words “normally used for international navigation,” but that the word “normally” was deleted during the First Committee session.\textsuperscript{160}

Despite this argument for “potential use,” a thorough review of the drafting history of all innocent passage-related clauses in the Geneva Convention provides strong evidence that the drafters had “actual use” in mind.\textsuperscript{161} The deletion of the word “normally” was one effect of a bundle of amendments.\textsuperscript{162} Of that bundle, delegates

\textsuperscript{158} 1949 I.C.J. 4, at 28.

\textsuperscript{159} \textit{Id.} The Court noted that, not counting those vessels which did not stop at Corfu, between April, 1936 and December, 1937, over 2,800 vessels of seven nations went through the Channel. In addition, Greek vessels made sailings through the Channel three times a week, one British ship fortnightly, and two Yugoslavian vessels once a week each. The British Navy also had been using the channel for eighty years. \textit{Id.} at 29.


\textsuperscript{162} \textit{Id.} at 113.
were more concerned about the controversial phrase creating international straits between the high seas and the territorial sea of a foreign state.\textsuperscript{163} The question of including or deleting the word “normally” was lost in the resulting debate. However, one of the amendments’ sponsors did assure the Committee that “normally” had been dropped because it was considered that the article “should apply to sea-lanes actually used by international navigation.”\textsuperscript{164} This view is in accord with not only a common sense understanding of what constitutes an “international strait,” but also an objective understanding of the past-tense “used” appearing in both statutory formulations and the two-part approach evident in the \textit{Corfu Channel Case} holding. “Actual use” appears to be the more tenable requirement for qualification as an “international strait.”

The Northwest Passage has never been declared an international strait by any treaty or convention, and therefore could only have become an international strait by customary usage. To date, the Passage has been negotiated in its entirety thirty-six times—sixteen times by foreign vessels, of which eleven were American.\textsuperscript{165} With the exception of the \textit{Polar Sea} transit, the permission of the Canadian government was requested and granted in all cases.\textsuperscript{166} This count, of course, does not take into account recent submarine voyages by the United States and the U.S.S.R.\textsuperscript{167}

In sum, under the “actual use” standard, the American case for making the Passage an “international strait” appears very weak. However, though at present both the rarity of surface voyages and the difficulty of navigation through the ice-bound waters keep international maritime navigation away from the Northwest Passage, technological advancement will soon complement geographic potential. Indeed, to a certain extent, this has already occurred with rapid

\textsuperscript{163} This is the last phrase of article 16(4). The final version states: “There 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.” Geneva Convention, supra note 87, art. 16(4). The article was meant to address Israel’s desire to enjoy access to the Gulf of Aqaba through the Straits of Tiran which, before the Israeli occupation of the Sinai Penninsula in 1967, was controlled by Egypt and Saudi Arabia.


\textsuperscript{165} See Pullen, supra note 7, at 69.

\textsuperscript{166} See Independence and Internationalism, supra note 26, at 131; see also Pullen, supra note 7 passim.

\textsuperscript{167} See supra notes 56-58 and accompanying text. The first and last verifiable crossings by submarines were those by the \textit{U.S.S. Seadragon} in 1960 (to investigate the feasibility of a submarine passage through the Parry Channel) and by the \textit{U.S.S. Skate} in 1962 (as part of U.S.-Canadian defense arrangements). See Pullen, supra note 7, at 69-70.
advances in submarine technology. Under either "actual" or "potential" use standards, the Passage is likely to become a far more compelling case for the status of an "international strait."\textsuperscript{168} This process is one which the Canadian government seeks to forestall, as with its actions of September, 1985 and the Agreement of January, 1988, and one that the American government sought to hasten with its dispatch of the \textit{Polar Sea}.

\textbf{VI. A Better Agreement}

The foregoing discussion indicates that the status of the Northwest Passage, and the rights of the two nations most concerned with the dispute over it, are unclear and would be exceedingly difficult to rule upon. To some extent, this is simply the result of problems inherent in the "attempt to reconcile the freedom of ocean navigation with the theory of territorial waters."\textsuperscript{169} Here, however, conflict has primarily resulted from the clash between the United States' highly legalistic position, and a Canadian position that is driven by strong nationalistic sentiment.

Focusing on important commercial and defense interests, the American government is unwilling to acknowledge the possibility that a traditional legal regime, conceived for an environment of only land, air and water, is perhaps inappropriate for that part of the world dominated by ice, where "water" can have all the characteristics of land, including possession, and the erection of permanent settlements. In the aftermath of the \textit{Polar Sea} voyage, the Canadian government responded to nationalistic pressure with a statement regarding "historic internal waters" that does not advance its legal position in a significant manner,\textsuperscript{170} and merely accentuates its operational inability to control the Arctic waters. Moreover, Canada's actions are contrary to its responsibilities as an international citizen. Prime Minister Pierre Trudeau cautioned in October, 1969:

\begin{quote}
To close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty, as some commentators have suggested, would be as senseless as placing
\end{quote}

\textsuperscript{168} Pharand has noted that the eastern part of the Passage is already being used to transport minerals from Nanisivik and Polar Mines, and concedes that the "internationalization" of the route may occur more quickly, in the legal sense, than it might elsewhere: "[T]he threshold use in the Corfu Channel Case was fairly high, but a sufficient use for the Northwest Passage might be considerably lower because of the remoteness of the region and the absence of alternative routes." Pharand, \textit{Sovereignty}, supra note 86, at 157.

\textsuperscript{169} P. Jessup, \textit{The Law of Territorial Waters and Maritime Jurisdiction} 120 (1927).

\textsuperscript{170} See \textit{supra} text accompanying notes 105-116.
barriers across the entrances to Halifax and Vancouver harbours. We would certainly prove by those acts that we were masters in our own house, but at immense cost economically by denying shipping of importance to Canada.171

As time passes, Canada may indeed consolidate its “historic title” and its model anti-pollution controls will gain even wider acceptance. However, advances in icebreaking and submarine technology will make Canada’s ice increasingly less like land, just as commercial and strategic necessity will increasingly make the Northwest Passage a crucial waterway.

Recourse to the ICJ, either now or in the future, seems both unlikely172 and fraught with disadvantages for both the United States and Canada.173 The remaining option, aside from an escalating cacophony of claims and counterclaims, is a political settlement that takes full account of both the divergent interests of the respective parties and the impact such an agreement would have on the ongoing development of the law of the sea in other parts of the world.

A new bilateral agreement between the two powers, which would formally recognize Canada’s claim over the Arctic waters on finely articulated grounds, yet grant the United States a blanket right of transit through the Northwest Passage and other navigable straits, is a feasible solution and would be a vast improvement on the relatively meaningless Agreement on Arctic Cooperation of January 1988.174

171. CAN. H.C., DEBATES, Oct. 24, 1969, at 39. The Prime Minister continued however, in the opposite vein: “On the other hand, if we were to act in some misguided spirit of international philanthropy by declaring that all comers were welcome without let or hindrance, we would be acting in default of Canada’s obligations not just to Canada but to all the world.” Id.


173. Aside from the uncertainty and delay of a judicial settlement, World Court litigation over the Northwest Passage question would follow soon after the dispute over U.S.-Canadian boundaries in the Gulf of Maine and further antagonize bilateral relations during the stage of full implementation of free trade. See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12).

174. U.S. Secretary of State Shultz has publicly stated that such an agreement is not presently being contemplated. See supra text accompanying note 42. However, it appears from a television interview with Canadian Prime Minister Mulroney that such a deal was the central thrust of the bilateral negotiations that took place between January, 1985 and January, 1988:

Interviewer (Mr. Kalb): [A]ssuming for a moment that the administration’s pre-
Such an agreement would promote that principle which the American government holds highest in its approach to all law of the sea problems: "unimpeded commercial and military navigation and overflight." The State Department’s concern that such an agreement would prejudice its claims of freedom of passage elsewhere in the world or serve as a precedent in the ongoing struggle between flag and coastal states is unfounded. Such concern focuses primarily on the Strait of Hormuz, the Malacca Straits and various straits in the Philippine archipelago. All of these situations can be distinguished from the Canadian Arctic, both because of the lack of special ice conditions in those straits, and by the fact that they have long been considered international waterways because of customary usage.

The United States may also be concerned about the way in which an agreement with the Canadian government would defeat its desire to gain a right of innocent passage through the Soviet Arctic’s "Northeast Passage." The merits of that claim warrant a wider

pared to acknowledge formally that Canada does have sovereignty over those straits, would you agree to give the United States for strategic reasons that you share as a member of NATO, the right to free and unimpeded access?

Prime Minister Mulroney: That's a hypothetical question.

Mr. Kalb: Mr. Prime Minister, that's the essence, as I understand it, of the negotiation.

Mulroney: [A]s a member of NATO . . . as a member of NORAD, where we share common responsibilities for the defense of this continent, we would look with favour, obviously on arrangements that would facilitate and expand those agreements between the countries, and therefore, you can draw some pretty fundamental conclusions from that.

Meet the Press, supra note 16, at 7. Two days later, in the Canadian House of Commons, the Prime Minister was condemned for intending "to compromise Arctic sovereignty by giving the United States unimpeded access, justifying the sellout, trying, if you like, to camouflage or disguise it as some kind of security arrangement with the U.S." Hon. Donald J. Johnston, CAN. H.C., DEBATES, Apr. 7, 1987, at 4927. Johnston’s comments reflect the fact that America’s legal objections, as articulated by Secretary Shultz, are matched by strong nationalist concerns in Canada.

175. U.S. Oceans Policy, supra note 88, at 462.

176. Author’s off-the-record interviews with State Department officials. See also President Reagan’s statement, quoted in the Gazette (Montreal), supra note 5.


178. At one time, the Sukarno Government of Indonesia attempted to restrict freedom of passage through those Straits. For an appraisal of current efforts by the coastal states involved (Indonesia, Malaysia and Singapore) to regulate passage, see N. LOGARAJ, FREEDOM OF PASSAGE IN THE STRAITS OF MALACCA IN THE CONTEXT OF INTERNATIONAL LAW WITH PARTICULAR REFERENCE TO THE PROBLEMS OF NAVIGATIONAL SAFETY AND ENVIRONMENTAL SECURITY (1978).

179. As the Canadian Minister of External Affairs has said: "[In the Canadian Arctic] you can walk from one island to another . . . . Try walking across the Gulf of Sidra." Who Owns the Arctic, supra note 177.

180. This Passage, like the Northwest Passage, is in fact a number of different routes. The main route is as follows: starting in the West at Murmansk, through the Barents Sea north of Novaya Zemlya, across the Vilkitsky Straits, into the Laptev Sea and then either

discussion than is possible here. However, Soviet realpolitik has already demonstrated that in spite of international objections regarding the legality of its claim, the U.S.S.R. is prepared to use its full legislative and naval powers to block foreign access to some parts of the passage. In effect, it is in all likelihood too late for the American government to be concerned about its legal rights in the Soviet Arctic, in the face of Soviet resolve to pre-empt the question or any judicial settlement of it.

Finally, recognition that the Arctic archipelago constitutes Canadian internal waters would further the United States' strategic interests in the Arctic by restricting the legal rights of passage for Soviet submarines. The present U.S. approach posits that the Northwest Passage is an "international strait" for all nations, which bestows upon Soviet submarines the right to roam the Arctic waters freely. The Soviet Union would be hard pressed to counter American recognition of Canada's exclusive sovereignty because of its own unequivocal position on the Northeast Passage and its long-standing support for Canada's claims.

The only remaining obstacle to such an agreement would be that north through the Sarnikov Strait or south through the Dmitri Laptev Strait into the East Siberian Sea. The route then splits to go on either side of the Medbezy Islands, south of Wrangel Island and finally into the Chukchi Sea and on through the Bering Strait. The Northeast Passage serves mostly domestic traffic, and foreign military vessels are denied the right of innocent passage through some parts of it. See D. Pharand, supra note 121, at 20-43; infra notes 182-183.

181. See D. Pharand, supra note 121, at 43, where Pharand concludes that all ships are entitled to innocent passage through the Northeast Passage under the 1958 Geneva Convention.

182. Not only has the Soviet Union adopted a number of laws restricting passage in the Arctic, see id. at 34-38, but it ratified the 1958 Geneva Convention only after entering a reservation to article 23 (regarding innocent passage for warships) as follows: "The Government of the USSR considers that a coastal state has the right to establish an authorization procedure for the passage of foreign warships through its territorial waters." 3 Sov. Stat. & Dec., no. 4, at 44-45.

183. In September, 1965, the U.S. Coast Guard icebreaker Northwind was effectively stopped from proceeding through Vilkitsky Straits by Soviet aircraft and warships. The Soviets made clear to the State Department that the waters of Vilkitskogo Strait are considered territorial waters. In August, 1967, the U.S. icebreaker Edisto cancelled its planned 8,000 mile circumnavigation of the Arctic Ocean when the Soviet Government declared that the passage of ships through the Vilkitsy Straits would be a "violation of Soviet frontiers." See D. Pharand, supra note 121, at 20-21; Comment, Soviet Union Warns U.S. Against Use of Northeast Passage, 62 Am. J. Int'l L. 927 (1968).

184. See generally Note, supra note 76, at 617-20; see also Dehner, supra note 76.

185. See supra text accompanying notes 56-61. This is one implication of the American position that some American officials, notably the former American Ambassador to Canada, have failed to acknowledge. See Northwest Passage Not for the Soviets, U.S. Envoy Feels, Globe and Mail, Aug. 2, 1985, at 1, col. 4.

186. See, e.g., Canadian-Soviet Communiqué, Office of the Prime Minister Press Release 11, Oct. 26, 1971, reprinted in Dehner, supra note 76, at 285. In fact, one year before the Polar
which has fueled Canada's angry gestures—Canadian nationalism.\textsuperscript{187} However, Canadian politicians have already publicly proposed the idea of a bilateral agreement,\textsuperscript{188} a suggestion which the Canadian Department of External Affairs seconded in a secret memorandum delivered to the Cabinet in October, 1985.\textsuperscript{189} Of course, such an agreement would gain only American acceptance of Canada's claims and would be ineffective against third parties. However, as the United States is the only nation that has challenged the Canadian position, the agreement would serve fully Canada's limited and largely symbolic aims and effect the "acquiescence" that is so crucial to Canada's legal position.

This is an ideal time to negotiate such a document. At a time when Canadian and American officials are involved in the implementation of a Free Trade Agreement of unprecedented scope, the status of the waters of the Arctic archipelago is an issue that could be included on the agenda and settled in the amicable spirit that has generally characterized U.S.-Canadian relations.

\textit{Nicholas C. Howson*}

\textsuperscript{187} Sea transit, the U.S.S.R. drew baselines around its own Arctic areas claimed as internal waters. Griffith, \textit{Time to Seek Arctic Deal}, Globe and Mail, Nov. 10, 1987, at A7, col. 2.

\textsuperscript{188} See \textit{supra} note 174 (comments of Hon. Donald J. Johnston).

\textsuperscript{189} See \textit{Independence and Internationalism, supra} note 26, at 132, where the option is hailed as one of three viable choices.
