

Melting Proof: Reassessing Canada's Legal Claims Over the Northwest Passage

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Melting Proof: Reassessing Canada's Legal Claims over the Northwest Passage

By: Jane Loyer

As pack ice continues to melt in the Arctic, the legal dispute over the Northwest Passage becomes increasingly important. Whether this area should be considered Canadian internal waters or a strait used for international navigation will greatly affect the environment, commercial shipping traffic and strategic mobility. As sea ice continues to melt, Canada's legal claims to internal waters become subject to increased scrutiny and are increasingly perceived as inadequate. Canada's claim to internal waters in the Northwest Passage is premised on three criteria: the application of straight baselines, the 'Arctic Clause,' Article 234 of the United Nations Convention on the Law of the Sea (UNCLOS), and the claim to historic waters within the passage. Each of these grounds, however, is problematic and incomplete after greater examination. Canada cannot claim that the Northwest Passage is internal waters based on these criteria because each legal argument is incomplete and therefore cannot fully be applied.

This paper will discuss the current problems associated with Canada's claim to internal waters in the Northwest Passage. A brief definition and historical summary of the Passage will be given to provide insight into specific details of the legal claims. A background of the political arguments between Canada and the United States (US), the primary disputant, will also be discussed to demonstrate how their national interests

impact their legal standings. Canada's arguments will then be assessed, beginning with its declaration of straight baselines, followed by its application of the UNCLOS "Arctic Clause" article 234 and finally its claim to historic waters. Additionally, the criteria for determining an international strait will also be discussed, as it pertains to the Northwest Passage.

To assess the legal status of the Northwest Passage, it is important to look beyond UNCLOS. Using relevant cases to supplement the treaty is important because non-state parties, such as the US, are not bound to UNCLOS and its Articles are quite general and lack specification (Macneil 2006, 217). Relevant international cases are beneficial for interpreting UNCLOS and making its broad Articles more specific and applicable in practical situations. Therefore, using multiple sources of international law to assess the legal status of the Northwest Passage is crucial to a complete argument.

I) The Northwest Passage: History and Political Arguments

The Northwest Passage has long been considered a mythic aspiration for international shipping and navigation. It connects the Atlantic Sea to the Pacific Sea and has only recently been open for navigation as a result of melting ice masses in the Arctic. The route is extremely valuable for international shipping because it is up to 9000 km or 5000 nautical miles (nm)¹ shorter than crossing the Panama Canal

¹ One nautical mile is approximately 1.85 km

² The 'Canadian Arctic Archipelago' is not a true archipelagic state as defined in the

(Kraska 2007, 258; Pharand 2007, 4). Surrounding the Northwest Passage is the 'Canadian Arctic Archipelago,'² a fringe containing more than 18 000 islands, including Ellesmere Island and Baffin Island, extending over 3000 km (Pharand 2007, 15). The Northwest Passage and the Arctic Archipelago constitute Canada's sovereign claims in its Arctic region.

Canada acquired its northern territories shortly after it became an independent, sovereign state. The Arctic officially became Canadian territory in 1880 when the land and water was officially renounced by Great Britain (Elliot-Meisel 2009, 209). The Norwegian explorer Roald Amundsen made the first recorded voyage across the Northwest Passage in modern history between 1903 and 1906 (Elliot-Meisel 2009, 207). This expedition proved that the Northwest Passage was not solid ice year round and could be useful for navigation.

The legal status dispute over the Northwest Passage began after the US vessel, the SS *Manhattan*, crossed in 1969.³ After the voyage, then-Prime Minister of Canada

² The 'Canadian Arctic Archipelago' is not a true archipelagic state as defined in the Law of the Sea Convention under article 46: 'a state constituted wholly by one or more archipelagos and may include other islands... 'archipelago' means a group of islands... interconnecting waters and other national features... forming an intrinsic geographical, economic and political entity, or which historically have been regarded as such' (UNCLOS 1982, art. 46). While the territory does not mean the requirements in the UNCLOS definition, the term will be used in this paper because it is used among scholars to define Canada's northern fringe of islands.

³ US vessel the SS *Manhattan* crossed the Northwest Passage from the Beaufort Sea to the Davis Strait in 1969 without attaining Canadian permission. The voyage was meant to prove the 'economic feasibility of icebreaking bulk cargo carriers to steam year round from Alaska to the East Coast of North America.' See James Kraska, (2007)

Pierre Elliot Trudeau stated: 'The waters between the Arctic Archipelago are internal over which Canada has full sovereignty' (Elliot-Meisel 2009, 210). Canada began to consider itself responsible for protecting the Arctic and preserving its national identity (Cornut 2010, 946). The Manhattan voyage signaled a need for Canada to substantiate its sovereignty over the northern regions. In 1973, the Department of Foreign Affairs Legal Affairs Bureau declared the Arctic waters to be historic internal waters (Elliot-Meisel, 2011). However, the international community, specifically the US, ignored this when, in 1985, the *Polar Sea*, a US Coast Guard Icebreaker, travelled across the Northwest Passage.⁴ Canada perceived this voyage as a threat to its sovereignty and established straight baselines around its Arctic Archipelago based on historic claims, with reference to the Anglo-Norwegian Fisheries case (Byers and Lalonde 2009, 1161). After the voyage, the US and Canada agreed that American icebreakers should gain Canadian consent before crossing through the Northwest Passage 'without prejudice to either side's legal position' (Lajeunesse 2008, 1044).

During the beginning of the 21st century, Canada did little to reinforce its claims over the Northwest Passage, until the Conservative Government came to power in 2007. Canadian Prime Minister Stephen Harper took initiatives to reinforce security

The Law of the Sea Convention and the Northwest Passage. *The International Journal of Marine and Coastal Law*, 22(2), 263-264.

⁴ In 1985, US Coast Guard vessel the *Polar Sea* crossed the Northwest Passage. Prior to its crossing, the US informed Canada of its intentions and, after Canada noted prior authorization was required for passage, the US refused contenting it was an international strait. See Donat Pharand (2007) The Arctic Waters and the Northwest Passage: A Final Revisit. *Ocean Development & International Law*, 38(1-2), 4.

in the Arctic, by building up to eight naval patrol ships and a new military training facility, and constructing the first arctic deep water port close to Iqaluit, Nunavut (De La Fayette 2008, 546). However, asserting sovereignty over a territory requires more than just claims, and Canada recognised the importance of supporting its sovereignty through military power.

Climate change is one of the crucial issues driving the legal debate over the Northwest Passage. The opening of the Passage could mean better routes for international navigation and greater access to resources. The Northwest Passage was completely ice-free for several weeks in the summer of 2001 and completely open for the first time in history (De La Fayette 2008, 534). However, due to the intense melting, the volume of sea ice and glaciers floating down from northern latitudes makes the passage quite dangerous (Huebert 2003, 301). Furthermore, extra sea ice floating through the Northwest Passage makes navigation a slow, expensive and hazardous process (Potts and Schofield 2008, 157). This questions whether the route would be shorter than the Panama Canal or other comparable routes. However, the passage could be completely ice-free by 2030 (Byers and Lalonde, 1136). This date presents somewhat of a deadline for Canada and the international community to settle the legal dispute over the Northwest Passage.

Canada's claim to internal waters is based on protecting and preserving the delicate Arctic marine environment and upholding sovereignty in the north. At the forefront of its argument, most scholars supporting Canadian claims argue that the

environment would not be well protected under International Maritime Organization (IMO) regulations. John Kennair warns that IMO negotiations over environmental protection in the Northwest Passage would lead to conclusions based on the 'least common denominator' (2010, 21). Furthermore, because IMO negotiations would involve a combination of Arctic, coastal and landlocked states, shipping standards would be much less strict (Huebert 2003, 300; Elliot-Meisel 2009,221; Kennair 2010, 21). The primary concern is that working through the IMO would lead to weak regulation, excessive pollution and increased criminal activity in the fragile Arctic.

Authors such as Robert Huebert argue that Canada is much more likely to protect its national interests and the environment in the Arctic (2003, 298). Canada has already enacted the Arctic Waters Pollution Prevention Act (AWPPA). The AWPPA, created in 1970 after the Manhattan Voyage, established protection over the marine environment in the Arctic extending up to 100 nm off of the coastline (De La Fayette 2008, 544). While this Act is in opposition to UNCLOS sovereignty regulations, it was also written prior to the completed of UNCLOS. Therefore, it could be argued that asserted sovereignty beyond its 12 nautical mile territorial sea (UNCLOS 1982, art. 3) would not be completely contrary to the treaty because the Act was made before it was drafted.

The Arctic environment is much more susceptible to human activities than southern environments because it has not been as exposed to human activities as other parts of the world. Increased marine traffic would increase the risk of oil spills,

pollution and the deterioration of the fragile Arctic ecosystem (De La Fayette 2008, 546). In addition, other types of pollution would be harmful to the Arctic's delicate environment. For example, shipping could also introduce foreign substances into the waters and cause significant noise pollution and disturbances to the Inuit population (Molenaar 2009, 291). Pollution in the Arctic would not only affect the ecosystem but also the wildlife and people who have inhabited the region for millennia.

If Canada gained full rights to the Northwest Passage, it would have extensive sovereignty to apply national laws in the area. While crossings vessels would still enjoy the right of innocent passage through the territorial sea (UNCLOS 1982, article 17), Canada would have extensive jurisdiction through other regulations. For example, according to UNCLOS Article 21 (1), 'the coastal state may adopt laws and regulations relating to innocent passage' (1982). This would include the use of sea -lanes and traffic separation schemes (UNCLOS 1982, article 22) without IMO approval. Canada could direct traffic away from fragile areas of the Arctic and apply more strict shipping regulations under the UNCLOS framework.

The US claim is based on maintaining freedom of the high seas and upholding international security. The US is known for seeking to increase freedom of navigation on the high seas wherever possible. A route such as the Northwest Passage is no exception, particularly because of its strategic value for both mobility and commercial interests (Lajeunesse 2008, 1046). If the Passage were determined to be internal waters, it would be inconvenient for the US and the international community to

repeatedly seek permission to cross. Especially in the post-September 11th era, the US designates security and terrorism as principle foreign policy concerns (Byers and Lalonde 2009, 1188). Limiting the US' ability to freely navigate the high seas would undermine their national security strategies.

The strategic argument has long been considered important for US national interests. Especially during the Cold War, if a strait as valuable as the Northwest Passage were to be internal waters, submarines would have to surface in order to cross the strait, jeopardizing the secrecy of their movements. (Byers and Lalonde 2009, 1176). Too many lucrative missions would be sacrificed and, as a consequence, threats to national security would increase. Therefore, the US, as the primary objector to Canada's internal waters argument, would be the most affected if it could not freely traverse the Northwest Passage. The political context behind each argument helps to explain why the Northwest Passage is a sensitive issue for each state and how their foreign policy goals would be seriously undermined if they were unable to use the Northwest Passage to achieve their own priorities.

II) Canada's Arguments and Their Limits

To label the Northwest Passage as internal waters, Canada unilaterally applies straight baselines around the outer islands of its Arctic Archipelago. Straight baselines would be the most effective way for Canada to establish internal waters because by drawing straight baselines around the outer islands, Canada would enclose the entire area inside of the fringe. This would mean that Canada could extend its jurisdiction

over the area and apply national laws. Other ships passing through would be required to abide by Canadian regulations in the area.

The traditional definition of straight baselines is described in Article 7 of UNCLOS. Straight baselines can be applied where 'the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity' (UNCLOS 1982, 7). Additionally, these baselines 'must not depart to any appreciable extent from the general direction of the coast and the sea areas lying with the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal water' (UNCLOS 1982, 7). These UNCLOS standards are based on the International Court of Justice (ICJ) Anglo-Norwegian Fisheries Case in 1951. The court stated three criteria: straight baselines must follow the direction of the coast, they must be 'closely linked to the land' and they must consider economic usage in the region (Fisheries Case 133). Although they differ slightly, it is important to take both legal sources into account when determining straight baselines. The Fisheries Case attaches an important aspect to the concept of straight baselines: historic rights. While this concept is important to Canada in advancing its argument, factors such as geography and direction are of greater importance.

The direction of the coast, according to UNCLOS and the Fisheries case, may be difficult to prove in the context of the Northwest Passage. Some authors do not see direction as a roadblock in the Canadian argument. Donat Pharand, for example, believes that straight baselines do not depart from Canada's coastline for two reasons.

He asserts that: 'straight baselines unquestionably follow the outer line or general direction of the Archipelago' as used in the fisheries case along the Norwegian Skjaergaard, and that 'the general trend of the most distant islands do not deviate more than 20° from coastline or its general direction' (2007, 18-19). In this view, the Canadian Arctic Archipelago is the outer baselines, not the coasts of Nunavut and the Northwest Territories, and therefore straight baselines accurately apply.

Simply looking at a map of the Canadian Arctic suggests it is difficult to establish this direction along the coast. As James Kraska states: 'Canadian straight baselines in the Arctic... project at numerous points tens of miles into the high seas violating virtually every rule governing lawfully drawn baselines' (2007, 272). Looking at the Arctic Archipelago, the fringe of islands run northeast and southwest. To follow directly along the land's coast would mean following an east-west direction. Therefore, a strict interpretation of straight baselines makes the concept inapplicable to Canada's Arctic Archipelago.

Although the Fisheries Case is widely cited and applied under international law of the sea disputes, the case is sixty years old. Recently, the International Court of Justice (ICJ) has somewhat reinterpreted the concept of straight baselines in the Qatar v. Bahrain case. While the criteria for straight baselines are upheld, the court attempts to limit its application. The case explains that, since straight baselines are already an exception to the normal baselines rule, they 'must be applied restrictively' (Qatar v. Bahrain 212). Recognising Canada's claim could create a dangerous precedence in the

application of straight baselines (Byers and Lalonde 2009, 1204). It is necessary to limit the application of straight baselines, otherwise too many states would justify its application and freedom of the high seas would decrease significantly. Therefore, straight baselines cannot be fully applied to the Arctic Archipelago because the directional requirement cannot be strictly applied.

One of Canada's strongest claims to internal waters in the Northwest Passage is the use of Article 234 of UNCLOS. The Article establishes extensive state jurisdiction over its exclusive economic zone⁵ in ice-covered areas:

'Coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.' (UNCLOS 1982, 234)

⁵ A state's exclusive economic zone extends 200 nm from its baseline. See UNCLOS 1982 art. 57.

This argument is highly favourable to implementing Canadian authority over the Northwest Passage. Firstly, this Article was originally drafted to give extensive power to Arctic states to prevent and control vessel oil pollution (Bartenstein 2011, 24). Canada's foreign policy in the Arctic region clearly puts environmental concerns at the forefront of its argument. Increasing Canadian laws in the Arctic would make international shipping standards much stricter. Specifically allowing Canada to extend its laws and regulations over these ice covered areas would increase its sovereignty and legitimise its claims to internal waters. Unlike other, more vague sections of UNCLOS, Article 234 'unambiguously declares that a coastal state has a "right to adopt and enforce" measures' (Bartenstein 2011, 39). Invoking this Article means Canada has clear power over its ice-covered regions to assert its sovereignty.

Climate change, however, could prove problematic to Canada's argument for using Article 234, as it is specific to ice-covered areas. While these areas were undisputedly ice-covered a century ago, the gradual reduction of ice in the Arctic makes establishing jurisdiction in ice-covered areas challenging. Ice coverage in the Arctic has already reduced 15-20% in the last 30 years (Byers and Lalonde 2009, 1135). As ice coverage over the Passage decreases, Canada's ability to rely on 234 to support its argument will gradually decline (Molenaar 2009, 297). Therefore, as ice coverage diminishes and the Passage opens, it will be increasingly difficult for Canada to fully assert its sovereignty in the region.

Moreover, Article 234 can only be applied to ice-covered areas in a state's exclusive economic zone. According to UNCLOS, states have jurisdiction in their exclusive economic zone with regards to the establishment of islands, scientific research and the protection and preservation of the marine environment' and 'sovereign rights for the purpose of exploring and exploiting resources' (UNCLOS 1982, 56). While Canada retains some sovereignty over the Arctic, it is in an exclusive economic zone and Canada cannot impede navigation through, and flights over, the area. As stated in Article 234, regardless of the laws and regulations Canada can enact in the Northwest Passage, it must still 'have due regard to navigation' (UNCLOS 1982, 234). Therefore, it cannot completely prevent navigation in the Arctic and protect the northern environment.

Although Article 234 is somewhat helpful for Canada's case, it will likely become inapplicable as global warming increases and northern ice continues to melt. For now, the Article allows Canada to assert some regulation and sovereignty to protect its environment, but Canada will not be able to rely on this Article much longer. As this is one of the most important parts of Canada's argument, it will make it increasingly difficult for Canada to prove to the international community that Northwest Passage constitutes internal waters. Thus, Canada's inability to rely on straight baselines and the 'Arctic clause' makes it difficult for much of the international community to believe the Arctic is anything but a strait used for international navigation.

Canada's strongest claim to sovereignty in the Northwest Passage is in labeling it not only internal waters but also historic internal waters. Although more difficult to claim than the types of bodies of water defined by UNCLOS, it is much easier for Canada to prove. Canada's Inuit population has inhabited the Arctic islands and waters for millennia, spanning the Yukon, Northwest Territories and Nunavut provinces of Canada (De La Fayette 2008, 544). This fact would be quite difficult for any member of the international community to dispute.

Definition of historic waters is not as clear and straightforward as many of the other definitions of waterways. In fact, there is much ambiguity surrounding the concept. UNCLOS does not mention specifics in determining historic waters. Therefore, it is important to review the United Nations Juridical Regime on Historic Waters, which was written in 1962. The UN document establishes three basic criteria for correctly defining a body of water as 'historic.' Firstly, the nation must exercise authority over the waters. Secondly, there must be a 'continuity of this exercise of authority.' Finally, historic waters must have 'the acquiescence of foreign nations' (UN HISTORIC). This definition has also been interpreted in the Fisheries Case: 'By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title' (Fisheries 130, 18).

Norway used historic claims to the waters inside its straight baselines to strengthen its argument. According to Pharand, Norway relied upon 'exclusive

privilege to fish and hunt during the 17th century in the LoppHAVET waters,' asserting more than 250 years of inhabitation by Norwegian people (2007, 7). This also attaches an economic criterion to the rights to historic waters. The Norwegian people depended on the region for nutritional and cultural survival (Byers and Lalonde 2009, 1168). The court therefore took into account not just the geography of the region but also the population and their economic needs.

Having lived in the Arctic Archipelago for centuries, the Inuit population has adapted to the harsh climate and extensively relies upon its ice and wildlife for their survival. It could be argued that sea ice is absolutely 'vital to Inuit culture and the preservation of their way of life' (Byers and Lalonde 2009, 1168). Protection of the Arctic environment is important for Inuit economic needs and also for their psychological well-being and the preservation of their identity, which are inextricably linked to Canada's Arctic (Pharand 2007, 21). Creating more pollution in the Arctic and harming the fragile ecosystem could destroy their way of life, affecting their ability to claim historic rights. Canada's Inuit population has exercised authority over the Northwest Passage on a continuous basis for millennia. This fulfills at least the first two criteria of the Historic Waters definition. Therefore, simply relying on the continuous existence of the Inuit in the Northwest Passage region, it would seem the first two criteria are satisfied.

The biggest concern is the third and final requirement of the Historic Waters definition of "acquiescence." Even if Canada's arguments are in accordance with

international law, they must be accepted by other states for its sovereignty over the Northwest Passage to be legitimate. Thus far, states have been reluctant to do so for reasons such as international trade, of which more than 90% is conducted through international straits (Kraska 2009, 1114). The Northwest Passage would be too beneficial a shipping route and international strait from the Atlantic to the Pacific, for other states to accept Canada's position.

The US is not the only state whose national interests would be impaired by limiting freedom on the high seas in this respect. The European Union (EU) has also protested against limiting the freedom of navigation in the Northwest Passage.

'The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.' (Communication from the Commission to the European Parliament and the Council, The European Union and the Arctic Region 2008)

The EU clearly does not support Canadian claims to straight baselines or even its historic rights (Bartenstein 2011, 35). As a prominent actor in the international

community representing a large number of states, the disapproval of the EU is perhaps more harmful to Canada's sovereignty claims than that of the US.

In the Fisheries case, the principle of acquiescence was only relatively challenged by the United Kingdom. Additionally, foreign states generally did not challenge Norway's use of straight baselines and even the United Kingdom waited more than 60 years to dispute the baselines (Pharand, 8). The Northwest Passage case is quite different: even before Canada established historic claims, states rejected any Canadian sovereign rights.

Realistically, even if Canada's argument is upheld, it is unlikely that most states will recognise its sovereignty in the area. As previously discussed, Canadian sovereignty will not be secured until it is recognised by other states (Lajeunesse 2008, 1049). Sovereignty requires both the assistance and compliance of other states, and Canada is nearly alone in its view of the Arctic Archipelago (Kennair 2010, 31). Although the Inuit presence is a strong claim to establishing historic waters in the Northwest Passage, other states dispute Canada's sovereignty in the area. Consequently, as with straight baselines and the 'Arctic clause,' each of Canada's major claims to sovereignty over the Northwest Passage can be interpreted as being insufficient to claiming internal waters. Even though parts of the legal Articles and cases function in Canada's favor, analysing the legal argument as a whole proves Canada's claims are incomplete.

III) The Northwest Passage: An International Strait?

If the Northwest Passage were legally declared an international strait, other states would have much greater rights to navigation and passage. Under Article 38 of UNCLOS, all ships and aircraft enjoy the right of transit passage, which shall not be impeded (1982). Ships, therefore, would not have to request permission before passage. Additionally, although Canada may still 'designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote safe passage of ships,' it must first consult the IMO prior to their adoption (UNCLOS 1982, article 41 and 41(4)). Other states would not only enjoy more opportunities for transit passage but would also be able to have their say in the regulation of the Northwest Passage through the IMO.

For the Northwest Passage to be established as an international strait, it must also fulfill additional criteria. The 1949 Corfu Channel Case (United Kingdom v. Albania) establishes the criteria for determining if a strait is 'international.' The case determines two criteria, geographical and functional, that must be satisfied for a strait to be considered international. Geographically, the strait must connect one part of the high seas or an Exclusive Economic Zone (EEZ) to another part of the high seas or another EEZ and, functionally, the strait must have historic 'usage' (Corfu Channel Case 28-29). While the geographic principle is fairly straightforward, the concept of 'usage' is still relatively vague.

The geographic criterion is undoubtedly satisfied in the case of the Northwest Passage. Simply by looking at a map, it is easy to determine that the Northwest Passage connects one part of the high seas to another. The route connects the Beaufort Sea on the Pacific Ocean side to the Davis Strait on the Atlantic Ocean side (Lajeunesse 2008, 1046). No matter which route a ship travels through Canada's Arctic Archipelago, it would eventually end up in a different ocean. This criterion, therefore, is largely undisputable.

The functional requirement, however, is much more problematic. Several questions arise from the ambiguity of the Corfu Channel principle. Also, its infrequent usage raises questions around whether it should be considered an international strait in the same category as the Corfu Channel or the Malacca Straits (Schofield, Potts & Townsend-Gault 2009, 43). The Corfu Channel had an estimated 2,884 ships register with customs in 21 months (Pharand 2007, 34) contrary to the approximately 69 transits in 100 years, from 1903-2005, in the Northwest Passage (37-38). The route has been subject to very little traffic compared to other international straits. Whether this route fulfills the functional criteria and, moreover, whether it has ever been historically useful is doubtful.

Other matters pertaining to the functional requirement also questions whether the Northwest Passage can be fully considered an international strait. Only valid and public evidence can be used in an ICJ case, meaning that secret submarine passages during the Cold War will not count (Lajeunesse 2008, 1046). As established in the

Corfu Channel case, only voyages by vessels that had been properly registered with customs were counted as legitimate (1047). Therefore, particularly after the Cold War, it is difficult to determine how many vessels have officially crossed the Northwest Passage.

However, the criteria used in the Corfu Channel case is more stringent than that used by UNCLOS to determine an international strait. Under Part III of UNCLOS, pertaining to straits used for international navigation, Article 37 defines such straits as connecting 'one part of the high seas or an exclusive economic zone to another part of the high seas or exclusive economic zone' (UNCLOS 1982, 37). It does not have a functional requirement, only a geographic one. James Kraska also highlights this differentiation and, in applying the international strait test in UNCLOS, the Northwest Passage easily meets the requirements (2007, 273). Therefore, using UNCLOS independent of other legal materials, the Northwest Passage is clearly a strait used for international navigation. Nevertheless, it is necessary to use the Corfu Channel case and analyse its additional criteria for practical applications.

IV) Conclusion: Agree to Disagree

For now, it seems that Canada and the US will continue to agree to disagree. The matter is likely to remain unresolved until the US becomes a signatory to UNCLOS. The only way to test the legal status of the Northwest Passage is through an ICJ ruling (Huebert 2003, 301). Although the Canadian argument is inadequate in

most of its criteria, the international strait argument is also incomplete. It is not possible to definitively prove either side without finding a flaw in the legal sources.

The Canadian argument for internal waters in the Northwest Passage is incomplete and does not meet all the necessary requirements to claim full sovereignty over the Arctic Archipelago. While it does use important international law of the sea legal principles, it is too easy for others to disprove the argument and disagree with Canada's authority in the region. The Northwest Passage is a special case in international law because navigation through it has only recently become possible and due to the delicate nature of the Arctic marine environment. Unlike other international straits, the Northwest Passage still holds a mythical status that promises to make Canada's claims over this region problematic for years to come.

Bibliography

Bartenstein, Kristin. (2011). The “Arctic Exception” in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage? *Ocean Development & International Law*, 42 (1-2), 22-52.

Byers, Michael and Lalonde, Suzanne. (2009). Who Controls the Northwest Passage? *Vanderbilt Journal of Transnational Law*, 42, 1133-1210.

Corfu Channel Case (United Kingdom v. Albania), 1949 WL 1 (I.C.J. 1949).

Cornut, Jeremie. (2010). Why and When We Study the Arctic in Canada. *International Journal*, 65, 943-953.

De La Fayette, Louise Angelique. (2008). Ocean Governance in the Arctic. *The International Journal of Marine and Coastal Law*, 23, 531-566.

Elliot-Meisel, Elizabeth. (2009). Politics, Pride and Precedent: The United States and Canada in the Northwest Passage. *Ocean Development & International Law*, 40, 204-232.

Fisheries Case (United Kingdom v. Norway), 1951 WL 12 (I.C.J. 1951).

Huebert, Rob. (2003). The Shipping News Part II: How Canada’s Arctic Sovereignty is on Thinning Ice. *International Journal*, 58(3), 295-308.

Kennair, John. (2010). An Inconsistent Truth: Canadian Foreign Policy and the Northwest Passage. *Vermont Law Review*, 34, 15-31.

Kraska, James. (2009). International Security and International Law in the Northwest Passage. *Vanderbilt Journal of Transnational Law*, 42, 1109-1132.

Kraska, James. (2007). The Law of the Sea Convention and the Northwest Passage. *The International Journal of Marine and Coastal Law*, 22(2), 257-282.

Lajeunesse, Adam. (2008). The Northwest Passage in Canadian Policy: An Approach for the 21st century. *International Journal*, 63, 1037-1052.

Macneil, Gillian. (2006). The Northwest Passage: Sovereign Seaway or International Strait? A Reassessment of the Legal Status. *Dalhousie Journal of Legal Studies*, 15, 204-240.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 WL 34607607 (I.C.J. 2001).

Pharand, Donat. (2007). The Arctic Waters and the Northwest Passage: A Final Revisit. *Ocean Development & International Law*, 38(1-2), 3-69.

Potts, Travis and Schofield, Clive. (2008). Current Legal Developments in the Arctic. *The International Journal of Marine and Coastal Law*, 23, 151-176.

Schofield, Clive, Potts, Travis and Townsend-Gault, Ian. (2009). Boundaries, Biodiversity, Resources, and Increasing Maritime Activities: Emerging Oceans Governance Challenges for Canada in the Arctic Ocean. *Vermont Law Review*, 34, 34-55.

United Nations Juridical Regime on Historic Waters, Including Historic Bays, UN Doc. A/CN.4/143 (1962).

United Nations Law of the Sea Convention (1982) 1833 U.N.T.S. 3.