

MARITIME LAW: SOVEREIGNTY IN THE ARCTIC

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I. The Changing Arctic

The Arctic region is changing literally and figuratively. In the literal sense, natural temperature variability and rising temperatures linked to global warming continue to cause the Arctic ice pack and Arctic sea ice to decrease at a concerning rate.¹ Since 1979, NASA satellites have monitored and produced a constant record of the Arctic ice levels, substantiating this decrease.² The period between 2007 and 2016 heightened global concern as the record indicates that the average annual decrease has become much more dramatic than that of decreases from previous years. The Arctic ice pack and Arctic sea ice has decreased by 40% since the satellite monitoring began in 1979. This period has seen the lowest levels of the Arctic ice pack and Arctic sea ice levels, unmatched in recent human history.³ A release by the National Snow & Ice Data Center has shown that the Arctic sea ice extent in 2017 has been the lowest since the satellite records began in 1979.⁴ Credible projections indicate that this trend will continue, and that it is likely to become more drastic. It is becoming widely known and increasingly noticeable that the once ice-entombed Arctic is melting.

In the figurative sense, the Arctic will become a significant economic and geopolitical region of the world. The decrease of the Arctic ice pack and the Arctic sea ice will reveal untouched land and seabed, rich in oil and minerals, and expose previously unnavigable waters and shipping lanes during the summer months. The

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¹ United States, National Snow and Ice Data Center, "Another Record Low for Arctic Sea Ice Maximum Winter Extent", (Colorado, National Snow and Ice Data Center, 24 March 2016), online: <<https://nsidc.org/arcticseaicenews/>> [National Snow and Ice Data Center].

² United States, National Aeronautics and Space Administration Earth Observatory, "Sea Ice", (Colorado, NASA Earth Observatory (16 September 2016), online: <earthobservatory.nasa.gov/Features/SeaIce/page5.php> [NASA Earth Observatory].

³ Council on Foreign Relations, "The Emerging Arctic" (2015), *Council on Foreign Relations* (blog), online: <www.cfr.org/polar-regions/emerging-arctic/p32620#1/?cid=otr_marketing_use-arctic_Infoguide#!>.

⁴ United States, National Snow and Ice Data Centre, "2017 Ushers in Record Low Extent", (Colorado, National Snow and Ice Data Center, 7 February 2017), online: <nsidc.org/arcticseaicenews/2017/02/2017-ushers-in-record-low-extent/>.

newly navigable waters will be vital to the ability of states to control and economically benefit from the Arctic region. The 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) defines the rights and responsibilities of states with respect to their use of the world's oceans.⁵ Yet, this convention is principally unable to resolve which states have territorial claims to some of the navigable waters in the Arctic region. Uncertainties surrounding territorial claims remain a preliminary question in the application of the 1982 UNCLOS in the Arctic region. However, the historical inaccessibility of the Arctic waters and the lack of activity in the region created disinterest in adjudicating territorial claims at the International Tribunal for the Law of the Sea (ITLOS) and International Court of Justice (ICJ). To date, differing opinions regarding claims to these waters have formed the basis of the conversation between the Arctic states.⁶ However, the recent⁷ turning of the capitalistic tide in the United States of America (U.S.) and the ambition of the Government of China will undoubtedly turn what has been a moderate disagreement into a more intense dispute, as states seek to exercise their rights to these waters.

II. Claim to the Northwest Passage: An Exercise of Sovereignty

As an Arctic state and founding member of the Arctic Council,⁸ Canada will be involved in the global dispute regarding territorial claims and the rights and responsibilities of states in the Arctic region.⁹ Canada is currently a principal party of

⁵ *United Nations Convention on the Law of the Sea*, 10 December 1982 at Part III (entered in force 16 November 1994) [UNCLOS].

⁶ Ted L McDorman, *Salt Water Neighbours: International Ocean Law Relations between the United States and Canada*, (New York: Oxford University Press, 2009) at 225-230. The reference to Arctic States includes all members of the Arctic Council: Canada, the Kingdom of Denmark (including Greenland/the Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, the United States of America and six international organizations representing Arctic Indigenous Peoples.

⁷ On April 28, 2017, an executive order titled "America-First Offshore Energy Strategy" was released by the President of the United States, Donald Trump, to allow oil exploration and drilling in the Arctic region. To carry out the policy of "encourag[ing] energy exploration and production, including on the Outer Continental Shelf" this executive order offers in Section 11: Review of Offshore Arctic Drilling Rule that "The Secretary of the Interior shall immediately take all steps necessary to review the Final Rule entitled "Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf," 81 Fed. Reg. 46478 (15 July 2016), and, if appropriate, shall, as soon as practicable and consistent with law, publish for notice and comment a proposed rule suspending, revising, or rescinding this rule." Presidential Executive Order Implementing an America-First Offshore Energy Strategy (USA White House Executive Order), pursuant under *Outer Continental Shelf Lands Act*, 43 USC 1331 (28 April 2017), online: <<https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy>> [White House Offshore Energy Executive Order].

⁸ The Arctic Council is the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic. *Arctic Council*, "The Arctic Council: A backgrounder" (2015), online: <www.arctic-council.org/index.php/en/about-us>.

⁹ *Ibid.*

a long-standing but dormant dispute regarding territorial claims; more specifically, a dispute regarding the international legal status of the Northwest Passage (NWP). The NWP is an ocean route comprised of a series of straits/sea lanes through the Canadian Arctic Archipelago. This Archipelago was assigned to Canada from Britain in 1880.¹⁰ Indeed, it is not the route nor the archipelagic land that is the subject of the international dispute, but the NWP's international legal status under the 1982 UNCLOS.¹¹ Canada claims that the waters within the NWP have the international legal status of Canadian internal waters. The NWP dispute is critical to Canada's ability to assert their sovereignty in the Arctic. Recognition of this status would accord Canada the authority to deny all foreign vessels, both commercial and military, the use of the NWP.¹² Many states, predominantly the U.S., do not recognize Canada's assertion that the NWP is Canadian internal waters, as they seek to have access to, and use of, the NWP, with as much freedom or rights during vessel passage as legally attainable. Thus, other states, namely the U.S., consider the waters to be an International Strait.¹³ Ultimately, the NWP will not have a definitive legal status unless this matter is either settled between the principal states, or is adjudicated by the ITLOS or the ICJ.

It is the value of the transit of the NWP for commercial and military vessels that propels the dispute. It is estimated that the Arctic contains 13% (~90 billion barrels) of the world's undiscovered conventional oil resources and 30% of the undiscovered natural gas resources.¹⁴ One-third of the undiscovered oil lies within the Arctic territory of the U.S. Through the implementation of the recent executive order titled "America-First Offshore Energy Strategy," it is foreseeable that these resources will be realized in the near future.¹⁵ Extraction and transport of these resources will increase the need and value of transit through the NWP. The NWP offers a route through the Arctic Sea, between the Pacific and Atlantic Oceans. There exist five major routes that can be used depending on a number of factors: the size of the vessel, the vessels ice-breaking capability, the ice conditions, and the adequacy of current navigational information.¹⁶ Three of the five routes have been identified as

¹⁰ Michael Byers, *Who Owns the Arctic? Understanding Sovereignty Disputes in the North*. (Madeira Park, BC: Douglas & McIntyre, 2009) at 6.

¹¹ Alan Vaughan Lowe & Robin Rolf Churchill, *The Law of the Sea* (Manchester: Manchester University Press, 1999) at 102.

¹² *Ibid* at 61.

¹³ McDorman, *supra* note 6 at 225.

¹⁴ United States Energy Information Administration, "Arctic Oil and Natural Gas Resources", (Washington DC, USEIA, 20 January 2012), online: <<https://www.eia.gov/todayinenergy/detail.php?id=4650>>.

¹⁵ Christina Nunez, "What Happens When Oil Spills in the Arctic?", *National Geographic* (24 April 2014), online: <news.nationalgeographic.com/news/energy/2014/04/140423-national-research-council-on-oil-spills-in-arctic/>. See also White House Offshore Energy Executive Order, *supra* note 7.

¹⁶ McDorman, *supra* note 6 at 229-230.

having the greatest commercial viability and are predicted to be ice-free from July until September by the end of this century – at the latest.¹⁷ If the predictions about the usability of the NWP are correct, ships will be attracted to the beneficial usage of Canadian Arctic waters. Use of the NWP for transit from Eastern Asia and Europe is approximately 7,000 km shorter than the current route through the Panama Canal – this will save time and reduce the cost of transit. The Danish-operated Nordic Orion became the first bulk carrier to traverse the NWP in September 2013, saving approximately \$80,000 in fuel.¹⁸ This transit was registered with, and received permission from the Canadian Coast Guard. Thereby, it did not undermine Canada’s legal position regarding the NWP.¹⁹ It is uncertain whether other states and their vessels will respect Canadian authority in this manner or seek to transit the NWP without permission. However, following the successful transit of the Nordic Orion, it is certain that other states and their vessels are planning to use the NWP. In 2016, the Government of China publicly announced their ambition and encouragement of the use of the NWP for commercial transit. This announcement was accompanied by the publication of the *Arctic Navigation Guide (Northwest Passage)*. This *Guide* was published without consultation with Canada and offers extensive information regarding the transit of the NWP.²⁰ Further, the NWP can also accommodate super-tankers and container ships that are too large for the Panama Canal. Naval aircraft carriers are also too large for the Panama Canal and may be attracted to an ice-free NWP.²¹ Indeed, the importance of the NWP is evident from the many beneficial usages of the passage. The international strait status, asserted by the U.S., provides the highest degree of freedom for vessel passage, allowing states to take advantage of the economic and geographic/transportation benefits listed above.²²

Canada reserves the potential to gain substantial economic benefits from the use of the NWP. However, Canada must comprehensively consider a balance of the benefits and the risks associated with the use of the NWP before transit activity increases. As the NWP is a route through the Canadian Arctic Archipelago, it is Canada’s duty to first consider the detrimental effects of the use of the NWP on the Canadian Arctic environment and the Arctic peoples. There are many Inuit communities along the NWP that should not be discounted by the size of their population. Communities such as Qausuittuq (Resolute), Uqsuqtuuq (Gjoa Haven), Iqaluktuuttiaq (Cambridge Bay), Qurluktuk (Kugluktuk), and Ulukhaqtuuq

¹⁷ NASA Earth Observatory, *supra* note 2.

¹⁸ Whitney Lackenbauer & Adam Lajeunesse, “More Ships in the Northwest Passage will boost our Arctic claim”, *The Globe and Mail* (5 January 2015), online: <www.theglobeandmail.com/opinion/more-ships-in-the-northwest-passage-willboostourarcticclaim/article22294408>.

¹⁹ Michael Byers, “Canada’s Arctic Nightmare Just Came True: The Northwest Passage is Commercial”, *Globe and Mail* (20 September 2013), online: <<https://www.theglobeandmail.com/opinion/canadas-arctic-nightmare-just-came-true-the-northwest-passage-is-commercial/article14432440>>.

²⁰ Nathan VanderKlippe, “China Reveals Plans to Ship Cargo across Canada’s Northwest Passage”, *Globe and Mail* (20 April 2016), online: <<https://www.theglobeandmail.com/news/world/china-reveals-plans-to-ship-cargo-across-canadas-northwest-passage/article29691054>>.

²¹ Byers, *supra* note 10 at 40.

²² Lowe & Churchill, *supra* note 11 at 105.

(Ulukhaktok) are located on the three routes identified as having the greatest commercial viability. It is important to note that these communities may benefit from a reduction in the cost of supplies and unemployment if activity in the region increases. However, these communities are likely to experience the most severe negative impacts.

In particular, oil extraction can significantly benefit the Canadian economy. However, oil spills, caused by drilling, extraction and transportation, have more severe effects in the Arctic region when compared to spills in more temperate climates. In high-latitude, cold ocean environments, oil persists for longer periods.²³ Low temperatures and insufficient sunlight result in low rates of natural oil evaporation and decomposition. This is substantiated by the effects of the 1989 Valdez oil spill that occurred in the sub-Arctic region. The Exxon Valdez spilled approximately 42 million litres of crude oil, resulting in contamination of 1,990 kilometers of shoreline. It has been estimated that approximately 302 harbor seals, 2,000 sea otters, and 250,000 seabirds died in the days following the spill.²⁴ Fish populations and larger marine mammals will suffer long-term ill effects from this spill and it will take up to 30 years for shoreline habitats such as mussel beds to fully recover.²⁵ More than a decade after this event, researchers report that a significant amount of oil persists in this region.²⁶ If the oil becomes trapped in ice, the long-term impacts of Arctic oil spills can be more devastating than previously thought.²⁷ The National Academy of Sciences have concluded that “no current cleanup methods remove more than a small fraction of oil spilled in marine waters, especially in the presence of broken ice.”²⁸ The once ice-entombed Arctic is vulnerable to deliberate and residual pollution caused by increases in transport, industrial development and mineral, oil and natural gas extraction.²⁹ Indeed, the environmental risks associated with the use of the NWP are significant.

²³ Mark Nuttal, “The Arctic is Changing” (2000) Stefansson Arctic Institute/European Union Raphael Programme, online: <www.thearctic.is/articles/overviews/changing/enska/index.htm>.

²⁴ Sarah Graham, “Environmental Effects of Exxon Valdez Spill Still Being Felt”, *Scientific American* (19 December 2003) online: <<https://www.scientificamerican.com/article/environmental-effects-of/>>.

²⁵ *Ibid.*

²⁶ Adam Hadhazy, “20 Years After the Exxon Valdez: Preventing and Preparing for the Next Oil Spill Disaster”, *Scientific American* (23 March 2009), online: <<https://www.scientificamerican.com/article/exxon-valdez-20-years-later-oil-spill-prevention/>>.

²⁷ *Earth Observatory, NASA, supra* note 2.

²⁸ Joel K Bourne Jr, “As Arctic Melts, a Race to Test Oil Spill Cleanup Technology”, *National Geographic* (14 September 2013), online: <news.nationalgeographic.com/news/energy/2013/09/130913-arctic-oil-spill-cleanup-technology/>.

²⁹ World Wildlife Foundation Canada, “Balancing Shipping Opportunities with a Healthy Arctic Future” (2017), online: <www.wwf.ca/conservation/arctic/a_new_frontier_for_shipping/>.

It has become apparent that the states who assert legal access to, and use of, the NWP are not fully considering the vulnerability of the Arctic environment and the Arctic peoples. Thus, the international legal status should not be left to uncertainty. The Valdez spill sheds light on the devastating effects of oil on the Arctic environment. A spill in the NWP would have devastating consequences on a population that for the past 4000 years, has relied on the hunting of seal and caribou, and fishing for Arctic char.³⁰ Should Canada win this dispute, they will have the authority to require foreign vessels to obtain their permission to transit the NWP. With exclusive access and control over the NWP, Canada will have the opportunity and the responsibility to instate stringent environmental regulations as well as the authority to foster strong international cooperation in the protection of the Arctic environment and the Arctic peoples.

III. Focus of Report: International Legal Statuses & Associated Rights of Passage

The resulting legal status of the NWP will have implications on Canada's authority to regulate, manage, and control the passage. This is a concern to other states, who seek to minimize the amount of control Canada is authorized to exercise over the passage. Simply, three main international legal statuses exist under the 1982 UNCLOS: 1) internal waters – which does not allow a foreign vessel the right of passage; 2) international strait – which allows a foreign vessel the right of 'transit passage'; 3) territorial sea – which allows foreign vessels the right of 'Innocent Passage'.³¹ These rights will be explained further in this report as their implication on foreign vessel passage greatly differs.

The significance of the dispute is increasing as the Arctic ice pack and Arctic sea ice melt. If Canada is to assert their sovereignty in the Arctic, this dispute must be settled by the principal states such that the international legal status of the NWP is determined and internationally recognized. If the international legal status dispute is resolved in Canada's favour, Canada will be better able to economically benefit from the Arctic, and protect the Arctic environment and Inuit peoples from threat. As Canada is a party to UNCLOS, this report will further explore the three international legal statuses offered under the convention, and the rights of passage that each grant to foreign, commercial and military vessels. Then, the uncertainty over the international legal status of the NWP will be approached through the lens of the Canada-U.S. disagreement. Assessing the cogency of their claims will shed light on the likelihood of the possible outcomes of an international legal status for the NWP.

³⁰ Canadian Museum of History, "The Dorset People" (2017) Government of Canada (Blog), online: <www.historymuseum.ca/cmhc/exhibitions/archeo/paleoesq/ped01eng.shtml>.

³¹ McDorman, *supra* note 6 at 212.

IV. Introduction of Analysis

The technical definition of a 'strait' is a narrow, natural passage or arm of water connecting two larger bodies of water.³² While the NWP fits this physical definition, it is largely irrelevant at International Law. The physical properties of the passage do not lead to a clear determination of its legal status. The absence of a clear definition offers the starting point for an analysis as to the international legal statuses that may apply to the NWP. If brought before the ITLOS or ICJ for determination of this question, three international legal statuses could be mandated to the waters of the NWP: internal waters, international strait, or territorial sea. As previously mentioned, the legal status that is ultimately ascribed to the NWP will determine Canada's control over its regulation and other countries' ability to navigate it. What follows is an outline of the three international legal statuses that could be given to the NWP. Indeed, it is this status and not its geographical features that determine the rights sought after by the U.S. and other states.

V. Internal Waters

Internal waters are not part of a state's maritime territory or territorial sea; they are legally assimilated to the terrestrial territory. A state enjoys full and exclusive sovereign authority over their own internal waters and, as mentioned above, has the right to deny all foreign vessels, both commercial and military, from passage through these waters.³³ Without the permission to enter another state's internal waters, the act of entering is a breach of law. When a vessel enters another state's internal waters, that vessel becomes subject to all domestic laws of that state. The 1982 UNCLOS does not offer a right of passage to foreign vessels nor does it provide for the regulation of conduct within internal waters.³⁴ This omission is likely due to the principle that the state has the sovereign authority to deal with its internal waters as it so chooses. The 1985 NWP voyage of the US Coast Guard Ice-Breaker, the *Polar Sea*, was the catalyst for the Canadian Government's public assertion that the NWP was internal Canadian waters. Although, it may not have been the intent of the U.S., the transit caused a nationwide public outcry as Canadian nationalists saw this as a serious violation of Canada's sovereignty in the Arctic region. In response, Canada drew straight baselines around the outmost islands of the Arctic Archipelago later that year.³⁵ Arguably, these straight baselines were drawn in accordance with the 1982 UNCLOS regulations.³⁶ Article 8 of Part II of the 1982 UNCLOS states that

³² Lowe & Churchill, *supra* note 11 at 102.

³³ *Ibid* at 61.

³⁴ *Ibid*.

³⁵ Byers, *supra* note 10 at 51-52.

³⁶ McDorman, *supra* note 6 at 238-340.

internal waters are: “waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.”

Based on Article 8, these straight baselines would *prima facie* give the NWP the status of internal waters. The U.S. and other countries do not agree with the Canadian drawn straight baselines, as highlighted by statements such as: “Canada was not justified in stating that all waters between Canadian islands in the Arctic were internal Canadian waters.”³⁷ Further, from an international law standpoint, they claim there is no basis to support justification of the straight baselines. However, Canada supports their claim that the NWP is within Canadian internal waters regardless of the legitimacy of the refuted straight baselines. This is based on an international legal distinction that is reliant on historic usage: “If the waters are internal by reason of historic title, no right of passage applies and the strait would not be capable of becoming an international strait.”³⁸

This limitation set out by the 1982 UNCLOS offers Canada an expanded claim to strengthen the justification of the NWP’s international legal status. In 1962, the United Nations Secretariat Study determined that historic claims were necessary to maintain a state’s title to areas that otherwise escape the scope of codified international law of the sea.³⁹ Therefore, claims of historic internal waters are based on customary international law. This was determined by the ICJ in the 1982 *Libya-Tunisia Case* concerning the delimitation of the continental shelf between the adjacent states.⁴⁰ Canada’s claim is further strengthened by ICJ precedence from the 1951 *Anglo-Norwegian Fisheries Case*. This case was brought before the ICJ to determine whether historical usage of a territory would act to include such territory within the exclusive bounds, offering Norwegian vessels exclusive rights to use such waters. The judgement is monumental as it provides that, although waters may not have the characteristics of internal waters at international law, they will be treated as such if there is evidence of historical title.⁴¹

This reasoning is a grand representation of a component of Canada’s claim regarding the international legal status of the NWP. As outlined in the 1962 United Nations Secretariat Study, there are three criteria for assessing whether the NWP is, in fact, historic waters: 1) the authority exercised over the area by the state claiming it as ‘historic water’; 2) the continuity of such exercise of authority of which occurs over a considerable amount of time; and 3) the attitude of foreign states.⁴² The

³⁷ Rob Huebert, “Polar Vision or Tunnel Vision: The Making of Canadian Arctic Waters Policy”, (1995) 19:4 Marine Policy 343.

³⁸ Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988) at 223.

³⁹ McDorman, *supra* note 6 at 214-215.

⁴⁰ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18 at para 100.

⁴¹ *Fisheries Case (United Kingdom v Norway)*, [1951] ICJ Rep 116 at 131.

⁴² McDorman, *supra* note 6 at 216.

burden of proof to satisfy these criteria is very high and the onus would be placed on Canada if the dispute was brought before ITLOS or the ICJ. With application of Canada's claim to the above three-part test, the validity of the historic internal waters claim will be analyzed further in this report.⁴³

VI. International Strait

The second international legal status is the international strait. This status was created during the expansion of the territorial sea from three to twelve nautical miles in the 1982 UNCLOS. This resulted in many narrow waterways, once known as 'High Seas,' falling within the territorial sea of the adjacent states. This was a concern for many states, as areas of water were now 'captured' in the territory of certain states, thus threatening to impede navigation and detrimentally affect strategic and economic interests.⁴⁴ The international strait status was the result of a need for a navigational-friendly right of passage through these narrow waterways. Canada's support for the resolution to create this international legal status was conditional on its inapplicability to the NWP. The status was first codified in Article 16(4) of the 1958 Territorial Sea and Contiguous Zone Convention, granting the right of passage through international straits if such passage was for international navigation. This status carried with it the Non-Suspendable right of 'Innocent Passage.' This right of passage conferred states with a higher degree of unimpeded navigation and introduced a right that could not be suspended. However, the remaining restriction on the freedom of navigation, within the Non-Suspendable right of 'Innocent Passage' was a catalyst for the codification of a new right: the right of 'transit passage'. Article 37 of the 1982 UNCLOS transit passage reads: "This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone *and another part of the high seas or an exclusive economic zone.*"⁴⁵ The added emphasis identifies the distinction between a Non-Suspendable Right of 'Innocent Passage' and 'transit passage'. A Non-Suspendable Right of 'Innocent Passage' exists for international navigation only when the route connects one part of the high seas, or an exclusive economic zone and the territorial sea of a foreign state.

It was previously mentioned that the absence of a definition of what constitutes a 'strait' at international law is problematic to the NWP dispute. This is also true for the absence of those defining factors that establish a strait as an "international strait" or 'Strait used for International Navigation' – terms found in the 1958 Territorial Sea and Contiguous Zone Convention and the 1982 UNCLOS. Thus, International law relies on the 1949 ICJ decision in the *Corfu Channel Case* to

⁴³ Pharand, *supra* note 38 at 223.

⁴⁴ McDorman, *supra* note 6 at 212.

⁴⁵ UNCLOS, *supra* note 5 (emphasis added).

address these definitional gaps. The *Corfu Channel Case* ultimately outlined two heads of criteria that exist when determining whether a ‘Strait’ is an international strait: 1) Geographic and 2) Functional.⁴⁶ Although these criteria shed light on what constitutes an international strait, they are not without their problems. The criteria are broad and lack official specification. Thus, if ITLOS or the ICJ were to adjudicate the legal status of the NWP, reliance on the criteria to assist on this determination would likely prove unhelpful. The geographical criterion, as noted above, is outlined in Part III, Section 2 Article 37 of the 1982 UNCLOS: “This section applies to straits which are used for international navigation *between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.*”⁴⁷

In the event that Canada is not able to justify that the NWP are Canadian historic internal waters, it is certain that the NWP satisfies the above geographic criterion. The Functional Criterion, as outlined in the *Corfu* findings, is not dependent on the volume of vessel traffic through a Strait.⁴⁸ There was no “use” threshold bearing on whether a ‘Strait’ is an international strait. This would discredit a Canadian argument that the NWP, due to lack of use for international navigation, is not an “international strait.” However, after the *Corfu Channel Case*, more emphasis has been placed on the historical acknowledgment of a route as a “useful” route for international navigation.⁴⁹

The right of passage through an international strait, known as a transit passage, is unique at international law. Article 38 of the 1982 UNCLOS outlines the right of ‘transit passage’ which reads:

1. *In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.*

2. *Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.* However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

⁴⁶ *The Corfu Channel Case*, Judgment of April 9th, 1949: [1949] ICJ Rep 28-29 at para 4 [*Corfu Channel Case*]

⁴⁷ UNCLOS, *supra* note 5 at part III (emphasis added).

⁴⁸ *Corfu Channel Case*, *supra* note 46 at 28.

⁴⁹ McDorman, *supra* note 6 at 243.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.⁵⁰

‘Transit passage’ does not offer the same freedom of navigation that exists on the high seas. However, when read together, the emphasis in article 38(1) and 38(2) above grants vessels, both commercial and military, the highest degree of freedom of unimpeded navigation that exists under the 1982 UNCLOS. This status is not subject to a threshold of ‘Innocence’ that must be satisfied during transit.⁵¹ Traditionally, within the territorial sea of a state, passage of a foreign vessel is required to comply with Article 19 of the 1982 UNCLOS:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.

However, foreign vessels are required to refrain from making threats or use of force. This is not a condition of the right of transit passage but an ancillary obligation. An activity which threatens a state has the effect of classifying the vessel under the general regime of innocent passage, in which case passage can be denied for want of innocence. The right of ‘transit passage’ does have limitations as it only permits vessels to conduct activities incidental to the normal mode of “continuous and expeditious transit” unless violations are rendered necessary by *force majeure* or distress.⁵² It is this right and the freedom that it grants to vessels, both commercial and military, that the U.S. and other states seek to obtain when transiting the NWP. The motivations of foreign states are clear in relation to their assertion that the NWP has the international legal status of an international strait. Canada, on the other hand, considers the international legal status of an international strait to be a serious concern. If the NWP is considered an international strait, Canada will not be able to deny a vessel’s passage unless the transit violates other provisions of the 1982 UNCLOS.

VII. Territorial Sea

The third international legal status is that of a territorial sea. This status is not a subject of the NWP dispute. Each island within the archipelago is entitled to its own baseline, drawn accordingly to the normal principles.⁵³ Within Canadian territorial sea, foreign vessels, both commercial and military, enjoy the right of ‘Innocent Passage’. Under Article 18 of the 1982 UNCLOS – Meaning of Passage states:

⁵⁰ UNCLOS, *supra* note 5 at part III (emphasis added).

⁵¹ Lowe & Churchill, *supra* note 11 at 107.

⁵² *Ibid* at 110.

⁵³ *Ibid* at 123 (Archipelagic Baselines).

Passage means navigation through the territorial sea for the purpose of: traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.

Passage shall be continuous and expeditious. *However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.*⁵⁴

Article 19 of 1982 UNCLOS states ‘Innocent Passage’ is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. If ‘innocent’, foreign commercial and military vessels would have more rights during passage within the territorial sea. The emphasis in Article 18 denotes “stopping and anchoring” but only so far as the same are incidental to ordinary navigation. The reason that Canada has concern about the right of ‘Innocent Passage’ can be found within Article 24 of the 1982 UNCLOS. This Article states:

1. *The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention.* In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:
 - (a) *impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or*
 - (b) *discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.*
2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.⁵⁵

If the NWP is considered Canadian Territorial Waters, Canada would have jurisdiction over the waters but would not be permitted to deny, impair or discriminate against the ‘Innocent Passage’ of foreign vessels, whether military or commercial. However, “Innocent Passage” offers Canada the ability, in the event that a foreign vessel violates Article 25 of the 1982 UNCLOS, to prevent passage of such vessel. Specifically, Article 25(1) and Article 25(3) – Rights of Protection of the Coastal State reads:

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
- ...
3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its

⁵⁴ UNCLOS, *supra* note 5 at Part II (emphasis added).

⁵⁵ *Ibid* (emphasis added).

territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.⁵⁶

While these provisions offer Canada some ability to prevent passage through the NWP, this is not the international legal status that Canada is asserting to exist within the waters of the NWP. In a time in which the Arctic is becoming a critical economic and geopolitical region of the world, the limited rights that the status of Territorial Waters affords is not sufficient. In Canada's opinion, this status does not give enough authority to regulate, manage and control the NWP. Therefore, the status of territorial sea should be considered a compromise to the NWP dispute.

It must briefly be noted that Article 234: Ice-covered areas of the 1982 UNCLOS does not grant Canada indirect jurisdiction over foreign vessel navigation through the NWP. The U.S. consider Article 234 as binding customary law but oppose the attempts of states to assert jurisdiction over navigation through this authority.⁵⁷ Article 234 does grant Canada limited authority to enforce more stringent environmental standards, like the *Arctic Waters Pollution Prevention Act*⁵⁸, to reduce and control pollution caused by foreign vessels that navigate in Canadian "ice-covered" waters. However, it would be detrimental to Canada's legal claim to invoke Article 234 regarding the NWP. Invoking Article 234 would concede the claim that the NWP is within Canadian internal waters as foreign vessels navigating the NWP should be subject to the jurisdiction of Canadian domestic law – not a multilateral treaty. If Canada continues to assert sovereignty in the NWP, the authority granted under Article 234 should be disregarded.

VIII. The Canada-U.S. Disagreement

As mentioned, Canada is the principal party to the long-standing but dormant dispute regarding the correct international legal status of the NWP. As the dispute is approaching its pinnacle of importance, the uncertainty is best approached through the lens of the opposing claims of Canada and the U.S. Canada asserts the NWP is Canadian internal waters whereas the U.S. asserts that the NWP is an international strait. Canada should consider this dispute to be a national issue – a test of sovereignty burdened with emotional freight as many Canadians consider the Arctic to be Canadian. The U.S. considers this dispute to be a global issue and a military concern, as it will hinder the ability of states to transit and economically benefit from

⁵⁶ *Ibid.*

⁵⁷ Kristin Bartenstein, "The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" (2011) 42 *Ocean Dev & Intl Law* 22 at 27, online: <www.tandfonline.com/doi/abs/10.1080/00908320.2011.542104>.

⁵⁸ *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12.

the Arctic region.⁵⁹ They are ultimately concerned about the level of authority Canada will have in the regulation, management and control of their own (foreign) vessels transiting the NWP. A verdict regarding the international legal status of the NWP will determine whether Canada has the sovereign authority to require foreign vessels, both commercial and military, to obtain their permission before passage through the NWP. This is an interesting dispute as both parties continually avoid legal resolution and actual political confrontation, often expressing a commitment to cooperation regarding the NWP.⁶⁰ It is apparent that both parties are uncertain as to what the outcome of an ITLOS or ICJ adjudication would be. However, both have well-founded legal arguments regarding their assertion as to the international legal status of the NWP.

IX. The Canadian Legal Claim

The Canadian claim finds its roots in a response to the actions of the U.S. As previously mentioned, the 1985 NWP voyage of the U.S. Coast Guard Ice-Breaker, the *Polar Sea*, was the catalyst for the Canadian Government's public assertion that the NWP was within Canadian internal waters. This assertion is contested by other states, as the validity of the straight baselines drawn around the outmost islands of the Arctic Archipelago is not certain.⁶¹ The Canadian government will need to substantiate that the 1985 straight baselines drawn around the Arctic Archipelago are consistent with international legal criteria and guidelines. According to Donat Pharand's research, these baselines meet the "flexible" geographic criteria and guidelines at international law. Donat Pharand is a well-recognized expert with regards to the NWP dispute. However, other scholars do not share this opinion.⁶² As mentioned, the U.S. and other states claim that from an international law standpoint, there is no basis to support justification of the straight baselines. The European Community, an organization focusing on economic integration between members of the European Union, claim that these straight baselines violate Article 7(3) of the 1982 UNCLOS which reads:

3. The drawing of straight baselines *must not depart to any appreciable extent from the general direction of the coast*, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.⁶³

They advocate that the baselines around the Arctic Archipelago utilize "inappropriate base-points, are excessive in length and depart from the general direction of the coast in areas such as Lancaster Sound, Amundsen Gulf and

⁵⁹ McDorman, *supra* note 6 at 225.

⁶⁰ *Ibid* (The 1988 Canada-U.S. Arctic Cooperation Agreement).

⁶¹ *Ibid* at 238-340.

⁶² *Ibid* at 238; Pharand, *supra* note 38.

⁶³ Byers, *supra* note 10 at 53 (emphasis added).

McClure Strait.”⁶⁴ However, application of the ‘flexible criteria’ referred to by Donat Pharand, is favorable to the Canadian claim. Based on the ruling in the 1951 *Anglo-Norwegian Fisheries Case*, Canada can contend that the length of the baselines are justified. In this judgement, it states that consistent and sufficiently long “peaceful usage” may be considered in drawing baselines that legitimize the extension of baselines under customary international law.⁶⁵ Through this reasoning, Inuit use and habitation of the Arctic and Arctic Waters can substantiate the extended Arctic straight baselines.⁶⁶

It remains an unanswered question whether the Arctic straight baselines satisfy the “flexible” geographic criteria and guidelines at international law. If so, the Arctic straight baselines capture the waters of NWP as Canadian internal waters. However, the status of internal waters does not automatically accord Canada the authority that it should be asserting; which is, the right to deny all foreign vessels, both commercial and military, from passage through these waters. This is due to Article 8(2) – internal waters of the 1982 UNCLOS:

2. *Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.*⁶⁷

However, there is a cogent argument that allows Canada to avoid this treaty obligation. When Canada drew the straight baselines around the Arctic Archipelago in 1985 it was not a party to the 1982 UNCLOS – it was a signatory. Canada ratified the 1982 UNCLOS in 2003. Thus, Canada would have been subject to customary international law as set out in the 1951 *Anglo-Norwegian Fisheries Case*, which provided that no right of innocent passage exists in waters enclosed by straight baselines.⁶⁸ To assert that otherwise would be a clear violation of the fundamental principle of non-retroactivity of treaties outlined in Article 28 of the Vienna Convention on the Law of Treaties.⁶⁹ Ultimately, if the straight baselines are considered to satisfy the “flexible” geographic criteria and guidelines at international

⁶⁴ *Ibid*; McDorman, *supra* note 6 at 238.

⁶⁵ Ruwanthika Gunaratne, “Anglo-Norwegian Fisheries Case” (2008), *Public International Law* (blog), online: <<https://ruwanthikagunaratne.wordpress.com/2014/04/11/anglo-norwegian-fisheries-summary/>>.

⁶⁶ Byers, *supra* note 10 at 54.

⁶⁷ UNCLOS, *supra* note 45 at part II (emphasis added).

⁶⁸ Pharand, *supra* note 38 at 228.

⁶⁹ Kristin Bartenstein, “Use it or lose it”: An appropriate and wise slogan?”, *Policy Options* (1 July 2010), online: <[policyoptions.irpp.org/magazines/i\[mmigration-jobs-and-canadas-future/use-it-or-lose-it-an-appropriate-and-wise-slogan/](http://policyoptions.irpp.org/magazines/i[mmigration-jobs-and-canadas-future/use-it-or-lose-it-an-appropriate-and-wise-slogan/)>.

law, then Canada would have a cogent argument that grants the authority they seek in the NWP.

This claim is strongly contested and has been denounced by the U.S and other states. In the event that the claim fails, Canada will be required to rely on the claim that the NWP is within Canadian historic internal waters. This claim will be difficult to substantiate and will likely be met with similar assertions that the NWP is an international strait. Nonetheless, if Canada is successful it will result in the NWP gaining the internal waters status. In 2007, Donat Pharand concluded that Canada would not succeed in establishing that the NWP had the status of Canadian Historic internal waters.⁷⁰ His conclusion was based on the difficulty faced by Canada in discharging the heavy burden of proof that it had exercised jurisdiction over the Arctic waters for a sufficiently long period of time, without protest from the U.S. and other states. The argument that Canada has exercised jurisdiction over the NWP is exceptionally complex. This is due, in part, to piecemeal Canadian assertions of such jurisdiction, from the implicit assertion made in 1907 by Canadian Senator Pascal Poirier that Canada owned everything within a pie-shaped sector extending from the continental coastline to the geographic North Pole to Prime Minister Stephen Harper's continual admonishment of states that do not recognize Canadian sovereignty over the NWP.⁷¹

Under international law, Canada can assert that they have exercised exclusive authority over the NWP; however, factually based demonstration of this authority is necessary. As the Arctic Archipelago was assigned to Canada from Britain in 1880, the Canadian claim relies partly on British exploration and mapping, dating back to the voyages of Sir Martin Frobisher in 1576. Canada also enacted its first legislation regarding the Arctic waters in 1926.⁷² As argued by Donat Pharand, there exists a fatal flaw in Canada's historic argument caused by the lack of alignment between historical activity in the Canadian Arctic waters and the assertion of Canadian sovereignty in such waters. Assertions of the NWP as Canadian internal waters have predominantly occurred in the 20th century and have always been met by opposition from states that do not recognize the claim.⁷³

If Canada is to succeed in the NWP dispute they will be required to partner with the Inuit peoples and base the claim on the Inuit's historical occupation and use of the NWP. The Inuit peoples were assimilated into Canada as citizens under the *Indian Act* in 1924.⁷⁴ Following the 1975 ICJ decision on the rights of Nomadic peoples in Western Sahara, the Canadian-Inuit connection in the claim for Canadian

⁷⁰ Pharand, *supra* note 38 at 237-238.

⁷¹ Byers, *supra* note 10 at 43.

⁷² *Ibid* at 49.

⁷³ *Ibid* at 50.

⁷⁴ Canada, Indian and Northern Affairs Canada, *Canada's Relationship with Inuit: A History of Policy and Program Development* (Ottawa: Public History Inc, 2006), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100016900/1100100016908#chpiv>>.

Historic internal waters has become paramount in establishing continuity of the use of the NWP. The *Western Sahara Advisory Opinion* determined that Nomadic peoples can acquire and transfer sovereign rights over land.⁷⁵ Thus, this judgement could be argued to apply to the Inuit, as they have hunted, fished, travelled and lived as Nomadic peoples in the Canadian Arctic for millennia.⁷⁶ As a result, Canada could refer to the 1993 Nunavut Land Claims Agreement. At section 2.7.1 of the Agreement, the Inuit release and surrender all of their sovereign rights. The section reads as follows:

In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:
cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada; and
agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty The Queen in Right of Canada or any province, the government of any territory or any person based on any aboriginal claims, rights, title or interests in and to lands and waters described in Sub-section (a).⁷⁷

Section 2.7.1(a) and 2.7.1(b) are very clear in portraying that the Inuit have ceded, released and surrendered all of their rights to the Canadian government. This will be met with controversy due to the historical relationship between Canada and the Inuit peoples. This claim will fail if Canada and the Inuit peoples do not establish a Canadian-Inuit partnership in as it is vital to the factors of this line of reasoning. If this occurs, Canada, *prima facie*, has a strong and cogent legal claim.

X. The U.S. Legal Claim

Although the U.S. have not been aggressive opponents in the NWP dispute, they remain steadfast in their position that Canada has no basis at international law to support the claim of internal waters.⁷⁸ The U.S. Department of State released a statement with regard to the Canadian claim over the NWP in 1970 that sheds light on the underlying reason as to why the U.S. claims that the NWP is an international strait. The statement reads: "We cannot accept the assertion of a Canadian claim that

⁷⁵ *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at 56, online: <www.icj-cij.org/docket/files/61/6195.pdf>.

⁷⁶ Byers, *supra* note 10 at 50.

⁷⁷ *Nunavut Land Claims Agreement Act*, SC 1993 c 29 (emphasis added).

⁷⁸ Huebert, *supra* note 37.

the Arctic water are internal waters . . . Such acceptance would jeopardize the freedom of navigational essential for the United States naval activities worldwide.”⁷⁹

The U.S. have historically challenged the legality of states’ sovereign authority if such authority affects U.S. interests.⁸⁰ As mentioned, they are seeking the international status that grants their vessels, both commercial and military, the highest degree of freedom of unimpeded navigation. As Ted McDorman states the “U.S position regarding the NWP may be best described as benign neglect.”⁸¹ This is a very telling statement regarding the U.S.’s attitude toward NWP dispute. However, the U.S.’ claim is more straightforward than Canada’s and, *prima facie*, legally well-founded.

The U.S. claim that the NWP is an international straits rests on a plain meaning interpretation of Article 37 of the 1982 UNCLOS which states that international strait s are straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁸² It is clear that the NWP satisfies this definition. However, referring back to the *Corfu Case*, there are two heads of criteria that exist when determining whether a ‘Strait’ is an international strait: 1) geographic and 2) functional. The U.S. attests that satisfaction of the geographic criterion is enough to determine whether the NWP is an international strait at international law. However, as was mentioned, more emphasis has been placed on the functional criterion since the *Corfu Channel Case*. There have been very few NWP transits to date.⁸³ An increase in international transiting through the NWP will be required if the functional criterion is to be satisfied. On this point, attention must be drawn to the wording of Article 37 of The 1982 UNCLOS - transit passage. It reads: “This section applies to straits *which are used for* international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”⁸⁴

Emphasis has been placed on “which are used for” as this can be interpreted as requiring the designation of an international strait to be conditional on actual use. International lawyers and academics agree with this interpretation. For example, Harvard international law professor Richard Baxter puts forth that, “International waterways must be considered to be those rivers, canals, and straits which are *used* to a substantial extent by the commercial shipping or warships.”⁸⁵ Ultimately, if the

⁷⁹ McDorman, *supra* note 6 at 236.

⁸⁰ David Welch, “Disputology: The US and East Asia’s Sovereignty Disputes” (June 2015), *Balsillie School of International Affairs* (blog), online: <<https://www.balsillieschool.ca/publications/disputology-us-and-east-asia%E2%80%99s-sovereignty-disputes>>.

⁸¹ McDorman, *supra* note 6 at 228.

⁸² UNCLOS, *supra* note 5 at part III.

⁸³ Byers, *supra* note 10 at 5.

⁸⁴ UNCLOS, *supra* note 5 at part III (emphasis added).

⁸⁵ Byers, *supra* note 10 at 55.

U.S. can satisfy both criteria outlined in the *Corfu Channel Case*, then they would have a cogent argument that they enjoy the right of passage that is sought; which is, the right of ‘transit passage’ – *which shall not be impeded*.⁸⁶

XI. Concluding Opinion

The Arctic region is undoubtedly changing. Arctic ice pack and Arctic sea ice will continue to decrease while states gradually recognize the significance of their economic and geopolitical interests in the Arctic region. This report has focused on the NWP dispute regarding the sought after international legal statuses that could exist in its waters. It is evident that each of these status’ are defensible when approached through the lens of the Canada-U.S. dispute. The global importance of this dispute will continue to increase as the many beneficial uses of the NWP continue to be discovered. This dispute will not remain dormant. Canada’s strongest claim is based on the waters within the NWP having the legal status of Canadian historic internal waters. This status would accord Canada the authority to deny all foreign vessels, both commercial and military, the use of the NWP.⁸⁷ This is the reason that many states, the U.S. in particular, do not recognize Canada’s claim. As the economic, strategic, and military benefits that stem from the transit of the NWP increase, more states are going to seek as much freedom and rights during vessel passage as legally attainable. This has been made clear by the recent public display of ambition from China through the publication of the *Guide* regarding the transit of the NWP.⁸⁸ A complication to the NWP dispute is that the U.S. is not a party to the 1982 UNCLOS, although they frequently state that they consider most of UNCLOS’s provisions to be customary international law.⁸⁹ This discrepancy has led to the avoidance of both Canada and the U.S. from applying to the ITLOS or ICJ for adjudication of their claims.

In the event of a hypothetical ITLOS or ICJ adjudication, the U.S. claim would likely be favoured. This report agrees, in part, with the opinion expressed by Donat Pharand: Canada is not in the position to discharge the heavy burden of proof that they have exercised jurisdiction over the Arctic waters for a sufficiently long period of time and without protest from the U.S. or other states.⁹⁰ Another problem that exists with the Canadian case is the argument that the Arctic straight baselines are not subject to Article 8(2) – internal waters of the 1982 UNCLOS. At international law, a state that signs a treaty is obliged to refrain, in good faith, from

⁸⁶ UNCLOS, *supra* note 5 at part III.

⁸⁷ Lowe & Churchill, *supra* note 11 at 61.

⁸⁸ VanderKlippe, *supra* note 20.

⁸⁹ James L Malone, “The United States and the Law of the Sea After UNCLOS III” (1983) 46:2 Law & Contemp Probs 29.

⁹⁰ Pharand, *supra* note 38 at 223.

acts that would defeat the object and purpose of the treaty. Signature alone does not impose on the state obligations under the treaty.⁹¹ Canada should only be subject to the principles of customary international law; however, past action of drawing straight baselines around the Arctic Archipelago may be considered an act that defeats the object and purpose of the 1982 UNCLOS. The purpose of the implementation of the 1985 straight baselines was to assert that there exists no right of passage within the Canadian Arctic Archipelago. This act is inconsistent with the 1982 UNCLOS. Further, Canada may have difficulty discrediting the U.S. claim as it is undisputable that the NWP can be used for international navigation. It is undeniable that the NWP connects a part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. Based on the Vienna Convention on the Law of Treaties – Article 31 – General Rule of Interpretation, of which Canada is a party:

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.⁹²

Thus, if interpreted in its ordinary meaning, the NWP is an international strait. As outlined in the *Corfu Channel Case*, in the event that the geographic criterion is satisfied for an international strait, the functional criterion must also be satisfied. Due to the current conditions in the Arctic, frequency of vessels transiting the NWP is low. However, this is gradually changing. Canada needs to be wary of an increase in international shipping activity in the Arctic. If the frequency of foreign vessels transiting the NWP increases, then the claim that the NWP is an international strait satisfies the second criterion and gains legitimacy. Once the international status of an international strait is globally recognized, Canada will lose their claim permanently. Adding to the concern is the current lack of Canadian presence and legal capacity in the Arctic to regulate, manage and control the NWP.

Canada will have difficulty establishing the merits of their internal waters claim if examined by the judiciary. This is not due to the legitimacy of the claim, but to the mismanagement of the dispute itself. Canada's piecemeal public assertions of jurisdiction and lack of consistency as to the status they assert will weaken their claim. The Canadian line of reasoning will require inferences from a judiciary to establish the evidence needed for historical title. If Canada is to succeed in the NWP dispute, their success will require a genuine partnership with the Inuit peoples to strengthen the historic internal waters claim. This claim has flaws, but it is here that this report has a disagreement with Donat Pharand. Canada is in a position to discharge the heavy burden of proof that they have exercised jurisdiction over the NWP if they stand with the Inuit Nation as one. There is no principled reason to distinguish the Inuit peoples from the Nomadic peoples of Western Sahara. The Inuit Nation can acquire and transfer sovereign rights and have done so as stated in 1993

⁹¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, arts 10, 18 (entered into force 27 January 1980), online: <https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml>.

⁹² *Ibid.*

Nunavut Land Claims Agreement. Together, all parts of the claim can potentially be affirmed, granting Canada a much stronger claim than the U.S.

The two claims assessed in this report are cogent, but the question remains: what will become of the NWP? Ice is present for most of the calendar year, and the NWP's viability is far from being able to accommodate large-scale commercial and military shipping. In the interest of Canada and the U.S., the next step that should be taken relates to the current Canada-U.S. agreement - The 1988 Arctic Cooperation Agreement. Both states should compromise to update this agreement before another state aggressively joins this dispute. The turning of the capitalistic tide in the U.S. will take notice of China's ambition in the use of the NWP. This will increase the likelihood of adjudication of a dispute that was thought to be dormant. Greater attention to this dispute will likely motivate Canada to assert their sovereignty in the Arctic region. It will also decrease Canada's vulnerability to gradually losing strands of sovereignty - until the NWP is recognized as an international strait - due to increases in vessel traffic in the Arctic. In any event, Canada has the opportunity to lead the global conversation regarding the NWP, Arctic environment and its peoples and to build relations that allow for cooperation. The NWP dispute is one of the most important disputes in Canadian history and should be considered of paramount importance in the coming years. The outcome of this dispute is more than a determination of the international legal status of the NWP - it is a critical test of Canada's ability to assert their sovereignty as an Arctic state, and more importantly, as a world power.