

THINKING OUTSIDE OF THE ICEBOX: CHARTING A NEW COURSE THROUGH THE NORTHWEST PASSAGE

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ABSTRACT

As the Arctic ice cap continues to melt, the fabled Northwest Passage is becoming a vital artery for global maritime commerce. The legal status of that waterway is disputed—the Canadians assert that they are entitled to regulate the passage as part of their internal waters, and the United States argues that the passage is an international strait that must be free and open to vessels of all nations. The two claims are generally viewed as mutually exclusive, but there may be some middle ground to be found. The unique geography of the Northwest Passage sets it apart from any other waterway on Earth, and perhaps that is justification enough to deviate from the default law of the sea by crafting a multilateral solution that accommodates some of Canada’s well-grounded concerns about opening up the Northwest Passage to international shipping.

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I. INTRODUCTION

Many brave sailors perished searching for the Northwest Passage.¹ Prior to the opening of the Panama Canal, the mythical Northwest Passage represented a shortcut that would allow Western merchants to bypass the long and arduous sea routes around the southern tips of Africa or South America on their way to Asia. The 1914 opening of the Panama Canal effectively ended the search for the Northwest Passage, but the recent retreat of the Arctic icecap has reinvigorated interest in the passage.² The allure of the passage remains the same—it is the shortest sea route between North Atlantic ports and lucrative Asian markets.³ In the era of ‘just-in-time’ shipping and hyper-competitive shipping markets, the opportunity to save time, crew, and fuel costs create enormous economic incentives to transit through the Northwest Passage.⁴

While the Northwest Passage is poised to become a major artery of global commerce in the near future, the legal status of the passage is disputed by the governments of Canada and the United States.⁵ Canada asserts the right to draw straight baselines,⁶ which would demarcate the vast majority of the

¹ See e.g., LIBRARY OF PARLIAMENT, THE ARCTIC: CANADA’S LEGAL CLAIMS (2008), http://publications.gc.ca/collections/collection_2017/bdp-lop/ym32-9/YM32-9-08-05-eng.pdf [<https://perma.cc/WXE5-ZSL8>]; PIERRE BERTON, THE ARCTIC GRAIL: THE QUEST FOR THE NORTHWEST PASSAGE AND THE NORTH POLE, 1818-1909 at 63, 107, 157, 243 (2001).

² BERTON, *supra* note 1, at 614, 627.

³ Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFFAIRS (Mar. 2, 2008, 12:00 AM), <https://www.foreignaffairs.com/articles/arctic-antarctic/2008-03-02/arctic-meltdown> [<https://perma.cc/JJW9-P7Q8>].

⁴ *Id.*

⁵ Order in Council P.C. 1985-2739 (Sept. 10, 1985) (Can.) 119 C. Gaz. Pt. II 3996 (announcing Canada’s straight baseline claim to the Northwest Passage) [hereinafter Canadian Claim]; BUREAU OF OCEANS AND INT’L ENVTL. AND SCIENTIFIC AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 112, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 29 (1992) (describing official U.S. government statement disputing Canada’s straight baseline claim to the Northwest Passage) [hereinafter STATE DEPT., EXCESSIVE MARITIME CLAIMS].

⁶ See discussion *infra* Part II (specifically defining the term *baseline*).

passage as Canadian internal waters.⁷ Continuing the well-established tradition of promoting the freedom of navigation, the United States denies that Canada has the right to draw straight baselines and further asserts that the Northwest Passage is a strait used for international navigation.⁸

These claims are both based on the United Nations (“UN”) Convention on the Law of the Sea Treaty (“UNCLOS”), and the primary difference is that the Canadian interpretation of UNCLOS would afford the Canadians the authority to regulate vessel transits through the Northwest Passage, while the American interpretation would categorically deny Canadians the ability to control or deny vessels the right to transit through the Northwest Passage.⁹

This dispute presents a novel question without an obvious answer—how should the Northwest Passage be regulated? The Canadians have good and valid reasons for standing by their interpretation of UNCLOS, and the Americans understandably want to preserve the freedom of navigation that is so crucial to the global economy. However, there are several factors that muddle the question. First, UNCLOS was drafted at a time when the Northwest Passage was decidedly not navigable.¹⁰ Second, the Northwest

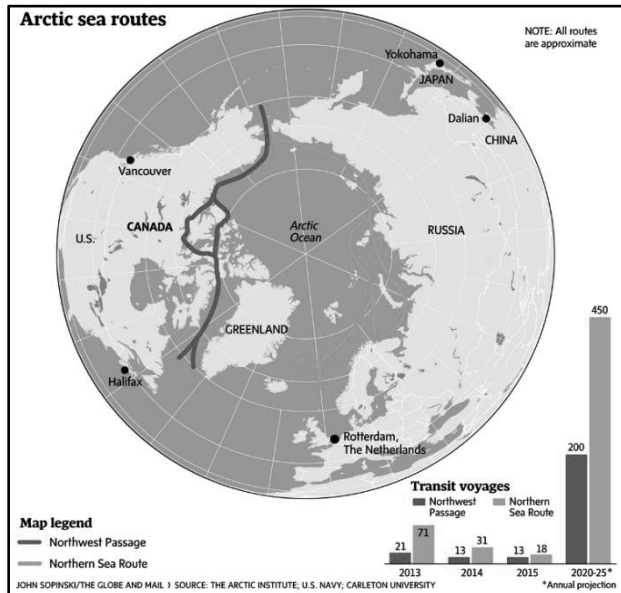


Figure 1. Polar projection map highlighting the relative position of the Northwest Passage (red line), the U.S. East Coast, and major Asian ports. Also shown (chart, in red) 2013, '14 & '15 transits through the Northwest Passage, as well as projected annual transits for 2020-25. Source: Nathan Vanderklippe, *China Reveals Plans to Ship Cargo Across Canada's Northwest Passage*, GLOBE & MAIL (Apr. 20, 2016), <https://www.theglobeandmail.com/news/world/china-reveals-plans-to-ship-cargo-across-canadas-northwest-passage/article29691054/>.

⁷ Canadian Claim, *supra* note 5.

⁸ STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 29.

⁹ See William Kim, *Global Warming Heats up the American-Canadian Relationship: Resolving the Status of the Northwest Passage Under International Law*, 38 CAN.-U.S. L.J. 167, 168 (2013).

¹⁰ See BERTON, *supra* note 1, at 1.

Passage is unique—there is no analogous geography in terms of remoteness, sheer length of transit exclusively through a single state's waters, and importance to the global economy; simply put, no other waterway is truly comparable.¹¹ Last, the potential for the Northwest Passage to regularly open and close as the polar ice cap expands and contracts each year sets it apart from most other straits used for international navigation.¹²

This Note reviews the intent underlying UNCLOS and conducts a comparative analysis of the legal regimes governing similar waterways with the goal of identifying a solution that fits within the existing structure of UNCLOS and preserves the important interests of all parties.¹³ Ultimately, it does not appear possible to reconcile Canadian claims to the Northwest Passage within the strict confines of UNCLOS. However, the Canadians are not prohibited by UNCLOS from pursuing a broad multilateral treaty along the lines of the Montreux Convention Regarding the Regime of the [Bosporus] Straits ("Montreux Convention").¹⁴ If the Canadians succeed in securing an effective multilateral treaty modeled on the Montreux Convention, they could codify the unique protections that the Northwest Passage requires while still broadly recognizing freedom of navigation. The United States could conceivably support such a treaty because, if properly crafted, it would not weaken the existing UNCLOS regime, and would thus preserve freedom of navigation.

II. EXISTING LEGAL STRUCTURE

UNCLOS, which entered into force in 1994, currently has 168 state parties and is the baseline law that applies to the world's oceans.¹⁵ The United States

¹¹ See *infra* Part IV (analysis of comparable geography).

¹² Maria-Jose Viñas, *2016 Arctic Sea Ice Wintertime Extent Hits Another Record Low*, NAT'L AERONAUTICS AND SPACE ADMIN. (Mar. 28, 2016), <http://www.nasa.gov/feature/goddard/2016/2016-arctic-sea-ice-wintertime-extent-hits-another-record-low> [https://perma.cc/UXK6-A52K].

¹³ The fact that the United States considers the relevant portions of UNCLOS to be customary international law, but has not ratified the full treaty, is not essential to this analysis because it does not change the U.S. or Canadian understanding of relevant international law. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) [hereinafter Presidential Proclamation 5928].

¹⁴ Convention Regarding the Regime of the Straits, Jul. 20, 1936, 28 L.N.T.S. 116 [hereinafter Montreux Convention] (not signed/ratified by the United States); United Nations Convention on the Law of the Sea art. 311, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (establishing that the treaty is a baseline, not an upper limit for regulating the seas) (not ratified by the United States).

¹⁵ See *United Nations Convention on the Law of the Sea of 10 December 1982*, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [https://perma.cc/M2G4-2TDR].

is one of the few countries that is not a party to UNCLOS, but it generally views most of the treaty as binding customary international law.¹⁶ Within the UNCLOS system, there are a few key terms of art that are particularly pertinent, namely: *baseline*, *straight baseline*, *archipelagic state*, *archipelagic baseline*, *archipelagic waters*, *territorial waters*, *internal waters*, *innocent passage*, *transit passage*, and *strait used for international navigation*. These terms have precise meanings, and the subtle differences between similar terms can have significant ramifications for coastal states and maritime commerce.

To start, a normal *baseline* is the boundary between a state's claim to land and its claim to the surrounding sea.¹⁷ Most states draw their *baselines* from where the shorelines are at low-tide.¹⁸ With few exceptions, the *baseline* follows the low tide-line along land, but those exceptions can be important, because areas of water that are on the landward side of a *baseline* are considered *internal waters*, where states have much more latitude to regulate maritime traffic.¹⁹ The notable exception relates to bays.²⁰ A state may draw its *baseline* across the mouth of a bay if: (1) the entire bay borders a single coastal state; (2) the bay is "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation;" and (3) "the distance between the low-water marks of the natural entrance points of [the] bay does not exceed 24 nautical miles"²¹

Departing from the normal type of *baseline*, states are permitted to draw a *straight baseline* in certain circumstances; specifically, UNCLOS Article 7 allows *straight baselines* "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. . . ."²² A state may deviate from the normal *baseline* and draw "*straight baselines* joining appropriate points," provided that: (1) the *straight baselines* do "not depart to any appreciable extent from the general direction of the coast," and (2) do not "cut off the territorial sea of another State from the high seas or an exclusive economic zone."²³ *Straight baselines* were generally envisioned as a way to allow states like Norway, with its

¹⁶ Presidential Proclamation 5928, *supra* note 13 (explaining the U.S. position that UNCLOS is generally a matter of customary international law).

¹⁷ See UNCLOS, *supra* note 14, art. 5.

¹⁸ See S. TREATY DOC. NO. 103-39, at 101 (1994) (Senate transmittal package for UNCLOS, describing low water baselines as the norm, and generally applicable unless the state is subject to one of a few exceptions) [hereinafter UNCLOS Transmittal Package].

¹⁹ UNCLOS, *supra* note 14, art. 8.

²⁰ *Id.* art. 10.

²¹ *Id.*

²² *Id.* art. 7.

²³ *Id.* (emphasis added).

deeply indented fjords, to draw reasonably convenient *baselines*.²⁴ Like normal *baselines*, the water on the landward side of a *straight baseline* is considered internal waters of the coastal state and is subject to much more regulation than *territorial seas*.²⁵ The United States has declined to employ *straight baselines* and generally opposes the use of *straight baselines* around the world.²⁶

Next, the term *archipelagic state* is defined by UNCLOS Article 46 as “a State constituted wholly by one or more archipelagos and may include other islands;” and “*archipelago* means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”²⁷ The key takeaway from this definition is that an *archipelagic state* must be “constituted *wholly* by . . . archipelagos . . .”²⁸ The United States recognizes sixteen states as *archipelagic states*, including: Fiji, Indonesia, Papua New Guinea, the Philippines, and the Bahamas.²⁹ However, the United States also rejects some archipelagic claims, such as Ecuador’s claim around the Galapagos Islands, the Dominican Republic’s claim, and China’s claim around several islands in the South China Sea.³⁰

The final type of baseline pertinent to this article is an *archipelagic baseline*. Defined by UNCLOS Article 47, an *archipelagic baseline* is a special type of baseline restricted to *archipelagic states* that allows those states to draw *straight baselines* between their islands that are up to one hundred nautical miles apart.³¹ The waters inside the bounds of the *archipelagic baselines* are defined as *archipelagic waters*, instead of *internal waters*, but otherwise, *archipelagic baselines* function identically to other *straight baselines*.³²

Understanding the rights and privileges associated with being an *archipelagic state* requires an understanding of what *archipelagic waters* are.

²⁴ Third U.N. Conference on the Law of the Sea, at 271, U.N. Doc. A/CONF.62/C.2/SR.37 (Aug. 12, 1974).

²⁵ UNCLOS, *supra* note 14, art. 8.

²⁶ See STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 21 (stating that the U.S. position was to draw baselines using the normal method).

²⁷ UNCLOS, *supra* note 14, art. 46 (emphasis added).

²⁸ *Id.* (emphasis added).

²⁹ STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 49.

³⁰ *Id.* at 48-49.

³¹ UNCLOS, *supra* note 14, art. 47 (there are several technical exceptions, including exceptions that allow up to three percent of the straight baselines to be up to 125 nautical miles apart, and a requirement that the ratio between land and water within the archipelagic baselines be between 1:1 and 1:9).

³² *Id.* arts. 47-50, 52-54.

Generally, *archipelagic waters* receive the same consideration as *internal waters* with two notable exceptions: (1) *archipelagic waters* are subject to *innocent passage*, but the *archipelagic state* may suspend innocent passage for security reasons; and (2) *archipelagic states* may designate sea lanes that transiting vessels must use while exercising their right of archipelagic sea lane passage.³³ That leaves the coastal *archipelagic state* with significantly more authority than most coastal states have to regulate what vessels transit through their *territorial seas* (but not *internal waters*).³⁴

In contrast to *archipelagic waters*, *territorial waters* are the default option for waters seaward of a *baseline*.³⁵ States are permitted to extend their *territorial seas* up to twelve nautical miles seaward of their *baselines*.³⁶ However, vessels from other states are entitled to exercise the right of *innocent passage* through *territorial seas*, and the coastal state is only allowed to implement limited regulations to protect their waters.³⁷

A state's *internal waters* are generally not subject to the provisions of UNCLOS and are subject to the full panoply of coastal state laws and regulations.³⁸ The right of *innocent passage* does not apply, and UNCLOS does not provide meaningful restrictions about how a state may choose to regulate or enforce domestic law within internal waters.³⁹ From the perspective of a coastal state, *internal waters* offer the most legal protection available under UNCLOS.

Innocent passage is a concept governed by UNCLOS Articles 17-21, 45, 52, and 53 that allows vessels from states other than the coastal state to pass through *territorial seas*, *straits used for international navigation*, and *archipelagic waters*, provided that such passage is "continuous and expeditious," and that the ship refrains from certain behaviors.⁴⁰ *Innocent passage* is liberally construed and there is generally no barrier to commercial

³³ *Id.* arts. 52, 53.

³⁴ *Id.*

³⁵ *Id.* art. 3.

³⁶ *Id.*

³⁷ *Id.* arts. 17-21 (Article 21 limits a coastal state's laws and regulations to those necessary to: (1) ensure the safety of navigation, (2) protect navigational aids, (3) protect cables and pipelines, (4) conserve living sea resources, (5) prevent illegal fishing, (6) protect the environment, (7) restrict hydrographic surveys and (8) enforce customs, fiscal, immigration, and sanitary laws and regulations).

³⁸ *Id.* art. 8.

³⁹ *Id.* (noting that innocent passage does not apply to internal waters unless a new straight baseline encloses waters that had not previously been considered internal waters).

⁴⁰ *Id.* arts. 17-21, 45, 52, 53 (Article 19 prohibits vessels exercising innocent passage from conducting overtly military activities, intentionally polluting, fishing, or conducting hydrographic surveys).

maritime traffic.⁴¹ Pursuant to UNCLOS Article 21, coastal states exercise limited authority over vessels exercising the right of *innocent passage*.⁴² The rights of protection afforded to coastal states by UNCLOS Article 25 allows coastal states to “suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security” as contrasted with the broader rights of *archipelagic states*.⁴³

Transit passage is best conceptualized as a form of *innocent passage* that only applies to *straits used for international navigation*, and is even less restrictive than *innocent passage*.⁴⁴ The primary difference is that the coastal state, which would normally be allowed to exercise limited authority over vessels exercising *innocent passage* under UNCLOS Article 21, has even fewer authorities to exercise under UNCLOS Articles 40-42.⁴⁵ *Transit passage* through a *strait used for international navigation* may not be suspended by a coastal state under any circumstance.⁴⁶

A *strait used for international navigation* is governed by UNCLOS Articles 34-44, and applies loosely to any strait that is used for international navigation, where there is not a comparably convenient alternative through the high seas or exclusive economic zone.⁴⁷ Passage through a *strait used for international navigation* is considered *transit passage* as opposed to *innocent passage*.⁴⁸ Existing straits used for international navigation include the Strait of Gibraltar, the Danish Straits, the Strait of Hormuz, and the Strait of Malacca.⁴⁹

Lastly, the pertinent duties and authorities of coastal states are defined by

⁴¹ UNCLOS Transmittal Package, *supra* note 18, at III (describing the regime of innocent passage as “advanc[ing] the interests of the United States as a global maritime power.”).

⁴² UNCLOS, *supra* note 14, art. 21.

⁴³ *Id.* art. 25.

⁴⁴ *Id.* arts. 38-39.

⁴⁵ Compare *id.* arts. 40-42 (which only allow a coastal state to prohibit hydrographic surveys, issue regulations for the safety of navigation, prevention of pollution, and prevention of illegal fishing for vessels exercising transit passage through a strait used for international navigation), with *id.* art. 21 (allowing a coastal state broader authorities over a vessel exercising innocent passage through territorial seas).

⁴⁶ *Id.* art. 44.

⁴⁷ *Id.* arts. 34-36. See *Corfu Channel (U.K. v. Alb.)*, Judgment on the Merits, 1949 I.C.J. 4 (Apr. 9, 1949) (Corfu Channel is the generally accepted definition of a strait used for international navigation).

⁴⁸ UNCLOS, *supra* note 14, arts. 40-42.

⁴⁹ See U.N. Conference on the Law of the Sea, *A Brief Geographical and Hydro Graphical Study of Straits Which Constitute Routes for International Traffic*, U.N. Doc A/CONF.13/6 and Add. 1 (Apr. 27 1958) [hereinafter 1958 UNCLOS Study] (background study conducted as part of the 1958 UNCLOS negotiations, specifically discussing the political and physical geography of major shipping lanes).

UNCLOS Articles 21, and 40-42. Article 21 governs the authority of a coastal state to regulate vessels engaged in *innocent passage*.⁵⁰ In that realm, the coastal state is permitted to regulate vessels to ensure the safety of navigation; to protect navigational aids, cables, and pipelines; to conserve living marine resources; to preserve the environment; to prevent hydrographic surveys and research; and to enforce their domestic fiscal, immigration, sanitation, and customs laws.⁵¹ Additionally, coastal states may temporarily suspend the right of *innocent passage* in specific areas of their territorial sea when it is necessary for the security of the coastal state.⁵² Those limited rights stand in sharp contrast against the restricted rights afforded to coastal states under the UNCLOS regime for *straits used for international navigation*.⁵³ Articles 40-42 define the limited authority a coastal state may exercise over *straits used for international navigation*.⁵⁴ Those rights are strictly limited to prohibiting research and survey activities, defining traffic separation schemes, providing for the safety of navigation, preventing pollution, preventing illegal fishing, and enforcing domestic fiscal, immigration, sanitation, and customs laws.⁵⁵

III. SUMMARY OF EXISTING CLAIMS

A. *Canada's Claim to the Northwest Passage*

Canada's claim to the Northwest Passage is intuitive. Canada's ownership of the islands of their Arctic archipelago is long-standing and undisputed, and the Northwest Passage snakes through those islands for approximately 2,000 nautical miles.⁵⁶ Uniquely, the Northwest Passage is the one of the longest sea routes that goes through a single state, is the only (largely) unexploited sea route with a potentially major impact on global commerce, has historically been inaccessible, remains very remote, and poses outsized environmental risks.⁵⁷ Canada formalized its current claim to the Northwest Passage in 1985 with a Privy Council order, and it has subsequently reinforced that claim with Acts of Parliament.⁵⁸ Invoking Article 7 of

⁵⁰ UNCLOS, *supra* note 14, art. 21.

⁵¹ *Id.*

⁵² *Id.* art. 25.

⁵³ Compare *id.*, with *id.* arts. 40-42.

⁵⁴ *Id.* arts. 40-42.

⁵⁵ *Id.* art. 42.

⁵⁶ See Canadian Claim, *supra* note 5.

⁵⁷ See Michael Byers & Suzanne Lalonde, *Mounting Tension and Melting Ice: Exploring the Legal and Political Future of the Arctic: Who Controls the Northwest Passage?*, 42 VAND. J. TRANSNAT'L L. 1133, 1133 (2009).

⁵⁸ See Canadian Claim, *supra* note 5; see, e.g., Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (Can.).

UNCLOS, Canada drew straight baselines around their Arctic Islands, effectively re-defining those waters as Canadian “internal waters” under Article 8 of UNCLOS, and putatively allowing the Canadian government to restrict passage through the Northwest Passage.⁵⁹

The Canadian government did not explicitly state its motivations, but academics have discussed the national security, environmental protection, and economic implications of the Canadian claim.⁶⁰ Those underlying rationales are all undeniably valid. UNCLOS even recognizes the right of archipelagic states to restrict transits through the center of those states for similarly good and valid reasons.⁶¹ In that way, Canada’s claim is within the mainstream of international practice—no nation wants to allow potentially hostile fleets or polluters into the heart of its territory, and certainly not for free.

Canada’s claim is further strengthened by UNCLOS Article 234, specifically governing ice-covered areas and allowing coastal states the affirmative right to:

[A]dopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe 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 environment⁶²

That Article, the sole article in Section 9 of Part XII of UNCLOS, is a single paragraph that conceivably grants broad authority to any coastal state near the poles. The limiting language “within the limits of the exclusive economic zone” (“EEZ”) can be interpreted as meaning that this authority only applies within the EEZ,⁶³ or could be interpreted to mean that Article 234 applies not just to the EEZ, but to any zone landward of the EEZ’s outer

⁵⁹ See Canadian Claim, *supra* note 5; UNCLOS, *supra* note 14, arts. 2, 7-8.

⁶⁰ See generally Third U.N. Conference on the Law of the Sea, at 126, U.N. Doc. A/CONF.62/C.2/SR.11 (July 22, 1974) [hereinafter UNCLOS Travaux 11th mtg.] (where the representative from the United Kingdom acknowledged the security and environmental concerns of coastal states near international straits and received widespread acknowledgment); see generally Byers & Lalonde, *supra* note 57.

⁶¹ UNCLOS, *supra* note 14, art. 52 (allowing an archipelagic state to “suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security.”).

⁶² *Id.* art. 234; see Stanley Fields, *Article 234 of the United Nations Convention on the Law of the Sea: The Overlooked Linchpin for Achieving Safety and Security in the U.S. Arctic?*, 7 HARV. NAT’L SEC. J. 55, 103 (2016).

⁶³ Meaning the zone from 24 – 200 nautical miles seaward of the baseline.

boundary⁶⁴—the latter interpretation is clearly correct for the following reasons. First, Part XII of UNCLOS specifically regulates the “protection and preservation of the marine environment,” and that part does not contain the bounding language that is contained in any of the other geographically restricted parts or sections.⁶⁵ Thus, Article 234 applies to any body of water that a state may claim sovereignty under per UNCLOS.⁶⁶ Second, the words “within the limits” are used elsewhere in UNCLOS, notably in Article 111, when describing the right of hot pursuit.⁶⁷ There, the language “within the limits” clearly describes situations where a state may engage in hot pursuit moving from the EEZ into the contiguous zone.⁶⁸ Last, to give any effect to Article 234, “within the limits of the EEZ” must be read to include the contiguous zone and territorial seas, because the EEZ is always twenty-four nautical miles from the baseline, where the ocean is generally deeper.⁶⁹ If a coastal state is limited to taking action to protect ice-covered environments within the EEZ, but not the contiguous zone or territorial seas, that would inexplicably exclude the most sensitive marine environments.⁷⁰

Thus, Canada’s claims to the Northwest Passage rest on two articles: Article 7, allowing coastal states to draw straight baselines, and Article 234, allowing coastal states to more closely regulate ice-covered areas. The Northwest Passage is clearly an ice-covered area, as contemplated by Article 234, but the questions regarding how the article is interpreted and whether the article can preempt other UNCLOS articles remain.

⁶⁴ Meaning the zone from the baseline out to 200 nautical miles from the baseline, including the territorial sea, contiguous zone, and the exclusive economic zone.

⁶⁵ UNCLOS, *supra* note 14, art. 234.

⁶⁶ There are several parts of UNCLOS that apply specifically to the exclusive economic zone, territorial seas, etc., and those parts have an article delineating the “Scope of this Part.” See e.g., *id.* arts. 35, 134. Thus, because Part XII does not contain any geographically restrictive article, it is presumed to apply to any body of water which a state may claim sovereignty over.

⁶⁷ *Id.* art. 111.

⁶⁸ *Id.* (“[A] mothership is *within the limits* of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf.”) (emphasis added).

⁶⁹ *Id.* arts. 55, 57 (“[T]he [EEZ] is an area beyond and adjacent to the territorial sea . . . ,” and describing the breadth of the EEZ such that it “shall not extend beyond 200 nautical miles from the baselines . . .”).

⁷⁰ *Marine and Coastal Ecosystems Factsheet*, NAT’L OCEANOGRAPHIC AND ATMOSPHERIC ADMIN., https://www.ncdc.noaa.gov/sites/default/files/attachments/Marine%20and%20Coastal_Low%20Res.pdf [<https://perma.cc/CQH9-FR7B>] (“Marine and coastal ecosystems . . . are sensitive habitats . . .”).

B. *America's Position on the Status of the Northwest Passage*

Despite the superficial appearance that the Northwest Passage is Canadian, the United States argues the Northwest Passage is an international strait under UNCLOS.⁷¹ That interpretation is in line with the United States' longstanding position of supporting the freedom of navigation worldwide.⁷² The U.S. is not alone when it questions Canada's straight baseline claims in the Arctic, but the U.S. has been the most active in disputing that claim.⁷³ The principle of the freedom of navigation predates UNCLOS, but has been codified in the UNCLOS provisions that provide for innocent passage and transit passage.⁷⁴ The clauses providing for innocent passage and transit passage preclude coastal states from restricting the vessels of other states from transiting through the coastal state's waters, except in time of war.⁷⁵ By insisting that the Northwest Passage is a strait used for international navigation, the United States has positioned itself as clearly opposed to Canada's straight baseline claims.

While both claims are ostensibly rooted in the same treaty, their respective interpretation of that treaty is entirely contradictory. The Canadian claim relies on Article 7 of UNCLOS, which allows member states to draw straight baselines "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity"⁷⁶ The next leg of Canada's claim rests on Article 8 of UNCLOS: "Except as provided in Part IV [which applies to strictly archipelagic states], waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."⁷⁷ Finally, because the rights of "innocent passage" and "transit passage" only apply to territorial

⁷¹ STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 73.

⁷² UNCLOS Transmittal Package, *supra* note 18, at 17-18 (highlighting America's longstanding position on the importance of the freedom of navigation).

⁷³ Byers & Lalonde, *supra* note 57, at 1156 (describing U.S. Coast Guard Cutter POLAR SEA's 1985 transit through the Northwest Passage, where the U.S. notified Canada, but did not seek consent); Craig H. Allen, *An Obama-Trudeau Agreement Conceding Canada's Claim to the Waters of the Northwest Passage?*, OPINIO JURIS (Mar. 16, 2016, 3:00 PM), <http://opiniojuris.org/2016/03/16/an-obama-trudeau-agreement-conceding-canadas-claim-to-the-waters-of-the-northwest-passage/> [<https://perma.cc/9FU5-2UVE>] (describing challenges to Canada's claim over the Northwest Passage); *Buoy Tender Completes Historic Northwest Passage Transit*, MARITIME EXEC. (Aug. 31, 2017, 9:57 PM), <https://maritime-executive.com/article/buoy-tender-completes-historic-nw-passage-transit> [<https://perma.cc/MYQ3-5UYV>].

⁷⁴ UNCLOS, *supra* note 14, arts. 17-26, 37-43 (governing the right of innocent passage and transit passage, respectively).

⁷⁵ *Id.* arts. 46-54 (governing archipelagic states).

⁷⁶ *Id.* art. 7.

⁷⁷ *Id.* art. 8.

or archipelagic waters of a state, Canada's claimed interpretation would allow it to preclude any other state from transiting the Northwest Passage.⁷⁸

Although the United States does not choose to employ straight baselines itself, prototypical examples of geography where straight baselines are appropriate include the fjords of Norway and the fringing islands of Chile's southern coast.⁷⁹ The employment of straight baselines in those cases has a relatively limited effect—it only creates small areas of internal waters and does not disrupt major shipping lanes. Canada's claim, however, is on an entirely different order of magnitude—it would create a huge area of internal waters and could hinder one of the most valuable shipping routes in the world.

The U.S. government's objection to Canada's claim is based on Part III of UNCLOS. Article 34 provides that:

The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.⁸⁰

The United States interprets that excerpt of Article 34 to establish a broad right, for all states, to sail vessels through straits that are being used for international navigation, and that the existence of such a strait does not alter the underlying legal status of those waters.⁸¹ Essentially, the strait used for international navigation is a special status that can be overlaid onto any section of water, without altering the original legal status of that water.⁸² However, Article 35 clarifies that:

Nothing in this Part affects: (a) any areas of *internal* waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas *which had not previously been considered as such*⁸³

⁷⁸ Allen, *supra* note 73 (“Under Canada’s view, no other nation has the right to navigate in or fly over those waters unless Canada consents.”).

⁷⁹ Vienna Convention on the Law of Treaties art. 20, May 23, 1969, 1155 U.N.T.S. 331 (establishing that failure to object to a reservation is constructively an acceptance of that claim) [hereinafter VCLT]; STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 23, 26 (stating that U.S. policy is to not use straight baselines and listing all known straight baseline claims, as well as which claims the U.S. has protested).

⁸⁰ UNCLOS, *supra* note 14, art. 34.

⁸¹ UNCLOS Transmittal Package, *supra* note 18, at 20 (explaining the American interpretation of UNCLOS art. 34).

⁸² See STATE DEPT., EXCESSIVE MARITIME CLAIMS, *supra* note 5, at 29-30.

⁸³ UNCLOS, *supra* note 14, art. 35 (emphasis added).

That clause has several layers to it. First, if the U.S. accepted that the Northwest Passage constituted Canadian internal waters, the question would be whether the U.S. recognized Canada's claim that the Northwest Passage had historically been Canadian internal waters.⁸⁴ Given that the U.S. does not accept the Canadian internal waters claim, the next question is how Articles 7 and 35 interact when a straight baseline does enclose waters that were not previously considered internal.⁸⁵ A plain reading of Article 35 makes it appear that Article 35 trumps the application of Article 7 when straight baselines are used to create a new area of internal waters.⁸⁶ Second, Article 38 provides that:

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.⁸⁷

Thus, if the Northwest Passage is an international strait as the U.S. contends, Canada may not take any action to impede vessels transiting the strait. Under this formulation, Canada's rights would be limited to the provisions of Article 42, which allows them to adopt laws and regulations relating to the safety of navigation, pollution, and fishing.⁸⁸ Finally, the U.S. flatly dismisses Canada's Article 234 claim to be able to regulate ice-covered areas and narrowly interprets that article to only apply in the EEZ proper, not the territorial sea or contiguous zone.⁸⁹

Ultimately, the U.S. and Canadian interpretations of UNCLOS are irreconcilable. The Northwest Passage cannot be Canadian internal waters and a strait used for international navigation at the same time. The author believes that the U.S. interpretation of UNCLOS is generally the better reading, but it leaves no room to acknowledge the unique geography of the Northwest Passage, the profound remoteness of the region, the special sensitivity of that environment, or the real challenges posed by ice. UNCLOS

⁸⁴ CAN. LIBRARY OF PARLIAMENT, *CONTROVERSIAL CANADIAN CLAIMS OVER ARCTIC WATERS AND MARITIME ZONES* 4 (2008), <http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0747-e.pdf> [<https://perma.cc/A4SK-G8HB>] (stating that prominent Canadian experts have evaluated their historical claims as untenable).

⁸⁵ See STATE DEPT., *EXCESSIVE MARITIME CLAIMS*, *supra* note 5, at 29.

⁸⁶ UNCLOS, *supra* note 14, arts. 7, 35.

⁸⁷ *Id.* art. 38.

⁸⁸ *Id.* art. 42.

⁸⁹ Fields, *supra* note 62, at 74 (explaining that U.S. opposition to a broad reading of Article 234 is because such a reading would potentially restrict freedom of navigation).

is a very comprehensive treaty, and it works well for the vast majority of the globe, but it would be a mistake to rigidly interpret UNCLOS as the end of the discussion.

IV. THE UNIQUE GEOGRAPHY OF THE NORTHWEST PASSAGE

Before deviating from a system as well established as UNCLOS, the reasons for that departure should be stated clearly. Here, the unique aspects of the Northwest Passage's geography set it apart from any other waterway on the planet.

The Northwest Passage is geographically unique because there is no other sea lane that: (1) goes exclusively through one state's sovereign waters; (2) is, or is expected to become, a major shipping lane; (3) has no reasonably available alternative through the high seas; (4) is incredibly isolated; (5) seasonally closes due to ice; and (6) is a new waterway that did not functionally exist when UNCLOS was negotiated.⁹⁰ Notably, while the Canadian Arctic is the world's second largest archipelago by area, Canada is not designated an archipelagic state under UNCLOS.⁹¹ The closest subjective parallels, in terms of geography, to the Northwest Passage are the Danish Straits, the Turkish Straits, and the Northern Sea Route (Russia).⁹² Additionally, given their status as choke points for global commerce, it would also be appropriate to compare the Northwest Passage to the Suez and Panama Canals.⁹³ Each of those sea routes, with the exception of the Northern Sea Route, is already governed by a stand-alone treaty that provides the coastal state varying degrees of authority to regulate transits.⁹⁴

⁹⁰ The term "sovereign waters" is used to describe water that may be the territorial seas, internal waters, or an international strait going through a coastal state, depending on whether that coastal state's claim is accepted. The term "sovereign waters" is not meant to convey any specific legal status.

⁹¹ UNCLOS, *supra* note 14, art. 46. An archipelagic state must be "constituted wholly by one or more archipelagos," thus, because Canada has a mainland area, it is categorically precluded from being considered as an archipelagic state. *Id.*

⁹² *Cf.* 1958 UNCLOS Study, *supra* note 49 (background study conducted as part of the 1958 UNCLOS negotiations, specifically discussing the political and physical geography of major shipping lanes); MARINE TRAFFIC, <http://marinetraffic.com> [<https://perma.cc/LM7D-VA23>] (showing the current position of all vessels in excess of 300 gross tons, on an international voyage, as required by the International Maritime Organization).

⁹³ Several other major geographic comparisons are the Strait of Gibraltar (between Spain and Morocco—controlling Atlantic access to the Mediterranean Sea), the Strait of Hormuz (between Iran and Oman—controlling access to the Persian Gulf), and the Strait of Malacca (between Singapore, Malaysia, and Indonesia—controlling the shortest sea lane from the Indian Ocean to the Pacific Ocean). For the sake of brevity, and because those straits are clearly shared by two or more states, they will not be discussed here.

⁹⁴ Panama Canal Treaty of 1977, U.S.-Pan., Sept. 7, 1977, 33.1 U.S.T. 39 [hereinafter Panama Canal Treaty] (governing the use of the Panama Canal); Montreux Convention, *supra*

A. *The Danish Straits*

The Danish Straits are really three different passages that provide the only access from other bodies of water to the Baltic Sea.⁹⁵ Two of those passages, including the primary channel, are controlled exclusively by the Danes, while one is shared with the Swedes.⁹⁶ Every ship bound for Poland, Latvia, Lithuania, Estonia, Finland, or (most of) Sweden passes through the Danish Straits, as does every ship bound for St. Petersburg in Russia.⁹⁷ In 1857, the Danes ended their longstanding practice of charging a toll for passage through the straits and the Copenhagen Convention established the Danish Straits as an international waterway that was free to all military and commercial shipping.⁹⁸



Figure 2. The three passages (marked) through the Danish Straits, controlling access to the North Atlantic Ocean from the Baltic Sea. Source: *Straits of Denmark Map*, LAHISTORIACONMAPAS, <http://www.lahistoriaconmapas.com/atlas/country-map04/straits-of-denmark-map.htm> [<https://perma.cc/72CP-YAS4>].

Geographically, the Danish Straits are comparable to the Northwest

note 14, at 213 (the United States is not a signatory to the Montreux Convention, but has complied with it as a matter of customary international law) (regulating passage through the Turkish Straits); U.S. DEP'T OF STATE, THE SUEZ CANAL PROBLEM 16 (1956) [hereinafter Constantinople Convention] (reprinting the 1888 Constantinople Convention governing the use of the Suez Canal in its entirety); see Convention Discontinuing the Sound Dues art. 1, U.S.-Den., Jan. 13, 1858, TS 67 [hereinafter Copenhagen Convention].

⁹⁵ GOOGLE MAPS, GOOGLE MAPS, <http://www.maps.google.com> (search "Danish Straits").

⁹⁶ Int'l Maritime Org. [IMO], *Recommendation on Navigation Through the Entrances to the Baltic Sea*, MSC 76/23/Add.1, Annex 12 (Dec. 5, 2002), [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.138\(76\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.138(76).pdf) [<https://perma.cc/DKR2-GWNA>] (explaining that the most commonly used passage is the Øresund, which passes exclusively through Danish waters); GOOGLE MAPS, *supra* note 95.

⁹⁷ GOOGLE MAPS, *supra* note 95.

⁹⁸ Copenhagen Convention, *supra* note 94, art. 1 (technically, the Danes did not establish that the straits were free to all military and commercial shipping, they specified that they would simply charge states a one-time fee for unlimited future passage. In reality, that one-time fee was nominal, and has not been actively enforced).

Passage in that they pass through an archipelago that cannot be declared archipelagic waters, constitute a major shipping lane, have no alternative through the high seas, are subject to freezing, and have a primary route passing exclusively through the waters of a single coastal state. The primary difference between the geography of the Northwest Passage and the Danish Straits is that the Danish Straits are not nearly as remote as the Northwest Passage.⁹⁹

B. The Turkish Straits

Similar to the Danish Straits, the Turkish Straits pass through the heart of Istanbul, and are the sole access point to the Black Sea.¹⁰⁰ Accordingly, the straits are enormously important to Turkey, Romania, Bulgaria, Ukraine, Russia, and Georgia.¹⁰¹ After millennia of conflict and disputes about the straits, dating back to the 5th century BC, the Turkish Straits were declared an international strait in 1936 by the Montreux Convention.¹⁰²

The Montreux Convention opened the straits to all international shipping, with the exception that Turkey may restrict traffic from non-Black Sea states.¹⁰³ Additionally, Turkey may restrict access to states that are involved in a war where Turkey is neutral.¹⁰⁴ These authorities can be understood to give Turkey significant legal protections above the UNCLOS baseline, and establish a high standard to



Figure 3. The Turkish Straits, passing from the Mediterranean Sea into the Black Sea, and going directly through the center of the largest city in Turkey, Istanbul. Source: *The Danish and Turkish Straits are Critical to Europe's Crude Oil and Petroleum Trade*, U.S. ENERGY INFORMATION ADMIN., <https://www.eia.gov/todayinenergy/detail.php?id=32552> [<https://perma.cc/WS7V-9G58>].

⁹⁹ Borgerson, *supra* note 3, at 63 (discussing the remoteness and environmental sensitivity of the Northwest Passage); GOOGLE MAPS, *supra* note 95 (showing that the Danish Straits transit through populated areas of Denmark).

¹⁰⁰ GOOGLE MAPS, *supra* note 95 (search "Turkish Straits").

¹⁰¹ See Debora Schweikart, *Dire Straits: The International Maritime Organization in the Bosphorus and Dardanelles*, 5 U. MIAMI INT'L & COMP. L. REV. 29, 30 n.1 (2015).

¹⁰² Montreux Convention, *supra* note 14, art. 1; see Schweikart, *supra* note 101, at 32.

¹⁰³ Montreux Convention, *supra* note 14, art. 14.

¹⁰⁴ *Id.*

measure the rights of coastal states near a strait used for international navigation.

From a geographic perspective, the Turkish Straits are similar to the Northwest Passage in that they pass through the sovereign waters of a single coastal state, are a major shipping lane, and have no alternative through the high seas. However, there is no risk of ice, and the Turkish Straits are not isolated.

C. The Northern Sea Route

The Northern Sea Route, through the Russian Arctic, offers another polar shortcut as the arctic ice cap recedes.¹⁰⁵ Shipping companies are already regularly sending vessels through the Northern Sea Route, but its legal status is currently in flux.¹⁰⁶ Like the Northwest Passage, the Northern Sea Route is witheringly remote and faces severe issues with ice. However, unlike the Northwest Passage, the Northern Sea Route almost exclusively runs through what is undisputed as Russia's exclusive economic zone or the high seas, and depending on the extent of ice, there may be a viable alternative through the high seas.¹⁰⁷

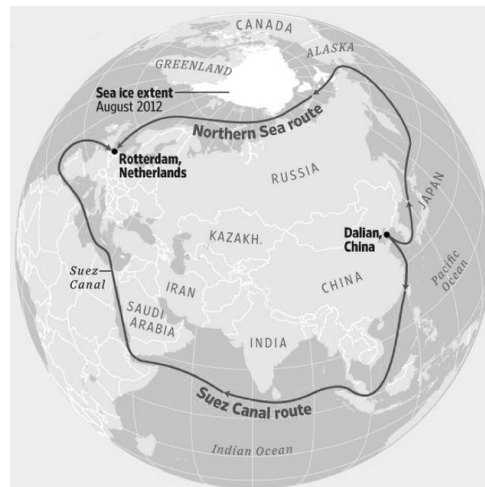


Figure 4. The Northern Sea Route, north of Russia, also offers a polar shortcut for international shipping.

Source: *Imagining Northern Sea Route*, ARCTIC ANTHROPOLOGY.ORG, <https://arcticanthropology.org/2017/01/22/imagining-northern-sea-route-historical-and-anthropological-perspectives-on-supporting-coastal-system/> [https://perma.cc/7Q9V-VL55].

¹⁰⁵ See Atle Staalesen, *The Northern Sea Route is Completely Ice-Free and Shipping Thrives*, BARENTS OBSERVER (Sept. 6, 2017), <https://thebarentsobserver.com/en/2017/09/northern-sea-route-completely-ice-free-and-shipping-thrives> (scroll down to the map).

¹⁰⁶ Mike Schuler, *Northern Sea Route Transit Applications Hit Record High in 2014*, GCAPTAIN (Oct. 28, 2014), <http://gcaptain.com/northern-sea-route-transit-applications-hit-record-high-2014/> [https://perma.cc/E8AN-FF2K]. Russia purports to regulate the Northern Sea Route through the Northern Sea Route Administration (NSRA), however the legal authority to do so under international law remains murky, and registration with the NSRA seems only to help secure access to weather reports, coordinate icebreaker escorts, and ensure that search and rescue assets are available.

¹⁰⁷ *National Snow and Ice Data Center*, NAT'L OCEANOGRAPHIC & ATMOSPHERIC ADMIN., <http://www.pmel.noaa.gov/arctic-zone/detect/ice-seaice.shtml> [https://perma.cc/5X RH-RPWY] (showing the variability of the polar ice cap over time, including recent

The final two geographic analogies this Note would like to draw are the Panama Canal and the Suez Canal. Like the Northwest Passage, those artificial seaways play an enormously important role in global commerce, and although they are not governed by UNCLOS, it would be incomplete to exclude them from this analysis.

D. *The Panama Canal*

Opened in 1914, the Panama Canal is now the world's busiest port, and allows ships to go between the Atlantic and Pacific oceans without going around the southern tip of South America, saving vessels almost 8,000 miles of voyage.¹⁰⁸ Use of the canal is currently governed by the Torrijos-Carter treaty, which grants Panama extensive authority to control the use of the canal, while still reserving some rights to the United States, and requiring that the canal be administered neutrally for all nations.¹⁰⁹ For example, Panama is allowed to charge vessels for transits, and can require the use of canal pilots, but Panama must allow U.S. military vessels priority access to the canal.¹¹⁰

Geographically, the Panama Canal is similar to the Northwest Passage because it exclusively passes through the sovereign waters of a single coastal state, has no reasonable alternative, and

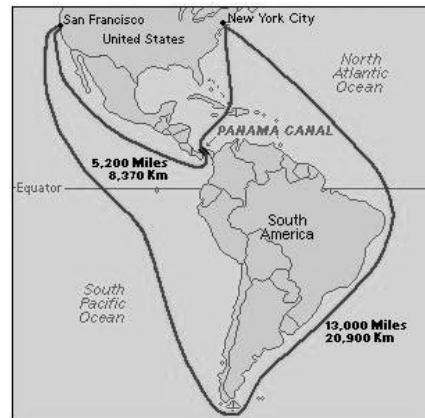


Figure 5. Original route between the Atlantic and Pacific Oceans, totaling nearly 13,000 nautical miles, and the shortcut through the Panama Canal, shortening the distance to 5,200 nautical miles. Source: *Panama Canal*, SSQQ, <http://www.ssqq.com/travel/panama-canal2012x04.htm> [<https://perma.cc/8DLZ-J6LE>].

incidences when the ice cap had receded north of all Russian islands). The straits passing through Nova Zemlya, Severnaya Zemlya, and the New Siberian islands are the only parts of the Northern Sea Route that pass through Russian Territorial Seas. Russia's straight baseline claims to the Barents Sea do not impact the Northern Sea Route, and Russia has not asserted any other straight baseline claims in the Arctic.

¹⁰⁸ Tia Ghose, *A Year of Global Shipping Routes Mapped by GPS*, WIRED (Jan. 25, 2010, 4:04 PM), [https://www.wired.com/2010/01/global-shipping-map/?+wiredscience+\(Blog+-+Wired+Science\)&utm_content=Google+Reader](https://www.wired.com/2010/01/global-shipping-map/?+wiredscience+(Blog+-+Wired+Science)&utm_content=Google+Reader) [<https://perma.cc/ECJ2-QSSZ>]; *Building the Panama Canal, 1903-1914*, OFF. OF THE HISTORIAN OF THE U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1899-1913/panama-canal> [<https://perma.cc/YT3D-LVKY>].

¹⁰⁹ Panama Canal Treaty, *supra* note 9494, art. 3.

¹¹⁰ *Id.* art. 9, Annex A.

is a major shipping lane.¹¹¹ However, the differences are pronounced: (1) the canal was artificially constructed and is not otherwise subject to UNCLOS; (2) the canal is not at all isolated; and (3) the canal is not subject to closure by ice.

E. *The Suez Canal*

Completed in 1867, the Suez Canal connects the Indian Ocean to the Mediterranean Sea, and thus the Atlantic Ocean.¹¹² The canal shortens the transit around the southern tip of Africa by 6,400 nautical miles, and underscoring the strategic importance of the canal, it has been fought over many times.¹¹³ The canal is governed by the Convention of Constantinople and is opened to all traffic, at all times—although that has not always been enforced.¹¹⁴ The convention does contain a concession allowing Egypt to defend itself from hostile states seeking to use the canal.¹¹⁵

Geographically, the Suez Canal compares to the Northwest Passage in the same ways the Panama Canal does. They share paths through exclusively sovereign waters, and they contain major shipping lanes without a viable alternative. Unlike the Northwest Passage, the Suez Canal has extensive infrastructure in place and is not subject to ice blockages.

Overall, these geographic considerations should help inform the legal

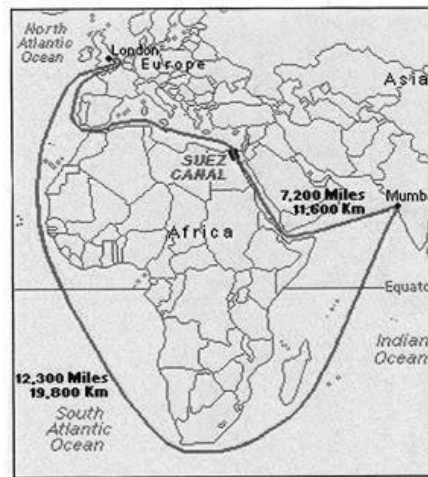


Figure 6. Original route between the Atlantic and Indian Oceans, totaling nearly 19,000 nautical miles, and the shortcut through the Suez Canal, shortening the distance to 7,200 nautical miles. Source: *Suez Canal Expansion Development Project Completed – Ready for Usage*, MARINERSGALAXY, <http://marinersgalaxy.com/2015/06/suez-canal-development-project-under-final-stages.html>, [https://perma.cc/7SJV-NFGS].

¹¹¹ See Ghose, *supra* note 108; GOOGLE MAPS, *supra* note 95 (search “Panama Canal”).

¹¹² GOOGLE MAPS, *supra* note 95 (search “Suez Canal”); *Canal History*, SUEZ CANAL AUTH., <http://www.suezcanal.gov.eg/English/About/SuezCanal/Pages/CanalHistory.aspx>.

¹¹³ SEADISTANCES.ORG, <http://www.sea-distances.org/> [https://perma.cc/SE49-K62R] (select drop-down and select Mumbai and London); SUEZ CANAL AUTH., *supra* note 112 (discussing canal closures during World War II, the Suez Crisis, and the Six Day war).

¹¹⁴ Constantinople Convention, *supra* note 94; see generally Robert Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 COLUM. L. REV. 755 (1957) (discussing instances where the Constantinople Convention was disregarded).

¹¹⁵ Constantinople Convention, *supra* note 94, art. 10.

future of the Northwest Passage. This Note has surveyed almost all of the key geography that impacts global sea-borne commerce. The remaining examples are all routes that are shared by more than one state, are already protected as archipelagic waters, or have readily available alternatives.¹¹⁶ What remains makes it clear that the geography of the Northwest Passage is truly unique and will be vitally important to global commerce. Even after comparing the Northwest Passage to the most analogous geography, there is no exact match. Furthermore, the foregoing review demonstrated that it would be abnormal for the Northwest Passage to not be governed by a separate treaty that affords some special rights to the Canadians.

V. ANALYZING THE TREATY NEGOTIATIONS

The 1982 UNCLOS was not created from a blank slate. Existing background norms date back centuries, and, most notably, the 1958 Geneva Conventions on the Law of the Sea ("1958 UNCLOS") established a natural starting point for negotiations.¹¹⁷ Indeed, many of the provisions of the 1958 UNCLOS are included in the modern version of UNCLOS, notably provisions about international straits and straight baselines.¹¹⁸ Despite striking similarities between the 1958 UNCLOS and the modern UNCLOS, the travaux préparatoires (the negotiation history treaty) show that there were lengthy negotiations about how other changes to the laws of the sea would impact international straits.¹¹⁹ Additionally, the drafters of the 1958 UNCLOS chartered an exhaustive geographical and hydrographical study of all straits which were then considered to constitute routes for international traffic.¹²⁰ Those sources provide some necessary context to help answer the question of whether the Northwest Passage should be considered a strait used for international navigation.

In reviewing the UN chartered geographical and hydrographical study prepared ahead of the 1958 UNCLOS, there are several important notes. First, although the 1958 UNCLOS established a three-mile limit on state

¹¹⁶ Other similar geography includes the Strait of Gibraltar (shared by more than one state and protected by treaty); the Straits of Malacca (shared by Indonesia, Malaysia and Singapore); the Cape of Good Hope (easy alternative in the high seas); the Straits of Magellan (easy alternative in the high seas); the Makassar Strait (already protected as archipelagic waters); or the Tsuguru Strait (secondary waterway).

¹¹⁷ See 1958 Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter 1958 UNCLOS]; see generally HUGO GROTIUS, MARE LIBERUM (1608) (first expounding the principle of the freedom of the seas, and generally credited as the starting point of modern law of the sea).

¹¹⁸ 1958 UNCLOS, *supra* note 117, arts. 4, 16; UNCLOS, *supra* note 14, arts. 7, 34-44.

¹¹⁹ See, e.g., Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/SR.1 (Dec. 3 1973).

¹²⁰ 1958 UNCLOS Study, *supra* note 49, at 114.

claims to a territorial sea, the study analyzed “straits of a width of twenty-six [nautical] miles or less”¹²¹ The purpose for that parameter was explicitly because twelve nautical miles was the upper limit of what the 1958 UNCLOS drafters were considering, and twenty-six miles would allow two neighboring coastal states to claim a full twelve nautical mile territorial sea, while preserving a two-mile wide gap for foreign vessels to sail through.¹²² Thus, any sea lane larger than twenty-six miles wide at its narrowest point was categorically excluded from consideration as a strait used for international navigation.¹²³

With those parameters in mind, the UN geographical and hydrographical study of existing international straits identified thirty-three straits that fell within its twenty-six nautical mile parameter.¹²⁴ Those straits included modern major shipping routes like the Strait of Gibraltar, the Strait of Hormuz, the Dover Strait, and the Strait of Malacca; it also specifically included the natural straits discussed above—the Danish Straits and the Turkish Straits (albeit referenced as “The Sound” and “The Dardanelles, Sea of Marmara, and the Bosphorus”).¹²⁵ Notably, the study did not include any reference to the Northwest Passage.¹²⁶

In its review of each strait, the UN survey noted several key features of each waterway, specifically: (1) which coastal states were impacted; (2) the approximate length of each strait; (3) the controlling depth of the strait; (4) whether there were any islands in or near the strait; (5) if there were ports available near the strait; and (6) whether there was an available alternate route through the high seas.¹²⁷ Those factors remain pertinent today, and generally correlate with the geographical analysis used to highlight the unique nature of the Northwest Passage above.

Next, regarding the discussions that took place between 1973 and 1982 as part of the drafting of the modern UNCLOS, the travaux préparatoires are enormously helpful in identifying what the drafters meant, intended, and understood during the negotiations. From start to finish, there were prominent concerns about how international straits were to be regulated under the new

¹²¹ *Id.* The negotiators would have also been familiar with the customary definition of a strait used for international navigation, as laid out in *The Corfu Channel Case*. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28-29 (Apr. 9). *See generally* Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/C.2/SR.14 (Dec. 10, 1982) [hereinafter UNCLOS Travaux 14th mtg.] (where Spanish diplomats directly cite to the *Corfu Channel case*).

¹²² 1958 UNCLOS Study, *supra* note 49, at 114-15.

¹²³ *Id.*

¹²⁴ *Id.* at 114.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See e.g., id.* at 115-44.

UNCLOS regime.¹²⁸ These concerns were “one of the most important questions facing the Conference,” and were amplified by the expectation that the modern UNCLOS would extend the limits of a coastal state’s territorial sea from the three nautical miles allowed by the 1958 UNCLOS to twelve nautical miles, thereby transforming numerous straits from high seas into territorial seas.¹²⁹ Even in the midst of the Cold War, there was broad consensus from coastal states, flag states, first world states, second world states, and even non-aligned states that the legal regime for international straits needed to strike a balance to “satisfy all legitimate concerns” about “the sovereignty of the coastal State and its responsibility for its own security” and its environment.¹³⁰

The negotiations on international straits focused on proposals from the United Kingdom/United States, the Soviet Union, a coalition led by Spain, and Fiji.¹³¹ The U.K./U.S.-proposed text effectively transformed international straits into the high seas.¹³² The Soviet proposal accomplished the same objective, with softer language.¹³³ The Spanish delegation countered with a proposal which explicitly stated that an international strait remained part of the territorial seas of a coastal state.¹³⁴ The Fijian proposal, while briefly acknowledged in the travaux, does not seem to have been substantively discussed by the parties. Ultimately, the Spanish proposal, with its stronger protections for coastal states, was adopted by the modern UNCLOS.¹³⁵ The Spanish proposal eventually became the treaty text because it struck an appropriate balance between the legitimate concerns of coastal states, while appropriately protecting the principle of freedom of navigation.¹³⁶

The last element of the travaux préparatoires that was particularly helpful were the discussions about preserving existing treaty regimes. Those discussions were brief and entirely non-contentious. Denmark explicitly stated that “the Danish straits leading to the Baltic Sea, had never been subject to the right of [innocent] passage but had been under a special régime serving the interest of both the coastal State and the international community”

¹²⁸ See, e.g., UNCLOS Travaux 11th mtg., *supra* note 60, at 124; Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/121 (Dec. 10, 1982).

¹²⁹ See, e.g., UNCLOS Travaux 11th mtg., *supra* note 60, at 125.

¹³⁰ See, e.g., Third U.N. Conference on the Law of the Sea, at 75, U.N. Doc. A/CONF.62/SR.23 (Dec. 10, 1982).

¹³¹ See, e.g., UNCLOS Travaux 14th mtg., *supra* note 121, at 136.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 141 (recording the vote in favor of the Spanish proposal).

and that “such a type of arrangement should remain in effect.”¹³⁷ That statement was met with agreement by Finland and the U.K., and not objected to by any other nation speaking on the record.¹³⁸

Thus, the sum of the context provided by the travaux préparatoires helps establish a few points. Firstly, that the negotiations reached the conclusion that there should be a balance between the rights of the coastal state and the rights of states whose vessels would be exercising transit passage through straits used for international navigation. Secondly, that despite an exhaustive survey of the globe, the unique geography of the Northwest Passage was not on the minds of the negotiators. Finally, the Danish request to preserve their exception for existing treaty regimes was viewed as non-contentious and was adopted after minimal debate.¹³⁹

VI. PLOTTING THE BOUNDARIES OF A MULTILATERAL SOLUTION

Finding a balance between Canada’s concerns about unlimited use of the Northwest Passage and the United States’ concerns about freedom of navigation is a delicate matter. Canada justifiably seeks to exert some measure of control over the Northwest Passage in order to protect its own environmental and security interests. However, any concessions to Canada’s interests in the Northwest Passage must not disrupt the long-established and carefully-balanced system of global freedom of navigation.

A. *Proposed Menu of Provisions*

To that end, with the sole intent of carving out a narrow exception that cannot be used as a direct precedent elsewhere, perhaps it is time to consider a multilateral solution that accommodates the unique challenges of the Northwest Passage.¹⁴⁰ Historically, other complex and important waterways have received this type of consideration, and Article 311 of UNCLOS specifically states that “State[] parties may conclude agreements modifying or suspending the operation of provisions of this Convention”¹⁴¹ Thus, in addition to preserving existing multilateral agreements that govern similar waterways,¹⁴² UNCLOS specifically allows for the type of multilateral agreement that is proposed, so long as that agreement “do[es] not relate to a provision derogation from which is incompatible with the effective execution

¹³⁷ UNCLOS Travaux 11th mtg., *supra* note 60, at 124.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See supra* discussion in Part V.

¹⁴¹ UNCLOS, *supra* note 14, art. 311 (allowing international agreements to remain in force after UNCLOS took effect).

¹⁴² Such as the Copenhagen Convention governing the Danish Straits or the Montreux Convention governing the Turkish Straits.

of the object and purpose of this Convention, and . . . shall not affect the application of the basic principles embodied herein . . . ”¹⁴³

Taking inspiration from existing treaties that govern straits used for international navigation, a menu of potential elements would include provisions that could allow Canada to: (1) dictate the routes foreign vessels must use; (2) specify when foreign vessels may transit; (3) specify classification requirements that ensure vessels are built to withstand the rigors of an arctic transit; (4) allot certain nations transit quotas; and, at the extreme end, (5) charge transit fees for the purpose of offsetting the cost of developing and maintaining the necessary infrastructure (including icebreakers, search and rescue facilities, vessel traffic services, temporary repair facilities, and medical facilities) for transits through the Northwest Passage.¹⁴⁴ This menu of options is neither intended to be exhaustive, nor considered as a complete package, it is merely intended as a starting point for the discussion.

Most of those provisions are clearly permissible under Article 311 of UNCLOS, while the fourth and fifth proposals push the boundary more than the others. However, the critical question in determining what provisions are permissible is whether the proposed provision would function as a derogation from the effective execution of the object and purpose of UNCLOS.¹⁴⁵ The text of UNCLOS itself does not explicitly specify what the exact object and purpose of the treaty are, leaving that question open to interpretation.

Within that framework, the first proposal, allowing Canada to dictate the routes that vessels take through the Northwest Passage, seems to be on solid footing. The proposal would allow the Canadians to limit the scope of their responsibility to providing search and rescue, environmental protection, and repair services to the portion of the Northwest Passage that they specify. Articles 22 and 41 of UNCLOS already allow coastal states to establish traffic separation schemes in territorial seas and straits used for international navigation.¹⁴⁶ The key distinction between existing UNCLOS provisions and this proposal is that traffic separation schemes are optional, and vessels that

¹⁴³ UNCLOS, *supra* note 14, art. 311; *see also* VCLT, *supra* note 79, art. 31.

¹⁴⁴ The costs associated with maintaining a safe, navigable waterway through the high arctic for approximately 2,000 nautical miles are not insignificant. However, if the Northwest Passage becomes widely used, Canada may be forced to shoulder those costs in order to comply with the requirements of the Safety of Life at Sea (SOLAS) Convention or the Arctic Search and Rescue Agreement. For the sake of argument, presuming that safely operating the Northwest Passage would require roughly the same amount of infrastructure and support as the United States allocates to conducting similar operations around Alaska, the cost would be roughly \$250 million annually. *2013 District 17 Fact Sheet*, U.S. COAST GUARD (on file with author).

¹⁴⁵ UNCLOS, *supra* note 14, art. 311.

¹⁴⁶ UNCLOS, *supra* note 14, arts. 22, 41.

do not wish to use them may take alternate routes. This proposal would go a single step further and make it mandatory for vessels transiting the Northwest Passage to use a route specified by the Canadians.¹⁴⁷ Given that this proposal is generally in line with the spirit of Articles 22 and 41 of UNCLOS, it seems safe to say that this proposal does not derogate from the object and purpose of UNCLOS.

The second proposal, giving the Canadians the authority to prescribe when vessels may transit the Northwest Passage, is a concession that would allow them to greatly reduce the risk posed by vessels trying to transit the Northwest Passage when the icepack is not cleared, or when powerful arctic storms make it significantly more dangerous to attempt a crossing. Article 234 of UNCLOS already provides coastal states the right to:

[A]dopt and enforce *non-discriminatory* laws and regulations for the prevention, reduction and control of *marine pollution* from vessels in *ice-covered areas* within the limits of the exclusive economic zone, where particularly severe climactic 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.¹⁴⁸

That short provision indicates that the drafters intended to afford coastal states some additional authorities to respond to the exceptional challenges posed by ice, but the treaty does not elaborate about the extent of those additional authorities, and it does not appear that the ICJ, or any other body, has defined the boundaries of the rights created by Article 234.¹⁴⁹ Furthermore, if the Northwest Passage is deemed to be a strait used for international navigation, it is unclear whether the permissive provisions of Article 234 prevail, or if the more restrictive provisions of Article 42 would be interpreted to prevent the Canadians from closing the Northwest Passage to traffic when they feel that the ice precludes safe passage.¹⁵⁰ This proposal, allowing the Canadians to define when vessels may transit the Northwest Passage, seems to facially comply with the provisions of Article 234, so long as the Canadians apply their determination to vessels of all states equally and

¹⁴⁷ Convention on the International Regulations for Preventing Collisions at Sea, Rule 10: Traffic Separation Schemes, Oct. 20, 1972, 28 U.S.T. 3459, 1977 U.N.T.S. 19 (by specifically providing for vessels who are not participating in the traffic separation scheme, the rule inherently acknowledges that the schemes are not mandatory).

¹⁴⁸ UNCLOS, *supra* note 14, art. 234 (emphasis added).

¹⁴⁹ Julie A. Paulson, *Melting Ice Causing the Arctic to Boil Over: An Analysis of Possible Solutions to a Heated Problem*, 19 IND. INT'L & COMP. L. REV. 349, 375 (2009) (discussing the author's interpretation of UNCLOS Article 234).

¹⁵⁰ See *supra* Sections II, III, V for discussion of UNCLOS art. 42.

ground their decision in the pollution threat to their marine environment. Additionally, because Article 234 is so vaguely defined, it would be difficult to say that a multilateral treaty that explicitly defines Canada's relevant rights runs contrary to the provision's ambiguous object and purpose.

As for the third proposal, hull classification requirements are not a new concept. For example, the United States passed domestic legislation requiring oil tankers to be "double-hulled" after the Exxon Valdez disaster; Panama and Egypt require vessels transiting their canals to meet hull classification requirements; and insurance companies generally require insured vessels to be certified by a hull classification society as part of their contract.¹⁵¹ Those classification societies have collectively published a set of requirements for vessels operating in polar waters, and it would be a small thing to explicitly allow the Canadians to require any vessel transiting through the Northwest Passage to be classified as an ice-rated vessel.¹⁵² Indeed, Article 21, concerning the laws and regulations of a coastal state relating to innocent passage, specifically provides that "[t]he coastal State may adopt laws and regulations . . . in respect of . . . the safety of navigation . . . [and] the preservation of the environment . . ."¹⁵³ However, "[s]uch laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."¹⁵⁴

The coastal state's rights are further circumscribed if vessels are not exercising innocent passage, but rather transit passage through a strait used for international navigation. Article 42, regulating the rights of a coastal state adjacent to a strait used for international navigation, allows the coastal state to legislate and regulate for "safety of navigation" and "the prevention, reduction and control of pollution, by giving effect to applicable international regulations."¹⁵⁵ However, that authorization in Article 42 specifically excludes the language that is present in Article 21 about the "design" or "construction" of ships.¹⁵⁶ Thus, narrowing the scope of Article 42 to "[s]uch

¹⁵¹ See *A Final Farewell to Oil Tankers with Single Hulls*, NAT. OCEANOGRAPHIC AND ATMOSPHERIC ADMIN. (Dec. 11, 2014), <http://response.restoration.noaa.gov/about/media/final-farewell-oil-tankers-single-hulls.html> [<https://perma.cc/6UDW-GLZP>] (highlighting the process to ban single-hulled tankers from U.S. waters in the wake of the *Exxon Valdez* disaster); *About IACS*, INT'L ASSOC. OF CLASSIFICATION SOC'Y, <http://iacs.org.uk/explained/default.aspx> [<https://perma.cc/XS4R-TMVB>].

¹⁵² *Requirements Concerning Polar Class*, INT'L ASSOC. OF CLASSIFICATION SOC'Y, (Apr. 2, 2016), www.iacs.org.uk/download/1803 [<https://perma.cc/KE79-HH5Y>] (detailing the International Association of Classification Society's standards for Polar Class vessels).

¹⁵³ UNCLOS, *supra* note 14, art. 21.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* arts. 21, 42.

¹⁵⁶ *Id.*

laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.”¹⁵⁷

The combined effect of Articles 21 and 42 is difficult to gauge. If the Northwest Passage is considered Canadian internal waters, Canada would absolutely have the authority to apply hull classification requirements. If the Canadians are not allowed to draw straight baselines, and the passage is considered a mix of territorial seas and straits used for international navigation, then the Canadians would be able to regulate the hulls of vessels exercising innocent passage under Article 21, so long as the classification requirements imposed are “generally accepted international rules.” Lastly, if the Northwest Passage is deemed to be one continuous strait used for international navigation, the Canadians are relegated to regulating under the weak authority provided by Article 42, which arguably precludes hull classification requirements. A multilateral treaty that explicitly codified Canada’s authority to require hull classifications would eliminate the above ambiguity and give force to a small modicum of prudence.

The last question related to the hull classification proposal is whether it would be permissible or contrary to the object and purpose of UNCLOS. Given the ambiguity that exists between Articles 21 and 42, it is difficult to decisively answer that question.¹⁵⁸ If, at the outset, the treaty declares that the Northwest Passage is either Canadian internal waters (unlikely), or Canadian territorial seas, the provision could certainly comply with the object and purpose of Article 21.¹⁵⁹ If that were the case, and a multilateral treaty were in place before the Northwest Passage is widely used for international shipping, then any subsequent change to the type of maritime traffic would be irrelevant.¹⁶⁰ Even when the Northwest Passage begins to regularly open up to marine traffic, and parts of it clearly become a strait used for international navigation, the specific multilateral treaty would still override the general text of UNCLOS.¹⁶¹ Thus, a proposal that allowed Canada to require vessels transiting the Northwest Passage to be classified as ice rated is arguably within the realm of possibility.

The fourth proposal, empowering Canada to employ quotas to manage transits through the Northwest Passage, is similar in spirit to the concession granted to the Turks to manage the Bosphorus and Dardanelles. There, the Turks are allowed to restrict the number of ships from non-Black Sea states

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* art. 21.

¹⁶⁰ *Id.* art. 311.

¹⁶¹ *Id.*

from entering the Black Sea.¹⁶² In this context, the Canadians could use a quota system to manage the absolute number of vessels transiting the Northwest Passage, thus limiting the resources that Canadians need to deploy to make the passage safe for maritime traffic. Alternately, the Canadians could use a quota system to incentivize the states whose vessels are transiting the Northwest Passage to do so safely. If, after a maritime accident or a pollution incident, the Canadians could reduce a nation's quota, that would provide a strong incentive for nations to ensure that the vessels flying their flag operated safely.

This proposal is, at a minimum, at the outer edge of what is permissible under UNCLOS. A quota system generally runs contrary to the principle of freedom of the seas, but such a system is enshrined as existing international law which is apparently "compatible with [UNCLOS] and [does] not affect the enjoyment by other States Parties of their rights . . ." under UNCLOS Article 311.¹⁶³ If such a quota system were desirable, Canada would need to construct a strong argument around that point and find a way to dispute the claim that such a treaty provision is contrary to the object and purpose of UNCLOS.

Lastly, the fifth proposal—enabling the Canadians to charge transit fees for passage through the Northwest Passage—is the most questionable. It is in Canada's interests to charge transit fees to offset the expenses associated with placing the required search and rescue assets, pollution response equipment, aids to navigation system, and repair facilities along the Northwest Passage.¹⁶⁴ Those facilities do not exist today to any appreciable extent, and the long-term costs associated with establishing and maintaining the Northwest Passage in a way that makes it safe for navigation would not be insignificant.¹⁶⁵ Canals, like Panama and Suez, have comparable operational expenses, but they are permitted to offset, or even profit from, transit fees. Given that the Suez and Panama canals consistently rank among the busiest hubs of international maritime commerce, these transit fees do not seem to have a particularly deleterious effect on the freedom of navigation.

No article of UNCLOS explicitly prohibits a coastal state from charging a fee for a vessel exercising innocent passage or transit passage through the coastal state's waters. However, the text of Articles 21 and 42 limit the applicable laws and regulations of a coastal state to a few enumerated

¹⁶² Montreux Convention, *supra* note 14, art. 19.

¹⁶³ UNCLOS, *supra* note 14, art. 311; *see id.* arts. 17, 45, 87.

¹⁶⁴ *Arctic Navigation*, NAT. OCEANOGRAPHIC AND ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/economy/arctic/> [<https://perma.cc/N9EL-643H>] (highlighting the need to establish a geospatial foundation and a constant reference system in the Arctic, which roughly translates as GPS does not work well in the high arctic).

¹⁶⁵ *See supra* note 144 (discussing the extensive costs associated with arctic maritime infrastructure).

purposes and offsetting the cost of necessary infrastructure is not one of those enumerated purposes.¹⁶⁶ Perhaps Canada could make an argument that the infrastructure costs they are offsetting are tied to the safety of navigation, or providing navigational aids, but it is unlikely that any other party would find those arguments compelling. Additionally, no other waterway regulated by UNCLOS currently charges a fee to vessels exercising innocent passage or transit passage. Furthermore, because the stated intent of UNCLOS is to preserve the ocean as “the common heritage of mankind,” a transit fee seems to run contrary to the treaty’s object and purpose of promoting freedom of navigation.¹⁶⁷

B. *Practical Factors*

In addition to the menu of five potential provisions for a multilateral treaty, there are several practical considerations that should also be addressed. Firstly, there are a few states that would absolutely have to be a party to the multi-lateral treaty governing the Northwest Passage for the treaty to be successful. Secondly, the timing of the proposed multi-lateral treaty is important. Finally, the potential use of this multi-lateral treaty as a precedent for any other waterway is a valid concern.

To start, the necessary parties to the multi-lateral treaty would include the primary ports-of-call that vessels transiting the Northwest Passage would be bound to or from. In this case, the U.S. East Coast and Europort in Rotterdam are the principal destinations, so the United States and the European Union would be vital parties.¹⁶⁸ Those behemoths would also be key because of their enormous political clout, as well as their ability to provide regulatory incentives for flag states to participate in this multi-lateral treaty. Next, the points of origin for vessels transiting the passage would be crucial. In this case, China, South Korea, and Japan are the largest members of that category.¹⁶⁹ The next, and potentially most challenging, category is the states that serve as flags of convenience. Flags of convenience are the states to which vessels are officially registered, and the states whose laws govern the registered vessel.¹⁷⁰ However, in all likelihood, the registered vessel has never visited the flag state, and flag states are often chosen because of the low registration fees, relaxed employment laws, and deferential safety

¹⁶⁶ UNCLOS, *supra* note 14, arts. 21, 42.

¹⁶⁷ UNCLOS, *supra* note 14, art. 136.

¹⁶⁸ See MARINE TRAFFIC, *supra* note 92 (showing the current position of all vessels in excess of 300 gross tons, on an international voyage, as required by the International Maritime Organization).

¹⁶⁹ *Id.*

¹⁷⁰ Allan I. Mendelsohn, *Flags of Convenience: Maritime and Aviation*, 79 J. AIR L. & COM. 151, 151-152 (2014).

regulations.¹⁷¹ The principal flag states today are Panama, Liberia, and the Marshall Islands.¹⁷²

The finer points of negotiating this proposed multilateral treaty are best left to the diplomats, but generally to succeed, there must be some give and take. The incentive Canada could plausibly offer the United States and Europe could rest with the reduced risk to the Arctic environment, which has a pronounced effect on global climate change. Arguably, Canada could entice the Asian points of origin to sign on to the multilateral treaty by highlighting how such a treaty could expand the shipbuilding that primarily occurs in those three countries. Finally, Canada could encourage flag state co-operation by agreeing to expand foreign aid to those countries. Ultimately, these specifics are beyond the scope of this discussion, but there are numerous creative alternatives that might help this proposed treaty succeed.

Next, from a practical perspective, it is preferable that this proposed multilateral treaty be in place before the Northwest Passage is widely used for international navigation. The principal reason for this preference is that a treaty that is in place before the Northwest Passage becomes a strait used for international navigation is protected by UNCLOS Article 35(c), which preserves existing international agreements.¹⁷³ Attempting to craft a multilateral treaty to govern the Northwest Passage under the regime for territorial seas or internal waters affords much more flexibility to avoid conflicting with the object and purpose of UNCLOS. Once the Northwest Passage is sufficiently well-trafficked, it will be much more difficult to plausibly argue that any proposals are within the much more rigid regime that governs straits used for international navigation. Thus, any attempt to create a multilateral treaty to specifically govern the Northwest Passage should be initiated sooner rather than later.

Lastly, part of the reason it was important to highlight the unique geography of the Northwest Passage is because the goal is to avoid creating a precedent that can be used to govern other waterways. Freedom of navigation has been a core principal of Anglo-American foreign relations for centuries, and it makes sense to avoid creating a patchwork system where every body of water is subject to a different treaty system. Thus, by highlighting the several unique features of the Northwest Passage, the intent was to provide sufficient grounds to distinguish this effort from future efforts related to any other body of water.

Overall, the proposed menu of provisions and potential parameters of a multilateral treaty to govern the Northwest Passage are just that—they need not be taken as a complete package or as a unified structure. The true object

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ UNCLOS, *supra* note 14, art. 35.

here has been to posit that a multilateral treaty could resolve the impasse between the United States and Canada regarding the Northwest Passage. Resolving that question has pressing implications for Canada's sovereignty and the future of global maritime trade, so letting the issue stagnate is ill-advised.

VII. CONCLUSION

Regardless of the legal status of the Northwest Passage, the next years and decades will almost certainly see explosive growth in its use as a vital artery of global maritime commerce. The receding polar ice cap and relentless pursuit of the bottom line allow for no other result. Canada's environmental concerns and United States' concerns about the freedom of navigation are both valid, but they need not be at loggerheads. It is incorrect to assert that either the American or Canadian claim is non-negotiable. The Canadian claim emphasizes broad readings of Articles 7 (straight baselines) and 234 (ice-covered areas) of UNCLOS, while the American claim emphasizes the underlying principle of freedom of navigation and the strict language of Article 34 (straits used for international navigation). Neither interpretation is objectively wrong, and each party justifiably applied its own meaning to the text during the negotiation—indeed it would be surprising if a document that took over a decade to negotiate, and that contains 320 articles, did not have some internal inconsistencies.

For a bevy of political and practical reasons it is unlikely that this case will be adjudicated by the ICJ, or the UNCLOS tribunal, but that does not mean the question about the Northwest Passage must remain unanswered.¹⁷⁴ A narrowly-tailored multilateral treaty could preserve the most vital Canadian interests, while preserving the principle of freedom of navigation that the U.S. is concerned about, without creating a precedent that could be used as a negative precedent in other waterways. This is possible because the geography of the Northwest Passage is so unique. There is no other waterway that: (1) goes exclusively through one state's sovereign waters; (2) is, or is expected to become, a major shipping lane; (3) has no reasonably available alternative through the high seas; (4) is incredibly isolated; (5) seasonally closes due to ice; and (6) is a new waterway that did not functionally exist when UNCLOS was negotiated. Those factors would allow participants in a multilateral solution to narrowly tailor their acceptance on those factors,

¹⁷⁴ The U.S. has historically been averse to ICJ jurisdiction, and President Trump has not made any public statement indicating that might change. *See e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 10 (June 27, 1986) (where the U.S. refused to appear before the ICJ). Furthermore, the U.S. has not ratified UNCLOS, and therefore cannot bring a claim before that tribunal. UNCLOS, *supra* note 14, annex VI.

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ensuring that other waters, such as the South China Sea, are not co-opted by other multilateral treaty regimes.

Finally, this proposed multilateral treaty to govern the Northwest Passage is time sensitive. The Northwest Passage is rapidly opening up, and once the passage becomes a strait used for international navigation, the terms of UNCLOS will limit the potential of any multi-lateral treaty regime. This route towards a mutually beneficial solution will cease to exist in the foreseeable future, and it is in everyone's interest to strike an appropriate balance between protecting the Canadian Arctic, and preserving the freedom of navigation.