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International Security and International Law in the Northwest Passage

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International Security and International Law in the Northwest Passage

*James Kraska**

ABSTRACT

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

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I. THE STRATEGIC VISTA OF THE ARCTIC

Seventy percent of the globe is covered by the single, interconnected “world ocean.”¹ Eighty percent of the world’s population lives within 200 miles of a coastline.² Ninety percent of international trade travels by sea.³ Much of the commerce, many of the people and resources, and much of the conflict on the planet occurs in the coastal zone.⁴ Consequently, the diplomatic and legal framework for ocean governance is of direct concern to the maintenance of a stable world system. These figures are especially compelling for the states of North America, which are connected to the world primarily by the Atlantic and Pacific Oceans.

The harsh climate of the High North and the ice cap over the Arctic Ocean has deterred most transcontinental traffic from using the northern waters as an approach into the shores of Canada and the United States.⁵

1. 8 THE NEW ENCYCLOPEDIA BRITANNICA 861 (15th ed. 2005).

2. J.R. Atkins, *Recovery from the Sea. Missed Opportunity for Joint Forces?*, DEPT OF DEF. PERS. RECOVERY UPDATE, Jan.-Mar. 2002, at 5, available at http://www.dtic.mil/dpmo/personnel_recovery/issue11.pdf.

3. Dinesh C. Sharma, *Ports in a Storm*, 114 ENVTL. HEALTH PERSP. A222, A223 (2006).

4. See *id.* (describing the high level and growth of commerce in the ports around the world, particularly China and the United States); LIZ CREEL, RIPPLE EFFECTS: POPULATION AND COASTAL REGIONS 2 (2003) (noting the large and growing numbers of people living in coastal regions).

5. See THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 1, at 795 (describing the ice and other obstacles which made the Northwest Passage historically unnavigable); see generally Anne Cadoret, *Conflict Dynamics in Coastal Zones: A Perspective Using the Example of Languedoc-Rousillon (France)*, 13 J. COASTAL

While three vast oceans—the Pacific, Atlantic, and Arctic—have shielded North America in the past, in recent decades globalization has brought increasing numbers and diversity of shipping into Atlantic and Pacific ports.⁶ Climate change may transform the Arctic Ocean into yet a third waterway for transcontinental traffic into North America. The result is that the northern tier will become open to the benefits and exposed to the potential costs of worldwide commerce. The greatest impact to date of the prospect of increased shipping in the North American Arctic has been the disruption of Canada's sense of security.

Over the past thirty years, the annual average sea-ice extent has decreased about eight percent, or nearly one million square kilometers—an area larger than all of Norway, Sweden, and Denmark combined. The extent of sea ice has declined more dramatically in summer than the annual average, with the loss amounting to 15–20 percent of late-summer ice coverage. Moreover, a consensus is building that the melting trend is accelerating, as Arctic temperatures have increased over the last few decades. Winter temperatures in Alaska and Western Canada, for example, are 3–4°C higher over the past fifty years, and there is an expectation that larger increases will be projected.⁷

The five Global Climate Models (GCMs) utilized in the Arctic Climate Impact Assessment (ACIA) project a decline in winter maximum extent ice over the next 100 years.⁸ Scientists believe these changes are one major reason for dramatic environmental events, such as the recent detachment of a sixty-six-square-kilometer giant ice shelf from Ellesmere Island, which is located about 800 kilometers from the North Pole.⁹

CONSERVATION 151, 151 (2009) (“Forming a highly coveted socio-spatial system, the coast is an area under pressure, where there are multiple conflicts of use.”).

6. ASHISH K. VAIDYA, *GLOBALIZATION: ENCYCLOPEDIA OF TRADE, LABOR, AND POLITICS* 436–40 (2006) (discussing the increased volume in shipping to American ports that has occurred as a result of globalization).

7. James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 *INT'L J. MARINE & COASTAL L.* 257, 257–58 (2007) (citing SUSAN JOY HASSOL, *IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT* 12–13 (2005), available at <http://amap.no/acia/>).

8. John E. Walsh & Michael S. Timlin, *Northern Hemisphere Sea Ice Simulations by Global Climate Models*, 22 *POLAR RES.* 75, 76–77 (2003). Conclusions among the models vary about the extent of summer ice. Some predictions indicate it will remain relatively constant; others indicate summers will be ice-free. *Id.* at 76–80.

9. Steve Lillebuen, *Ancient Ice Shelf Snaps and Breaks Free from Canadian Arctic*, *THE CAN. EZINE*, Dec. 28, 2006, <http://www.lilith-ezine.com/articles/canada/2006/Ice-Shelf-Snaps-Free.html>. The ice floated on the sea but had previously been connected to land. *Id.* Some scientists believe the separation of the ice from land is the largest event of its kind in Canada in thirty years. *Id.*

A. *War in the Arctic?*

Coupled with other environmental stress, such as illegal fishing, overfishing, and pollution, there is concern that the trends in Arctic climate change may “overwhelm the adaptive capacity” of some Arctic ecosystems and reduce or even eliminate populations of living resources.¹⁰ The security implications of these changes could be enormous.

The *New York Times* suggests that Arctic waters are an emerging arena of international competition in a High North version of the “Great Game.”¹¹ New Arctic maritime claims, maritime boundary disputes, and international competition over the resources of the Arctic Ocean exacerbate the unease precipitated by the prospect of increased international shipping.¹² These trends led Scott Borgerson to warn in *Foreign Affairs* last year of an impending “Arctic meltdown” generating conflict in the region.¹³ Meanwhile, the European Commission suggests that changes in the Arctic physical environment are altering the geostrategic dynamics of the region and will affect global security.¹⁴

Climate change is transforming the security dynamic in the Arctic, but does the future hold a stable and cooperative Arctic order or a competitive and volatile Arctic anarchy? The United States has been the voice of reason, and Washington has the power to shape the future. Yet those concerned about the potential for Arctic conflict suggest that climate change threatens to upend international stability or even drag nations into war. We have, after all, been here before.

The seventeenth century faced upheaval and adversity on a monumental scale: in China, the Ming dynasty suffered a violent collapse; the Ottoman Empire was engaged in a bitter struggle with the Holy League; and the Dutch Revolt pried the Low Countries from

10. HASSOL, *supra* note 7, at 5, 10.

11. Clifford Krauss et al., *As Polar Ice Turns To Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

12. *Id.*

13. Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFF., Mar.-Apr. 2008, at 63, 63.

14. *See Paper from the European Commission & High Representative for the Common Foreign and Security Policy, Climate Change and International Security*, S113/08, at 1–2 (Mar. 14, 2008).

Climate change is best viewed as a threat multiplier which exacerbates existing trends, tensions and instability. The core challenge is that climate change threatens to overburden states and regions which are already fragile and conflict prone. It is important to recognise that the risks are not just of a humanitarian nature; they also include political and security risks that directly affect European interests.

the Spanish Empire.¹⁵ The Thirty Years War dismembered Central Europe, ending in the Peace of Westphalia in 1648 and ushering into existence the modern nation-state.¹⁶ More warfare afflicted the globe during the seventeenth century “Great Crisis” than during any time until the 1940s.¹⁷ New climate data archives have begun to confirm what Voltaire explained to his mistress Madame du Chatelet in the 1740s: “The ‘period of usurpations almost from one end of the world to the other’ . . . were the result of government, religion and ‘le climat.’”¹⁸ The planet had cooled in the Little Ice Age, which froze Chesapeake Bay; chilled Alexandria, Egypt; and killed rice crops in Japan and wheat in Portugal.¹⁹ These climate changes caused widespread famine that descended into anarchy, triggering riots and chaos throughout the world.²⁰

The United States is more circumspect about the prospects of impending Arctic warfare. The Cooperative Strategy for 21st Century Sea Power, which was signed by the service chiefs of the Navy, Marine Corps, and Coast Guard in 2007, suggests,

Climate change is gradually opening up the waters of the Arctic, not only to new resource development, but also to new shipping routes that may reshape the global transport system. While these developments offer opportunities for growth, they are potential sources of competition and conflict for access and natural resources.²¹

II. ARCTIC COMPETITION

In 2008, the U.S. Geological Survey estimated that the Arctic region holds 13% of the undiscovered oil and 30% of the undiscovered natural gas in the world—figures that do not include potentially vast

15. See generally PAUL ARBLASTER, *A HISTORY OF THE LOW COUNTRIES* 121–55 (2006) (describing the Dutch Revolt against the Spanish Empire and contemporaneous issues and events in the Low Countries); KENNETH M. SETTON, *VENICE, AUSTRIA, AND THE TURKS IN THE SEVENTEENTH CENTURY* (1991) (describing the various troubled relations between the members of the Holy League and the Ottoman Empire); F.E. WAKEMAN, *THE GREAT ENTERPRISE: THE MANCHU RECONSTRUCTION OF IMPERIAL ORDER IN SEVENTEENTH-CENTURY CHINA* (1985) (detailing the fall of the Ming dynasty and the rise of its successor).

16. See Geoffrey Parker, *Countdown to Peace*, in *THE THIRTY YEARS' WAR* 138, 160–69 (Geoffrey Parker ed., 1997) (discussing the thirty years war and its implications and results in Europe).

17. Woodrow Wilson Int'l Ctr. for Scholars, *Fallout from the Ice Age (Mid 17th Century Crises)*, WILSON Q., Winter 2009, at 77 (reviewing *THE GENERAL CRISIS OF THE SEVENTEENTH CENTURY* (Geoffrey Parker & Leslie M. Smith eds., 2d ed. 1997) (discussing the various conflicts that occurred during the 17th century)).

18. *Id.*

19. *Id.*

20. *Id.*; see also Parker & Smith, *supra* note 17, at 7–12.

21. U.S. NAVY ET AL., *A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWER* (2007), <http://www.navy.mil/maritime/MaritimeStrategy.pdf>.

reserves of methane gas hydrates.²² Areas of the Beaufort Sea and north of Siberia as well as the waters and seabed of the Sverdrup Basin were identified as probable areas of interest.²³ However, most of the Arctic energy resources are located within coastal states' recognized 200-mile exclusive economic zones, which are not subject to any controversy or likely to incite conflict.²⁴ The talk of a war over resources is inaccurate—though it is red meat for Canadian and Russian nationalists; it is the prospect for new resources that is driving the competition.²⁵

A. Factors Driving Tension

There are at least five broad factors contributing to rising tension in the Arctic, and all are related to the rich natural resources in the region. The foremost Arctic resource is water—the immense spatial resource of the Arctic Ocean—as a domain of movement for international shipping. Ninety percent of international trade travels by sea, and if the Arctic ice melts, intercontinental tanker and cargo traffic between Europe and Asia will become much more economical.²⁶

Second, high commodity prices and scarce supplies of oil, gas, and minerals mean demand for commodities is tight—even in a depressed global economy.²⁷ If prosperity returns, commodity prices could skyrocket to feed the global economy.

Third, we are experiencing a renaissance in technology for operating in the extreme Arctic environment. New technologies make drilling in the extreme conditions of the Arctic Ocean feasible, and

22. Ed Struzik, *Dawn of a New Arctic*, EDMONTON J., May 3, 2009, at E1 (Can.).

23. Frédéric Beaugard-Tellier, *The Arctic: Hydrocarbon Resources*, PARLIAMENTARY INFO. AND RES. SERVICE, Publication PRB 08-07E, Oct. 24, 2008, at 2-4, available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0807-e.pdf>.

24. Yuri Solozobov, *Escalating Tensions Over Hunt for Oil and Gas in the Arctic*, ROSSIYSKAYA GAZETA (Russ.), Aug. 28, 2009, <http://www.telegraph.co.uk/sponsored/russianow/6098600/Escalating-tensions-over-hunt-for-oil-and-gas-in-the-Arctic--Russia-Now.html> (noting that the great majority of the Arctic's gas and oil resources are concentrated within the Russian and U.S. Arctic territories, respectively).

25. Struzik, *supra* note 22.

26. See Brian Beary, *Race for the Arctic*, 2 CQ GLOBAL RESEARCHER 213, 218 (2008), available at <http://www.indigenoussummit.com/servlet/download?id=68> (“Savings on shipping routes could be enormous if the Arctic routes were to become usable for longer periods.”).

27. See MARK J.C. CRESCENZI, ECONOMIC INTERDEPENDENCE AND CONFLICT IN WORLD POLITICS 12 (2005) (noting that “[i]f a nation needs a certain quantity of oil regardless of the price to keep its production and transportation systems running, then this demand for oil is inelastic” and the nation will be forced to pay whatever price is necessary to obtain such oil or any other absolutely necessary commodity).

new ice-breaker designs make it easier to travel through the ice pack.²⁸

Fourth, climate change is melting the ice, and the Arctic could be ice-free during the summer within a few years.²⁹ While this trend increases access to the seas, the melting permafrost threatens to disrupt road and rail infrastructure on land.

Finally, with increased activity and greater numbers of ships come potential new threats to homeland security. The attacks of 9/11 altered the perception of port, vessel, and waterway security, galvanizing public attention toward potential maritime vulnerabilities in Alaska.³⁰

Norway, with an economy based on oil and fishing, wants to fence off as much of the water in the Barents Sea and surrounding Svalbard as possible in order to ensure a steady flow of new oil and other resources in the coming years.³¹ Oslo seeks international recognition for Norwegian control of the resource-rich waters off Svalbard; responsibility for governing the frozen island outpost was granted to the nation under a 1920 treaty.³² Russia has resisted the move; Norway and Russia are also at odds over control of portions of the Barents Sea.³³ Like Norway, Greenland needs to develop natural resources if it ever hopes to declare independence and give up government subsidies from Copenhagen.³⁴

There are other Arctic issues that sometimes are mistakenly conflated with issues related to the Northwest Passage. These include continental shelf claims by Russia and other countries; the related debate over the legal status of the North Pole; and maritime boundary issues such as the disagreement between Canada and the United States in the Beaufort Sea and the disagreement between

28. Brian Baskin, *Northern Exposure: As the Arctic Gets Warmer, Oil and Gas Producers See the Chance for a Big Expansion; But Plenty of Technological Hurdles Remain*, WALL ST. J., Feb. 11, 2008, at R4; Beary, *supra* note 26, at 218.

29. HASSOL, *supra* note 7, at 13. ("The average extent of sea-ice cover in summer has decreased by 15–20% over the past 30 years. This decline is expected to accelerate, with the near total loss of sea ice in summer predicted for late this century.")

30. See Kevin Wadlow, *Tighter Boating Oversight?: Terrorism Fears Could Lead to Total Monitoring*, KNIGHT RIDDER TRIB. BUS. NEWS (Wash., D.C.), Mar. 14, 2007, at 1 (discussing increased attention to maritime security, as well as increased risks of terrorist attacks to the nation's coastline, following the attacks of September 11, 2001).

31. See Beary, *supra* note 26, at 213, 219, 226, 228 (describing declining oil production in Norway, setting off a desperate search by that country for new resources).

32. *Id.* at 226, 228.

33. *Id.* at 226.

34. See CIA World Factbook, Economy: Greenland, <https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html> (last visited Oct. 8, 2009) (showing that Greenland's economy is heavily dependent on subsidies from Denmark, but that Denmark intends to reduce the subsidies as revenues from oil exports come onstream).

Canada and Denmark with regard to Hans Island, which is situated in the center of the Nares Strait between Ellesmere Island (the most northerly part of Nunavut, Canada) and Greenland.

While each of these and other issues may be affected by ice changes occurring in the Arctic, they encompass separate and distinct problems and are subject to different international rules. Morris Maduro, a professor of international law at the University of Alberta, recently warned in the *Edmonton Journal* that mixing Arctic issues has tended to generate confusion and impede cooperation.³⁵ For that reason, this Article focuses primarily on the legal status of the Northwest Passage, its associated diplomatic and security issues, and its effect on the global oceans order.

The United States, which has been labeled the “reluctant Arctic power”³⁶ but is catching up to the other Arctic nations, released a presidential-level Arctic Region Policy in January 2009.³⁷ The Commandant of the Coast Guard, Admiral Thad Allen, is fond of saying that when it comes to climate change and the causes of global warming, he is an agnostic: “All I know is there is more water up here than ever. And I have to provide marine safety and marine security to that water.”³⁸

The milieu of Arctic politics and competing maritime claims, new Arctic security considerations, and the promise of Arctic economic development has disturbed the historically placid Arctic politics. The epicenter of this trend is a new “cold war” developing between Russia and Canada. Disputes over competing claims to the continental shelf of the North Pole have unnecessarily ignited a contest of words and wills featuring Moscow and Ottawa as the principle antagonists.³⁹

B. *Russia: Responsible or Revanchist?*

Russia views Arctic development as a means to attain greater recognition and as a resource basin to fuel renewed economic growth powered by Arctic-region natural resources. The Arctic currently produces twenty percent of Russia’s GDP.⁴⁰ The new Russian

35. Morris Maduro, *True North Strong and Free—But is it Ours?*, EDMONTON J., Mar. 26, 2008, at A19 (Can.), available at <http://www.canada.com/edmontonjournal/news/ideas/story.html?id=b516e78d-7ab1-411a-9d9c-439c558d2eaa>.

36. Robert Huebert, *United States Arctic Policy: The Reluctant Arctic Power*, U. OF CALGARY SCH. OF PUB. POL’Y BRIEFING PAPERS, May 2009, at 1, 1–2.

37. *Id.* at 1.

38. George Bryson, *Receding Ice Pack Means More Traffic in Arctic*, ANCHORAGE DAILY NEWS, Aug. 11, 2008, available at <http://www.adn.com/arctic-alaska/story/489973.html>.

39. See Randy Boswell, *Canada, Russia Play Political Game in Arctic: Experts*, NAT’L POST (Toronto), Aug. 16, 2009, available at <http://www.nationalpost.com/m/story.html?id=1899263>.

40. Solozobov, *supra* note 24.

national security strategy warns that, within a decade, nations could be at war over resources in the Arctic Ocean.⁴¹ In language reminiscent of the hand-wringing over bipolar measurements concerning the U.S.–Soviet “coalition of forces” in the 1970s, Moscow’s new strategy states that Arctic resources will become the “critical point for the world military balance.”⁴² Wrapping 170 degrees around the Arctic Circle, the high latitude nation dominates the geography of the polar north.⁴³ Russia “thinks like the North and drinks like the North.”⁴⁴

The country has embarked on a project to ensure it is regarded as the first Arctic superpower. In 2001, Russia was the first nation to stake a claim to the oil and mineral resources of the seabed in the Arctic Ocean by filing a claim for exclusive resource rights under the Law of the Sea Convention.⁴⁵ Canada and Denmark (Greenland) have filed claims as well.⁴⁶ The cheeky 2007 submarine expedition to plant a Russian titanium flag on the seabed of the North Pole presaged Moscow’s entry to a geostrategic opera in the High North.⁴⁷ Meanwhile, long-range Tupolev-95 “Bear” and Tupolev-160 “Blackjack” strategic bomber flights over the Arctic have been renewed after a fifteen-year suspension, raising hackles in Canada and Norway.⁴⁸ Flush with petrodollars, Moscow is developing the Arctic as a cash cow to provide a future stream of oil, gas, and mineral wealth.⁴⁹ Is the warning contained in the new Russian strategy a prescient sign of the future or more bluster from the Kremlin’s public diplomacy machine to restore national pride?

41. *Russia Warns of War Over Arctic Resources*, PRESS TV, May 14, 2009, <http://www.presstv.ir/detail.aspx?id=94709§ionid=351020602>.

42. Presidential Decree, Pres. Dmitry Medvedev, Security Council of the Russian Federation, С Т Р А Т Е Г И Я: национальной безопасности Российской Федерации до 2020 года [Strategy: National Security Strategy Russia 2020], Decree No. 537 (May 12, 2009), <http://www.scrf.gov.ru/documents/99.html> (last visited Oct. 7, 2009) [hereinafter Russian National Security Strategy] (author’s translation).

43. One need only look at a map to confirm the extent of Russia’s immense Arctic coastline.

44. Russian National Security Strategy, *supra* note 42 (author’s translation).

45. Beary, *supra* note 26, at 225, 228.

46. *See id.* at 217.

47. *Id.* at 215.

48. *Russian Strategic Bombers Conduct 20-hr Patrol Over Arctic Ocean*, RIANOVOSTI (Russ.), May 14, 2008, <http://en.rian.ru/russia/20080514/107337318.html>; *see also* Randy Boswell, *Arctic Tensions Heat Up; Nordic Nations Might Form Military Alliance*, MONTREAL GAZETTE, Mar. 1, 2009, at A4 (describing Canada and Norway’s angry reaction to one particular patrol).

49. *See* Beary, *supra* note 26, at 230–34 (describing the actions taken by Russia to extract resources in the Arctic).

C. Canada: Progressive or Paranoid?

Canada is taking Russia at its word, firing back diplomatic missives in response to each intemperate move by Moscow. At the same time, shoring up its own excessive assertions of sovereignty over large parts of the Arctic Ocean has become a national preoccupation. Canada plans to build up to eight ice-strengthened patrol vessels to enforce strict laws in the famed Northwest Passage, a network of Arctic Ocean waterways—some of which are 100 miles wide—that connects the North Atlantic in the east to the Beaufort Sea in the west.⁵⁰ Although Canada claims these areas as internal waters—the equivalent of the Great Salt Lake in Utah—under the Law of the Sea Convention, the waters of the Passage are actually composed of a combination of territorial seas, the Canadian exclusive economic zone, and an international strait open to the international community.⁵¹

Canada was the first Arctic nation to assert controversial claims over large areas of the Arctic Ocean beyond its land territory.⁵² Even as other Arctic nations scramble to assert sovereign rights in the resources of the seabed, Canada's internal waters claims over vast stretches of the sea still constitute the most excessive maritime claims of any Arctic nation.⁵³ Ottawa's extensive claims are built on a northern mythos and profound disquiet over a new sense of national vulnerability that first emerged in the late 1960s.⁵⁴ The result was the adoption of strict laws for marine environmental protection that purportedly apply outside the legitimate borders of the country.⁵⁵ In the 1980s, straight baselines were drawn to enclose the islands and waters of the North American Arctic in a continent-wide gambit to

50. *Canada to Build Arctic Offshore Patrol Ships*, MARINE LOG, July 10, 2007, <http://www.marinelog.com/DOCS/NEWSMMVII/2007jul00101.html>.

51. See Huebert, *supra* note 36, at 7 (stating that Canada claims the Arctic areas as internal waters but that other countries do not recognize these claims).

52. *Id.* Canada's claims to the Northwest Passage as internal waters became controversial by 1970. See *id.* (noting that tensions escalated between the United States and Canada over the Canadian claims to the Northwest Passage as internal waters). For comparison, Russia did not make its controversial claim of half the Arctic Ocean, including the north pole, until 2001. Beary, *supra* note 26, at 225.

53. See J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 117–21 (2d ed. 1996) (describing Canada's various arctic maritime claims and the response of the United States to Canadian claims).

54. See Guy Killaby, "Great Game in a Cold Climate": *Canada's Arctic Sovereignty in Question*, CANADIAN MILITARY J., Winter 2005/2006, at 31, 33 ("As noted by Canadian legal scholar Douglas M. Johnston, '... the remoteness and vastness of these [Arctic] territories have passed down a legacy of political, legal, and military unease.' Part of this uneasiness can be traced to the history of Canada's unrequited claims of Arctic sovereignty.")

55. See Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 67 MICH. L. REV. 1, 1–3 (1970) (describing the Canadian environmental law and its possibility for creating international tension).

lay claim to essentially the entire panoply of littoral and coastal regions of the Arctic Ocean in the western hemisphere.⁵⁶ Canada and Denmark (in its capacity as proprietor of Greenland) dispute Hans Island, an insignificant speck of ground between the two nations.⁵⁷ Canada also claims authority over part of the Beaufort Sea off the coast of Alaska and rejects Russia's seabed claims in the Arctic Ocean.⁵⁸

Critiquing Canada's straight baseline claims, the European Commission stated:

The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.⁵⁹

Alert, Canada's northernmost base, located on Ellesmere Island, is actually closer to Moscow than to Ottawa.⁶⁰ This remote outpost for defending Canada's sovereignty had a population of only five inhabitants in the 2006 census.⁶¹

The prospect of increasing numbers of oil tankers, cargo vessels, cruise ships, oceanographic research ships, and fishing fleets entering the area compelled the five Arctic nations—Russia, Canada, the United States, Denmark, and Norway—to focus seriously on the Arctic in recent years. The five-year international Arctic marine shipping assessment found that 6,000 vessels operate in the Arctic Ocean every year.⁶² As a result of increased traffic, Canada's claim over the waters throughout the Northwest Passage as internal waters appears likely to weaken in the future.

56. See Robert Dufresne, *Canada's Legal Claims Over Arctic Territory and Waters*, PARLIAMENTARY INFO. AND RES. SERVICE, Publication PRB 07-39E, Dec. 6, 2007, at 1, 12–15, available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0739-e.pdf> (describing all of Canada's claims over the Arctic Archipelago and the baseline theory supporting these claims).

57. See Beary, *supra* note 26, at 226 (describing the once good-humored rivalry over the 300 acre barren and uninhabited island).

58. See *id.* (describing many of the territorial disputes presently at issue in the arctic and surrounding area).

59. ROACH & SMITH, *supra* note 53, at 121 (citing Note from British High Commission, Note No. 90/86 (Jul. 9, 1986), reprinted in Telegram from U.S. Embassy in Paris, No. 33625 (Jul. 24, 1986)).

60. Christoph Seidler, *Who Is Winning the Race for the Arctic?*, BUS. WEEK, June 12, 2009, http://www.businessweek.com/globalbiz/content/jun2009/gb20090612_999975.htm.

61. *Id.*

62. U.S. COAST GUARD, ARCTIC MARINE SHIPPING ASSESSMENT 72 (2009).

The United States and Canada are among the closest allies in the world; their economies, people, and destinies are intertwined.⁶³ They share a fundamental interest in North American security. In a joint media appearance with Canadian Foreign Minister Cannon, Secretary of State Clinton stated:

Obviously, there are questions of sovereignty and jurisdiction that have to be acknowledged and respected, but what we don't want is for the Arctic to become a free-for-all. If there is going to be greater maritime passageways through the Arctic, if there is going to be more exploration for natural resources, if there are going to be more security issues, I think it's in the Canadian and the United States' interests to try to get ahead of those, and try to make sure we know what we're going to do to resolve them before countries that are not bordering the arctic are making claims, are behaving in ways that will cause us difficulties.⁶⁴

Neither country is secure if the other is vulnerable, which is why the two neighbors have integrated continental defense under the bilateral North American Air Defense (NORAD) military command for decades.⁶⁵ Membership in NATO provides an additional opportunity for the two democracies to champion stability and freedom, with both nations sharing the burden of combat in Afghanistan.⁶⁶

Canadian exceptionalism in the Arctic Ocean has weakened the ties between the two countries and provided an unflattering glimpse into how governments in Ottawa—both on the left and the right—have used the Arctic to score political points at home and reject multilateralism abroad.⁶⁷ At times, all nations are inclined to feel defensive within the international community, and going it alone feeds a certain hypersensitive sovereignty impulse that can appeal to fears, pride, and independence.

63. *Canadians Everywhere Mark Canada Day*, CANWEST NEWS SERVICE, July 1, 2009, available at <http://www2.canada.com/topics/news/story.html?id=1750171>. In a statement on Canada Day, U.S. Secretary of State Hillary Clinton wrote that “Canada and the United States are the closest of allies and friends. Our two peoples are joined by fundamental values that define our societies.” *Id.*

64. Hillary Clinton, U.S. Sec’y of State, Remarks with Canadian Foreign Minister Cannon (Jun. 13, 2009), http://ottawa.usembassy.gov/content/textonly.asp?section=can_usa&document=Sec_State_Minister_Cannon.

65. Ann Denholm Crosby, *A Middle-Power Military in Alliance: Canada and NORAD*, 34 J. OF PEACE RES. 37, 38 (1997).

66. Jim Cox, *Afghanistan: Canada and the Intra-NATO Dialogue*, PARLIAMENTARY INFO. AND RES. SERVICE, Pub. PRB 08-02E, Apr. 22, 2008, at 1–5, available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0802-e.pdf>.

67. See, e.g., *Canada Must Be Vigilant about Arctic, Harper Says*, THE STAR (Toronto), Aug. 2, 2007, <http://www.thestar.com/DesiLife/News/article/242523>; *Arctic of 'Strategic Importance' to Canada: PM*, CBC NEWS, Aug. 19, 2009, <http://www.cbc.ca/canada/story/2009/08/19/harper-nanook-arctic-north-sovereignty414.html> (describing Operation Nanook, which involved maritime surveillance patrols by military personnel and aerial reconnaissance of the Arctic).

In a world fraught with conventional and irregular military risks, political and cultural divisions, and the global economy collapsing in slow motion, the United States, Canada, and the strong network of free, democratic, and capitalist allies, friends, and partners form the fulcrum of stability that holds the world together. Ottawa and Washington are principle defenders of a stable state world system. Both nations are rich and prosper from the enjoyment of peace, liberty, and equality that is only possible with a safe and stable planet.

The foundation for ocean governance is the UN Convention on the Law of the Sea, which is the constitution for the world's oceans.⁶⁸ Conflict avoidance, international peace and security, and global stability are directly connected to the Law of the Sea. In the United States, the sovereignty impulse has led us astray, convincing a handful of powerful senators to reject the Law of the Sea Convention.⁶⁹ They believe that going it alone protects U.S. sovereignty and promotes American interests.⁷⁰ But as one of the prime beneficiaries of a stable, fair, and widely accepted global order, the United States has abandoned self-interest in favor of placating a false sense of independence by not working multilaterally to join the Law of the Sea Convention.

Likewise, Canada is under the unilateralist spell of oceans sovereignty, going it alone in the Arctic Ocean in a vain attempt to grasp a future of stability and security amidst a rapidly changing geophysical Arctic climate and unsettling and dynamic Arctic politics. Canada has resurrected "sovereignty" patrols, loudly trumpeted plans to construct ice-strengthened patrol vessels to enforce unilateral rules in the Northwest Passage, and retreated behind the mythos of Canadian Arctic sovereignty.⁷¹ The storyline is recycled by the government-media-academic complex to obtain the approval—or at least the acquiescence—of the international community, especially the United States.

The often repeated assertion of Canadian sovereignty has acquired an elusive definition; in the media, it has become a rhetorical vessel containing varying elements of control, authority, and perception.⁷² There is a sense that Canada would like to exercise

68. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

69. Betsy Baker, *The UN Convention on the Law of the Sea*, USGS, Aug. 14, 2009, <http://www.usgs.gov/journals/arctic/2009/08/the-un-convention-on-the-law-of-the-sea/>.

70. *Id.*

71. See *Arctic of 'Strategic Importance' to Canada: PM*, *supra* note 67; *Canada to Build Arctic Offshore Patrol Ships*, *supra* note 50.

72. See generally Matthew Carnaghan & Allison Goody, *Canadian Arctic Sovereignty*, PARLIAMENTARY INFO. AND RES. SERVICE, Publication 05-61E, Jan. 26, 2006, available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.htm>.

sovereignty over the waters and have them recognized as internal waters, but Ottawa has never determined how to do this or precisely what theory might be most effective in obtaining the support of the international community.⁷³ Relying on cultural and policy arguments augmented by a series of claims and legislative acts over a period of time, Canadians typically view all these efforts as having coalesced into a convincing package of evidence to support claims of sovereignty.⁷⁴

Outside of government, some of the rhetoric from Canada is particularly undisciplined, with nongovernmental organizations and media making seemingly self-evident assertions that the waters are under Canadian "control," "oversight," "jurisdiction," or "sovereignty." Some believe that an increased level of sovereignty-affirming activities by the Canadian government will secure Canadian claims. Paradoxically, rather than supporting multilateral efforts to protect arctic ecology, Canadian environmental groups are among the most strident in supporting unilateral assertions of Canadian sovereignty over the passage in order to avert what they see as an impending ecological catastrophe caused by increased shipping.⁷⁵

....

The 1967 and 1968 Canadian straight baselines in the arctic, both in the East and West, project at numerous points tens of miles into the high seas, violating virtually every rule governing lawfully drawn baselines. The effect is to enclose the entire Canadian [A]rctic as internal waters. Even if one accepts the series of straight baselines, the international community would still enjoy the right of innocent passage through those newly enclosed internal waters. This is because the Law of the Sea Convention provides that where the establishment of straight baselines has the effect of enclosing as internal waters areas that had not previously been considered as such, a right of innocent passage still exists in those waters. Some suggest that straight baselines made by a nation before 1982 have special status and should be considered permissible. This approach is unconvincing; otherwise, the entire range of excessive maritime claims predating the 1982 Convention similarly would be permissible, thus creating a global crazy quilt of conflicting maritime claims and defeating the purpose of the Convention as "one gigantic package deal."⁷⁶

73. Robert Huebert, *International Law, Geopolitics and Diplomacy in the Northwest Passage*, J. OF OCEAN TECH., Summer 2006, at 16, 16.

74. *Canadians Adamant on Arctic Sovereignty*, ANGUSREID, Aug. 22, 2008, http://www.angus-reid.com/polls/view/canadians_adamant_on_arctic_sovereignty/ (noting that, according to a poll, seventy-four percent of Canadians believe Canada should invest heavily in establishing sovereignty over its Arctic territory).

75. Kraska, *supra* note 7, at 262 (arguing that recent international pressures have led to an increased interest in Arctic security from both the Canadian government and the media); Robert Huebert, *The Shipping News Part II, How Canada's Arctic Sovereignty is on Thinning Ice*, 58 INT'L J. 295, 296-97 (2003) (arguing that the Canadian government must do more to protect its Arctic sovereignty).

76. *Id.* at 271 (citing Constantin A. Stavropoulos, *Procedural Problems of the Third Conference on the Law of the Sea*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY lvii, lxx (Myron H. Nordquist ed., 1985) (stating

The problem is that the ice keeps melting and no other nation has accepted Canada's excessive claims of sovereignty.⁷⁷ The reason for this lack of acceptance is that Canada's Arctic claims are inconsistent with the Law of the Sea Convention, to which Canada became a party in 2003.⁷⁸ Canadian scholars have circulated well-practiced (if not slightly tortured) theories purportedly grounded in the international law of the sea in order to manufacture a rationale that would support Canada's claims to sovereignty over an ocean.⁷⁹

III. THE NORTHWEST PASSAGE

In particular, the loss of sea ice in the High North has renewed discussions over the legal status of the Arctic and subarctic transcontinental maritime routes connecting the Atlantic with the Pacific. The routes, which shorten transit from Europe to Asia by 4,000 miles, connect the North Atlantic and the Labrador Sea to the Beaufort and East Siberian Seas.⁸⁰ The merchant shipping industry is also interested in using the shorter routes through the Northern Sea Route and Northwest Passage, and perhaps a transpolar route straight across the pole.⁸¹ The United States and Russia are poised to manage all traffic through the Bering Strait (also called the Bering Gate), a narrow choke point only fifty-two miles wide that is the

that the purpose of the 1982 United Nations Convention on the Law of the Sea was to create "one gigantic package deal."))

77. See BUREAU OF OCEANS & INT'L ENVTL & SCIENTIFIC AFFAIRS, U.S. DEPT OF STATE, LIMITS IN THE SEA NO. 112: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 29-30 (noting that both the United States and the Member States of the European Community rejected Canada's straight baseline claims as excessive).

78. *Id.* at 29 (quoting Note Verbale dated Nov. 1, 1967) (stating that the United States considers Canada's territorial sea declarations to be contrary to the Law of the Sea); United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, United Nations Convention on the Law of the Sea, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (last visited Oct. 7, 2009) (listing Canada as a participating nation beginning Nov. 7, 2003).

79. See, e.g., Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 58-59 (concluding that Canadian sovereignty over the Northwest Passage is legally secured by the 1985 baselines).

80. See *Northwest Passage, By the Numbers*, CBC NEWS, July 25, 2006, <http://www.cbc.ca/news/background/northwest-passage/numbers.html> (stating that 7,000 km would be saved by utilizing the Northwest Passage rather than an alternate route like the Panama Canal or Suez Canal).

81. See Huebert, *The Shipping News Part II, How Canada's Arctic Sovereignty is on Thinning Ice*, *supra* note 75, at 302-05 (detailing the reasons why it is likely that the shipping industry will take advantage of this new shipping lane as soon as possible).

gateway connecting the Pacific Ocean to the Arctic Ocean.⁸² The two nations should use their position astride the strait to ensure that other Arctic states adopt only internationally accepted vessel safety, security, and traffic management regulations.

Compared to the current routes via the Panama Canal and Suez Canal, a transit from the Pacific to the Atlantic through the Northwest Passage could save two weeks of travel.⁸³ The savings in transit time will be especially beneficial to European and Asian nations:

EU Member States have the world's largest merchant fleet and many of those ships use transoceanic routes. The melting of sea ice is progressively opening opportunities to navigate on routes through Arctic waters. This could considerably shorten trips from Europe to the Pacific, save energy, reduce emissions, promote trade and diminish pressure on the main trans-continental navigation channels. But serious obstacles remain, including drift ice, lack of infrastructure, environmental risks and uncertainties about future trade patterns. Hence the development of Arctic commercial navigation will require time and effort.⁸⁴

This time savings translates into lower fuel costs, saved ship steaming time, and a reduction in labor costs for the commercial shipping industry. Although transport by ship is the most environmentally sensitive method of moving heavy cargo, bunker fuel is extremely dirty, so less travel time means fewer air emissions.⁸⁵ For the armed forces, utilizing the route could facilitate improved crisis response and accelerate time-phased force deployment schedules to move forces from one theater to another.

Canada has succumbed to the sovereignty impulse because the nation fears that without ownership over the Arctic Ocean and unilateral control over the Northwest Passage, the safety, security, and environmental protection of the Arctic Archipelago—and the entire nation—will be threatened by the outside world.

Much like 9/11 absorbed the psychological final measure of the American sense of self-protection and innocence regarding terrorism, the disappearing ice cap threatens to impose the ugly reality of the

82. This will become even more important with the increased shipping traffic that the Bering Strait is likely to see in the future due to global warming. See TRAUSTI VALSSON, *HOW THE WORLD WILL CHANGE WITH GLOBAL WARMING* 107 (2006) (“The narrowness of the Bering Strait, where the Arctic Ocean opens into the Pacific will mean that there will be enormous shipping traffic there later in the century.”).

83. *Northwest Passage, By the Numbers*, *supra* note 80.

84. *Communication from the Commission to the European Parliament and the Council, The European Union and the Arctic Region*, §3.3, at 8, COM (2008) 763 final (Nov. 20, 2008), available at http://ec.europa.eu/external_relations/arctic_region/docs/com_08_763_en.pdf.

85. See Adrian Burton, *Air Pollution: Ship Sulfate an Unexpected Heavyweight*, 116 ENVTL. HEALTH PERSP. A475, A475 (2008) (arguing that the high sulfur content in bunker fuel presents an environmental hazard).

world on the idyllic doorstep of Canada. Poorly maintained Third World merchant ships and their multinational crews from distant and unsavory lands will discover the new superhighway between Asian manufacturers and European markets. The result: the challenging, ice-infested waters will cause oil spills, and the multiplying number of ships will bring illegal migrants or, even worse, terrorists.

In this regard, ensuring safety, security, and environmental protection in the Arctic and the Northwest Passage is a shared concern that provides an opportunity for greater cooperation not only between Canada and the United States but also among all maritime states and future users of the waterway. Although it is common (albeit unhelpful) to cast the issue of the Northwest Passage as a bilateral disagreement between the United States and Canada, it is not.⁸⁶ The issue is a multilateral matter involving the interests and equities of nations from Asia and Europe.

Consequently, Canada can best secure its interests in sovereignty, safety, security, and environmental protection by proactively engaging to develop an Arctic legal regime under the framework of Law of the Sea Convention. This will mean abandoning some of the more audacious and unsupported claims of sovereignty and complying with the rules contained in the treaty. On the other hand, if it acts now, Ottawa will be able to lead the design and implementation of the new Arctic framework before the ships arrive.

Canada should move quickly. Surface vessels belonging to Canada, the United States, Norway, Netherlands, Japan, Bahamas, and Liberia have fully transited the Northwest Passage nearly seventy times.⁸⁷ Submarines of the United States, the United Kingdom, and presumably Russia have utilized the Arctic Ocean as a transit corridor for decades.⁸⁸ Both the United States and Canada have essential national interests in developing a widely accepted respected legal regime for the Arctic Ocean and Northwest Passage before climate change alters shipping patterns.

If the shipping arrives before the two North American partners can work with the international community to adopt an Arctic regime, both Washington and Ottawa will experience reduced negotiating leverage and the result will be less control over the Arctic. Hardline foot-dragging in Canada is squandering time and

86. See, e.g., Huebert, *The Shipping News Part II, How Canada's Arctic Sovereignty is on Thinning Ice*, *supra* note 75, at 305–07 (arguing that if a challenge is raised to Canada's sovereignty in the Northwest Passage, it is likely to come from the United States); Oran R. Young, *Arctic Shipping: An American Perspective*, in *POLITICS OF THE NORTHWEST PASSAGE* 115, 115–17 (Franklyn Griffiths ed., 1987) (framing the issue in terms of a conflict between the United States and Canada).

87. Pharand, *supra* note 79, at 38.

88. *Nuclear Submarines Surface In Arctic: British and Americans Rendezvous at Pole*, ATHROPOLIS, <http://www.athropolis.com/news/submarines.htm> (last visited Oct. 7, 2009).

the diplomatic capital needed to negotiate such an agreement, making both nations less secure over the long run.

Canada exercises complete sovereignty over the islands of the North American Arctic.⁸⁹ Although there is not much open to question on the issue of Canada's sovereignty over the islands of the Canadian Arctic, it is worth addressing the issue because the point is typically obfuscated, generating chest-thumping reassurances of sovereignty.

A. *Law of the Sea*

On September 10, 1985, Canada claimed that "all the waters among its Arctic islands as internal waters" and drew straight baselines to encircle the North American Arctic.⁹⁰ This claim is inconsistent with the Law of the Sea Convention.

Under the Law of the Sea Convention, nations are entitled to draw normal baselines along the low water mark of the shoreline and claim a twelve-nautical-mile territorial sea projecting into the water.⁹¹ Straight baselines may be drawn in some localities, such as Norway, "where the coastline is deeply indented" and deeply "cut into" or where "there is a fringe of islands along the coast in its immediate vicinity."⁹² Straight baselines must fulfill two additional criteria: they "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."⁹³

The Arctic Ocean also does not support a claim of historic internal waters. The UN has said that "three factors are to be considered in determining whether a body of water may be considered historic internal waters: (1) the exercise of authority over the area of the claiming nation; (2) 'the continuity of this exercise of authority'; and (3) the acquiescence of foreign nations."⁹⁴ "This three-part test makes historic claims notoriously difficult to maintain," and the Northwest Passage does not meet the test.⁹⁵

89. See Dufresne, *supra* note 56, at 3-5 (asserting that while Canada has not consistently occupied the Arctic Islands, Canadian sovereignty over all but Hans Island has been uncontested).

90. BUREAU OF OCEANS & INT'L ENVTL & SCIENTIFIC AFFAIRS, *supra* note 77, at 29 (quoting Letter from James W. Dyer, Acting Asst. Sec'y of State for Legislative & Intergovernmental Affairs, U.S. Dep't of State, to Charles Mathias, Jr., U.S. Senator, State Dep't File No. P86 0019-8641 (Feb. 26, 1986)).

91. UNCLOS, *supra* note 68, art. 3.

92. *Id.* art. 7(1).

93. *Id.* art. 7(3).

94. Kraska, *supra* note 7, at 264 (quoting *Juridical Regime of Historic Waters, Including Historic Bays*, ¶ 80, 2 Y.B. Int'l L. Comm'n 1, 13, U.N. Doc A/CN.4/143 (1962)).

95. Kraska, *supra* note 7, at 264; Pharand, *supra* note 79, at 13.

It is particularly important to note that, within the context of the Canadian Arctic, where straight baselines are established that have the effect of "enclosing as internal waters areas that had not previously been considered as such," the international community retains the right of innocent passage through those waters.⁹⁶ In other words, even if one accepts Canada's excessive claims for straight baselines or historic internal waters, international shipping still has the right of innocent passage through the waters.

The routes through the Northwest Passage meet the plain definition of a "strait used for international navigation," in which vessels and aircraft are entitled to the nonsuspendable right of transit passage.⁹⁷ This means submarines can travel under the surface, aircraft can fly over the area, and ships and planes may use the route without the permission of, or prior notice to, Canada.⁹⁸ Waters within twelve nautical miles of the coastline are still under Canadian sovereignty, but the nonsuspendable right of transit passage supersedes that sovereignty.⁹⁹ Canadian laws still apply, but only so long as they do not impede or impair transit through the strait.¹⁰⁰ Both the United States and the European Community have rejected Canada's claim.¹⁰¹

Seeking a positive way forward, some scholars in Canada and the United States have advocated a bilateral solution under the assumption that the issue would be resolved if the two countries could cut a deal.¹⁰² A bilateral approach will not resolve the issue,

96. UNCLOS, *supra* note 68, art. 8(2).

97. *See id.* arts. 37, 44 ("There shall be no suspension of transit passage" in "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.").

98. *See id.* art. 38 (noting that "[i]n straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded" and defining "transit passage" as "the exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit").

99. *See id.* arts. 3, 34 (setting the twelve nautical mile territorial sea limit and stating that the passage of ships through "straits used for international navigation" does not affect the sovereignty of bordering states as it relates to their sovereignty and jurisdiction over such waters, but that such sovereignty yields to the rights of transit or innocent passage of others).

100. *See id.* art. 42(1)-(2) (stating that states bordering straits may pass laws regarding passage through those straits but that "[s]uch 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.").

101. BUREAU OF OCEANS & INT'L ENVTL & SCIENTIFIC AFFAIRS, *supra* note 77, at 29 (quoting Note Verbale dated Nov. 1, 1967, at 29); ROACH & SMITH, *supra* note 53, at 121 (citing Note from British High Commission, Note No. 90/86 (Jul. 9, 1986), *reprinted* in Telegram from U.S. Embassy in Paris, No. 33625 (Jul. 24, 1986)).

102. *See, e.g.,* Young, *supra* note 86, at 132-33 (arguing that the jurisdictional conflict over the Arctic should be set aside, and that Canada and the United States should instead "resolve issues . . . through processes of integrative bargaining.").

however, because it is a global rather than a bilateral issue. Any bilateral agreement between the two countries would not affect the rights of other states such as Korea, China, or Germany. Furthermore, a special deal between the United States and Canada provides a precedent for other nations to develop bilateral treaties for controlling traffic, such as Iran and Oman with respect to the Strait of Hormuz.

Just as Russian reconnaissance aircraft and Chinese intelligence-gathering ships are free to operate just beyond twelve nautical miles of the United States and European countries, the rules respecting the Canada's territorial sea in the Arctic Ocean are no different, and the state does not acquire any special protection in this regard. On the other hand, both Canada and the United States benefit from a liberal global order of the oceans that entitles their commercial shipping and naval vessels and aircraft to operate throughout the globe. Having an increasingly expeditionary military force and an economy reliant on transcontinental and cross-border trade, Canada has compelling economic and national security interests in a stable regime of the Law of the Sea.¹⁰³ Being internationalist, outward-looking, and concerned about global order—rather than just homeland security—both the United States and Canada should be strong proponents of the generous navigation regimes permitted by the Law of the Sea Convention.

Still others have suggested the issues of the Northwest Passage may be best resolved in new treaty architecture modeled on the Antarctic Treaty governing activities in the polar South.¹⁰⁴ The difference, however, is that Antarctica is a continent; the Arctic Ocean is primarily a maritime domain with existing rules reflected in the Law of the Sea Convention. There is, however, an international institution ready-made to serve as an effective multilateral forum for increasing coordination and cooperation throughout the Arctic generally and the Northwest Passage specifically: the International Maritime Organization (IMO).¹⁰⁵

103. See Solozobov, *supra* note 24.

Each year, Canada holds military exercises aimed at asserting sovereignty over the northern territories. Recently, the Canadian government unveiled plans to establish a new army training centre for 100 personnel in Resolute Bay, as well as to build a new deep-sea port at the north of Baffin Island. In addition, Canada will build six to eight new patrol vessels for deployment in the Northwest Passage.

Id.

104. See, e.g., Pharand, *supra* note 79, at 59.

105. See Int'l Mar. Org. [IMO], *Introduction to IMO*, <http://www.imo.org/> (last visited Oct. 7, 2009) ("IMO's main task has been to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.").

IV. CONCLUSION: OTTAWA SHOULD LEVERAGE THE INTERNATIONAL MARITIME ORGANIZATION

Working in conjunction with the United States, Japan, and the EU nations, Canada should develop a comprehensive Arctic Ocean framework for ensuring appropriate sovereignty, safety, security, and environmental protection in the Arctic Ocean, including the Northwest Passage. The IMO is the specialized UN agency for developing standards for shipping and the oceans.¹⁰⁶ The organization has already “adopted nearly fifty treaties and hundreds of codes, guidelines, and recommendations,”¹⁰⁷ and it should begin work under Canadian leadership to complete the regime applicable to the Arctic. The IMO already has in place a number of widely accepted treaties that could be strengthened and extended for application to the Arctic Ocean, thereby accommodating Canada’s sensitivities and concerns within a strong, stable framework that is universally respected.

The 1974 Safety of Life at Sea Convention (SOLAS), for example, . . . applies to 98.8% of world shipping [and] is generally considered to be the most important of all international treaties concerning the safety of merchant ships. . . . Among the topics covered in its chapters are ship construction, subdivision and stability, fire protection, life saving appliances and arrangements, radio communications, safety of navigation, carriage of cargoes and dangerous goods, safe management and maritime security.¹⁰⁸

Chapter V of the annexed regulations provides for the establishment of ship-routing measures and reporting systems, which can be made mandatory if the IMO approves them (Regulations V/10 and 11).¹⁰⁹ SOLAS regulation V/12 provides for the establishment by parties of vessel traffic services “where the volume of traffic or the degree of risk justifies such services.”¹¹⁰ Canada could enjoy ship-routing and reporting measures under the authority of the IMO rather than trying to haphazardly impose unilateral measures.

The voluntary Guidelines for Ships Operating in Arctic Ice-Covered Waters could be strengthened, extended, and made

106. MULTILATERAL PLANNERS CONFERENCE VI, MARITIME SECURITY PRIMER: GLOBAL MARITIME SECURITY COOPERATION IN AN AGE OF TERRORISM AND TRANSNATIONAL THREATS AT SEA 11 (2008).

107. *Id.*

108. *Id.* at 11–12.

109. International Convention for the Safety of Life at Sea (SOLAS), entered into force May 25, 1980, Annex 7, Ch. V, Regulations 10–11, 32 U.S.T. 47, 1184 U.N.T.S. 278.

110. *Id.* Annex 7, ch. V, reg. 12.

mandatory, thereby controlling the types of vessels that are approved for Arctic transits.¹¹¹

The International Convention for the Prevention of Pollution from Ships (MARPOL) applies to 99.01% of the world's shipping.¹¹² It contains six annexes dealing with oil pollution, pollution by chemicals carried in bulk, harmful substances in packaged form, sewage, garbage, and air pollution.¹¹³ Others Conventions address the dumping of wastes at sea, the rights of coastal states to intervene if their coastline is under threat of pollution following a maritime casualty, and the use of certain toxic substances in ships' antifouling paint.¹¹⁴ A special annex covering the ice-covered waters and the Arctic Ocean could replicate Canada's tough laws on marine ecology but do so in a multilateral context.¹¹⁵

The International Shipping and Port Facility Security (ISPS)—a post-9/11 amendment to SOLAS (chapter XI-2)—and the Convention on the Suppression of Unlawful Acts at Sea against the Safety of Maritime Navigation (SUA) address crimes committed at sea.¹¹⁶ The main purpose of the SUA convention “is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons onboard ships; and the placement of devices onboard a ship that are likely to destroy or damage” the vessel.¹¹⁷ At a diplomatic conference in 2005, the IMO adopted two protocols to the SUA Convention, one focusing on the safety of vessels and the other focusing on the safety of fixed platforms on the continental shelf.¹¹⁸ “Among the unlawful acts covered by the SUA Convention in Article 3

111. See generally Int'l Mar. Org. [IMO], *Guidelines for Operating in Arctic Ice-Covered Waters*, IMO Doc. MSC/Circ.1056 (DEC. 23, 2002), available at http://www.imo.org/includes/blastDataOnly.asp/data_id=6629/1056-MEPC-Circ399.pdf (providing a set of advisory guidelines for ships operating in the Arctic).

112. Int'l Mar. Org. [IMO], *Summary of Status of Convention* (Aug. 31, 2009) http://www.imo.org/Conventions/mainframe.asp?topic_id=247

113. International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto (MARPOL), *entered into force* October 2, 1983, 34 U.S.T. 3407, 1340 U.N.T.S. 184.

114. International Convention on the Control of Harmful Anti-Fouling Systems on Ships, *entered into force* Sept. 19, 2008, 1833 U.N.T.S. 397; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *entered into force* August 30, 1975, 1046 U.N.T.S. 120; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *adopted* November 29, 1969, 970 U.N.T.S. 211.

115. Part IV *infra*.

116. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *entered into force* Mar. 1, 1992, 1678 U.N.T.S. 221. (“The main purpose of the convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships.”); International Convention for the Safety of Life at Sea (SOLAS), *entered into force* May 25, 1980, 32 U.S.T. 47, 1184 U.N.T.S. 278 (“Special Measures to Enhance Maritime Security”).

117. *Id.*

118. *Id.*

are the seizure of ships by force; acts of violence against persons onboard ships; and the placement of devices on board a ship which are likely to destroy or damage it.”¹¹⁹ The 2005 protocols criminalize activities such as (1) the use of explosives, radioactive material, biological, chemical, or nuclear weapons, or dual-use material against a ship; and (2) the use of “a ship in a manner that causes death or serious injury or damage.”¹²⁰

The IMO can be an effective institution for strengthening appropriate sovereignty, security, marine safety, and environmental protection. Through a process called the “Cooperative Mechanism,” for example, the IMO helped the littoral nations of the Straits of Malacca and Singapore, Indonesia, Malaysia, and Singapore develop a governance framework to manage the straits.¹²¹

About one-third of the world’s trade and half of its oil traverse the straits each year,¹²² so resolving management and regulation to address safety, security, and environmental protection in the straits was incredibly complex. The IMO and the littoral states began meeting with about thirty other nations beginning in 2005 to develop a comprehensive regime.¹²³ After meetings in Jakarta, Kuala Lumpur, and Singapore, the straits states and the user states reached a groundbreaking agreement for cooperation among stakeholders in the Straits of Malacca and Singapore.¹²⁴ The agreement, named the Cooperative Mechanism, represents the first time that user states and states bordering a strait have come together in fulfillment of Article 43 of UNCLOS to manage cooperatively both safety and environmental protection in a strait used for international navigation.¹²⁵

The littoral and user states now have a forum for regular dialogue to exchange views, a committee to coordinate and manage specific projects, and a new fund to receive and manage financial contributions to build greater capacity to maintain aids to navigation.¹²⁶ The multilateral approach for the Straits of Malacca and Singapore, which is supported by several major maritime powers including Japan, the United Kingdom, and the United States¹²⁷ is a

119. *Id.*

120. *Id.*

121. *International Cooperation on Malacca Strait Safety*, MAR. EXECUTIVE, Sep. 13, 2007, <http://www.maritime-executive.com/article/2007-09-13international-cooperation-agreement-on/>.

122. *Id.*

123. *Milestone Agreement Reached on Co-operation Over the Straits of Malacca and Singapore*, IMO NEWS, 2007 No. 4, at 8, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D20746/IMONewsNo407LR.pdf.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

model for the Northwest Passage, the longest and perhaps most environmentally sensitive international strait.

In the era of globalization, the IMO's success on the equator provides the ideal framework for promoting Canada's goals of preserving the fragile Arctic environment, maintaining maritime domain awareness in Arctic waters, and exercising appropriate security jurisdiction and regulatory oversight over the strait. This approach would open the door to widespread international recognition of Canada's status as a strait state and attract support for appropriate measures to protect the Arctic ecosystem, ensure Canadian security and sovereignty, and promote safe navigation through designated routes. Doing so would achieve a major diplomatic success for Ottawa and would offer the best means for Canada to achieve its goal of obtaining widespread international acceptance of Canadian prerogatives in the maritime Arctic. Furthermore, it would keep all of us safer.