



The Northwest Passage and its approach lanes.

## THE NORTHWEST PASSAGE IN CONTEXT

by Andrea Charron

**T**he intent of this article is to provide clarification and context to the Northwest Passage debate that has resurfaced as a result of new scientific findings related to global warming. These studies suggest the Passage will become ice-free or, at least, more free of ice, and this will occur much more quickly than anyone previously imagined. This opens the possibility for the Passage to become a long dreamed of international commercial shipping channel, since it represents a 7000-kilometre shorter route between Europe and Asia than the currently preferred route through the Panama Canal.

Although the Passage has a much wider audience of concern, including the other circumpolar states and Canada's northern communities, there is a particular and specific conflict between Canada and the United States concerning the extent of legal control Canada possesses vis-à-vis the Passage. This has created a legal impasse.

Legal impasses are not necessarily a problem. What will be contended here is that, despite the impasse, the Canadian government has been very creative in its policy choices with respect to the Passage, and they need to be highlighted. It is very easy to criticize, but rare to praise. Bucking the trend, this writer will outline examples of Canada's creative thinking that needs to be acknowledged and encouraged.

This article will outline both the Canadian and the American legal positions regarding the Passage. Both Canada and the US have legal arguments that are supported in cases from the International Court of Justice (ICJ). All indications are that a strictly legal solution to the impasse is unlikely. While some individuals and groups sound the alarm for immediate and definitive action, the Canadian government has created a number of work-around solutions over the years that have tried to protect northern communities and the environment, to promote Canada/US relations and to further the Canadian northern identity. To be sure, not all of Canada's policies have been successful or popular, but they must be acknowledged for their creativity.

Before commencing, however, comment on the term "sovereignty" and its misuse is warranted.

### Sovereignty

**T**he term "sovereignty" is much maligned, bandied about like a badminton bird. Its users refer to it as an antidote against those questioning a state's absolute control of territory. The term sovereignty, however, has many meanings and has evolved profoundly over history.<sup>1</sup> Therefore, it is unreasonable to use the term "sovereignty" as an invisible shield of protection.

When one uses the term sovereignty with respect to a state, two issues are being raised: authority and territory. Attributes of sovereignty flow from the existence of a state as an international legal entity. The most specific definition of sovereignty is supreme authority within a territory.<sup>2</sup> But, is the state supreme over all matters or merely over some of them within this context? Matters to which sovereignty do not extend are typically covered by international law. Furthermore, states may choose which matters are covered by state sovereignty and by international law. Nowhere is this more evident than in Europe. For example, France has authority with respect to defence policy but not trade policy, since it has chosen to join the European Union. Invoking international law, therefore, does not necessarily revoke sovereignty – it just changes or modifies the authority. Canada, in particular, has promoted the rule of international law as a tool of world order that, in many ways, has strengthened its sovereignty. For example, as will be discussed, *Canada's Arctic Waters Pollution Prevention Act* was translated into Article 234 of the *United Nations' Convention on the Law of the Sea* (UNCLOS), which protects fragile arctic environments – Canada's as well as those of other states. While certain states do not believe Canada's *Arctic Water Act* applies to them, they do recognize Article 234.

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Sea ice, Beaufort Sea.

## The Legal Positions

Let us be clear. That the Passage is considered Canadian territory is not in doubt. At issue is whether Canada has the right to control which vessels enter the Passage. While Canada maintains the Passage falls within “historic internal waters,”<sup>5</sup> the US contends that the Passage is an international strait. If the Passage is located within historic internal waters, then Canada has the exclusive right to decide which ships may and may not enter it. If the Passage is an international strait, then the international transit regime applies “as it does through the Cape Horn [and] as it does through the Indonesian Archipelago, [the] Strait of Singapore.”<sup>6</sup> Let us begin with a review of Canada’s position.

The split in jurisdiction between the state and international law represents a dilemma for Canada and the US when it comes to the Passage. While Canada believes that all issues with regard to the Passage fall within its sovereign jurisdiction, the US believes the particular issue of “transit passage”<sup>3</sup> falls within the confines of international law. While the example of France’s defence versus its trade policy was clear and illustrative, many argue it is not directly applicable to the Canada/US Passage example. France willingly chose to allow trade policy to come under the European Union. Canada, on the other hand, is being “pressured” to cede its sovereignty. But is this actually the case? Has Canada been held hostage and/or forced to pursue unwanted policies because of pressure by the US and its insistence the Passage is an international strait? This writer is not convinced. The Passage certainly creates emotive responses, but it remains a *legal argument* to date that may be summarized as follows:

If a navigable channel in an international strait is comprised of high seas, then there is no difficulty with the right of states to proceed through the strait unhindered – freedom of navigation is recognized universally. The difficulty arises when the waters of a strait consist of the territorial sea (or other maritime zone) of a coastal state, as is the case with the Passage. In such cases, Dr. Martin Dixon, a distinguished international legal scholar asks: Is there a right of navigation and may it be restricted by the coastal state?<sup>4</sup> These questions apply to many straits, including the Dover Strait in the English Channel and to the Dardanelles, situated between Europe and Asia. The US has consistently said “yes,” a right of navigation exists, while Canada says “no,” such a right does not exist, especially with respect to the Passage.

Lester B. Pearson, at the time, Canada’s ambassador to the United States, defined the Canadian Arctic in 1946 as “not only Canada’s northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries, extended to the North Pole.”<sup>7</sup> However, Canada was slow to adopt national legislation to formally claim rights to the Passage. According to D.M. McCrae, professor of international law at the University of British Columbia, this was because such jurisprudence, particularly that which distinguished between sovereignty over the land and sovereignty over waters, was then considered quite radical.<sup>8</sup> At the time, Canadian politicians were not certain about their jurisdiction over the waters of the Arctic. For example, when asked if the waters up to the North Pole were Canadian waters, the Honourable Alvin Hamilton, Minister of Northern Affairs and National Resources, replied doubtfully in 1957:

Mr. Speaker, the answer is that all the islands north of the mainland of Canada, which comprise the Canadian Arctic archipelago, are of course part of Canada. North of the limits of the archipelago, however, unusual physical features complicate the position... Consequently, the ordinary rules of international law may or may not have application. Before making any decision regarding the status which Canada might wish to contend for this area, the government will consider every aspect to the question with due regard to the best interests of Canada and to international law.<sup>9</sup>

As well, “the anticipated reaction from the US to any formalizing of a Canadian position that the waters of the Arctic Archipelago were internal waters of Canada discouraged precipitate action.”<sup>10</sup> This would change quickly in 1969<sup>11</sup> when the American supertanker, the *Manhattan*, traversed a portion of the Northwest Passage on two separate occasions.<sup>12</sup>

**“Attributes of sovereignty flow from the existence of a state as an international legal entity.”**

The Canadian government realized the significance of the events, and feared that the *Manhattan* might represent a precursor of future commercial voyages that could seriously undermine Canada’s claim to sovereignty. Should other US or international vessels traverse the Passage, “a practice [of using the Canadian archipelago] for navigation may evolve among states.”<sup>13</sup> Rather than being viewed as an opportunity for bilateral cooperation and exploration of the Passage, the first voyage of the *Manhattan* became a watershed for the formal declaration of Canada’s right of ownership of the Passage. Shortly after the first voyage, the Canadian government unveiled its plan to pass pollution legislation specifically for the Arctic in its *Speech from the Throne*, dated 23 October 1969. This legislation, along with other strategies, was intended to exercise functional sovereign control over the Passage.<sup>14</sup> The second *Manhattan* voyage, which began on 1 April 1970, proceeded under much stricter rules. Humble Oil had to agree to a number of specific anti-pollution controls, and Canada’s Department of Transportation insisted upon inspecting the hull of the vessel. Furthermore, the captain of the Canadian icebreaker that conducted a now mandatory accompaniment of the *Manhattan* had ultimate responsibility and the authority to end the voyage if necessary. A Canadian authority was also placed on board the *Manhattan*.<sup>15</sup> Humble Oil agreed to the conditions, posted a bond, and gave Canada ultimate control of the voyage.<sup>16</sup> As a result of the Canadian demands on Humble Oil, however, the US government affirmed its belief that the Passage was an international strait. Oil imports from Canada were reduced by 20 percent, and, most damaging, on the day the *Manhattan* began its second voyage, the US Congress approved construction of the *Polar Sea* – the most powerful, non-nuclear icebreaker in the world.<sup>17</sup> The US, presumably, was preparing to ram its point home, both literally and figuratively.

It was the transit of the *Polar Sea* through the Northwest Passage in 1985 that led to the Canadian *Territorial Sea Geographical Co-ordinates (Area 7) Order of 1986*<sup>18</sup> that encapsulated the Passage within straight geographical baselines. These baselines formally defined the outer limits of Canada’s historic internal waters. However, the use of straight baselines to encircle a coastal archipelago is “problematic.”<sup>19</sup> The Passage is a difficult piece of territory to categorize, because it is neither just land nor just water, and the legal jurisprudence for waters, let alone remote, ice-infested, arctic waters, is not clear.<sup>20</sup> The US does not dispute Canada’s sovereignty over the islands located in the Canadian sector of the Arctic,<sup>21</sup> but it insists the laws governing international waters do not align with Canada’s position. The Canadian government remains undeterred, and consistently points to the International Court of Justice’s (ICJ) ruling on the *Fisheries Case* (United Kingdom versus Norway) of 1951,<sup>22</sup> which serves as “direction regarding jurisdiction of states over waters adjacent to their coasts.”<sup>23</sup> This ruling was particularly important for Canada because: 1) it recognized the concept of historic title to coastal waters, and 2) it accepted the method of measurement of territorial seas that Canada prefers – the use of straight baselines. This method of calculation was reinforced



A fragile environment. Polar bears prowl the pack ice.

FOC Photo bears\_004\_2002 from www.mar.dfo-mpo.gc.ca



Arctic seal.

UN Law of the Sea Convention provides:

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 methods set forth in article 7 (Straight Baselines) has the effect of enclosing as internal waters areas *which had not previously been considered as such*.<sup>31</sup>

The question is: Was the Passage considered internal waters before the method of straight baseline calculation was applied? Canada's response would be emphatically in the affirmative. Had Canada made formal claims to enclose the Passage within straight baselines before 1958, and not waited until 1986 to do so, her position might have been strengthened. Of course, laws can be interpreted differently, and so, Canada's position remains that straight baselines drawn around the perimeter of the Arctic Archipelago

seven years later at the first United Nations (UN) Conference on the Law of the Sea.<sup>24</sup> Rather than following the outline of a country's land mass, as was the more traditional method,<sup>25</sup> the straight baseline method allows a country with offshore islands and/or very jagged coastlines to calculate its territorial seas from straight lines drawn from a point on the coast to the islands, or from island to island.<sup>26</sup> One then "connects the dots" literally, and the water behind the lines is designated internal water, while waters away from the line and toward open waters are considered territorial seas. Hence the term "straight baseline." The area encompassing a country's internal waters can be increased by adopting the straight baseline method<sup>27</sup> of calculation, thus increasing the amount of water deemed internal and under the full authority and sovereignty of the coastal state so affected.

The enclosure of the Passage within these straight baselines "can be justified by virtue of the principle of the domination of the land domain over the adjacent sea..."<sup>28</sup> However a question remains as to whether the enclosure "will automatically terminate the right of passage for foreign ships."<sup>29</sup> While the government of Canada believes to be fully within its right to pass laws to interdict traffic at its discretion, Bing Bing Jia, an eminent professor of international law, argues that a strait may retain its international character in spite of having become part of the internal waters by application of the rules of straight baselines.<sup>30</sup> Article 35(a) of the

constitute the outer limits of its internal waters.<sup>32</sup> Furthermore, the ongoing use and occupation of the ice-covered Passage by the Inuit "from time immemorial" constitutes another legal "hook" upon which to hang Canada's legal claim. Unfortunately, the melting icecap may undermine this latter argument.

### The American Position

There are two legal precedents that lend support to the US case that the Passage is an international strait. The first is based on geography, and the second is based on use.

If it can be demonstrated that the Passage represents a waterway, then the geographical condition is met. A waterway "must join one area of high seas to another."<sup>33</sup> Since all seven channels of the passage link the Davis Strait (a high sea) to the Beaufort Strait (a high sea), the first condition is met, even if two of the channels are considered too shallow for commercial cargo vessels.<sup>34</sup> Furthermore, the US has consistently defended the right of transit passage through international waters. Some examples include the American refusal to accept Libya's claim that the Gulf of Sidra is entirely internal waters, and, in 1986, the dispatch of the cruiser *Yorkton* and destroyer *Caron* deep into the Black Sea "on a route that deliberately passed through the Soviet Union's internationally accepted 12-mile territorial waters," in order to prove the point that states should not limit

the access of vessels to an international strait.<sup>35</sup> Even during the Cold War, at a time when brinkmanship courted nuclear disaster, the American insistence on establishing the right of passage was considered paramount. Naval interests of the United States around the world, according to the *Canadian Arctic Resources Committee*,<sup>36</sup> prevent the US government from conceding to Canada on the Passage. The US has characteristically shied away from “entangling alliances” and agreements. It will continue to project power from straits and channels and protect vital trade routes around the world. And the US is not in the habit of telephoning ahead for permission...

For the second condition, legal scholars turn to the *ICJ Corfu Channel Case* (United Kingdom versus Albania),<sup>37</sup> in which relatively small amounts of international maritime traffic constituted sufficient usage for the Corfu Channel to be considered a strait.<sup>38</sup> While there has been relatively little traffic through the Passage due to ice conditions, unregulated foreign submarines could be considered amongst the numbers of those having done so.<sup>39</sup> Still, Donat Pharand, Canada’s legal expert on the law of the sea does not believe this particular condition has been met to date.<sup>40</sup> Should the Passage become ice-free, however, it is quite possible the “use” condition will be satisfied. But, even if academics cannot agree on the extent of effects of global warming on the Passage, imagine, for a moment, what would happen if the Panama Canal were closed in the summer months. The pressure to re-route cargo ships through the Passage would be very great indeed. Canada, therefore, would be wise, according to the US, to prepare for such an eventuality.

There is another legal argument that both the US and Canada have side-stepped, which is the essentiality of commerce as a decisive criterion.<sup>41</sup> While related to the “usage” criterion, maritime commerce is imputed decisive weight in attributing a passage or strait international status. To date, this criterion has not been met for the Northwest Passage, and neither country wishes to focus attention on it because it weakens both cases, depending upon the time frames considered. It weakens Canada’s case, because, in the future, an ice-free Passage will likely generate an increase in maritime commerce. It weakens the US case in today’s terms because commercial traffic (a category in which military submarines do not belong) is still too low. Interestingly, Russia has invited foreign shippers to take advantage of the Northeast Passage and to use Russian services (icebreaking, navigational aids, and so on), to be charged at various rates. By offering these services, the Russian claim that the Northeast Passage falls within national waters has been strengthened.<sup>42</sup> Canada should keep this situation in mind. In both cases (the Northwest and Northeast Passages), however, the US still maintains they are international waters.<sup>43</sup>

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Fundamentally, Canada and the US disagree on principles of law, but, as law is only a tool and not a means unto itself, there is a way forward. Legal scholars have concluded that continued reliance on strictly legal argument is likely to result in a stalemate with regard to the Passage.<sup>44</sup> However, this impasse has afforded the Canadian Government opportunities for

creativity in order to secure a number of its vital interests, including protection of the environment and northern communities, promotion of Canada/US bilateral relations and furthering the Canadian northern identity. What now follows is an example of a creative policy that protects or furthers Canada’s interests without having to tackle the legal impasse.

### **Protection of the Environment and Northern Communities**

Canada’s *Arctic Water Pollution Prevention Act* (AWPPA)<sup>45</sup> is legislation that has enabled Canada to exercise functional jurisdiction over shipping in the Passage in order to protect the Arctic marine environment, but does not change the position of Canada with respect to her claim of sovereignty over the Passage.<sup>46</sup>

At the time of the first *Manhattan* voyage, the Canadian public, the media and the opposition cried foul and demanded concrete action by the government to protect its sovereignty. Prime Minister Trudeau, however, resisted this pressure in favour of internationalist ideology. The AWPPA was seen as a vital tool to protect the distinctive way of life of Canada’s northern communities. Conceived by Jean Chrétien, the AWPPA was not a guise for national greed.<sup>47</sup> Its sole purpose was to establish a 100-mile-wide Arctic pollution control zone measured outward from the nearest Canadian land in which environmental controls to shipping practices and the



The icebreaker USCGC *Healy* in Canadian arctic waters.

protection of the marine environment were to be enforced by Canada. Canada argued that this legislation was necessary because of the danger posed by oil-laden tankers that could spill their contents, thus permanently damaging the fragile Arctic environment. Such actions could not be considered innocent. The 100-mile limit was chosen to comply with international legal standards applicable to oil pollution from tankers.<sup>48</sup> The thinking was: If states could defend themselves against armed attack, why not against environmental attack? At a time when the world was only beginning to think about environmental protection issues, this legislation was particularly *avant-garde* in its custodianship concept.<sup>49</sup>

Acknowledging the novelty of its legislation, Canada submitted a reservation to the International Court of Justice (ICJ) to exempt the AWPPA from the compulsory jurisdiction of the Court – a move Canada’s current Prime Minister, Paul Martin, opposed. While Canada has always supported international law as an ordering regime, in this case national interests took precedence. Therefore, the reservation to the court was necessary so as not to lose the “forest for the trees,” so to speak. In other words, expecting US opposition, Canada did not want to lose its pollution protection for the sake of deference to the international court. Eventually, the reservation to the AWPPA was withdrawn by Canada in September 1985.

Canada, realized, however, that its Act would have no legitimacy if it was not respected by the international community. Through a number of multilateral conferences and meetings, Canada promoted its idea of custodianship to the world. While many states recognized the strong American legal argument to designate the Passage as an international strait, and also “recognized the self-interest in Canada’s measures,”<sup>50</sup> Canada secured enough international support, especially among the circumpolar states of Sweden, Norway, Iceland, and, most importantly, the Soviet Union, to accept a Canadian regime focused on custodianship and exceptionalism.<sup>51</sup> Ultimately, Canada’s reasoning behind its AWPPA, with its emphasis on the uniqueness of the Arctic, translated into the “arctic exception” – Article 234 – that was adopted by the final *UN Convention on the Law of the Sea*, dated 10 December 1982.<sup>52</sup> Canada did not ratify the treaty until 7 November 2003,<sup>53</sup> and the US has yet to do so, but indications are that they will in the near future.<sup>54</sup> Thus, Canada has managed to enact legislation to protect the environment without having to address the sovereignty issue. This form of creative thinking needs to be encouraged in future.

### Promotion of Canada/US Bilateral Relations

There are many examples of joint Canada/US agreements that have benefited both states. The construction of the North Warning System, an upgraded version of the Distant Early Warning (DEW) Line of the 1950s, is but one example. The Canada/US 1988 *Agreement on Arctic Cooperation* is yet

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another. It is an agreement that applies specifically to the Passage to facilitate the transit of US Coast Guard icebreakers, including polar class icebreakers.<sup>55</sup> It is also a tangible reminder of the importance of a close relationship between the Canadian Prime Minister and the US President. Ultimately, this agreement perpetuates the status quo, but it has been instrumental in preventing diplomatic wrangling. The difficulty for Canada is that we do not have the same ice breaking capabilities as the US<sup>56</sup> in either displacement capacity or in output measured by shaft power. Furthermore, whereas Canada’s icebreakers are affiliated with our Canadian Coast Guard – which is not considered part of Canada’s Armed Forces, but, rather, the nation’s Department of Fisheries and Oceans<sup>57</sup> – the US icebreakers are affiliated with the US Coast Guard, which is considered a branch of the US armed forces. The Coast Guard is under the operational command of the United States Navy during war, and under the operational command of the Department of Homeland Security during peacetime. The newest American polar class icebreaker, the USCGC *Healy*,<sup>58</sup> is impressive by all technological accounts. The optics of this agreement appears very one-sided, but it is proof that Canada is not a pawn on America’s chessboard. So as not to be accused of being Pollyanna-ish or naïve, it must be noted that the 1988 agreement came shortly after the 1987 *Defence White Paper*, which was very hawkish in tone and purpose. Indeed, the decision to allow US icebreakers through the Passage benefited Canada greatly. It strengthened Canada/US relations, and, probably most importantly, put Russia on notice.

### Canada’s Northern Identity

Canada has historically been an eager supporter of multilateral problem solving fora. Therefore, any opportunity to associate with like-minded and circumstanced states is embraced by the federal government. Canada has been a leader in establishing multilateral discussions among the circumpolar states to discuss common threats and concerns. The *Arctic Council*, established in 1996, is an intergovernmental forum at which issues and concerns related to the environment, sustainable development, and social and economic considerations are discussed. The members include Canada,<sup>59</sup> Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States.

This Council has been successful in establishing a number of initiatives, including the *Arctic Environmental Protection Strategy* (AEPS)<sup>60</sup> – a joint action plan to share scientific information to support the promotion and protection of the environment and an indigenous way of life. In addition, an *Arctic Monitoring and Assessment Programme* (AMAP) has also been established to study anthropogenic pollutants. These research initiatives involving all of the circumpolar states are vital and must continue.

In addition to research, this Council promotes a number of northern cultural projects, including a number of northern and Inuit art projects and centres. Canada has the most associations, centres and galleries.<sup>61</sup> The Arctic Council website (<http://www.arctic-council.org>) is well worth examination, if only to highlight how active Canada's participation is, and how many positive contributions the Council is making to the promotion of northern cultures within a Canadian context, as well as in the larger circumpolar context.

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certainly strengthen cries for an alternative international Passage. However, this does not mean that precipitate action is required. Canada is very creative when it comes to defending her interests. Canada's *Arctic Waters Pollution Prevention Act*, the 1988 *Agreement on Arctic Cooperation*, and participation in the *Arctic Council* are all examples of this trend.

### Conclusions

So what are the conclusions that one can draw from the points presented here? Firstly, a strictly legal solution is not likely. As the Passage becomes more ice-free, US legal arguments could gain favour with other states, thus placing pressure on the Canadian government to accept unfettered international navigation through the Passage. Any disaster in the Panama Canal would

Canada and the US have a long history of compromise and work around agreements. Considering the number of challenges the US and Canada face together, perhaps the Passage is not one of those challenges on which to focus and to force a legal solution. Sometimes an impasse is not a problem. Sometimes an impasse presents new opportunities for solutions to other problems. Of course, this is always easier said than done.



### NOTES

1. For a very readable précis of the history of the term sovereignty, see *State Sovereignty*, Sohail H. Hashmi, (ed.) (Pennsylvania: Pennsylvania State University, 1997): pp. 15-48.
2. *Ibid.*, p.19.
3. Transit passage is defined as the nonsuspendable right of continuous and expeditious navigation and/or overflight in the normal mode through an international strait linking one part of the high seas (or exclusive economic zone (EEZ)) with another. (Art. 38 (2) of the 1982 *UN Convention of the Law of the Sea* (UNCLOS) Although the coastal state may make regulations for various purposes (Art. 42), the right of transit passage may not be suspended (Art. 44.) In this respect, transit passage is “wider” than innocent passage because the former includes “over flight.” In so far as “transit passage” is not yet a customary right, innocent passage will govern territorial sea straits for states not members to the Convention and will continue to apply to other sea straits not governed by treaty or transit passage. See Martin Dixon, *Textbook on International Law*, 4<sup>th</sup> Edition (London: Blackstone Press, 2000), pp. 222-229.
4. Dixon, p. 222. UNCLOS contains provisions dealing with the circumstance of an international strait that passes through the territorial waters of another state. As Canada has ratified this treaty, this law does bind us. The question becomes: Is the passage an international strait at all?
5. Surface waters are commonly divided into three categories: internal waters, territorial seas and high seas. Internal waters comprise water from the state to the base or inner line of the territorial sea. Territorial seas extend from the outer limit of the internal waters to the high seas and the high seas comprise the rest of the waters. States exert complete control over their internal waters (as they do over land territory). A state has control over territorial seas but with accepted limitations, principally certain rights of transit passage for foreign vessels. The high seas are for all to use. See Gordon W. Smith, “Sovereignty in the North: The Canadian Aspect of an International Problem”, in R St. J MacDonald (ed.) *The Arctic Frontier* (Toronto: University of Toronto Press, 1966), pp. 227-228.
6. Quote from US State Department lawyer J. Ashley Roach quoted in James Brook, “Arctic Shortcut Worries Canadians”, *New York Times*, (29 July 2000).
7. LB Pearson, “Canada Looks ‘Down North,’” in *Foreign Affairs*, Vol. 24, No. 4 (July 1946), pp. 638-39.
8. DM McCrae, “The Negotiation of Article 234,” in *Politics of the Northwest Passage*, Franklyn Griffiths (ed.), (Kingston: McGill-Queen’s University Press, 1987): pp. 99-100.
9. Canada, *House of Commons Debates*, 27 November 1957, Vol. ii, p. 1159, quoted in Smith, p. 223.
10. McCrae in Griffiths, p. 100.
11. McCrae mentions in an endnote that USS *Nautilus*, having traversed the passage under the polar ice cap, also prompted Canada to think about its jurisdiction in 1958. There is no doubt that, during the Cold War, other vessels voyaged through the Passage under the ice but this paper is restricted in scope to above ice vessels. McCrae in Griffiths, p. 285.
12. John Kirton and Don Munton, “The Manhattan Voyages and their Aftermath,” in Griffiths, pp.70-73.
13. McCrae in Griffiths, p.100.
14. Kirton and Munton in Griffiths, p. 80.
15. *Ibid.*, p. 91.
16. *Ibid.*, p. 93.
17. *Ibid.*
18. Canada Gazette, Pt. II, Vol. 119, No. 20, p. 3996 (10 September 1985). Canada claimed that the passage of the Polar Sea was made under its permission while the US denied this. See Bing Bing Jia, *The Regime of Straits in International Law* (London: Clarendon Press, 1996), p. 7. Neither the US nor the European Community recognizes the validity of this 1986 order. See J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims*, Second Edition, (Dordrecht: Martinus Nijhoff, 1996), pp. 117-121.
19. See *Canadian Yearbook of International Law* (CYIL) No. 25, 1987, p. 406 and CYIL No. 26, 1988, pp. 314-315.
20. McCrae in Griffiths, p. 98.
21. Oran R.Young, “Arctic Shipping: An American Perspective,” in Griffiths, p. 119. Much of the reason has to do with the fact that legal jurisprudence regarding sovereignty and jurisdiction of land is more developed and Canada is able to maintain a presence on the land through Rangers, Canada’s Department of Defence, and scientific outposts.
22. 1951 ICJ rep 116.
23. McCrae in Griffiths, p. 99.
24. *Ibid.* Canada did not ratify the UN Law of the Sea Convention until 7 November 2003, which provides some insight into the extent to which Canada wishes to be “constrained” or “protected” by multilateral agreements.
25. The traditional method of measurement (which is still used and favoured by the US) simply calculated the territorial seas from a baseline not exceeding 12 nautical miles from shore (at the low-water line) that traced the outline of the coast. Therefore, the baseline would exactly match the seacoast, but 12 miles out to sea.
26. McCrae in Griffiths, p. 99.
27. The possibility of calculation by straight baseline methods would also impact the calculation of internal waters on the east and west coast. Orders in Council did not settle these until 1967 and 1969 respectively. See McCrae in Griffiths, p.100.
28. Bing Bing Jia, p. 6.
29. *Ibid.*, p. 7.
30. *Ibid.*, pp. 6-9.
31. *United Nations Convention on the Law of the Sea* (10 December 1982) [[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)].
32. *Territorial Sea Geographical Co-ordinates* (Area 7) Order (Privy Council 1985, p. 2739).
33. John Honderich, *Arctic Imperative: Is Canada Losing the North?* (Toronto: Toronto University Press, 1987), p. 47.
34. *Ibid.*, p. 41.
35. *Ibid.*

36. See their very pragmatic and even-handed report, "The Question of Sovereignty", an excerpt from *Independence and Internationalism*, pp. 127-135 [http://www.carc.org/pubs/v14no4/6.htm]. Accessed 13 September 2005.
37. *Corfu Channel Case (United Kingdom vs. Albania) (Merits) ICJ Rep*, 9 April 1949.
38. 3000 transits of the North Corfu Channel over a 21-month period. In contrast, Professor Pharand points out that in an 80-year period, there had been only 11 foreign transits of the Northwest Passage, all "with Canada's consent or acquiescence, either expressed or implied." See Donat Pharand, *The Northwest Passage Arctic Straits: Volume VII*, (Dordrecht: Martinus Nijhoff Publishers, 1984), pp. 120-121.
39. Honderich, p. 48.
40. Pharand, p. 102.
41. Bing Bing Jia, pp. 34-36.
42. *Ibid.*, p. 52. As quoted in P.D. Barabolya, *Manual of International Maritime Law*, (Washington: Department of Navy, 1968), p. 273.
43. Roach and Smith, p. 340.
44. Friedrich Kratochwil, Raul Rohrich, and Harpreet Mahanjan, *Peace and Disputed Sovereignty: Reflections on Conflict Over Territory*. (Boston: University Press of America Inc., 1985), pp. 118-119.
45. McCrae in Griffiths, p. 100.
46. *Ibid.*, pp.100-101.
47. Of course, the other interpretation is that the AWPPA was a backdoor solution to securing sovereignty over the Passage by ulterior motives.
48. Kirton and Munton, in Griffiths, p. 91.
49. In addition to the *Pollution Act*, Canada also increased its territorial sea from three miles to twelve miles making the two entrances of the Northwest Passage – the Barrow Strait and the Prince of Wales Strait – Canadian Territorial waters. See Elizabeth B. Elliot-Meisel, "Still Unresolved after Fifty Years: The Northwest Passage in Canadian-American Relations, 1946-1998", in *American Review of Canadian Studies*, Vol. 29, No. 3 (Fall 1999), p. 412.
50. Kirton and Munton, in Griffiths, p. 95.
51. *Ibid.*
52. For the best summary of this process, see *Ibid.*, pp. 98-114. Another note about this book is warranted. Despite being written during the Cold War, this does not dominate the chapters. This is rare for books dedicated to the Passage written in the 1980s.
53. See the UN's website on the Law of the Sea at [http://www.un.org/Depts/los/index.htm].
54. Thomas Graham and Ben Friedman, "Law of the Sea Opponents Hurt US Security", in *International Herald Tribune*, Thursday 21 April 2000.
55. *Agreement between the government of Canada and the government of the United States of America on Arctic Cooperation* (11 January 1988). Signed by Joe Clark and George P. Schultz. The close relationship between Prime Minister Brian Mulroney and President Ronald Reagan is offered as the reason for the establishment of this agreement.
56. Nor Russia. In the 1980s, Russia had more icebreakers on paper than the US. See Kim Richard Nossal, "Polar Icebreakers: The Politics of Inertia", in Griffiths, p. 230.
57. For a history of Canadian Icebreakers, see Thomas E. Appelton's, "A History of the Canadian Coast Guard and Marine Services", in *Fisheries and Oceans Canada*, (1 July 2004) [http://www.ccg-gcc.gc.ca/usque-ad-mare/chapter08-08\_e.htm] (Accessed 19 September 2005).
58. See *Department of Transportation US Coast Guard Statement of Rear Admiral Ernest R. Riutta on the Coast Guard Icebreaking Program before the Subcommittee on Coast Guard and Maritime Transportation Committee on Transportation and Infrastructure*. US House of Representatives (29 March 2000). [http://www.house.gov/transportation/cgmt/hearing/03-29-00/riutta.html] (Accessed 21 September 2005).
59. *The Northern Dimension of Canada's Foreign Policy*, Foreign Affairs Canada, [http://www.dfait-maeci.gc.ca/circumpolar/sec02\_nfp-en.asp], (10 February 2005)
60. AETPS as found on the Arctic Council website at [http://www.arctic-council.org/files/pdf/artic\_environment.PDF], (7 October 2004).
61. See [http://www.arctic-council.org/en/main/infopage/79/ for more details]. (21 September 2005).



Tundra flowers.