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UNCLOS and the Arctic: The Path of Least Resistance

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Abstract

This Note discusses the territorial disputes in the Arctic, which are becoming increasingly contentious as a result of the Arctic melt, and the potential resolutions through the mechanisms of international law. Part I discusses the scientific consensus regarding the changing Arctic climate and the resulting conflicts that arise from increased interests in the region. Part II evaluates the varying legal paradigms that may be utilized in order to navigate through the competing claims. Part III argues that, given the uncertainties surrounding both the outcome of any potential International Court of Justice ("ICJ") decision and entering into an Arctic Treaty, universal adherence to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") is the most efficient mechanism to balance the interests of the signatory Arctic States.

NOTE

UNCLOS AND THE ARCTIC: THE PATH OF LEAST RESISTANCE

*Mark Jarashow, Michael B. Runnels, & Tait Svenson**

INTRODUCTION

The Arctic ecosystem is rapidly moving towards a state that has not existed for over one million years.¹ This new Arctic will likely have less permanent ice than exists at present, resulting in ice-free summers within a century.² While scientists debate the cause and permanence of this rapid polar melt,³ they seem to

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1. See J.T. Overpeck et al., *Arctic System on Trajectory to New, Seasonally Ice-Free State*, 86 EOS 309, 309-13 (2002) (discussing how Arctic climate falls outside prevailing parameters of glacial dynamics of recent Earth history); see also Andrew C. Revkin, *Past Hot Times Hold Few Reasons to Relax About New Warming*, N.Y. TIMES, Dec. 27, 2005, at F2 (explaining that forty-nine million years ago Arctic Ocean was not covered in ice, but instead was warm and covered in duckweed).

2. See Overpeck et al., *supra* note 1, at 309 (discussing how feedback-enhanced warming is primarily responsible for climate change, and that there seems to be few, if any, processes or feedback in Arctic climate which might alter this course); see also Andrew C. Revkin, *In a Melting Trend, Less Arctic Ice to Go Around*, N.Y. TIMES, Sept. 29, 2005, at A1 (explaining that higher temperatures leaves lower amounts of ice in the Arctic to reflect solar light back into space). Revkin further argues that this continual increase in heat storage in the Arctic Ocean increases the amount of ice-melt. See Revkin, *In a Melting Trend*, *supra* note 2, at A1 (positing that as heat is trapped beneath ice layers, these layers melt at a faster rate).

3. See Andrew C. Revkin, *No Escape: Thaw Gains Momentum*, N.Y. TIMES, Oct. 25, 2005, at F1 (explaining how some researchers believe that Arctic's turbulent climate makes it difficult to analyze effects resulting solely from human factors and also explaining that many researchers warn against assuming such climate change will continue into future); see also Revkin, *Past Hot Times*, *supra* note 1, at F2 (describing how some

generally agree that the Arctic will ultimately become warmer.⁴

A rush is currently underway to claim undeveloped and, in some cases, unseen territory; natural resources; and marine-access claims worth hundreds of billions of dollars due in large part to the polar melt.⁵ The value of these claims only rises as the temperature does—a fact which is already creating lower costs, largely by way of more navigable waterways, to access the natural resources within the region and increasing the navigability of the Northwest Passage (“The Passage”).⁶ The Arctic melt is stimulating the need of an international mechanism through which to bring such claims to resolution.⁷

This Note discusses the territorial disputes in the Arctic, which are becoming increasingly contentious as a result of the Arctic melt, and the potential resolutions through the mechanisms of international law. Part I discusses the scientific consen-

scientists believe that warming trends are simply part of patterns seen throughout Earth’s history, but that even they admit that current warming may be accelerated due to human factors). These researchers further argue that the same Arctic feedbacks that are amplifying human-induced climate changes are also amplifying natural variability, which means that there could possibly be periods in the next few decades when the region cools and ice grows. *See* Revkin, *Past Hot Times*, *supra* note 1, at F2.

4. *See* Revkin, *No Escape* *supra* note 3, at F1 (discussing consensus among experts that Arctic climate will gradually increase in average temperature); *see also* Revkin, *Past Hot Times*, *supra* note 1, at F2 (discussing how Arctic climate, particularly with respect to temperature, has recently trended upward in way not consistent with established patterns and trends that have taken place throughout recent history).

5. *See* SUSAN JOY HASSOL ET AL., *THE ARCTIC COUNCIL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 11* (2004) (discussing how Arctic melt may increase access to natural resources in this region and also possibly exacerbate Arctic sovereignty issues and disputes); *see also* Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, *N.Y. TIMES*, Oct. 10, 2005, at A1 (explaining how Arctic melt may unlock lucrative shipping routes, including Northwest Passage, and has prompted number of companies and States to prospect for and make new claims); Andrew C. Revkin, *Under All That Ice, Maybe Oil*, *N.Y. TIMES*, Nov. 30, 2004, at F1 (describing possibility of large petroleum reserves underneath seabed of Arctic Circle).

6. *See* HASSOL ET AL., *supra* note 5, at 11 (discussing how Arctic melt may increase navigation in Arctic waters and may make previously unreachable natural resources exploitable, and also may exacerbate sovereignty disputes arising over territory in region); *see also* Krauss, *supra* note 5, at A1 (examining how Arctic melt may unlock lucrative shipping routes, including Northwest Passage, and has prompted number of companies and States to prospect for and make new claims).

7. *See* Krauss, *supra* note 5, at A1 (discussing that, due to Arctic melt, amount of marine access rights and natural resources country can claim is not clear); *see also* Michael Byers & Suzanne Lalonde, *Our Arctic Sovereignty is on Thin Ice: Climate change has Other Countries Warming to the Prospect of Encroaching on the Northwest Passage*, *GLOBE & MAIL*, Aug. 1, 2005, at A11 (arguing how Arctic melt causes uncertainty for Canada’s claims at international law).

sus regarding the changing Arctic climate and the resulting conflicts that arise from increased interests in the region. Part II evaluates the varying legal paradigms that may be utilized in order to navigate through the competing claims. Part III argues that, given the uncertainties surrounding both the outcome of any potential International Court of Justice (“ICJ”) decision and entering into an Arctic Treaty, universal adherence to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) is the most efficient mechanism to balance the interests of the signatory Arctic States.⁸

I. THE CLIMATE AND HISTORY: WHAT DOES THE ARCTIC MELT MEAN?

The Arctic climate is warming at an accelerated pace, leading to potential territorial disputes that will heighten tensions between States in the region.⁹ Section A of Part I presents the scientific research that predicts this climatic change;¹⁰ examines the history of the region, which puts into context the potential territorial disputes; supplies background information concerning the States that may be involved; and analyzes the specific disputes that will be the most contentious.¹¹

8. The International Court of Justice (“ICJ”), located at The Hague, in the Netherlands, was borne out of the U.N. Charter in 1945 to serve as the judicial arm of the United Nations. See BARRY CARTER ET AL., *INTERNATIONAL LAW* 288-90 (4th ed. 2003) (discussing structure and functioning of ICJ). The ICJ increasingly hears cases regarding territorial disputes. See *id.* at 284 (listing types of cases heard by ICJ). The ICJ hears cases through special agreements (“*compromise*”) between States, when parties state that “compulsory jurisdiction” applies or by a treaty provision stipulating that all disputes will be settled by the Court. See *id.* at 284 (explaining method by which disputes come before ICJ); see also Brian Taylor Sumner, Note, *Territorial Disputes at the International Court of Justice*, 53 *DUKE L.J.* 1779, 1781 (2004) (discussing how ICJ decisions are binding in large part because parties have agreed to have disputes settled by ICJ judges).

9. See Overpeck et al., *supra* note 1, at 309 (explaining how feedback-enhanced warming is primarily responsible for warming in Arctic region); see also Revkin, *In a Melting Trend*, *supra* note 2, at A1 (analyzing process of global warming and how it is affecting Arctic sea ice).

10. See Revkin, *No Escape*, *supra* note 3, at F1 (positing that current warming could melt glacial ice which has existed for millions of years, leading to severe consequences, such as rising sea levels and temperatures worldwide); see also HASSOL ET AL., *supra* note 5 at 22 (discussing Arctic warming, in all its potential forms, based on observations over past fifty years, and its consequences on Arctic region and worldwide).

11. See Daniel Howden, *Race for the Arctic: An International “Cold War” Has Begun Over Who Owns the Rapidly Unfreezing Wastes of the Far North and What Is Thought to Be its Treasure of Natural Resources*, INDEP. (UK), Jan. 5, 2005, at 26 (discussing history, climate change, and virtually all aspects of Canadian Arctic waters); see also Stephen Thorne,

A. *Scientific Projections Regarding the Arctic Melt*

To fully understand the importance of the territorial disputes in the Arctic, the current development of this new and valuable environment must first be understood. Records of increasing temperatures and the decreases in the range and thickness of Arctic Sea ice suggest that the Arctic region is becoming warmer¹² and that such warming is becoming a trend.¹³ Many experts assert that this particularly sharp trend in warming results from human-induced global warming, combined with the region's tendency to amplify change.¹⁴

Some scientists and government officials, however, do not agree that Arctic warming merits concern, arguing that it is not known to what degree warming can be attributed to natural cycles or human-induced warming.¹⁵ Though conceding that global warming plays some factor in the Arctic warming, some

Canada Plans Arctic Eye, CANADIAN PRESS, Aug. 28, 2005 (describing brief history of Hans Island and potential for dispute over island).

12. See HASSOL ET AL., *supra* note 5, at 22 (arguing that observations over past fifty years show decline in arctic sea-ice during all seasons, with most prominent retreat in summer); see also Revkin, *Past Hot Times*, *supra* note 1, at F2 (explaining that Arctic Ocean is warming at accelerated pace, which will result in Arctic climate that stands in contrast to recent Earth history); Andrew C. Revkin, *NASA Scientists See New Signs of Global Warming*, N.Y. TIMES, Sept. 14, 2006, at A20 (detailing NASA reports that recent higher temperatures and retreat of sea ice in Arctic indicate that buildup of heat-trapping gases are influencing Arctic climates); Revkin, *No Escape*, *supra* note 3, at F1 (arguing that current warming of Arctic could melt Greenland's ice cap, which would raise sea levels worldwide more than twenty feet).

13. See HASSOL ET AL., *supra* note 5, at 22 (describing effects of changes in climate and natural systems on Arctic environment); see also Overpeck et al., *supra* note 1, at 313 (explaining that there are no known factors that can be altered to prevent warming of Arctic).

14. See Revkin, *No Escape*, *supra* note 3, at F1 (explaining dynamics by which Arctic region amplifies global environmental changes); see also HASSOL ET AL., *supra* note 5, at 20 (describing global warming in Arctic region is more pronounced due to several unique environmental and geographical factors not present elsewhere); Overpeck et al., *supra* note 1, at 313 (arguing that human-induced global warming is prevailing over Arctic's natural environmental cycles).

15. See Krauss et al., *supra* note 5, (describing conversation with Igor L. Shpektor, President of Russia's Union of Arctic Cities and Towns, in which Shpektor claims that apple trees will not be growing in Vorkuta, Russian coal mining town); see also Revkin, *In a Melting Trend*, *supra* note 2, at A1 (explaining that some scientists argue that size of ice cap could greatly vary, due to changes in wind patterns, which can cause ice to pile up against one Arctic shore or drift away from another); Revkin, *No Escape*, *supra* note 3, at F1 (describing conversation with Igor Polyakov, expert at International Arctic Research Center of University of Alaska at Fairbanks, in which Polyakov argues that level of variability in high-latitude regions is huge, making it difficult to separate from human-induced trend).

experts describe rising temperatures and shrinking sea ice as taking place within a complicated system that is still far from being completely understood.¹⁶

Although scientists disagree on the specific role that global warming plays in the Arctic melt, there is a general consensus that the Arctic will become warmer and that such warming appears to be human-induced.¹⁷ Indeed, research suggests that the planet is undergoing the early stages of human-induced global warming evidenced by alterations in certain natural cycles, such as the levels and fluctuations in ice in the Arctic Ocean.¹⁸ As a result, scientists claim that each area of the Arctic Ocean that is exposed due to melting ice will absorb a much larger amount of solar energy, which would then lead to the melting of even larger amounts of ice.¹⁹

B. Northwest Passage: Background and Ramifications

Since the fifteenth century, navigators have sought a commercial sea route north and west around the American continents, a search that has not been without its costs.²⁰ Due to the

16. See Revkin, *No Escape*, *supra* note 3, at F1 (explaining how some Arctic researchers believe that because climate of Arctic nearly has most turbulent climate on Earth, it is difficult to parse out any human-induced factors); see also Overpeck et al., *supra* note 1, at 313 (describing Arctic ecosystem as delicate interplay between several "hubs," such as precipitation and human population, authors argue that this ecosystem is difficult to completely understand and predict).

17. See Revkin, *No Escape*, *supra* note 3, at F1 (discussing consensus among experts that Arctic climate will gradually increase in average temperature); see also HASSOL ET AL., *supra* note 5, at 2 (describing how nature of carbon dioxide in atmosphere means there would necessarily be lag time between when measures to curb global warming are implemented and when their effects would be realized).

18. See Overpeck et al., *supra* note 1, at 312 (describing how research suggests that although current warming trend still lies within boundaries of past glacial-interglacial cycles, present rate of sea ice loss will push current trend out of these parameters within century); see also Revkin, *No Escape*, *supra* note 3, at F1 (analyzing amplifying nature of Arctic as "flywheel," which, once started, tends to keep going, with scientists expecting that insulating power of greenhouse gases to dominate Arctic's natural climate fluctuations for centuries).

19. See Revkin, *No Escape*, *supra* note 3, at F1 (describing how Arctic region amplifies climate change due to unique conditions such as how sunlight reacts to bright white sea ice and dark sea beneath it); see also HASSOL ET AL., *supra* note 5, at 26 (explaining that as snow and ice melt, darker land and ocean surfaces absorb more heat, which goes directly into warming rather than into evaporation, thus melting even more ice).

20. See DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 187-01, 244 (1988) (describing this search for more efficient route from Europe to Asia and different paths that could be taken through Northwest Passage); see also DONAT

Arctic melt, scientists project that such a route, historically known as the Northwest Passage, may be open to shipping within this century.²¹ Such a passage could cut the sea-route for cargo from Europe to the Far East by 4000 miles, from the current route through the Panama Canal, and a ship could eliminate over 6650 nautical miles on a trip from England to Japan.²² Insisting that the Northwest Passage is an "international strait"²³ through which it has "transit passage,"²⁴ the United States continually refuses to acknowledge Canadian sovereignty over the Arctic Archipelago, and thus, the Northwest Passage.²⁵

PHARAND, *THE NORTHWEST PASSAGE, ARCTIC STRAITS*, in 7 *INTERNATIONAL STRAITS OF THE WORLD 1-20* (1984) (explaining possible routes through Northwest Passage and some of problems with each route).

21. See Howden, *supra* note 11, at 26 (describing how some experts believe that within 100 years polar ice may have melted so significantly that area could be used as major shipping route); see also Rebecca Dube, *As Ice Melts, Debate Over Northwest Passage Heats*, USA TODAY, Apr. 4, 2006 (explaining how U.S. Navy predicted in 2001 that within ten years, Northwest Passage would be open to non-strengthened vessels for one month per year and how Chief of Ice Forecasting for Canadian Ice Service predicts that by end of century there could be extended summertime shipping season).

22. See Roy A. Perrin III, Comment, *Crashing Through the Ice: Legal Control of the Northwest Passage or Who Shall be "Emperor of the North,"* 13 TUL. MAR. L.J. 139, 161 (1988) (describing that trip from Yokohama, Japan, one of Japan's most important port cities, to London, England would be reduced from 14,650 nautical-miles to less than 8,000 nautical-miles, and that travel from Yokohama to Rotterdam would also be reduced from 15,640 nautical-miles to 6,610 nautical-miles); see also Dube, *supra* note 21 (detailing how 12,600 nautical-mile trip from Europe to Asia via Panama Canal would be 7900 nautical-miles using Northwest Passage).

23. Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 348 (1993) (explaining that some nationals seek international strait exception to coastal State sovereignty due to fear that they would become subject to navigational regimes imposed by the coastal State); see also Dube, *supra* note 21 (detailing how United States claim that Northwest Passage is "international strait" based on even relatively few transits that have been accomplished over time).

24. See United Nations Convention on the Law of the Sea art. 39, Dec. 10, 1982, 1833 U.N.T.S. 3 (1994) [hereinafter UNCLOS]. Article 38 states:

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

See UNCLOS, *supra* note 24, art. 38; see also Dube, *supra* note 21 (explaining how United States generally supports maximum freedom of seas and wish for free international passage through Northwest Passage).

25. See Mike Perry, *Rights of Passage: Canadian Sovereignty and International Law in the Arctic*, 74 U. DET. MERCY L. REV. 657, 669-70 (1997) (considering U.S. actions and presence in Arctic Waters surrounding Canada and motivations and policies underlying

C. *Hans Island: Why Is This Little Rock So Important?*

The 1973 Agreement between Denmark and Canada, relating to the Delimitation of the Continental Shelf between Greenland and Canada (“Danish-Canadian Delimitation Agreement”),²⁶ defined the border between the two territories.²⁷ The Agreement listed 127 points between the Davis Strait and the end of the Robeson Channel, from which geodesic lines were drawn to form the border; but failed to draw a line from point 122 to point 123, a distance of 875 meters, in which a small rock, called Hans Island, is located.²⁸ Canada and Denmark have long disputed which State controls the small 1.3 kilometer island.²⁹ Hans Island is situated between Greenland and Canada’s Ellesmere Island, approximately 1,100 kilometers south of the North Pole.³⁰ The island carries importance for several reasons, including (1) the possible oil reserves lying beneath it and (2) its loca-

these actions); see also Dube, *supra* note 21 (summarizing how U.S. Ambassador to Canada, David Wilkins, stated that United States disagreed with Canadian claim concerning Northwest Passage as recently as Jan. 25, 2006).

26. See Agreement between the Government of the Kingdom of Denmark and the Government of Canada Relating to the Delimitation of the Continental Shelf between Greenland and Canada [hereinafter Danish-Canadian Delimitation Agreement], 17 December 1973, Den.-Can., available at <http://www.un.org/Depts/UNCLOS/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-CAN1973CS.PDF> (delineating boundary between Greenland and Canada); see also Alex G. Oude Elferink, *Arctic Maritime Delimitations: The Preponderance of Similarities with Other Regions*, in *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 179, 194-95 (2001) (describing conditions and circumstances leading up to formation of Agreement).

27. See Elferink, *supra* note 26, at 181 (stating that boundary line was used to divide fishing zones between two States); see also Danish-Canadian Delimitation Agreement, *supra* note 26, art. 1 (listing seven articles that comprise Agreement, including Article 1, which describes Agreement as determining dividing line between Greenland and Canadian Arctic Islands for purpose of each State’s exploration and exploitation of natural resources of that part of continental shelf).

28. See Elferink, *supra* note 26, at 182 (stating there is no delimitation between points 122 and 123 due to dispute over Hans Island); see also Danish-Canadian Delimitation Agreement, *supra* note 26, art. 2 (listing geographic co-ordinates of each of 127 points, including omission of boundary line between points 122 and 123).

29. See Thorne, *supra* note 11 (explaining recent actions by both Canadian and Danish Governments aimed at exerting sovereignty or control over small island and its surrounding areas); see also Alexander Rubin, *Hands Off Hans Island*, CANADA FREE PRESS, July 27, 2005 (depicting Hans Island as small pile of rocks far from any civilization). The only inhabitants of the small rock are a local seal colony. See Howden, *supra* note 11, at 26 (describing Hans Island, its natural features, wildlife, and its history).

30. See CBC News In-depth, *It’s a Fine Line: Disputing Boundaries*, Oct. 11, 2005, http://www.cbc.ca/news/background/boundary_disputes/ (last visited Apr. 14, 2007) (detailing how every so often Canadian or Danish Governments send nationals to 1.3 square-kilometer Hans Island to leave something there such as Canadian or Danish

tion at the center of the Kennedy Channel, a potentially important shipping lane.³¹ A resolution of the dispute between Canada and Denmark over Hans Island may have significant implications for determining the continental shelf boundaries under UNCLOS; and will certainly affect resolution of the Northwest Passage dispute because if Canada were to subordinate its claims to either, it might lose any leverage it holds in the Arctic region.³²

D. *Russian Claims: How Other Claims May Have an Impact*

Along with the disputes over the Northwest Passage and Hans Island, other disputes could arise in the Arctic Region. One such example of the uncertainty in the region is evidenced by the actions of the former Dictator of the U.S.S.R., Joseph Stalin, who once simply drew a line from Murmansk to the North Pole, and then from the North Pole to Chukchi and claimed it as the "U.S.S.R. Polar Region."³³ Now the mapping of the region has greater ramifications and, instead of Stalin's claim, the lines will be drawn by the Commission on the Limits of the Continental Shelf ("Commission"), which operates under the auspices of UNCLOS.³⁴ The Commission consults seismic mapping of the

flag); *see also* Rubin, *supra* note 29 (discussing Hans Island's location in Nares Strait, which lies between Greenland and Ellesmere Island).

31. *See* Krauss et al., *supra* note 5, at A1 (detailing how major companies and various States believe that shipping routes that would be available and natural resources that might be uncovered could potentially be worth hundreds of millions or billions of dollars); *see also* Rubin, *supra* note 29 (describing how melting of polar ice caps would potentially open viable shipping and transport routes in Arctic and how Danish control of Hans Island would give them free passage through important Arctic straits, as well as any oil reserves discovered in area).

32. *See* *Hans Island the Tip of Iceberg in Arctic Claims*, CTV.CA NEWS STAFF, July 31, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050731/hans_island_QP_050731?s_name=&no_ads= (last visited Sept. 17, 2006) (describing how Canadian Defense Minister Bill Graham's statements about Canadian sovereignty over Hans Island was necessary because to set strong precedent for all remaining issues over sovereignty in region, particularly that of sovereignty over Northwest Passage).

33. *See* Krauss et al., *supra* note 5 (describing how claims were once made to Arctic territory, and how these claims contrast to current division of this region that will likely be made by international commission based on geography of seabed); *see also* Clifford Krauss et al., *Arctic riches coming out of the cold*, INT'L HERALD TRIB., Oct. 10, 2005 (detailing outlandish claims made by Stalin, according to Artur N. Chilingarov, Arctic explorer and deputy speaker of Russia's Duma).

34. *See* Krauss et al., *supra* note 5, at A1 (describing how claims will now likely be determined by division of region that will be made by international commission, based on geography of seabed under UNCLOS); *see also* Sean D. Murphy, *U.S. Reaction to*

seabed geography, which is provided by the claiming signatory State, in order to make territorial determinations.³⁵

On December 10, 2001, Russia submitted a claim to 1.2 million square kilometers of territory, including the North Pole—nearly half of the Arctic Ocean—to the Commission, in accordance with UNCLOS provisions.³⁶ As Russia is the first State to submit a claim,³⁷ other Arctic States have several reasons to determine whether this claim overlaps with their respective continental shelves, especially since this claim covers an area containing significant quantities of oil.³⁸ After deliberating, the Commission requested that Russia revise its submission with respect to its extended continental shelf in the Central Arctic Ocean.³⁹ Russia is still in the process of documenting its claim.⁴⁰

Russian Continental Shelf Claim, 96 AM. J. INT'L L. 969, 969-70 (2002) (explaining functionality of Commission under UNCLOS).

35. See Murphy, *supra* note 34, at 969 (describing how commission reviews information submitted by coastal State and then makes recommendations to State regarding delimitation of its continental shelf); see also UNCLOS, art. 76(8) & annex II (articulating how each coastal State shall be responsible for submitting information on limits of continental shelves beyond two hundred nautical miles from baselines).

36. See William Underhill, *The North Pole Heats Up*, NEWSWEEK INT'L, Dec. 5, 2005, at 1 (describing Moscow's claim in 2001 and its subsequent rejection); see also Murphy, *supra* note 34, at 969 (detailing these claims by Russia, which was first State to submit such information to Commission); Andrew C. Revkin, *Jockeying for Pole Position*, N.Y. TIMES, Oct. 10, 2004, at F4 (providing circumstances of Russian claim).

37. See Murphy, *supra* note 34, at 969 (describing how Russia was first State to submit its claims to commission, which would review claims and also distribute the details of claims to all U.N. Member States); see also Jeff Sallot, *Canada Joins with Denmark to Map Depths of the Arctic*, GLOBE & MAIL, Mar. 24, 2006, at 1 (explaining how Russia claimed Lomonosov Ridge line within its claims, asserting that it was extension of Siberian continental shelf).

38. See Semyon Golovko, *Warmer Climate Promotes Coldness in Relations: The Thawing Pole May Generate a Quarrel Among the Northern States*, DEF. & SEC., Sept. 9, 2005, at 1, available at 2005 WLNR 14188357 (describing the amount as nearly five billion tons); see also Sallot, *supra* note 37, at 1 (cautioning that there is still copious scientific work to be done before it can be determined what natural resources are present in region, but fact that there is considerable sediment on seabed is indication that there is gas and oil underneath seabed).

39. See Murphy, *supra* note 34, at 970 (describing how in June 2002, Commission asked Russian Federation to make revised submission with respect to its extended continental shelf in Central Arctic Ocean); see also Golovko, *supra* note 38, at 1 (explaining how Russia's claims were tabled until further materials were provided in form of revised submission to Commission).

40. See Golovko, *supra* note 38, at 1 (describing how Russia's claims were tabled until further materials were provided in form of revised submission to Commission); see also Krauss et al., *supra* note 5 (commenting that Russia's claims in 2001 were initially rejected by Commission's technical panel and that there is hope that recent research by ship named *Akademik Fyodorov* will provide new mapping data in its favor to support its

II. LEGAL ANALYSIS AND OPTIONS FOR RESOLUTION

The legal status of the Northwest Passage remains uncertain. Canada claims control over it through the implementation of the straight baseline theory⁴¹ or through historical title, but it is unclear whether the Northwest Passage qualifies as an international strait under UNCLOS, thus impacting the United States' failure to possess the right of innocent passage through the increasingly viable passage.⁴² Canada and Denmark also claim disputed Hans Island, using legal claims such as historic title and geography, hoping to benefit from the protective laws under UNCLOS and to exclusively garner the resources that could comprise the Exclusive Economic Zone ("EEZ") of Hans Island.⁴³

Part II discusses these claims, as well as Russia's claims in the region and how the United States' failure to ratify UNCLOS threatens the United States' future claims to the abundant resources in the Arctic.⁴⁴ Finally, Part II will address the three peaceful solutions that might conceivably be utilized in order to amicably resolve the territorial disputes in the Arctic: (1) submitting them to the ICJ; (2) entering into a treaty similar to the Antarctic Treaty; and (3) all interested parties ratifying UN-

pending re-submission to Commission); Murphy, *supra* note 34, at 970 (explaining how Russian Federation's revised submission is still pending).

41. The straight baseline theory is a theory first established by the ICJ in the *Fisheries Case* whereby States can claim that coastal waters are internal waters provided the baselines do not depart to any appreciable extent from the general direction of the coastline, the waters lying within the baselines are closely linked to the coastal State's domain and the enclosed waters represent economic interests which are particular to the region and which have an importance evidenced by a long history of use. See *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (establishing elements of straight baseline test); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20 (detailing ramifications of straight baseline theory in relation to territorial claims to coastal waters).

42. See UNCLOS, *supra* note 24, arts. 34-45 (providing standards for "international strait" and providing for right of innocent passage). See generally PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20 (discussing in depth Northwest Passage and varying legal theories that could conceivably settle territorial dispute.)

43. See UNCLOS, *supra* note 24, arts. 55-75 (laying out criteria for establishing Exclusive Economic Zones ("EEZ") and the potential bars on islands possessing EEZ); see also Thorne, *supra* note 11 (describing potential dispute between Canada and Denmark).

44. See Murphy, *supra* note 34, at 970 (describing Commission's process of handling UNCLOS claims). See generally GEORGE V. GALDORISI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY (1997) (writing about history of United States and UNCLOS).

CLOS.⁴⁵

A. *International Law Governing the Northwest Passage*

The following sections analyze the international law that governs any dispute over sovereignty of the Northwest Passage. Section 1 discusses straight baselines, specifically how they may be used to enclose sections of the Northwest Passage as Canadian internal waters. Section 2 discusses international law governing international straits and its interplay with straight baselines.

1. *Straight Baselines*

On September 10, 1985, the Canadian Secretary of State for External Affairs read a statement to the House of Commons in which he asserted Canadian sovereignty over the Northwest Passage and the Arctic Archipelago.⁴⁶ He claimed that Canada controlled the Passage as internal waters and stated that drawing straight baselines around the islands of the Arctic Archipelago effectively enclosed the waters as Canadian territory.⁴⁷ The Secretary supported these claims in international law by asserting that Canada's territorial sea under UNCLOS extended twelve miles from the Canadian coastal baselines.⁴⁸

The 1951 Anglo-Norwegian *Fisheries Case*,⁴⁹ decided by the

45. See generally GALDORISI & VIENNA, *supra* note 44 (discussing UNCLOS, in particular, UNCLOS and how it pertains to United States); Rothwell, *supra* note 23, 96-115 (examining ICJ, Antarctic Treaty, and UNCLOS throughout).

46. See Canada Statement Concerning Arctic Sovereignty, 24 I.L.M. 1723 (1985) (declaring that Northwest Passage and Arctic Islands were Canadian territory); see also Douglas M. Johnston, *The Northwest Passage Revisited*, 33 OCEAN DEV. & INT'L LAW 145, 148 (2002) (noting that Canada drew its straight baselines under Territorial Sea Graphical Co-ordinates (Area 7) Order (Privy Council 1985-2739, Sept. 10, 1985)).

47. See Canada Statement Concerning Arctic Sovereignty, *supra* note 46 (declaring that Northwest Passage and Arctic Islands would be enclosed by Canadian baselines); see also Johnston, *supra* note 46, at 148 (noting that Canadian baselines were legal and would enclose Northwest Passage).

48. See Canada Statement Concerning Arctic Sovereignty, *supra* note 46 (proclaiming Canadian straight baselines as means to exert Canadian sovereignty); see also Act to Amend the Territorial Sea and Fishing Zones Act, S.C. 1969-70, c.68, s.1243; Suzanne Lalonde, *Increased Traffic through Canadian Arctic Waters: Canada's State of Readiness*, 38 R.J.T. 49, 63 (2004) (stating that in response to voyage of *Manhattan*, Prime Minister Trudeau proclaimed extension of Canada's territorial waters from three to twelve miles).

49. See *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18) (examining and deciding dispute between United Kingdom and Norway over sovereignty of fishing wa-

ICJ, set out the requirements for a State to make use of straight baselines along its coast in order to enclose inlets, bays, harbors, and even offshore islands.⁵⁰ The Court analyzed the legality of the Norwegian system of baselines.⁵¹ The Norwegian baselines were drawn around its coast, enclosing inlets, fjords, bays, and the Norwegian *skjaergaard*—the mass of islands and rocks that border most of the Norwegian coastline.⁵² The ICJ ruled in favor of Norway and, as a result, created an expanding conception of what territory qualified as internal waters.⁵³ The straight baseline test set forth by the Court requires choosing points at land or low-water marks and connecting the marks by drawing straight lines between them.⁵⁴ In the Anglo-Norwegian *Fisheries Case*, the effect of using these baselines was to extend Norway's territorial sea to the outermost edges of the *skjaergaard*.⁵⁵ The Court thus rejected the United Kingdom's contention that this

ters surrounding Norwegian coastline in 1951). For more information, see Lalonde, *supra* note 48, 69-70 (discussing *Fisheries Case* and circumstances which led to its submission and resolution in front of ICJ).

50. See *Fisheries Case*, 1951 I.C.J. at 133 (articulating requirements for any State to establish straight baselines around its coast); see also Lalonde, *supra* note 48, 69-70 (describing *Fisheries Case* and requirements for establishing baselines); Tullio Scovazzi, *The Baseline of the Territorial Sea: The Practice of Arctic States*, in *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 69, 70 (2001) (analyzing Norway's establishment of baselines around its coast and subsequent ICJ case dealing with their legitimacy).

51. See *Fisheries Case*, 1951 I.C.J. at 143 (examining legality of Norwegian straight baseline system); see also Scovazzi, *supra* note 50, at 70-71 (stating that *Fisheries Case* was first case in which international court decided on legality of straight baseline system).

52. See *Fisheries Case*, 1951 I.C.J. at 127 (detailing how straight baselines were drawn); see also Scovazzi, *supra* note 50, at 71-72 (describing Norwegian coastline as made up of deep indentations (fjords), numerous islands, islets, rocks and reefs, some of which make up *skjaergaard*).

53. See *Fisheries Case*, 1951 I.C.J. at 129, 143 (detailing how Court decided that waters with baselines drawn by Norway were internal waters under international law); see also Scovazzi, *supra* note 50, at 71 (stating that ICJ decided that baselines created by 1935 Norwegian Decree were not contrary to international law).

54. See *Fisheries Case*, 1951 I.C.J. at 129-33 (stating that possessing land is what gives sovereign right to possess water and that clarifying land boundaries would appear to be pre-requisite to establishing right to possess water); see also Scovazzi, *supra* note 50, at 72 (discussing *Fisheries Case* and criteria for establishing baselines).

55. See *Fisheries Case*, 1951 I.C.J. at 127-32 (describing islands, fjords, and other features of *skjaergaard* which were enclosed by baselines); see also DAN P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 200 (1982) (detailing how from 1812 to 1948 Norway and its neighbors, particularly Denmark, had issued series of Royal Decrees which established limitations, later in form of baselines, which enclosed surrounding waters, particularly those utilized for fishing).

method could only be employed across bays.⁵⁶ After the Court upheld the legitimacy of these baselines, it went on to describe the requirements necessary to establish legal straight baselines around coastal regions, namely: (1) baselines must not depart to any appreciable extent from the general direction of the coastline; (2) the waters lying within the baselines must be closely linked to the coastal State's domain as to be considered internal waters; and (3) that the waters represent economic interests which are particular to the region and which have an importance evidenced by a long history of use.⁵⁷

This straight baseline test initially did not allow the right of passage to other States in the enclosed waters, no matter what the legal rights were prior to a State enclosing its waters using the baselines system.⁵⁸ This was an inequitable result, one which the 1958 Convention on the Territorial Sea and the Contiguous Zone ("1958 Convention")⁵⁹ sought to remedy by making the straight baseline test subject to the right of innocent passage if the waters were previously territorial waters or high seas.⁶⁰ Canada and several other States never became signatories to the

56. See *Fisheries Case*, 1951 I.C.J. at 129-33 (stating "there is no valid reason to draw [straight baselines] only across bays . . . and not also to draw them between islands, islets and rocks, across the sea separating them, even when such areas do not fall within the conception of a bay"); see also Lalonde, *supra* note 48, 69-70 (discussing U.K.'s assertions in *Fisheries Case*).

57. See *Fisheries Case*, 1951 I.C.J. at 133 (stating three factors that would be basis for establishing straight baselines); see also Lalonde, *supra* note 48, at 69-70 (describing reasons court gave for its decision, including three requirements for establishing baselines).

58. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 228 (stating that under customary international law applied by ICJ in *Fisheries Case*, there was no right of passage in waters enclosed by straight baselines); see also O'CONNELL, *supra* note 55, at 385-86 (asserting that access to sea at either end of landlocked waters does not allow passage through internal waters).

59. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force on Sept. 10, 1964) [hereinafter 1958 Convention]; see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 226 (explaining that 1958 Convention corrected this mistake by allowing for innocent passage even where waterways were subsequently enclosed by baselines).

60. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 228 (discussing importance right of innocent passage to international trade and shipping); see also 1958 Convention, *supra* note 59, art. 5(2). Article 5(2) states:

Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

See 1958 Convention, *supra* note 59, art. 5(2).

1958 Convention, however, leading some to believe that its limited ratification made it unlikely that the provision for innocent passage in newly enclosed waters ever became legally binding on all States.⁶¹

Following from the definition of an international strait found in the 1958 Convention, UNCLOS⁶² incorporated and codified the existing customary international law governing straight baselines, also including additional criteria for the drawing of baselines around archipelagic States.⁶³ The requirement for drawing baselines of this sort were virtually the same as that of coastlines of mainland States, except that it was to be applied to States made wholly of an archipelago, such as Indonesia.⁶⁴

In 1986 Canada drew straight baselines along its coast and around its Arctic Archipelago, in accordance with the *Fisheries Case* requirements.⁶⁵ To understand whether these baselines are legal, one must first analyze whether the baselines depart to a significant extent from the Canadian coastline, as is the first requirement under the test established by the ICJ in the *Fisheries Case*. Both the 1958 Convention and UNCLOS allow baselines to be drawn where the coastline is deeply indented or if there is

61. See PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 228-29 (stating that only twenty-one of sixty States which have employed straight baselines have become signatories to 1958 Convention); *see also* Lalonde, *supra* note 48, at 78 (noting that Canada never signed 1958 Convention).

62. See UNCLOS, *supra* note 24, arts. 34-36 (defining "international strait" and explaining what rights are affected in such straits); *see also* Lalonde, *supra* note 48, at 64 (discussing how UNCLOS adapted 1958 Convention's definition of "international strait" into its text).

63. See UNCLOS, *supra* note 24, arts. 7-8, and 47 (codifying existing international law and listing requirements for drawing baselines around archipelagic States); *see also* Lalonde, *supra* note 48, at 72 (describing how 1958 Convention and UNCLOS codified three requirements of *Fisheries Case* and these Convention's effects on drawing of baselines around Canadian Archipelago).

64. See UNCLOS, *supra* note 24, arts. 46(a), 47 (detailing how straight baselines could be drawn around coasts of States made up entirely of islands, also known as "archipelagic States"); *see also* BO JOHNSON THEUTENBERG, *THE EVOLUTION OF THE LAW OF THE SEA* (1984) (discussing evolution of international law of the sea, while analyzing in-depth UNCLOS in 1982).

65. See Territorial Sea Geographic Coordinates (Area 7) Order of 10 September 1985, *reprinted in* U.S. DEP'T OF DEF., *MARITIME CLAIMS REFERENCE MANUAL* 2-82 (1987) (detailing Canada's establishment of straight baselines around archipelago in its Arctic waters); *see also* Scovazzi, *supra* note 50, at 76 (stating that in 1985 Canada established straight baseline system of 139 segments, enclosing Canadian Arctic Archipelago, in response to voyage of *Polar Sea*).

a fringe of islands along the coast.⁶⁶ Additionally, when viewed as a whole, baselines should not depart from the general direction of the coastline.⁶⁷ One potential problem is that the Canadian Archipelago does not appear to conform to the Canadian coastline when viewed as a whole.⁶⁸ Several arguments have been made, however, that could neutralize this criticism: (1) that the Canadian coastline is so varied with indentations and peninsulas that no general direction of the coastline could be ascertained;⁶⁹ and (2) that the Canadian Arctic Archipelago is actually part of the Canadian coast and therefore baselines drawn between its islands by definition are drawn along the coastline.⁷⁰

The second factor to be addressed, established by the ICJ in the *Fisheries Case*, is whether the waters lying within the baselines are so closely linked to the coastal State's domain as to be considered internal waters.⁷¹ With respect to this requirement, the

66. See 1958 Convention, *supra* note 59, art. 4(1) (detailing how baselines may be drawn around coastline of coastal States); see also UNCLOS, *supra* note 24, art. 7(1) (reinforcing earlier 1958 Convention by detailing where baselines may be drawn around coasts of coastal States).

67. See *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 133 (Dec. 18) (describing limitations on coastal baselines); see also Lalonde, *supra* note 48, at 69 (stating that while State must be allowed to adapt its delimitation to its needs, drawing of baselines must not depart to any appreciable extent from general direction of coast).

68. See Lalonde, *supra* note 48, at 71 (stating that although coastline is indented, archipelago extends almost 1,000 miles north from mainland and northern group of islands is separated by a wide body of water); see also Johnston, *supra* note 46, at 148 (discussing how some experts question analogy between *Fisheries Case* and Canadian Archipelago, due to deeply indented coastline of northern Norway, making baselines easier to draw to determine Norway's internal waters).

69. See Lalonde, *supra* note 48, at 72 (stating that no general direction could be ascertained with any accuracy due to peninsulas and indentations); see also Mark Killas, *The Legality of Canada's Claims to the Waters of its Arctic Archipelago*, 19 OTTAWA L. REV. 95, 111 (1987) (discussing geographic features of Canadian Arctic Archipelago).

70. See Lalonde, *supra* note 48, at 72-73 (proposing that because term "coast" is inherently ambiguous, it could be argued that seaward coasts of Arctic Archipelagic islands was effectively Canadian coastline); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 162-63 (discussing straight baselines around Canadian Arctic Archipelago and how baselines might be upheld based on fact that baselines follow northerly direction of Canadian coastline and also that there is close link between land and sea in Canadian Arctic Archipelago); Donat Pharand, *Sovereignty and the Canadian North*, in REPORT OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA 141, 152 (1985) (analyzing sovereignty issues which Canada faces in its Arctic territory).

71. See *Fisheries Case* 1951 I.C.J. at 133 (explaining second factor that must be met in order to establish strait baselines). See generally Lalonde, *supra* note 48, at 72 (discussing analyzing *Fisheries Case*).

waters surrounding the Canadian coast are unique because they are frozen for most of each year.⁷² Some experts have also argued for a ratio of sea to land test, whereby the ratio of the land present within an archipelago is compared with the total land area in that same region.⁷³ Under this test, Canada has a higher ratio of land to sea in its archipelago than is present in the Norwegian *skjaergaard*.⁷⁴

The third and final factor in this test is whether there are sufficient economic interests, particular to the region, which are evidenced by a long history of use.⁷⁵ Over 20,000 Canadian Inuit currently live in northern Canada, including the Arctic Archipelago.⁷⁶ They have been living in this region since pre-historic times and are almost wholly dependent upon hunting and fishing in these areas for their food, clothing, and overall survival.⁷⁷

72. See Lalonde, *supra* note 48, at 72-73 (stating that because waters around archipelago are frozen for most of year, they are more like land than water); see also John Byrne, *Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago*, 28 U. TORONTO FAC. L. REV. 1, 4-5 (1970) (describing climate in region of Arctic Archipelago); Ivan L. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L.J. 200, 223 (1963) (detailing unique climate in Arctic region, which might affect Canadian claims).

73. See Lalonde, *supra* note 48, at 73 (arguing that this test would prevent States from claiming sovereignty over vast expanses of ocean); see also Killas, *supra* note 69, at 119 (arguing that sea-to-land ratio test is most appropriate for interpreting Article 7(3) of UNCLOS).

74. See Lalonde, *supra* note 48, at 73 (describing how this ratio test would affect Canadian claims in its Arctic Archipelago); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 163 (stating that sea-to-land ratio of Canada is 0.822 to 1, while that of Norwegian coast is only 3.5 to 1).

75. See *Fisheries Case*, 1951 I.C.J. at 133 (describing Court's third factor, which is whether there are economic interests as result of long history of use); see also UNCLOS, *supra* note 24, art. 5 (further codifying test first described in *Fisheries Case* and later codified in 1958 Convention); 1958 Convention, *supra* note 59, arts. 3-13 (codifying decision and in particular third factor from *Fisheries Case*).

76. See PHARAND, INTERNATIONAL STRAITS OF THE WORLD, *supra* note 20, at 50 (discussing number and character of Inuit communities in Canadian territory); see also *Report: Inuit Land Use and Occupancy Project*, 3 CAN. GOV. CAT. NO. R2-46 (1976) (detailing populations of native population in Canada).

77. See Donald R. Rothwell & Christopher C. Joyner, *The Polar Oceans and the Law of the Sea*, in THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION 19 (2001) (describing how Inuit people in Alaska, Northern Canada, and Greenland developed culture dependent on exploitation of animals found on and under sea ice); see also Scovazzi, *supra* note 50, at 78 (stating that from "time immemorial" Inuit have used and occupied ice as they have done so with land); David VanderZwaag & Donat Pharand, *Inuit and the Ice: Implications for the Canadian Arctic Water*, 21 CAN. Y.B. INT'L L. 53, 64-70 (1988) (discussing history of Inuit population in northern Canada and its surrounding waters).

The Inuit's use is very similar to that of the Norwegian fishermen in the *Fisheries Case*, and could satisfy the third requirement for the baselines test.⁷⁸

2. International Straits

Even if the Canadian baselines were found to be legal, this would not settle the issue of Canadian sovereignty over the Northwest Passage. This is because if, as described below, the Northwest Passage was an international strait prior to the establishment of the baselines, a right to innocent passage for the international community would still exist.⁷⁹ If there were no such right to innocent passage, however, the establishment of the baselines would effectively create a bar on innocent passage and Canada would thus be able to regulate all travel within the Northwest Passage.⁸⁰

For this reason, the legal analysis that may be most important to the outcome of the Canadian claims is whether they constitute international straits under existing international law.⁸¹ The significance of this determination is that an international strait is considered international waters, whereby foreign vessels

78. See *Fisheries Case*, 1951 I.C.J. at 127-28 (discussing how Norwegian fishermen had for centuries survived to great extent off of fish they caught in Norwegian coastal waters). But see Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 160 (2005) (pointing out that longstanding local custom such as Norway's then-local "straight baseline" method can trump established customary international law, particularly when other States fail to object to local practice, potentially complicating any assumption that "straight baseline" is fail-safe rule of customary international law).

79. See Lalonde, *supra* note 48, at 74 (discussing how innocent passage survives establishment of straight baselines); see also N.C. Howson, *Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage*, 26 COLUM. J. TRANSNAT'L L. 337, 360 (1988) (stating crucial issue is status of Northwest Passage under international law prior to their enclosure, particularly whether there is right of innocent passage before establishment of baselines).

80. See Lalonde, *supra* note 48, at 74 (stating that if, prior to 1985, no right of innocent passage existed, none would after establishment of baselines); see also Howson, *supra* note 79, at 356-62 (highlighting potential inconsistencies that could trip up Canada's bid for "exclusive sovereignty," whereby if Canada has claimed Northwest Passage belongs to them based on theories other than internal waters, that theory may not hold up).

81. See Rothwell, *supra* note 23, at 351-57 (reasoning that because of developments in international law, such as expansion of territorial sea regime, navigation regime of international straits would likely be applied to any determination of sovereignty over Northwest Passage); see also Johnston, *supra* note 46, at 148-49 (providing analysis of whether Northwest Passage is international strait and detailing possible factors in any such analysis).

have a right of innocent passage, with no need of permission or supervision by any neighboring coastal State.⁸² In contrast, internal waters are subject to complete sovereignty by the coastal State, and other States must abide by their regulations within the territorial waters.⁸³ UNCLOS addressed the issue surrounding international straits by defining the scope of straits where the right of the international community to openly navigate straits would apply.⁸⁴ UNCLOS expanded the countries' territorial seas, but in the process, created a safe passage for foreign vessels to use international straits.⁸⁵

b. International Law Governing International Straits

The *Corfu Channel Case*, decided by the ICJ in 1949, forms the basis for the definition of an "international strait" in the context of customary international law.⁸⁶ The ICJ upheld the right of innocent passage for the U.K. Navy, based upon the meeting of geographic components of the Strait of Corfu and the international navigational functionality of the strait.⁸⁷ In so doing, the ICJ created two necessary criteria governing the existence of

82. See *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 30-49 (Apr. 9) (defining innocent passage and associated rights); see also Rothwell, *supra* note 23, at 351-57 (describing rights associated with international straits, such as that of innocent passage, which would prove most beneficial to States wishing to transit Northwest Passage).

83. See UNCLOS, *supra* note 24, art. 8 (defining internal waters as waters which are landward of baselines, which form boundaries for States' territorial seas); see also Rothwell, *supra* note 23, at 351-57 (contrasting legal characteristics of international strait with that of internal waterway).

84. See UNCLOS, *supra* note 24, arts. 34-45 (declaring that "international straits" were water routes where shipping vessels or other vessels had right of innocent passage); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 215-16 (discussing legal status of Northwest Passage and particularly addressing definition of "international straits" provided by UNCLOS).

85. See UNCLOS, *supra* note 24, arts. 34-45 (declaring that "international straits" were water routes where shipping vessels or other vessels had right of innocent passage); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 215-16 (discussing legal status of Northwest Passage and particularly addressing definition of "international straits" provided by UNCLOS).

86. See *Corfu Channel Case*, 1949 I.C.J. at 30-49 (defining what qualified as "international strait," as well as qualities straits possessed); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-19 (analyzing international law governing definition of international straits, including UNCLOS, 1958 Convention, and 1949 *Corfu Channel Case*).

87. See *Corfu Channel Case*, 1949 I.C.J. at 30-49 (describing reasons for Court's determination that United Kingdom had right of innocent passage through Corfu Channel); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-19 (discussing ICJ's decision in *Corfu Channel Case*).

international straits: (1) geography, meaning that the strait connected either two areas of high seas or two EEZs; and (2) functionality, the usage or traffic traveling across the strait's waters.⁸⁸

The Northwest Passage is a series of straits connecting the Atlantic and Pacific Oceans made up of a series of routes between islands.⁸⁹ This connection between the two oceans raises the question of whether the Northwest Passage can be considered a single strait for the purpose of analysis under international law.⁹⁰ If the Passage is not considered a single strait due to the vast number of islands within the Arctic Archipelago, experts believe it will ease Canada's ability to assert that the Passage is considered to be internal waters.⁹¹

Many commentators find little doubt that the Northwest Passage satisfies the geographic element for an international strait due to the several routes of the passage which connect oceans and EEZs.⁹² With the first element of an international strait largely assumed, the real question relates to interpreting the *Corfu Channel Case* and its method of determining naviga-

88. See *Corfu Channel Case*, 1949 I.C.J. at 4 (holding that these are two criteria that must be examined when determining whether strait is considered "international strait"); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-21 (discussing how ICJ established criteria for straits to be international straits).

89. See Center for Oceans Law and Policy, *International Energy Policy*, in THE ARCTIC AND THE LAW OF THE SEA 287-88 (Myron H. Nordquist, John Norton Moore, and Alexander S. Skaridov eds., 2005) (describing Northwest Passage as series of straits); see also Rothwell, *supra* note 23, at 352-53 (describing and detailing particular geography of Northwest Passage, noting that this Passage is, in reality, series of connected strait passages).

90. See Rothwell, *supra* note 23, at 351-57 (stating that although geography of Northwest Passage presents some novel conditions, because it connects areas of high seas or EEZs it should simply be looked at as whole strait for any legal analysis); see also Johnston, *supra* note 46, at 148-49 (questioning whether Northwest Passage would be viewed as single strait or as series of straits for purposes of legal analysis).

91. See Rothwell, *supra* note 23, at 351-57 (stating that should Northwest Passage be found to not be one single passage, analysis of whether it is geographically considered international strait might favor Canadian interests); see also Johnston, *supra* note 46, at 148-49 (examining whether Northwest Passage is considered international strait and what determinations would be crucial to such determination).

92. See Rothwell, *supra* note 23, at 353-54 (predicting that despite little to no precedent of whether such series of straits could be determined to be only one strait for purposes of analyzing whether this passage is considered international strait, more important characteristics are whether this route connects areas of high seas or EEZs); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 224. Some arguments have been made that, because of thick layer of ice that covers the Passage for majority of each year, no actual link between the two oceans exists.

tional functionality.⁹³ In the *Corfu Channel Case*, the United Kingdom sent its Navy through the Corfu Channel, running from the Ionian Sea to the Adriatic Sea between Corfu and Albania, without permission from the Albanian government.⁹⁴ The United Kingdom argued that the geographic element was the deciding factor in determining whether a strait qualifies as international and that functionality should have little bearing on the Court's determination.⁹⁵ On the other hand, Albania argued that the functionality of the Channel should be the deciding factor, stating that the Corfu Channel did not have vast importance for international navigation purposes and did not receive enough volume of ship traffic to warrant being considered an international strait.⁹⁶ The ICJ determined that the Corfu Channel was an international strait, stating that the most important factors in determining an international strait are its geography in connecting separate oceans and whether it is used internationally for navigation purposes.⁹⁷ Moreover, the ICJ determined that the presence of other available routes does not affect the legal status of a strait's categorization, so long as the strait has been used by international maritime vessels.⁹⁸

93. See *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 at 30-49 (Apr. 9) (describing ICJ's determination that Corfu Channel was international strait, in particular that this channel connected separate oceans and was used for international navigation); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 224-25 (discussing *Corfu Channel Case*, in particular that Court established both geographic and functional requirements for any strait to be denoted "international strait").

94. See *Corfu Channel Case*, 1949 I.C.J. at 4-30 (describing circumstances that led to this matter coming before I.C.J.); see also GEORGE ELIAN, THE INTERNATIONAL COURT OF JUSTICE 98 (1971) (detailing events which led up to Albania and England's dispute over whether Corfu Channel qualified as international strait).

95. See *Corfu Channel Case*, 1949 I.C.J. at 4-49 (detailing U.K.'s arguments in front of ICJ). For more information on the *Corfu Channel Case*, see ELIAN, *supra* note 94, at 98 (discussing important decisions and advisory opinions by ICJ, including the *Corfu Channel Case*).

96. See *Corfu Channel Case*, 1949 I.C.J. at 4-49 (detailing Albania's arguments in front of ICJ). For more information on the *Corfu Channel Case*, see PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 218-21 (discussing *Corfu Channel Case* with regard to establishment of criteria for declaring waterways as international straits).

97. See *Corfu Channel Case*, 1949 I.C.J. at 28 (stating that two most crucial factors are straits geographical characteristics as connecting two parts of high seas and also whether it is being used for international navigation); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 217-26 (discussing *Corfu Channel Case*, particularly geographic requirements established by ICJ, that strait connect high seas and contain international maritime traffic).

98. See *Corfu Channel Case*, 1949 I.C.J. at 28 (explaining how existence of other routes does not affect its status as international strait so long as it has been useful route).

Some experts assert that, because the ICJ in the *Corfu Channel Case* focused mainly on the geographic characteristics of a strait, this should be the primary inquiry when making any similar examination.⁹⁹ This would relegate the functionality of such a strait to merely a subsidiary inquiry.¹⁰⁰ Nevertheless, functionality does remain an element in classifying the legal status of a strait.¹⁰¹

Though the *Corfu Channel Case* defined the basic criteria of what constitutes an "international strait," the ICJ did not fully settle all questions regarding travel through international straits.¹⁰² The 1958 Convention codified a great deal of existing customary international law, including the ICJ's ruling in the *Corfu Channel Case* in Article 14.¹⁰³ The Convention defines the right of innocent passage through an international strait in foreign territorial waters as allowing ships to legally pass through

for international maritime traffic). For more information on the *Corfu Channel Case*, see ELIAN, *supra* note 94, at 98-100 (discussing *Corfu Channel Case*, particularly its importance as foundational case for ICJ).

99. See Rothwell, *supra* note 23, at 353-54 (describing how ICJ in *Corfu Channel Case* emphasized geographic qualities of that strait, making level of maritime navigation only subsidiary); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-21 (asserting that due to ICJ's decision in *Corfu Channel Case*, geographic considerations are far more important than any other considerations in determining whether one strait is "international strait").

100. See ELIAN, *supra* note 94, at 98-100 (detailing decision in *Corfu Channel Case*, particularly how ICJ based its decision that Albanian People's Republic could not regulate innocent passage of warships through that strait in large part on geographic position of Corfu Channel); see also Rothwell, *supra* note 23, at 353-54 (describing how ICJ emphasized geographic qualities of this strait, making level of maritime navigation subsidiary).

101. See *Corfu Channel Case*, 1949 I.C.J. at 28 (holding that while any strait's geographical situation is of utmost importance, it is also necessary that any strait be useful route for international maritime traffic); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 217-23 (explaining that UNCLOS provided different categories of international straits, but ambiguity surrounding functionality of Northwest Passage will be determinative as to whether it is declared international strait).

102. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-21 (describing that Corfu Channel did not fully address amount of maritime traffic necessary to meet functionality requirement for strait to be determined to be "international strait"); see also Rothwell, *supra* note 23, at 353-54 (explaining how ICJ in *Corfu Channel Case* did not fully address all considerations with regard to international straits, such as amount of maritime traffic necessary to meet functionality requirement).

103. See 1958 Convention, *supra* note 59, art. 12 (detailing factors necessary for strait to be international strait under international law); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 832-34 (2006) (discussing 1958 Convention and while some items were codified, ambiguities or Convention's silence left items such as limits on high seas undefined).

seas without encroaching on the internal waters of others.¹⁰⁴ Pursuant to the Convention, the State that controls the territorial sea in which the strait is located, suspend passage through the strait by foreign ships under any circumstances.¹⁰⁵

Despite the customary international law codified in the 1958 Convention, there still remained unsettled issues—the Six-Day War in the Middle East in 1967 for example, began in large part due to Egypt's closing of the Strait of Tiran in the Gulf of Aqaba.¹⁰⁶ The League of Nations' mandate following World War I designated this strait as an international strait, with rights of innocent passage.¹⁰⁷ This conflict served as a major signal that further codification and clarification was necessary.

Further codification came in the form of UNCLOS,¹⁰⁸ which extended the amount of water countries could claim as territorial sea to twelve nautical miles.¹⁰⁹ This revision resulted

104. See 1958 Convention, *supra* note 59, art. 14 (defining right of innocent passage as allowing transit for ships through foreign waters without trespassing into State's sovereign territory); see also Oxman, *supra* note 102, at 832-34 (assessing International Law Commission's efforts to codify customary international law, with convention's such as 1958 Geneva Convention).

105. See 1958 Convention, *supra* note 59, art. 16 (stating that although States may prevent non-innocent passage and although States may prevent passage if essential for its own security, State may not suspend innocent passage of foreign ships between one part of high seas and another); see also Oxman, *supra* note 102, at 832-37 (addressing evolution of territorial sovereignty over oceans through evolution of UNCLOS).

106. See Statement to the General Assembly by Foreign Minister Meir, Mar. 1, 1957 (declaring that Israel would consider closure of Strait of Tiran as *casus belli*, or act of war, as Israel withdrew from Sinai and Gaza in 1957); see also *Egypt Closes Gulf Of Aqaba To Israel Ships: Defiant move by Nasser raises Middle East tension*, LONDON TIMES, May 23, 1967, at A1 (describing that on May 22, 1967, President Nasser of Egypt announced closure of Strait of Tiran, vital shipping route for Israel).

107. See *Egypt Closes Gulf Of Aqaba To Israel Ships*, *supra* note 106 (detailing Nasser's announcement of closure of Strait of Tiran, vital Israeli shipping route, on May 22, 1967). For more information, see *Aide-memoire from Egypt to the United States regarding Passage through the Straits of Tiran*, Jan. 28, 1950, Israel Ministry of Foreign Affairs: Foreign Relations, Historical Documents: 1947-74, available at <http://www.mfa.gov.il/MFA/>.

108. See UNCLOS, *supra* note 24, arts. 34-45 (codifying existing customary international law and previous conventions with regards to international straits); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 216-17 (detailing how UNCLOS was another codification of international law, particularly with regard to international straits, following 1958 Convention and previous customary international law).

109. See UNCLOS, *supra* note 24, art. 3 (stating that coastal States had right to demarcate territorial sea off its shores for up to twelve nautical miles from its coast or coastal baselines); see also Rothwell, *supra* note 23, at 350-51 (stating that Article 3 of UNCLOS extended right of coastal States to demarcate territorial sea off its shores for up to twelve nautical miles from its coast or coastal baselines).

in the enclosure of some international straits, making it necessary to provide the international community with “transit passage” through newly-created territorial seas.¹¹⁰ UNCLOS allows international vessels to freely navigate international straits now enclosed within territorial seas if the strait links oceans or EEZs.¹¹¹ Despite the new creation of “transit passage” and the detailed designation of what rights of passage ships had through straits in territorial seas, UNCLOS failed to completely define what constituted an international strait, and which specific straits used for international navigation carried the rights of transit passage.¹¹²

d. The Canadian Straits

The determination of whether the Northwest Passage is an “international strait” hinges on the number and character of transits necessary in order to meet the functionality element of the test laid out in the *Corfu Channel Case*.¹¹³ Indeed, there is debate over whether a single transit will satisfy this element.¹¹⁴ The *Corfu Channel Case* does not set a level of actual use that is

110. See UNCLOS, *supra* note 24, art. 3 (describing how right of transit passage would allow vessels to traverse through territorial waters of foreign States freely, so long as there was right of transit passage prior to enclosure of as territorial seas); see also Rothwell, *supra* note 23, at 350-51 (examining effect of transit passage and how this right would affect Northwest Passage if it were to be declared international strait).

111. See UNCLOS, *supra* note 24, arts. 37, 38 (creating right of transit passage, whereby vessels which previously would enjoy innocent passage on international strait would now enjoy freedom of navigation between one part of high seas, or one EEZ, and another). See generally THEUTENBERG, *supra* note 64, at 11 (discussing UNCLOS and the rights of transit passage to all shipping vessels and aircraft).

112. See UNCLOS, *supra* note 24, arts. 34-44 (failing to describe elements of international straits, despite fully defining transit passage and legal status of straits used for international navigation); see also Rothwell, *supra* note 23, at 368-69 (describing how failure of UNCLOS to specify or even hint at some required amount of maritime traffic necessary to meet functionality requirement for international straits under this test first established in *Corfu Channel Case* left large amounts of ambiguity in international law for any such analysis).

113. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 224-25 (stating that geographic criterion would assuredly be met, but casting doubt about whether functional requirement would be met); see also *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 28-29 (Apr. 9) (describing functionality prong of this test for straits should be legally-considered “international strait”).

114. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 224-25 (asserting that it would require more than one single transit, even more than sixteen crossings by foreign vessels to satisfy functionality requirement); see also *Corfu Channel Case*, 1949 I.C.J. at 28-29 (failing to specify some actual number of transits that would be necessary to satisfy functionality prong).

required in order to satisfy the functionality element, as there is very little case law that addresses this issue.¹¹⁵ Despite these problems, to determine whether Canada has sovereignty over the Passage it is very important to determine whether the Northwest Passage is an international strait.¹¹⁶

Since 1903, when the first transit of the Northwest Passage was made, there have been less than fifty completed transits.¹¹⁷ Of these transits, only sixteen were made by foreign vessels and few were for commercial use.¹¹⁸ The level of traffic present in the *Corfu Channel Case* was a great deal more than is present in the Northwest Passage, raising the question of whether such infrequent use could meet the functionality requirement for an international strait.¹¹⁹ The functionality requirement laid out in

115. See Pharand, *The Northwest Passage in International Law*, *supra* note 116, at 107 (arguing that ICJ required not only that strait in question must functionally be used as such, but also that volume of traffic was important, as strait in question must be useful for international maritime traffic, and suggesting that said sufficiency of use is determined by amount of ships using strait and number of States sending vessels through strait in question); see also ELIAN, *supra* note 94, at 98-99 (describing how ICJ ruled mainly based on geographic position of Corfu Channel).

116. See PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 224-25 (arguing that functional criterion of *Corfu Channel Case* is not met in Northwest Passage situation due to there only being forty-five completed transits of Northwest Passage in eighty years, twenty-nine of which were by Canadian vessels); see also Donat Pharand, *The Northwest Passage in International Law*, 17 CAN. Y.B. INT'L L. 99, 107 (1979) (discussing importance of whether Northwest Passage is considered international strait).

117. See Pharand, *The Northwest Passage in International Law*, *supra* note 116, at 110-12 (discussing some actual transits that have occurred through Northwest Passage); see also PHARAND, *INTERNATIONAL STRAITS OF THE WORLD*, *supra* note 20, at 110-11 (addressing number of transits through Northwest Passage and circumstances surrounding many of these transits, such as transit of *Manhattan*).

118. See Pharand, *The Northwest Passage in International Law*, *supra* note 116, at 110-12 (discussing actual transits that have occurred through waters of Northwest Passage). See generally PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 224-25 (describing number of transits through Northwest Passage and circumstances surrounding many of these transits, such as *Manhattan's* transit).

119. Over 2880 ships traveled the Corfu Channel in 1936-1937, whereas only forty-five ships traveled the Northwest Passage between 1903 and 1985. See *Corfu Channel Case*, 1949 I.C.J. at 28 (detailing amount of ship traffic on Corfu Channel during 1936-37); see also Pharand, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 224-25 (discussing extremely small number of transits of Northwest Passage during past eighty-two year span). Some interpretations of the *Corfu Channel Case* bolsters the Canadian claim that the Northwest Passage is not an international strait due to the low number of record transits by other States, particularly the United States. See generally Krauss et al., *supra* note 5 (highlighting potential benefits of navigable Arctic waters, but noting how transits of Northwest Passage have been infrequent at best, and how legal claims and disputes there are hard to predict or anticipate).

the *Corfu Channel Case* is so ambiguous that commentators believe it may be hard to determine what the requisite level of travel is or even if it is required.¹²⁰ Compounding this ambiguity is that the amount of transits required to meet the functional element is fewer for Polar Regions where weather conditions restrict travel through the channel.¹²¹ Other commentators argue that due to the geographic nature of the Arctic Archipelago, the Arctic melt may currently be increasing iceberg flow in the Northwest Passage, making it more difficult for vessels to navigate in the short term, leading to a decrease in transits, thereby further reducing the functional utility of the Northwest Passage.¹²²

The ICJ, in the *Corfu Channel Case*, makes it clear that the strait need not be a necessary route for international navigation, but that there must have been a history of useful passage, not just the mere possibility of this use. Several delegates from UNCLOS believe that functionality requires actual use, not potential use.¹²³ These delegates theorize that any use at all is sufficient to satisfy the functionality prong of the international strait test, because attempts at the conference to insert words such as “customarily,” “normally,” or “traditionally” into the text on in-

120. See generally Krauss et al., *supra* note 5 (discussing Canadian patrolling of remote Arctic regions so as to establish a strong posture in future talks over the Northwest passage); see also *Corfu Channel Case*, 1949 I.C.J. at 29 (listing number of transits and history of transits made through Corfu Channel, and assessing significance of such transits).

121. See *Legal Status of Eastern Greenland Case (Nor. v. Den.)*, 1933 P.C.I.J. (Ser. A/B) No. 53 (Apr. 5) (analyzing functionality in Arctic region); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 217-30 (discussing functionality requirement for international straits established in *Corfu Channel Case*).

122. See HASSOL ET AL., *supra* note 5, at 84-85 (noting studies by Canadian Ice Service which indicate that despite overall decreases in amounts of sea ice since 1968, there is higher year-to-year variability of amounts of sea ice); see also Rob Huebert, *Climate Change and Canadian Sovereignty in the Northwest Passage*, 2 CAN. J. OF POL'Y RES. 86, 91 (2001) (stating that increases in ice flows in waters of Northwest Passage could hinder any travel on these waterways).

123. See Satya N. Nandan & D. H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982*, 60 BRIT. Y.B. INT'L L. 159, 167-69 (1989) (discussing their view that potential use of waterways is insufficient, and that there must be actual use, although it does not have to reach any predetermined level); see also Rothwell, *supra* note 23, at 354-55 (describing his own theory alongside theories of S. N. Nandan, D. H. Anderson, both delegates at UNCLOS, and Tommy Koh, President of UNCLOS Commission from 1981-1982, that mere potential use of straits is insufficient for straits to meet some functionality requirement).

international straits were all rejected.¹²⁴ Tommy Koh, President of UNCLOS, agrees, and further argues that because UNCLOS provisions dealing with transit passage in international straits adopt the same interpretation of straits as used in the 1958 Convention, to which the United States adheres, only a functional requirement must be met.¹²⁵

Based on commentary and analysis of the *Corfu Channel Case*, it seems that the number of ships, the number of different countries using the strait, and the totality of ships that travel through the strait in general are the most important concerns when considering the element of functionality.¹²⁶ It is possible that usage by naval vessels could be relevant to shaping the Court's opinion as well.¹²⁷ To be sure, the possibility that the ICJ would ever hear the Northwest Passage dispute seems unlikely, given the ambiguity over the required number of transits that are necessary to satisfy the element of functionality.¹²⁸ The

124. See Nandan & Anderson, *supra* note 123, at 167-69 (discussing basis for their theories from their experience as delegates at UNCLOS); see also Rothwell, *supra* note 23, at 354-55 (describing theories of these experts and underlying facts that they use to support these theories).

125. See *United States Adherence to the Law of the Sea Convention: A Compelling National Interest: Hearing Before the House Comm. on Int'l Relations*, 108th Cong. (2004) (Prepared Testimony of John N. Moore) (describing U.S. adoption of 1958 Convention by advice and consent of U.S. Senate); see also Tommy B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagos under the 1982 Convention on the Law of the Sea*, 29 *MALAYA L. REV.* 163, 178-79 (1987) (arguing that because UNCLOS provisions dealing with transit passage in international straits adopt interpretations of straits as used in 1958 Geneva Convention, to which United States adheres, only some functional requirement must be met); PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 217-30 (discussing possibility that some functionality requirement is only prong that is of any real concern).

126. See generally *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 28-29 (Apr. 9) (describing that straits should be considered international straits with right of innocent passage if deemed useful routes for international maritime traffic); PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 219 (discussing *Corfu Channel Case*, specifically Court's analysis of functionality requirement and level of use required to satisfy this prong).

127. See generally *Corfu Channel Case*, 1949 I.C.J. at 28 (noting in Court's analysis of functionality requirement, in particular any transits actually made through channel, that British Navy regularly used Corfu Channel for eighty years, and that this channel was also used by navies of other States); see also PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 219 (discussing how ICJ took note that British Navy had made transits through Corfu Channel in its decision in *Corfu Channel Case*).

128. See generally *Corfu Channel Case*, 1949 I.C.J. at 28 (failing to specify any actual number of transits necessary to meet functionality requirement in future decisions of whether straits or water passages would be considered international straits); see also PHARAND, *CANADA'S ARCTIC WATERS*, *supra* note 20, at 215-43 (discussing state of functionality requirement, its ambiguity, and reasons that predicting any court's decision on this prong is so difficult).

United States' position is that the geographic element is clearly met due to the fact that the Northwest Passage joins two international seas and that the functionality element is met by the fact that the passage has been used by a small number of international vessels.¹²⁹

3. Other Claims

Canada's most famous claim to the Northwest Passage came in 1909, when Canadian Senator Pascal Poirer laid claim to the Canadian Arctic territories under the Sector Theory.¹³⁰ This theory has never held much weight under international law,¹³¹ and stronger claims of sovereignty in these polar areas have been primarily based on traditional grounds.¹³² In this vein, Canada

129. See Huebert, *supra* note 122, at 90 (discussing U.S. and European positions that Northwest Passage is "international strait" according to tests set forth in *Corfu Channel Case*, in particular U.S. assertions that any functionality requirement is met by even some relatively small number of transits by international vessels that has taken place so far); see also PHARAND, INTERNATIONAL STRAITS OF THE WORLD, *supra* note 20, at 101-18 (listing transits made by international vessels throughout history). The European Community also voiced their objections, with the United Kingdom as the communiqué, protesting the straight baseline test, thereby challenging Canadian sovereignty. See Huebert, *supra* note 122, at 91 (discussing United Kingdom's issuance of diplomatic protest against Canada for its efforts in 1985 to enclose Arctic waters to its North by using straight baselines).

130. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 10 (analyzing Canada's declaration, formally, that Canada had sovereignty to all territory located north of major Canadian land mass, extending to North Pole); see also PHARAND, INTERNATIONAL STRAITS OF THE WORLD, *supra* note 20, at 8-11 (discussing Senator Poirier's speech in which he advocated for some Canadian statement of sovereignty over all lands to north of Canada, extending up to North Pole). The Sector Theory is a theory, around since at least the fifteenth century, by which Canada first claimed all territory from mainland Canada to the North Pole, running northwards, between the 141st meridian of longitude to the series of straits between Ellesmere Island and Greenland. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 4-11 (analyzing joint address by House of Commons and Senate of Canada, adopting joint address by British Parliament, asking for transfer of all Arctic lands and island lying in covered territory). Canada later re-iterated this claim and specified its easternmost boundary more concretely as lying at the 60th meridian of longitude. See *id.* at 8-11 (examining Sector Theory, particularly Senator Pascal Poirier's motion in 1907).

131. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 26-27, 42-43, 78-79 (examining, and denouncing, boundary treaties, theories of contiguity, and customary international law as basis for Canada's claims under Sector theory); see also U.S. DEP'T. OF STATE, *Coordinate Positions for the Plot of U.S.-Russia Convention of 1867*, 14 INT'L BOUNDARY STUDY 3 (Oct. 1, 1965) (stating United States did not support any "sector theory" claims in polar regions).

132. See Rothwell, *supra* note 23, at 334-38 (discussing historic claims of sovereignty over Northwest Passage); see also Huebert, *supra* note 122, at 88-89 (addressing

views its control of the Northwest Passage, and the Arctic Archipelago, as a clear historical title stemming from the 1880 transfer of territorial rights from Great Britain to Canada.¹³³ These claims to the Northwest Passage are based on the acts of discovery and travel by the early European explorers from the late fifteenth Century to the mid nineteenth Century.¹³⁴ In addition to the transfer from Great Britain, Canada also has a claim based on the use of the region by Canada's Inuit population which has inhabited much of its northern territory since before the colonization of North America.¹³⁵ Acts of discovery and historical use can be a valid basis for a State to claim sovereignty over territory. Two such grounds are the theories of Historic Waters, Historic Consolidation of Title, and the Doctrine of *uti possidetis*. This Section discusses these theories and analyzes the existing international law governing similar disputes.

a. Historic Internal Waters

Historical claims stem from the principle of "first in time, first in right," submitting either priority or duration as the claim's basis.¹³⁶ While historical, priority does not necessarily go back to the first discoverer or inhabitant documented, but rather to the first in priority with regards to the respective claimants in

Canadian claims of sovereignty which are mainly rooted in history and how this is partly because this is likely Canada's strongest argument).

133. See Huebert, *supra* note 122, at 88-89 (discussing one of few statements by Canadian Government regarding sovereignty in Arctic region in which officials in Legal Affairs Bureau espoused Canadian view that, since 1880 deed transfer from England to Canada, Arctic Archipelago and its waters have been Canada's internal waters); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 114 (stating that in 1880, Great Britain transferred all British territory in North America to Canada and discussing subsequent expeditions Canada sent into Arctic waters to its north).

134. See Huebert, *supra* note 122, at 88-89 (discussing history of Canadian Arctic archipelago); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 113-14 (providing instructions given to British explorers by Great Britain, to discover passages between Atlantic and Pacific Oceans, and describing some British explorers, from Martin Frobisher in 1576 to Franklin in 1859).

135. See Perry, *supra* note 25, at 673-77 (stating that evidence indicates that nomadic Inuit have been using these Arctic waters since pre-historic time); see also Lalonde, *supra* note 48, at 66 (asserting that Canadian Inuit have occupied and used this land and ice in northern Canada since "time immemorial").

136. See Andrew Burghardt, *The Bases of Territorial Claims*, 63 *GEOGRAPHICAL REV.* 225, 230 (1973) (stating that all historical claims are based on either priority or duration, priority meaning simply being their first, and also discussing different claims of priority throughout history); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 98 (asserting that historic title must be based on long usage).

the contemporaneous dispute.¹³⁷ The fact that the agrarian population of a State has lived in a territory for centuries is a very strong argument that the State should have sovereignty over the territory in question.¹³⁸ Unlike with the theory of Consolidation of Title, a claim under the theory of Historic Internal Waters does not require a sovereign to possess the land at the time of the claim.¹³⁹

The Anglo-Norwegian *Fisheries Case* defined historic waters as waters which are treated as internal waters, but are only treated this way due to the existence of a historic title.¹⁴⁰ The U.S. Supreme Court went further in *United States v. Alaska*, where it laid out several criteria that must be met in order for a historic internal waters claim to be successful under international law.¹⁴¹ The Court stated: (1) a State must exercise authority over the area in question; (2) the authority must be exercised continuously; and (3) other States must acquiesce to this exercise of authority.¹⁴² Canada's argument for sovereignty under this theory starts with its claims of control over the Arctic Archipelago.¹⁴³ The effective

137. See Burghardt, *supra* note 136, at 231 (describing how determinations of priority do not go back to beginning of history, but simply to furthest point in time that is pertinent to disputes); see also Huebert, *supra* note 122, at 89 (discussing that Canadian claims of priority, under auspices of theory of historic waters, would likely not succeed in proving that waters of Arctic Archipelago are historic internal waters).

138. See Burghardt, *supra* note 136, at 231 (describing how historical claims are strengthened by duration, such as duration of possession); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 90-100 (discussing theories of historic internal waters and historic title with regard to Canadian control of its Arctic waters and Archipelago).

139. See Sumner, *supra* note 8, at 1789-90 (discussing roles of historical use and also proximity to sovereign territory in claims of historic internal waters); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 97 (listing three criteria establishing claims of historic waters, which merely require history of use or passage of time, among other requirements).

140. See *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 130 (Dec. 18) (defining "historic waters" as waters which are treated as internal waters due to historic title, as it is defined in customary international law); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 92 (stating that historic waters are only such due to existence of historic title).

141. See *United States v. Alaska*, 422 U.S. 184, 189 (1975) (describing criteria needed for such claims to prevail under international law); see also Perrin, *supra* note 22, at 149 (stating that these criteria have been adopted as international law and govern international claims under historic waters).

142. See *Alaska*, 422 U.S. at 189-90 (summarizing and applying criteria described in previous case law); see also Perrin, *supra* note 22, at 149 (discussing criteria laid out in *Alaska*, particularly with respect to legal claims by States that waters were "historic internal waters").

143. See Rothwell, *supra* note 23, at 334 (discussing Canada's claims of sovereignty

control doctrine is often viewed as the strongest legal claim to territory, and essentially requires that a country possess uncontested administrative control of the land and its resident population.¹⁴⁴

Some of the earliest arguments for Canadian control stem from the English and French explorers who voyaged through the Arctic waters during their travels.¹⁴⁵ These voyages give rise to a “first in time, first in right” discovery claim.¹⁴⁶ In particular, explorer Robert McClure traversed the Northwest Passage, using both the land and water, between the years 1850 to 1854.¹⁴⁷

One factor unique to the Arctic region with respect to this argument is that effective control varies depending on the utility of the land.¹⁴⁸ Pursuant to this argument, a desert or Arctic terrain does not require the same degree of continuous habitation

over Northwest Passage, in particular its control and use of Arctic Archipelago and its surrounding waters); *see also* Huebert, *supra* note 122, at 88-89 (analyzing Canadian sovereignty over Arctic Archipelago and how this relates to and affects its sovereignty over waters surrounding and between these islands).

144. *See* Burghardt, *supra* note 136, at 228 (discussing legal principles of effective control, also noting that, legally, no new prescription of territory can be made without abandonment of title by previously controlling State); *see also* Sumner, *supra* note 8, at 1787-92 (analyzing claims of effective control and citing principles in general property law of possession being most of ownership as evidence that claims of effective control are some of strongest legal claims to territory).

145. *See* Burghardt, *supra* note 136, at 228-29 (discussing Canada’s argument for effective control); *see also* Sumner, *supra* note 8, at 1787-78 (analyzing ICJ’s territorial dispute jurisprudence).

146. *See* Rothwell, *supra* note 23, at 334 (discussing such claims and their basis on which State was there first, meaning which State discovered areas and which State has used areas for longer duration); *see also* Perrin, *supra* note 22, at 147-52 (analyzing Canadian claims of sovereignty over Northwest Passage under both historic internal waters and historic consolidation of title, particularly analyzing cession from sovereigns, in this case European States and Inuit populations).

147. *See* Rothwell, *supra* note 23, at 334 (discussing early discovery and exploration that took place during this time period in Canadian Arctic); *see also* Robert McClure Finds the Northwest Passage, Library and Archives Canada, <http://www.collectionscanada.ca/2/24/h24-1840-e.html> (describing Sir Robert John Le Mesurier McClure’s original transit of Northwest Passage, completed in 1850).

148. *See* Burghardt, *supra* note 136, at 228 (citing case dealing with dispute in Sahara Desert between Morocco and Algeria over whether because region is uninhabitable there could be no effective control in this region); *see also* Perrin, *supra* note 22, at 151-53 (discussing cession from native peoples, such as in *Western Sahara Case*, where ICJ left open possibility of native people transferring title to barren lands); Thomas W. Donovan, *The Marouini River Tract and its colonial legacy in South America*, 4 *CHI-KENT J. INT’L & COMP. L.* 1, 10 (2004) (analyzing ICJ Eastern Greenland decision awarding Denmark territory in question despite very limited occupation due to Arctic territory being “so remote and virtually inaccessible”).

and control of the land as more heavily trafficked territory.¹⁴⁹ Demonstrating effective control in more desirable land is achieved through continuous and lasting occupation of the territory as well as through remaining the administrator of law over the territory, with settlement of land and extraction of natural resources from the territory other possible indicators.¹⁵⁰

Canada has attempted to strengthen its claims of control over the Arctic, and one such act of control was Canada's passing of the Arctic Waters Pollution Prevention Act ("AWPPA" or the "Act") in 1970.¹⁵¹ This Act furthered Canada's jurisdictional claim over the Arctic waters by allowing it to enforce anti-pollution laws on vessels passing through the Arctic.¹⁵² It established a 100-mile pollution control zone measured outward from the nearest Canadian land, within which environmental controls to shipping practices and the protection of the marine environment were to be enforced by Canada.¹⁵³ Under the Act, Canada could prescribe standards for vessel construction, navigation,

149. See Burghardt, *supra* note 136, at 228 (citing case of Sahara Desert and argument that uninhabitable regions should have less stringent requirements for effective control because ability to live is extremely difficult); see also Western Sahara Case, 1975 I.C.J. 12, 36-61 (Oct. 16) (analyzing whether land of Western Sahara Desert could be transferred by local nomadic tribes to Spain and whether levels of habitation were factors to be considered relevant).

150. See Burghardt, *supra* note 136, at 229 (setting forth effective control implying "continuous administration" and "effective occupancy" of territory); see also Sumner, *supra* note 8, at 1787-88 (identifying Professors' Burghardt, Blum, and Hill opinions that administration of political and military control over territory or resource exploitation as important factors in demonstrating effective control).

151. See Arctic Waters Pollution Prevention Act, *reprinted in* 9 INT'L LEGAL MATERIALS 543 (1970) [hereinafter AWPPA] (declaring Canada's control over its northern waters for purposes of preventing pollution in region); see also Lalonde, *supra* note 48, at 61 (stating that Prime Minister Trudeau's Government adopted measures to strengthen Canada's position in Arctic).

152. See Rothwell, *supra* note 23, at 339-40 (discussing effects of AWPPA, which was passed by Canada in 1970, following transit of U.S. ship, *Manhattan*, through Northwest Passage, in effort to exert more control in that region and in Canada's northern waters); see also Huebert, *supra* note 122, at 92 (examining Canadian enactment of AWPPA, which created 100-mile environmental protection zone within Canadian waters allowing Canada to forbid discharge of fluids into these waters and which requested registration with Canadian Government for any transit through these waters).

153. See Rothwell, *supra* note 23, at 339-40 (discussing measures taken by Canada following voyage of U.S. ship, *Manhattan*, through Northwest Passage, in particular passage of AWPPA, which included establishment of one hundred mile wide pollution control zone); see also John Kirton & Don Munton, *The Manhattan Voyages and Their Aftermath*, in POLITICS OF THE NORTHWEST PASSAGE (1987) (examining AWPPA and its effects on disputes and sovereignty issues concerning Northwest Passage).

and operation for ships traveling through its coastal waters.¹⁵⁴ Canada argued that this legislation was necessary because of the danger posed by oil tankers that could spill their contents and permanently damage the fragile Arctic environment.¹⁵⁵

Fearing that the ICJ might not agree with the legitimacy of the Act and the control it gave Canada over the disputed waters, Canada withdrew its acceptance of the compulsory jurisdiction of the ICJ regarding matters dealing with Canada's Arctic sovereignty.¹⁵⁶ By doing this, Canada could choose to test validity of its territorial claims and the validity of AWPPA in front of the ICJ at its volition, while in the interim appearing to demonstrate effective control over the Arctic waters.¹⁵⁷

While Canada could argue that it has had and does have exclusive control over the Northwest Passage, several arguments have been made on the contrary. First, Canada has exercised little and fairly erratic control over its northern waters, as evidenced by the 1985 Canadian Government statement that no previous Canadian government had ever defined the specific boundaries of its internal waters or territorial sea.¹⁵⁸ Addition-

154. See AWPPA, reprinted in 9 INT'L LEGAL MATERIALS 543 (1970) (noting that in addition to being able to set these requirements, failure to comply with these specifications gave Canada the power to prohibit transit of such vessels); see also Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 1-50 (1970) (describing various restrictions and regulations that Canada could place on vessels wishing to travel through its Arctic waters).

155. See Kirton & Munton, *supra* note 153 (describing reasons espoused by Canada leading to its enactment of AWPPA); see also Huebert, *supra* note 122, at 92 (discussing enactment of AWPPA which allowed Canada to forbid discharge of any fluids or solid wastes, including oil, into Arctic Waters).

156. See Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, 9 I.L.M. 598 (1970) (withdrawing Canada's acceptance of compulsory jurisdiction of ICJ regarding matters dealing with Canada's Arctic sovereignty); see also Canada: Statement Concerning Arctic Sovereignty, 24 I.L.M. 1723 (Sept. 10, 1985) (withdrawing Canada's acceptance of compulsory jurisdiction of ICJ regarding matters dealing with Canada's Arctic sovereignty). Canada also submitted reservation to the Court in AWPPA which exempted the States from the ICJ's compulsory jurisdiction. See AWPPA, reprinted in 9 INT'L LEGAL MATERIALS 543 (1970). This reservation was later withdrawn in 1985 revision of the Act. See Revision of Arctic Waters Pollution Prevention Act, 1985 R.S., c.A-12.

157. See Lewis, *supra* note 156, at 1726 (withdrawing Canada's acceptance of compulsory jurisdiction of ICJ regarding matters dealing with Canada's Arctic sovereignty); see also Rothwell, *supra* note 23, at 339-40 (discussing three measures taken by Canadian Government following transit through Northwest Passage, in 1969, of U.S. vessel, *Manhattan*, which were to pass AWPPA, to extend its territorial seas to twelve miles, and to withdraw its acceptance of compulsory jurisdiction of ICJ to any such dispute).

158. See Perrin, *supra* note 22, at 150 (discussing weaknesses of any Canadian claim

ally, the United States has opposed any actions by the Canadian government attempting to exert control over the Northwest Passage.¹⁵⁹

For instance, in 1969, an oil supertanker owned by Exxon, the *Manhattan*, traversed a portion of the Northwest Passage.¹⁶⁰ While the *Manhattan* was escorted by both U.S. and Canadian icebreakers, the United States did not seek Canadian permission for the voyage.¹⁶¹ As a result, when the *Manhattan* made its second voyage in 1970, Canada insisted on much stricter scrutiny and control.¹⁶² A Canadian official was placed on board the *Manhattan's* second voyage while Humble Oil, a subsidiary of Exxon, had to agree to certain Canadian anti-pollution controls, with the ultimate control during the voyage's duration given to the captain of the accompanying Canadian icebreaker.¹⁶³ Due in large part to the demands by Canada, the United States,

of control over region and noting that when Canadian Secretary of State for External Affairs announced establishment of straight baselines in 1985, he stated that no previous Canadian Government had ever specified precise limits of Canada's internal waters and territorial sea in Arctic); see also Huebert, *supra* note 122, at 89 (stating doubts that any claim of historic ownership would be successful).

159. See Rothwell, *supra* note 23, at 331-32 (stating that United States does not claim Northwest Passage for itself, instead arguing that these waters should remain open to international navigation); see also Lalonde, *supra* note 48, at 59 (describing that United States regards these Arctic waters as *res communes*, or property of all subject to acquisition and appropriation of none). But see UNCLOS, *supra* note 24, art. 234 (suggesting that even if Northwest Passage is considered international strait, Canada has rights to apply rigorous environmental standards to such strait resulting from its location and condition).

160. See Kirton & Munton, *supra* note 153 (noting that oil tanker *Manhattan* voyaged through Arctic waters, eliciting Canadian governmental response claiming territorial dominion over Arctic); see also Perry, *supra* note 25, at 661-62 (outlining history of transits of Northwest Passage, noting passage of *Manhattan* in 1969).

161. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (discussing transit of *Manhattan* through Northwest Passage and describing how U.S. refusal to ask permission for transits of *Manhattan* and later *Polar Sea* led to Canadian efforts to establish baselines around Arctic Archipelago); see also Perry, *supra* note 25, at 661-62 (describing transit of *Manhattan* and Canada's response of unequivocally declaring Canadian sovereignty to its Arctic waters).

162. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (discussing how Canadian representative aboard this vessel, Captain Thomas C. Pullen, and ship itself was escorted by Canadian icebreaker *John A. Macdonald* during transit of *Manhattan*); see also Perry, *supra* note 25, at 661-62 (evaluating transit of *Manhattan* and its affront to Canadian sovereignty).

163. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (describing second transit of *Manhattan*, in particular how one Canadian representative was onboard and how *Manhattan* was escorted by Canadian icebreaker); see also Perry, *supra* note 25, at 661-62 (discussing transit of *Manhattan* and its affront to Canadian sovereignty).

again, insisted that the Passage was an international strait and approved construction of a new, powerful ice-breaker, named the *Polar Sea*.¹⁶⁴ The voyage of the *Polar Sea* through the Northwest Passage in 1989 was another major act which the United States intended to undercut Canadian claims of administrative control.¹⁶⁵ The United States informed Canadian officials of the planned transit, but did not seek Canadian permission, as was required under the AWPPA.¹⁶⁶ The voyages of these two ships, along with those of foreign submarines freely patrolling beneath the Arctic ice,¹⁶⁷ illustrate how the United States has entered the waters of the Northwest Passage numerous times without Canadian authority.¹⁶⁸

b. Historic Consolidation of Title

A second argument for Canadian sovereignty over the Northwest Passage stems from historic claims of ownership over territorial waters, perhaps based on the historic consolidation of title, a theory stemming from the decision of the Permanent Court of Arbitration in the *Grisbadarna Case*.¹⁶⁹ For a claim of

164. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (discussing transit of *Polar Sea* through Northwest Passage, which was deployed by United States into waters to carry out oceanographic work); see also Perry, *supra* note 25, at 662-63 (describing voyage of the *Polar Sea*, where United States ignored Canada's demand that United States seek permission for any further transits).

165. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (describing how United States, again, refused to seek Canadian permission for voyage of *Polar Sea*); see also Perry, *supra* note 25, at 661-63 (restating that United States refused to seek permission for *Polar Sea*'s Arctic voyage despite Canadian requests).

166. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 225 (discussing transit of *Polar Sea*, including U.S. refusal to gain Canadian approval beforehand); see also Perry, *supra* note 25, at 661-63 (restating that United States refused to seek permission for *Polar Sea*'s Arctic voyage despite Canadian requests). The transit of the *Polar Sea* was directly followed by the drawing of straight baselines around the Canadian Arctic Archipelago, which enclosed much of the Northwest Passage. See Canada: Statement Concerning Arctic Sovereignty, 24 I.L.M. 1723 (1985).

167. See Perry, *supra* note 25, at 668-69 (stating that presence of U.S. submarines in Arctic waters surrounding Canada is biggest threat to Canadian sovereignty); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 147-49 (discussing documented passages of U.S. submarines and hinting that there likely have been many more).

168. See Perry, *supra* note 25, at 668-69 (detailing U.S. submarine traffic in Arctic waters near Canada and potential consequences of these transits). *But see* Scott Borgerson, *Breaking the Ice Up North*, N.Y. TIMES, Oct. 19, 2005, at A21 (discussing role United States should play in establishing environmentally aware Arctic policy).

169. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* MANLEY O. HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW 258, 258-62 (1929) (holding it necessary to decision that waters in question, and territory appurtenant to it

ownership based on this theory a State must show: (1) that it discovered the land or received transfer of title from the previous sovereign; (2) that it maintains administrative control over the region; and (3) that there has been peaceful possession by the natural inhabitants of the region for a long period of time.¹⁷⁰

Analyzing the Canadian claim under this theory, the Inuit population of the Nunavut, formerly the Northwest Territories, would be similar to the Swedish nationals in the *Grisbadarna Case*, and their use of the water and land in these areas could be the kind of use necessary to satisfy the third requirement of the test.¹⁷¹ The Inuit have hunted on the ice pack over the waters of northern Canada in a semi-permanent manner for centuries, which may be sufficient for Canada to gain title given the harsh conditions of the Arctic.¹⁷² The Inuit are indigenous to the Arctic and have used the ice cover of the Northwest Passage as part of their livelihood throughout their habitation, perhaps bestowing sovereignty on them and, in turn, on the State of Canada, which would satisfy the first requirement of the test for historic consolidation of title.¹⁷³ International law, however, does not

called "The Bohuslan," were ceded to Sweden in 1658). For a critique on *The Grisbadarna Case*, see PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 140-44 (explaining how *Grisbadarna Case* is foundational for theory of historic consolidation of title).

170. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* HUDSON, *supra* note 169, at 258-62 (holding that demarcation of region in question, *Grisbadarna*, was supported by several circumstances, including that lobster fishing had been carried on for longer and to greater extent by Swedish fishermen, and that Sweden had performed various acts of dominion and control in this region while Norway admitted it had not); see also *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 138-39 (Dec. 18) (discussing historic consolidation and historic title with regard to this dispute over Norwegian coastline and surrounding waters).

171. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* HUDSON, *supra* note 169, at 258-62 (detailing how Swedish nationals had long history of lobster fishing in shoals of *Grisbadarna*, whereas Norwegian nationals had fished these waters for relatively much shorter period of time); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 140-44 (analyzing *Grisbadarna Case* with respect to historic consolidation of title, particularly noting importance ICJ placed on nature of activity by Swedish nationals in *Grisbadarna* region).

172. See *Johnston*, *supra* note 46, at 147 (articulating that Inuit have lived and hunted in Arctic for extended period of time); see also Perrin, *supra* note 22, at 151-53 (noting potential Canadian claims of sovereignty based on Inuit's presence in waters of Northwest Passage).

173. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* HUDSON, *supra* note 169, at 258-62 (holding that cession from previous sovereigns is one definitive criteria in such decisions); see also *Johnston*, *supra* note 46, at 147 (discussing historic consolidation of title and how Inuit in northern Canada could possibly establish Canadian use and control in this region over long duration); Perrin, *supra* note 22, at 151-53

clarify whether indigenous persons have the ability to possess or transfer titles to land.¹⁷⁴ Other than a transfer of title from the Inuit, Canada instead acquired title to its northern territories largely through discovery by English and French explorers, which would also satisfy the first requirement of the test for historic consolidation of title.¹⁷⁵ Similar to a claim of historic waters, however, there may be problems with any Canadian claim of administrative control over the region due to the presence of the United States and the uncertainty of the boundaries of any such Canadian control.¹⁷⁶

c. The Doctrine of *Uti Possidetis*

A third potential claim based on historic possession and use would be based on the doctrine of *uti possidetis*.¹⁷⁷ This doctrine allows former colonies and their subordinates to claim sovereignty over territory that their previous mother country possessed, absent prior consent of the parties to alter those pre-de-

(analyzing theories of historic consolidation of title and that Canada could argue that its Inuit population are similar to that of Swedish Nationals in *The Grisdarna Case*, but also suggesting that Canada might wish to avoid this argument due to internal disputes of ownership with its Inuit population).

174. See Johnston, *supra* note 46, at 147 (stating that arguments based on property law, taken from postclassical international law, which state that Canadian Inuit give title to Canada, has been largely rejected); see also Perrin, *supra* note 22, 151-52 (describing how land claim settlement disputes between Canada and its Inuit threaten validity of claims that Canadian's received valid passing of title from its Inuit and ongoing ambiguity of whether native people can pass title to land).

175. See Rothwell, *supra* note 23, at 334 (describing various discoveries of English and French explorers of Northern Arctic territories, with majority of exportations led by English); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 1-11 (discussing transfer of title from United Kingdom to Canada, along with other discovery and history of what is now Canadian territory).

176. See Perrin, *supra* note 22, at 150 (observing that U.S. failure to recognize Canada's sovereignty over Northwest Passage, and unclear history of Canada's claims regionally hamper Canada's ability to base their claim in history); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 252 (describing weaknesses of any Canadian claim of sovereignty over Northwest Passage under theories of historic waters or historic title due to Canada's failure to exercise exclusive control over this region and due to other States, including United States, not acquiescing to such control).

177. See JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS 7-8 (explaining that *uti possidetis* roughly translates to "as you possess, so you possess", hailing from Roman law doctrine grew through Spanish Empire's withdrawal from Latin America); see also Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 566 (Dec. 22) (describing that importance of this principle is that it intends to validate boundaries which existed when States gained independence).

lineated boundaries.¹⁷⁸ While violence has not erupted in the Arctic region, the doctrine of *uti possidetis* is problematic due to ambiguous territorial control by other States, including Britain and France.¹⁷⁹ During the colonial era, boundary lines were artificially created across territories without regard to the ethnic composition of inhabitants and often without specifically demarcating the exact territorial boundaries.¹⁸⁰ These ambiguities often lead to either internal conflicts amongst the post-colonization territory inhabitants or between States' disputing their territorial boundaries.¹⁸¹ For example, in *The Frontier Dispute Case*, two African States requested that the ICJ should not disregard the borders created through colonization because these types of frontiers were frequently intangible and, therefore, the Chamber should not disregard the principle of *uti possidetis*.¹⁸² The Court found the principle of *uti possidetis* to be deeply embedded within international law due to decolonization and States gaining independence.¹⁸³ With respect to Canada's claim under this

178. See CASTELLINO & ALLEN, *supra* note 177, at 7-8 (allowing that many colonies gained their territory through this principle at time of independence during decolonization period); see also *Frontier Dispute*, 1986 I.C.J. at 554 (phrasing dispute in its simplest terms as uncertainty of frontiers inherited by each State from their colonial predecessors).

179. See CASTELLINO & ALLEN, *supra* note 177, at 7-8 (discussing *uti possidetis* as basis for territorial claims, particularly how territory to which colonial powers had title are transferred entirely to subsequent sovereigns); see also *Frontier Dispute*, 1986 I.C.J. at 568 (stating that once new State acquires its independence it gains its land with territorial boundaries which existed at time that territory was colonial).

180. See CASTELLINO & ALLEN, *supra* note 177, at 7, 21-24 (explaining that one of many problems with theory of *uti possidetis* is failure to account for ethnic and cultural differences pre-existing colonization); see also *Frontier Dispute*, 1986 I.C.J. at 564-67 (illustrating importance of this principle is ambiguity concerning territorial ownership passed on to former colony with its newfound sovereignty in that these two States only shared international boundary at moment of independence as both Mali and Burkina Faso had been part of French West Africa and had no prior need for territorial delineation).

181. See CASTELLINO & ALLEN, *supra* note 177, at 7-8 (discussing problems associated with post-colonization territory inhabited by numerous ethnicities and cultures); see also *Frontier Dispute*, 1986 I.C.J. at 564-67 (noting that both States' disputes stem from "process of decolonization," luckily both parties agreed to submit this dispute for resolution as opposes to non-violent manner).

182. See *Frontier Dispute*, 1986 I.C.J. at 565 (stating that these two parties cannot ignore principles of *uti possidetis*, whose application is responsible for territorial uncertainty in first place); see also CASTELLINO & ALLEN, *supra* note 177, at 21-22, 125-30, (discussing *Frontier Dispute* case, particularly Court's backing of principles of *uti possidetis* in its decision).

183. See *Frontier Dispute*, 1986 I.C.J. at 565 (explaining that "[i]ts obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal

doctrine, the relevant history is as follows. Canada became a confederation in 1867,¹⁸⁴ and through an 1880 Order-in-Council, Great Britain transferred all the British possessions on the North American continent.¹⁸⁵

B. *International Law Governing Hans Island*

As recently as July 2005, Canadian Defense Minister Bill Graham re-asserted Canadian sovereignty over Hans Island.¹⁸⁶ The recent dispute over Hans Island may signal that States are increasingly trying to strengthen their territorial claims in the Arctic region in order to capitalize on its growing accessibility and resources.¹⁸⁷ Although the dispute could be settled by the ICJ, it is questionable whether the Court will ever hear the case, as Canada withdrew from the ICJ's compulsory jurisdiction on September 10, 1985.¹⁸⁸ This prevents the Court from deciding

struggles provoked by the challenging of frontiers following the withdrawal of the administering power"). For more information on *uti possidetis*, see CASTELLINO & ALLEN, *supra* note 177, at 7-27 (discussing theory of *uti possidetis* and explaining its foundations and its advantages and disadvantages).

184. See Rothwell, *supra* note 23, at 335 (describing Confederation's desire and effort to assure legal title over its territory, also illustrating how Canada also purchased part of modern day North-Western Territory from Hudson's Bay Company in 1869 in order to further clarify its title to land during early stages of its confederation); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 12-43 (discussing Canada's history, particularly its transfer of title from Great Britain and various conventions and agreements that might have effect on its claims of sovereignty over Northwest Passage).

185. See Rothwell, *supra* note 23, at 335 (stating that this territory included all British territories and possessions in North America not already included within Dominion of Canada and all islands adjacent to any of such territories or possessions); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 252, 255 (discussing that Canadian claims of sovereignty over Northwest Passage under theory of historic waters go back to Great Britain's 1880 transfer of title to Canada).

186. See CTV.CA NEWS STAFF, *supra* note 32 (reporting on Defense Minister Bill Graham's statements that Canada's assertions of sovereignty over Hans Island were important for more reasons and had more far reaching implications than simply who controlled the tiny rock); see also *Canada Has Claim to Hans Island: Pettigrew*, CANADIAN PRESS, Aug. 20, 2005 http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050820/hans_island_pettigrew_050819/20050820/ (last visited Jan. 16, 2007) (describing Graham's trip to Hans Island in 2005, which was officially protested by Denmark's government).

187. See Thorne, *supra* note 11 (positing that as global warming melts Arctic ice it could potentially open valuable oil and mineral deposits for exploitation, which might explain intensification of Canada and Denmark's dispute over Hans Island); see also CANADIAN PRESS, *supra* note 186 (including views by Professor H. Scott Fairley, longtime law professor at Osgoode Hall who notes importance of being able to protect State's sovereignty).

188. See Lewis, *supra* note 156 (discussing how Canada withdrew its previously

the fate of either Hans Island or the Northwest Passage without an explicit agreement from Canada.¹⁸⁹

1. Historic Claims

The theory of historic consolidation of title is one theory that could be raised before the ICJ as grounds for the Canadian claim of sovereignty over Hans Island.¹⁹⁰ To prevail on a claim based on this theory, a State must show several things: (1) discovery of the land (or transfer of title from the previous sovereign); (2) that it has administrative control over the region; and (3) that there has been peaceful possession by the natural inhabitants of the region for a long period of time.¹⁹¹ The analysis of the first requirement in relation to Hans Island is unlike the analysis with respect to the dispute over the Northwest Passage, because there was no transfer of title from a previous sovereign, as there are no people that live on the island.¹⁹² Therefore, to

given permission for ICJ's compulsory jurisdiction over disputes concerning Canada, in 1985, at same time it established its straight baselines around its Arctic Archipelago, in large part to keep any dispute over Northwest Passage or surrounding areas from reaching halls of ICJ); *see also* Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, *supra* note 156 at 598 (withdrawing Canada's acceptance of compulsory jurisdiction of ICJ regarding matters dealing with Canada's Arctic sovereignty fifteen years prior to its withdrawal in 1985).

189. *See* Lewis, *supra* note 156 (explaining that for ICJ to hear such dispute, parties must first submit to Court's authority); *see also* Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, *supra* note 156 at 598 (disallowing ICJ from deciding any dispute regarding Canada's Arctic Waters unless Canada were to submit to its authority).

190. *See The Grisbadarna Case*, 121 Hague Ct. Rep. 130, also found in HUDSON, *supra* note 169, at 258-62 (stating that one crucial factor for determining title to territory would be cession from its sovereign); *see also Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden, Award of 23 October 1909*, 4 AM. J. INT'L L. 226 (1910) [hereinafter *Maritime Boundary Dispute*]. For the original French version, *see* 121 Hague Ct. Rep. at 487, 11 R. Int'l Arb. Awards 155.

191. *See The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* Hudson, *supra* note 169, at 258-62 (describing factors that led this Court to its decision, where it relied heavily on sovereign's cession of land to Sweden and Sweden's exercising much greater degree of dominion and control over this territory, as well); *see also Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden, Award of 23 October 1909*, 4 AM. J. INT'L L. at 228.

192. *See* Howden, *supra* note 11, at 26 (describing Hans Island as lacking any inhabitants). *But see* Kenn Harper, *Hans' History: Noted Arctic Historian and Published Author Kenn Harper Walks Us Through Hans' Past So We May Understand its Possible Future*, CANADIAN GEO., available at <http://www.canadiangeographic.ca/hansIsland/background.asp> (last visited Jan. 28, 2007) (noting there have been hunters in this region for extended period of time).

satisfy this requirement, each State would have to provide evidence to show that they had discovered the rock.¹⁹³ From the 1850s to the 1880s British and U.S. explorers led expeditions in the general vicinity of Hans Island.¹⁹⁴ These expeditions varied in nature, from the pursuit of the elusive Northwest Passage, others the North Pole, while others searched for survivors of British explorer John Franklin's 1845 expedition.¹⁹⁵ In 1871, U.S. explorer Charles Francis Hall, sailing for the North Pole with Greenlander Hans Hendrik as his hunter and guide, noticed the tiny island between Ellesmere Island and the Greenland Coast, unnamed on maps made by earlier U.S. explorer Elisha Kent Kane.¹⁹⁶ Hall named this island "Hans Island" after his guide, and the name first appears on a map published in 1874.¹⁹⁷

The second requirement for a claim under historic consolidation of title is that the sovereign must show that it has administrative control over the region.¹⁹⁸ Both Canada and Denmark have taken measures in recent years to attempt to demonstrate

193. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, 258-62 (discussing how discovery impacts claims of historic consolidation of title); see also *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 138-39 (Dec. 18) (listing as bases for historic title either transfer from sovereign or discovery).

194. See *Harper*, *supra* note 192 (describing early exploration of Arctic, upon which European explorers assuredly passed this island, but noting that George Nares's British expedition in 1875 occurred after this island had already been named, by U.S. citizen, after one Greenlandic Inuit individual); see also *Robert McClure Finds the Northwest Passage*, *supra* note 147 (recounting Sir Robert McClure's journey through Canadian Arctic waters, including expanses of Northwest Passage).

195. See *Harper*, *supra* note 192 (describing that this island was named Hans Island, by U.S. explorer Charles Francis Hall, during his exploration through Kennedy Channel in 1871 on *Polaris*); see also *Whose Hans? A Border Dispute Between Denmark and Canada Over a Tiny Kidney-Shaped Island at the Top of the World*, *The Hans of Time*, CANADIAN GEO., available at <http://canadiangeographic.ca/hansisland/default.asp> (discussing Charles Hall and his "ill-fated" ship, *Polaris*).

196. See *Harper*, *supra* note 192 (discussing exploration by Charles Francis Hall that led to naming Hans Island); see also *Whose Hans?*, *supra* note 195 (noting that Hall passed through Kennedy Channel and noticed an unnamed island on his map).

197. See *Harper*, *supra* note 192 (discussing how Hall named island after member of his expedition who was Greenlandic Inuit and also had worked as guide for previous U.S. expeditions of Greenland); see also *Whose Hans?*, *supra* note 195 (noting 1874 as first published map with "Hans Island" specifically labeled).

198. See *The Grisbadarna Case*, 121 Hague Ct. Rep. 130, *reprinted in* HUDSON, *supra* note 169, at 258-62 (deeming it important that Sweden had exercised almost unfettered control in *The Grisbadarna*); see also *Fisheries Case*, 1951 I.C.J. at 138-39 (listing requirements for establishing baselines and for historic title, including by way of historic consolidation of title).

effective control over Hans Island and the surrounding seas. Denmark sent fighter jets over the island in 1983, and in 1984 the Danish Minister for Greenland chartered a helicopter to the island.¹⁹⁹ On the other hand, in 2004, Canada conducted a US\$4 million dollar military exercise in the Arctic to reinforce its claims to Arctic sovereignty, part of which was a patrol by Canadian troopers, who hammered metal plaques into the rocks of Hans Island, claiming it as Canadian.²⁰⁰ It is unclear how these actions might affect the claim of administrative control, as a dependence on plaques does not make a strong case for sovereignty, which Great Britain learned in the Falklands Islands.²⁰¹ The third requirement to establish a claim under historic consolidation of title is that the State must show that there has been peaceful possession of the territory by its natural inhabitants for a long period of time.²⁰² The strongest argument for this element being satisfied is the fact that, since the Fourteenth Century, the people of northwestern Greenland have historically used the area surrounding Hans Island as part of their traditional hunting grounds.²⁰³

199. See Hans Island, *supra* note 29 (documenting recent Danish efforts to demonstrate control in Hans Island, or at least reiterate sovereign interest therein in Hans Island); see also CANADIAN PRESS, *supra* note 186 (explaining that Hans Island was discovered by Britain, ceded to Canada, appearing on Canadians maps, and then home to scientific research stations).

200. See Clifford Krauss, *Canada Reinforces Its Disputed Claims in the Arctic*, N.Y. TIMES, Aug. 29, 2004, (summarizing various actions by both Canada and Denmark which were aimed at establishing control and sovereignty over Hans Island and its surrounding waters); see also Burghardt, *supra* note 136, at 228-29 (describing how Canada placed one plaque on Hans Island, and discussing its potential value in claiming effective control over Hans Island, in part due to its central location in Arctic region).

201. See Burghardt, *supra* note 136, at 229, n.23 (citing J.C.J. Metford, *Falklands or Malvinas? The Background to the Dispute*, 44 INT'L AFF. 463, 463-81 (1968)) (noting that cost of occupation led Britain to withdraw their military presence in Falkland Islands, but claimed effective control through presence of plaques).

202. See PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 95 (discussing history of historic waters theory and necessary elements of claim of historic consolidation of title, which includes requirement that there have been State activities in this area over long period of time); see also *Fisheries Case*, 1951 I.C.J. at 138-39 (pointing out that peaceful possession of territory by natural inhabitants is required to establish historic consolidation of title).

203. See Harper, *supra* note 192 (noting that peaceful and uninterrupted hunting may meet requisite level required within historic consolidation of title analysis); see also Johnston, *supra* note 46, at 147 (explaining general theory and possibility that extended hunting by indigenous people may give rise to claims under historic consolidation of title).

2. Claims Under UNCLOS

In their attempts to claim sovereignty over Hans Island, either State might base its argument on the international law codified in UNCLOS.²⁰⁴ Article 121(3) of UNCLOS explains that rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.²⁰⁵ Since Hans Island might be considered a “rock” under UNCLOS, a determination of the EEZs²⁰⁶ of both Canada and Greenland in the region could have a significant effect on the outcome of the dispute between the two States, if either were to comprise Hans Island.

Article 56 of UNCLOS provides that within the EEZ, the coastal State has the exclusive right to explore, exploit, and generally manage the natural resources of the waters superjacent to the sea-bed and of the sea-bed itself.²⁰⁷ UNCLOS places a limit on the breadth of the zones, however, stating that they should

204. See UNCLOS, *supra* note 24, art. 121 (barring rocks that are unable to “sustain human habitation” or at least “economic life” from having individual EEZ); see also THEUTENBERG, *supra* note 64, at 13, 147 (discussing UNCLOS and Article 121 limitations on establishing EEZs).

205. See UNCLOS, *supra* note 24, art. 121(3) (setting forth criterion for which land area will be deemed “a rock” and be denied benefits of an EEZ); see also THEUTENBERG, *supra* note 64, at 13, 147 (remarking on Article 121 and its bar on granting EEZs to islands incapable of sustaining “human habitation” or “economic life”).

206. UNCLOS defines a country’s Exclusive Economic Zone (“EEZ”) as:

[A]n area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

UNCLOS, *supra* note 24, art. 55; see also ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 33 (1993) (writing about negotiations between UNCLOS delegates, including United States, which led, in part, to inclusion of EEZs within UNCLOS).

207. See UNCLOS, *supra* note 24, art. 56 (explaining what rights States shall possess within its EEZ). For an interesting parallel to the current tension between Canada and Denmark concerning Hans Island, particularly when the potentially enormous value of the EEZ raises the ante, see Larry Rohter, *25 Years After War, Wealth Changes Falklands*, N.Y. TIMES, Apr. 1, 2007 (discussing Britain’s decision after the 1982 Falklands Islands War between Great Britain and Argentina to allow Falkland Government to declare 200-mile EEZ, thereby allowing Falkland Islanders to reap fish-abundant rewards of icy sea adding revenue of approximately US\$88 million dollars per year). Great Britain had been hesitant to grant the Falkland Government the right to declare the EEZ for fear of angering Argentina, who has never acquiesced its claim to the Falklands. Rohter notes that relations between the two States have recently worsened as a result of the EEZ, noting that Argentina has mostly banned flights headed to or from the Falklands and that current Argentinian President Néstor Kirchner has grown increasingly nationalistic about the Falklands. *Id.*

not exceed 200 nautical miles from the State's coastal baselines.²⁰⁸ These economic zones are seen as limits on the distance of the continental shelf.²⁰⁹ The establishment of EEZs under UNCLOS limits the extension of the continental shelf area of a State, but also allows States to claim control over seas surrounding its shores when the continental shelf does not extend very far.²¹⁰ Despite the potential benefits of claiming that Hans Island lies within the EEZ of one of the States, both States might claim overlapping EEZs, a dispute that might have to be worked out through negotiation, as is required by countries with overlapping claims over continental shelves.²¹¹

3. Geography

Another factor that may influence the outcome of the dispute over Hans Island is geographic features, such as mountains, oceans, islands, and rivers create natural borders, which the ICJ has previously considered when crafting decisions.²¹² These natural borders have been used to form land claims, either in combination with or independent of other theoretical bases for claiming territory.²¹³ At least one scholar argues that perhaps

208. See UNCLOS, *supra* note 24, art. 57 (defining territorial limits that can be claimed as EEZ); see also THEUTENBERG, *supra* note 64, at 20-23 (summarizing codification of EEZ under UNCLOS).

209. See UNCLOS, *supra* note 24, art. 76 (explaining how EEZs, in most cases, set limits of continental shelves); see also THEUTENBERG, *supra* note 64, at 20-23 (analyzing particular rights States possess within EEZs, such as scientific and oceanographic research).

210. See UNCLOS, *supra* note 24, art. 82 (explaining exceptions to Article 76 so that continental shelves may extend further under certain circumstances, for instance Article 82 calls for coastal States who exploit resources over continental shelves, but beyond 200 mile limit to make payments which would be distributed on equitable basis to other States which are parties to UNCLOS); see also Oxman, *supra* note 102, at 832-34 (discussing President Harry S. Truman's claim to Continental Shelf in 1945, starting rapid evolution of UNCLOS and international law involving ocean).

211. See Krauss et al., *supra* note 5, at 13 (explaining that negotiations are required when States have overlapping claims to continental shelves); see also UNCLOS, *supra* note 24, arts. 55-83 (defining both EEZs and delimitation of States' continental shelves, as well as explaining rights and duties of each States relating to both EEZs and continental shelves).

212. See Burghardt, *supra* note 136, at 236 (commenting that natural geographic features have been used by ICJ in deciding territorial disputes); see also Sumner, *supra* note 8, at 1781-84 (explaining how ICJ decisions have, throughout history, used geography, particularly natural territorial boundaries, to resolve disputes over territory).

213. See Burghardt, *supra* note 136, at 240 (describing how these natural borders have been used to establish stand alone territorial claims, or used in combination with other theories of territorial claims); see also Sumner, *supra* note 8, at 1795-96, 1800-

geographical delimitation commands more respect than more historically-rooted and effectively controlled claims.²¹⁴ Despite the fact that geographical features do not necessarily alter the respective States' claims to Hans Island, as Hans Island does not present a territorial integrity issue for either Canada or Denmark, the ICJ has, in the past, used non-legal arguments to solve disputes and might take any geographic factors, such as the proximity to each State, into consideration.²¹⁵

C. *International Law Governing Russia's Claims*

As previously mentioned, the Commission's evaluation of the Russian claim to nearly half of the Arctic Ocean will be contingent upon verification of the seismic mapping of the claimed area by the Commission.²¹⁶ Under UNCLOS, a State has sovereignty over its continental shelf for the purpose of exploring and exploiting its natural resources, a right which is exclusive to that State.²¹⁷ A State's continental shelf is defined as "comprising the seabed and subsoil of the submarine areas" along the natural extension of its territory out to the "edge of the continental mar-

01 (examining how natural boundaries have affected ICJ decisions in conjunction with other reasoning).

214. See Burghardt, *supra* note 136, at 236 (describing how Britain has possessed Mediterranean's Rock of Gibraltar on tip of Iberian mainland for several centuries, yet United Nations voted in 1968 that Britain should transfer Gibraltar to Spain, Burghardt thereby illustrating apparent weight Spain's geographic proximity is given over territory that has historically been effectively controlled by Great Britain); Sumner, *supra* note 8, at 1783-84 (characterizing geographic demarcation as "psychological").

215. See North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, 30-31 (Feb. 20) (arguing that while not found to be inherent rule at international law, proximity, in some general sense, may be used as part of analysis regarding conflicting land claims); see also CASTELLINO & ALLEN, *supra* note 177, at 127 (noting that while legal doctrine shapes decisions, equity may also factor into ICJ decisions).

216. See Murphy, *supra* note 34, at 970 (describing how this Commission reviews information submitted by coastal States and then makes recommendations to States regarding delimitation of its continental shelf); see also Golovko, *supra* note 38, at 1 (stating that due to discrepancies noted in Russia's submission by several U.N. Member States, Russia must revise its submission addressing such discrepancies before any decision can be reached by Commission).

217. See UNCLOS, *supra* note 24, art. 77 (stating that States may extract natural resources that consist of minerals and other non-living resources of seabeds and that sovereign rights of coastal States to exploit natural resources are exclusive, and even if coastal States do not utilize natural resources, no other State may attempt to utilize those natural resources absent express consent); see also FRIEDHEIM, *supra* 206, at 78-81 (discussing Russia's positions and objectives in negotiating UNCLOS).

gin" or up to "200 nautical miles from the baselines."²¹⁸ With baselines as a primer, the State can establish the outer limits of its continental shelf to either a limit not exceeding 350 nautical miles from such baselines,²¹⁹ or a limit not exceeding 100 nautical miles from the 2500 meter isobath.²²⁰ Because the deliberations of the Commission are confidential, the United States, as a non-signatory, is unable to influence the interpretation and application of the aforementioned provisions.²²¹

D. Options for Resolution of Dispute

1. The International Court of Justice

The ICJ provides one potential option for resolving territorial disputes in the Arctic region. Article 59 of the Statute of the International Court of Justice ("ICJ Statute") effectively eliminates the conventional notion of *stare decisis*, mandating that only ICJ decisions bind the parties that submitted the case and to that action upon the case to which the Court is deliberating.²²² The ICJ looks to re-occurring theories of territorial dispute reso-

218. See UNCLOS, *supra* note 24, art. 76 (detailing formula used to define State's continental shelf). *But see* UNCLOS, *supra* note 24, art. 3 (stating that territorial seas must not exceed twelve nautical miles, measured from baselines).

219. See UNCLOS, *supra* note 24, art. 5 (providing formula used to establish baselines). For the purposes of this section, the baseline is the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." *Id.* For more information, see BERNARD H. OXMAN, THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE NINTH SESSION (1980) 211-56 (1981) (discussing formation of and particular provisions of UNCLOS, including Article 5).

220. See UNCLOS, *supra* note 24, art. 76 (stating that 2500 meter isobaths are imaginary lines along continental shelf that are at constant depth of 2500 meters); *see also* BERNARD H. OXMAN, THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE NINTH SESSION (1980) 211-56 (1981) (articulating mechanics of UNCLOS including Article 76).

221. See Murphy, *supra* note 34, at 969; *see also* Richard G. Lugar, *Senate Should Ratify Law of the Sea in the Interest of Our National Defense*, NAVY TIMES, Mar. 8, 2004, available at <http://lugar.senate.gov/sfrc/opeds.html> (explaining that without ratifying UNCLOS, United States will be unable to oppose Russian claims); Caitlyn L. Antrim, *Mineral Resources Of Stateless Space: Lessons From The Deep Seabed*, INT'L AFF., Sept. 22, 2005 (arguing that operating outside of UNCLOS provisions will put United States in inferior bargaining position in its current and future conflicts with UNCLOS signatories).

222. See Statute of the International Court of Justice, June 26, 1945, art. 59 Stat. 1060, [hereinafter ICJ Statute] (Article 59 states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case"). *See generally* ELIAN, *supra* note 94 (discussing formation of ICJ and its history and importance for dealing with legal disputes between States); Philip V. Tisne, Note, *The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts*, 29 FORDHAM INT'L L.J. 865, 876-87 (discussing the origins of ICJ).

lution and customary international law to resolve the cases before it.²²³ In this regard, the Court does follow its own precedent, and its decisions can shed light on how future decisions might be adjudicated.²²⁴

Scholars find territorial dispute resolution to derive from treaties, geography, principles of equity (including economic necessity), effective control, history, *uti possidetis*, and documentation in certain instances.²²⁵ These theories stem from the text of Article 38 of the ICJ Statute, further evidenced and expanded by ICJ decisions resolving territorial disputes. Article 38 of the ICJ Statute clearly mentions that treaties shall form part of the basis of adjudicating territorial disputes within the ICJ.²²⁶ Commentators argue that Article 38 not only obligates the ICJ to defer to treaties, but that a treaty itself means that parties have decided to let go of their historical claim and other bases of claims subject to the agreed upon provisions of the treaty.²²⁷

Canada entered into the Treaty of Paris in 1763, under

223. See ICJ Statute, *supra* note 222, art. 38 (identifying “international custom,” as evidence of general practice accepted as law” and “general principles of law recognized by civilized nations” as sources of law that ICJ utilizes when hearing cases). See generally ELIAN, *supra* note 94, at 40-44, 71-132 (discussing establishment of ICJ and force, and authority, of its opinions, both its advisory opinions and its binding opinions).

224. See ELIAN, *supra* note 94 (following customary international law, by no means legally binding, ICJ helps to further shape body of customary international law and theory by articulating what it views as critical criterion enabling postulation of how ICJ may view cases before it). For discussion of why parties might submit to the ICJ, Beth A. Simmons, *Capacity, Commitment, and Compliance: International Arbitrations and Territorial Disputes*, 46 J. CONFLICT RES. 829, 829-34 (2002) (arguing that parties submit their disputes to ICJ in order to receive economic windfall stemming from political stability).

225. See Burghardt, *supra* note 136, at 228 (presenting seven categories of territorial claims: effective control, historical, cultural, territorial integrity, economic, elitist, and ideological). Sumner expanded the categorization of territorial dispute resolution to nine, consisting of treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology. Sumner, *supra* note 8, at 1782-93. For the purposes of this Note, the authors largely adopt both Sumner and Professor Burghardt’s categorizations, but focus on seven theories that are prevalent within ICJ decisions regarding territorial disputes that readily lend themselves to the Canadian Arctic situation.

226. See ICJ Statute, *supra* note 222, art. 38 (stating that treaties shall form part of basis for resolving territorial disputes); see also Sumner, *supra* note 8, at 1782-83 (explaining that Article 38 of ICJ Statute requires Court judges to consider treaties while crafting decisions).

227. See ICJ Statute, *supra* note 222, art. 38 (establishing that one method for resolving territorial dispute may be relying on treaties); see also Sumner, *supra* note 8, at 1782-83 (arguing that beyond ICJ Statute obviating weight treaty will be given by ICJ, treaty seems to trump all others and serve as evidence that treaty should command above all other territorial theories).

which France relinquished all claims to French territory in Great Britain's North America with the exception of two islands.²²⁸ Russia also granted Great Britain a claim to the territorial sea in between modern-day Alaska and the Yukon in the 1825 Boundary Treaty.²²⁹ The existence of these treaties gives rise to the possibility that the ICJ would grant Canada sovereignty to both Hans Island and the Northwest Passage.²³⁰

The principle of equity is an over-arching idea that the ICJ seeks to apply throughout its decisions.²³¹ Judgments are based on the applicable international law in force, yet equitable principles may also impact the Court's decisions.²³² In *Continental Shelf*, the ICJ provided that equity and the opportunity to be heard equally do not mean that the Court will alter results in order to achieve territorial equality.²³³ The Court, therefore, re-

228. See Treaty of Paris, Feb. 10, 1763, available at http://www.solon.org/Constitutions/Canada/English/PreConfederation/Treaty_of_Paris_1763W (ceding all of Canada from France to Great Britain, including Cape Breton Island and all other islands in St. Lawrence River); see also *Treaty of Paris (1763)*, The Canadian Encyclopedia, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006083>.

229. See Rothwell, *supra* note 23, at 334-35 (describing 1825 Boundary Treaty, which established Canadian-United States border at 141st meridian and provided that border between Alaska and Yukon extended to "Frozen Ocean"); see also Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, Feb. 16, 1825, art. 3, 75 C.T.S. 95.

230. See Rothwell, *supra* note 23, at 334-35 (arguing that Canadian claims also are rooted in various treaties); see also PHARAND, CANADA'S ARCTIC WATERS, *supra* note 20, at 228 (discussing Canadian treaties in Arctic region and their possible effects on potential sovereignty disputes).

231. See CASTELLINO & ALLEN, *supra* note 177, at 127 (articulating general principles of equity theory that ICJ may look in order to help resolve territorial disputes in front of Court). For a case where the ICJ utilized equitable principles in its decision, see *Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986 I.C.J. Reports 554 (Dec. 22) (holding that equity may be utilized where parties agree in order to come to fair resolutions, but also that relevant law will be considered in conjunction with principles of equity for any such decision).

232. See *Frontier Dispute*, 1986 I.C.J. at 554 (ruling that equity was applicable to disputes in conjunction with international law in force). But see ICJ Statute, *supra* note 222, art. 38 (stating that Courts can only apply equitable solutions if both parties agree that Courts may implement such considerations).

233. See *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1985 I.C.J. 13, 30 (June 3) (stating that certain principles, such as geography, non-encroachment upon neighboring States and equality between States should not necessarily be given equal weight before court employing equity to reach solution). For a summary of *Continental Shelf*, see CASTELLINO & ALLEN, *supra* note 177, at 131-33 (summarizing case, particularly with regards to delimitation of continental shelf).

jected Malta's argument that the continental shelf should be more favorable to Malta as opposed to Libya due to the inequity of territorial control, economies, and the lack of natural resources capable of producing energy for Malta.²³⁴ In the *North Sea Continental Shelf Cases*, the ICJ declared that the resolution of a dispute between three States over a division between them of the Continental Shelf of the North Sea would be inequitable if divided based upon the equidistance rule described in Article 6 of the 1958 U.N. Convention on the Continental Shelf.²³⁵

While the disparity of two States' resources may not directly impact resolving territorial disputes, equity may allow for economic necessity in shaping decisions.²³⁶ Although applying principles of equity appears to have limited application by the ICJ, it seems to be an important consideration for them in any deliberation over international disputes.²³⁷

As previously mentioned, the effective control doctrine, often viewed as the strongest legal claim to territory, essentially means that a State possesses uninterrupted and unchallenged supervision of the territory and its population.²³⁸ Absent a third-

234. See *Continental Shelf*, 1985 I.C.J. at 41-42 (identifying substantive components of principles of equity as they may be used in ICJ decisions and how principles of equity relate to disputes concerning boundary delimitations); see also CASTELLINO & ALLEN, *supra* note 177, at 131-33 (analyzing how equity played role in ICJ's decision, which was made possible because both parties agreed that delimitation of continental shelf should be resolved by equitable principles).

235. See *North Sea Continental Shelf Cases* (F.R.G. v. Den.); F.R.G. v. Neth.), 1969 I.C.J. 3, 49-50 (Feb. 20) (reiterating that equity does not mean equality). The 1958 U.N. Convention on the Continental shelf defined the equidistance rule as "the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." United Nations Convention on the Continental Shelf, Apr. 29, 1958, art. 6, 499 U.N.T.S. 311 [hereinafter UNCCS].

236. See *Continental Shelf*, 1985 I.C.J. at 13 (reading ICJ decision in *Continental Shelf* Case calls into question how much weight the principle of equity would receive); see also Burghardt, *supra* note 136, at 237-38 (pointing out that Commentators allow that railroad tracks, ports, pipelines, natural resource deposits, and shipping routes are often claimed as economic necessities that warrant awarding sovereign undisputed territorial control over land); Sumner, *supra* note 8, at 1785-86 (noting that other economic justifications are asserted for territorial disputes).

237. Article 38 of the Statute of the International Court of Justice ("ICJ Statute") requires special consent for application of principles of equity to disputes in front of the ICJ. See ICJ Statute, *supra* note 222, art. 38. See also *Continental Shelf*, 1985 I.C.J. at 13 (discussing principle of equity and its bearing on resolving territorial disputes in front of ICJ).

238. See Burghardt, *supra* note 136, at 228 (believing that no new legal title can be obtained unless previous sovereign possessing territory in question had committed act

party tribunal or party willing to enforce a different understanding, effective control is a necessary requisite to the maintenance of legal title.²³⁹ Varying from effective control, an historical claim does not require a sovereign to possess the land at the time of the claim.²⁴⁰ Historical claims stem from the principle of first in time, first in right, submitting either precedence or length of time as the claim's basis.²⁴¹ Historical priority does not necessarily go back to the first discoverer or inhabitant documented, but rather to the first in priority with regards to the respective claimants in the contemporaneous dispute.²⁴²

The natural borders established by geographical features such as mountains, oceans, islands, and rivers,²⁴³ are used to form land claims, either in combination or irrespective with other theoretical bases for a sovereign claiming territory.²⁴⁴ At least one scholar argues that perhaps geographical delimitation commands more respect than more historically-rooted and effectively-controlled claims.²⁴⁵ *Uti possidetis*, roughly translating to

explicitly abandoning land); see also Sumner, *supra* note 8, at 1787-78 (analogizing that similar to adverse possession claim under U.S. common law).

239. See Burghardt, *supra* note 136, at 228 (positing that effective control is required by law in order to possess legal title); see also Sumner, *supra* note 8, at 1787-88 (explaining that effective control of territory creates stronger rights to territory and stronger claims to territory than any other factor).

240. See Burghardt, *supra* note 136, at 230-33 (believing that strongest historical claim is one based on territory that is viewed as State's "homeland"); see also Sumner, *supra* note 8, at 1789 (providing that historical claims create basic claims to territory, no matter whether State has actual possession of land at time of claim).

241. See Burghardt, *supra* note 136, at 230 (referring to historical-based claims as derived from priority or duration); see also Sumner, *supra* note 8, at 1789-90 (articulating that historical claims tend to be most common of territorial claims and are most often based on either duration or discovery).

242. See Burghardt, *supra* note 136, at 232 (describing that timelines for disputes extend as far back as possible so long as that time is pertinent to existing problems); see also Sumner, *supra* note 8, at 1789-90 (discussing how history and use of territory by disputing parties may affect outcomes of such disputes in front of ICJ).

243. See Burghardt, *supra* note 136, at 235-37 (analyzing territorial integrity as it relates to claims of sovereignty; noting that although experts have tried to debunk concepts of natural boundaries, these concepts survive as people continue to view certain regions and lands as possessing unity or wholeness); see also Sumner, *supra* note 8, at 1783-84 (assessing geography's role in determining outcomes of territorial disputes in front of ICJ).

244. See Burghardt, *supra* note 136, at 235-37 (examining territorial integrity as it relates to other legal claims over territory and how territorial integrity often creates strong emotional reactions and motivations within local inhabitants and disputing parties); see also Sumner, *supra* note 8, at 1783-84 (addressing geography's interplay with other factors when judges craft ICJ decisions for territorial disputes between States).

245. See Burghardt, *supra* note 136, at 235-37 (suggesting that disputes which are

“as you possess, so you possess,” leaves former colonies and subordinates to pursue the sovereignty claims that their previous “mother country” possessed, absent prior consent of the parties to alter those pre-delineated boundaries, with numerous colonies gaining their independence through this principle during the decolonization epoch.²⁴⁶

The ICJ utilizes documents such as maps and treaties as evidence of sovereignty. In addition to employing the baseline test in the *Fisheries Case*, the Court also looked towards history and documentation in ultimately finding for Norway.²⁴⁷ In 1959, the ICJ held that Belgium had not ceded sovereignty to territory disputed between Belgium and the Netherlands in *Sovereignty over Certain Frontier Land*.²⁴⁸ One issue the Court addressed was whether Belgium still controlled a specific territory it gained through a boundary convention, despite failing to assert its rights and allegedly allowing the Netherlands to assert control intermittently over the territory in question since 1843.²⁴⁹ The ICJ, in part, determined that Belgium had not abandoned sovereignty over the disputed territory by turning to Belgium’s evidentiary items such as military staff maps and survey records that

inapposite to territorial integrity create more emotional disputes and parties that are less willing to compromise); *see also* Sumner, *supra* note 8, at 1804-12 (analyzing ICJ jurisprudence and its justifications for decisions).

246. *See* Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554 (Dec. 22) (discussing *uti possidetis*, particularly how important it was in regards to disputes over territory which had previously been colonies of sovereign States); *see also* CASTELLINO & ALLEN, *supra* note 177, at 125-27 (describing ICJ’s decision not to disregard principle of *uti possidetis*, because this principle carries extra weight in areas of post-colonization, like Africa).

247. *See* Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 134-39 (Dec. 18) (applying history and documentation, in addition to application of baseline test, in arriving at its decision); *see also* PHARAND, CANADA’S ARCTIC WATERS, *supra* note 20, at 144-46 (discussing holdings of *Fisheries Case* and later codification of customary international law established in that case).

248. *See* Case Concerning Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209, 230 (June 20) (suggesting that perhaps history and documentation may play greater roles than effective control in some instances); *see also* CASTELLINO & ALLEN, *supra* note 177, at 122-25 (summarizing ICJ’s decision, important because it addressed issues of territorial disputes in post-colonial areas without invoking theory of *uti possidetis*).

249. *See* Case Concerning Sovereignty over Certain Frontier Land, 1959 I.C.J. at 227 (controlling territory intermittently was insufficient for Dutch to beat Belgium documentation, according to ICJ). For more information on this case, *see* CASTELLINO & ALLEN, *supra* note 177, at 122-25 (summarizing *Case Concerning Sovereignty over Certain Frontier Land* when discussing methods and principles that State’s acquire title to lands held previously by sovereigns).

clearly enclosed the disputed territory within the State's control, and held for Belgium.²⁵⁰

In *Frontier Dispute*, the Court held that a principle applicable to international territorial disputes did give significant weight to maps in terms of evidence that express a State's notion of territorial sovereignty.²⁵¹ The Court gives varying weight to maps ranging from legitimate legal force that represents a State's view of its territorial possession to a more circumstantial type of evidence that must be coupled with other evidence in order to shape a cogent argument.²⁵²

2. The Antarctic Treaty

Another alternative solution to the numerous Arctic territorial disputes discussed here could be taken from the solution to a similar situation on the other side of the globe, the Antarctic Treaty.²⁵³ In 1959, the United States invited twelve States with claims in Antarctica to a conference in Washington, D.C., which produced the Antarctic Treaty.²⁵⁴ This Treaty included a key provision, Article IV, which addressed the competing territorial claims of all of the States that wished to assert territorial claims

250. See *Case Concerning Sovereignty over Certain Frontier Land*, 1959 I.C.J. at 229-30 (believing that documentation showing territory's inclusion within Belgium, absent explicit act of abandonment, served as adequate evidence of Belgian control); see also CASTELLINO & ALLEN, *supra* note 177, at 122-25 (analyzing ICJ's evaluation of various documentation, where ICJ assessed reliability, validity, and value of each piece of documentation).

251. *Frontier Dispute*, 1986 I.C.J. 554 (giving weight to maps as indication of State's supposed territorial control, but not necessarily entire story). For more information on this case, see CASTELLINO & ALLEN, *supra* note 177, at 125-30 (summarizing *Frontier Dispute*).

252. *Frontier Dispute*, 1986 I.C.J. 554 (stating that maps are not always reliable or accurate, and therefore cannot themselves constitute evidence of title to territory, but are merely extrinsic evidence that there may be such title); see also CASTELLINO & ALLEN, *supra* note 177, at 129 (quoting ICJ decision which questioned reliability of maps and similar documentation, which by themselves, ICJ found, did not constitute territorial title).

253. See *Antarctic Treaty* (Dec. 1, 1959), 12 U.S.T. 794, 42 U.N.T.S. 71 (recognizing that it would be in States' interests worldwide to suspend all territorial claims in Antarctica and instead focus resources on exploration and scientific research in Antarctic for benefit of all States); see also *Antarctic Treaty*, Antarctic Treaty Secretariat (discussing formation of Antarctic Treaty and its pertinent components).

254. See THEUTENBERG, *supra* note 64, at 78-84 (discussing formation of Antarctic Treaty, including analysis of its impact and discussion of negotiations leading up to its formation); see also Rothwell, *supra* note 23, at 333 (describing formation of Antarctic Treaty in 1959).

on the continent.²⁵⁵ Article IV essentially suspended all of the States' rights in Antarctica, stating that the Treaty did not act as a renunciation of any previously asserted claims to territory on the continent.²⁵⁶ It also made clear that no State should make any new territorial claims in Antarctica while the Treaty was in force.²⁵⁷ While the actual effect of this language was somewhat unclear, it was important because it allowed the States to look past any territorial disputes and focus on other important problems facing the continent, such as pollution control, natural resource exploitation, and scientific exploration.²⁵⁸ No new sovereignty disputes have arisen in Antarctica for more forty-five years, due in large part to Article IV.²⁵⁹

The similar environmental issues, and the impact that global warming has in both regions, might lead States to form a similar treaty in the Arctic Circle.²⁶⁰ It could be advantageous for the Arctic Rim States to hold multilateral discussions on issues such as pollution control, management of wildlife, the na-

255. See Antarctic Treaty, *supra* note 253, art. 4 (stating that nothing in said Treaty could be interpreted as renunciation of previously asserted rights or claims by any State, nor could any future action by parties to said Treaty constitute actions furthering such claims); see also Bobo, *supra* note 254 (analyzing Article 4 of Antarctic Treaty).

256. See Antarctic Treaty, *supra* note 253, art. 4 (stating that while Antarctic Treaty was in place no new claim or enlargement of existing claims could be asserted by any State); see also Bobo, *supra* note 254 (restating Article IV of Antarctic Treaty as example which could be borrowed by Arctic States to resolve similar issues).

257. See Antarctic Treaty, *supra* note 253, art. 4 (stating that all such claims were suspended by Antarctic Treaty); see also Rothwell, *supra* note 23, at 333 (providing that under this Treaty, sovereignty ceases to be an issue in this region for duration of this Treaty); Bobo, *supra* note 254 (noting that territorial aspects of this treaty entered into effect after all signatories ratified on June 23, 1961, while Antarctic environmental regulations promulgated by 1991 Madrid Protocol have yet to be ratified by sufficient number of States).

258. See Rothwell, *supra* note 23, at 333 (discussing Antarctic Treaty's formation and parts of this Treaty that have been most beneficial to region and States involved); see also Antarctic Treaty, *supra* note 253, art. 4 (detailing rights that would be suspended under this Treaty to allow all signatory States to focus on important issues such as environment).

259. See Rothwell, *supra* note 23, at 333 (discussing Antarctic Treaty, in particular how agreement on non-sovereignty issues has led to stability in Antarctic region and has also prevented any sovereignty disputes from forming during its duration); see also Antarctic Treaty, *supra* note 253, art. 4 (stating that certain rights and claims of sovereignty were suspended by this Article of Antarctic Treaty).

260. See Rothwell, *supra* note 23, at 333 (suggesting that Arctic States could benefit greatly from treaties or Treaty similar to Antarctic Treaty); see also Bobo, *supra* note 254 (explaining conditions in Arctic region that might lead to formation of such treaty).

tive population's rights, and the law of the sea in the region.²⁶¹ Although a treaty like the Antarctic Treaty would not alter States' territorial claims and would ignore any action taken to further one's claim to the region while the Treaty is in force, States could enter into additional negotiations to settle certain territorial disputes in the same treaty, or add an addendum to the treaty.²⁶²

There are already close parallels to the Antarctic Treaty in place in the Arctic region. The first came about with the passing of Canada's AWPPA in 1970, which is discussed more fully above.²⁶³ The second parallel is the Arctic Cooperation Agreement.²⁶⁴ In 1988, following two years of negotiations, Canada and the United States entered into the Agreement, which sought to protect and develop the Arctic in a cooperative manner, while neither side subordinated its respective positions with regard to sovereignty.²⁶⁵ Both parties acknowledged that the Agreement did not disturb Canada's claims of sovereignty over either the Arctic Archipelago or the Northwest Passage.²⁶⁶ A third parallel

261. See Rothwell, *supra* note 23, at 333 (suggesting that such discussions could be advantageous to all States in region without delving into any truly contentious issues, which might prevent any agreement); see also Bobo, *supra* note 254 (explaining advantages for Arctic States to come to agreement over certain issues in region).

262. See Rothwell, *supra* note 23, at 364-67 (discussing effects on signing States' rights and their subsequent legal positions after formation of Antarctic Treaty); see also Antarctic Treaty, *supra* note 253, art. 4 (suspending legal claims to territory in Antarctica for duration of Treaty).

263. See AWPPA, *reprinted in* 9 INT'L LEGAL MATERIALS 543 (1970) (listing each section of AWPPA); see also Rothwell, *supra* note 23, at 339-40 (discussing enactment of AWPPA, its intentions, and its effects).

264. See Agreement on Arctic Cooperation, Jan. 11, 1988, U.S.-Can., *reprinted in* 28 I.L.M. 141 (1989) (formalizing agreement between United States and Canada to cooperate in advancing shared interests in Arctic navigation, development and security); see also Scovazzi, *supra* note 49, at 79 (discussing how this Agreement's purpose was to ensure that disputes over navigation rights did not affect Arctic region's unique environment).

265. See Agreement on Arctic Cooperation, *supra* note 264, art. 4. Article 4 contains a disclaimer that reads:

Nothing in this agreement of cooperative endeavor between Arctic neighbors and friends nor any practice there under affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.

See also Rothwell, *supra* note 23, at 345-47 (discussing this agreement which was entered into in order to advance Canada's and United States' shared interests in security and development in Arctic region).

266. See Rothwell, *supra* note 23, at 346 (citing Arctic Cooperation Agreement, Clause 4, which ensured that legal positions taken by both United States and Canada

is the Arctic Council, which convened for the first time in 1998, but with no real delegated power, the Council's role remains yet to be determined.²⁶⁷ At the moment, the Council operates on a minimal budget and only low-level officials of its eight Member States attend meetings, hinting that thus far States are not devoting significant resources to the Council.²⁶⁸

3. Ratification of UNCLOS

With 149 signatories,²⁶⁹ UNCLOS is one of the most widely adhered-to conventions in the world.²⁷⁰ The signatories include all of the permanent Members of the U.N. Security Council except the United States.²⁷¹ As a non-signatory to UNCLOS, the United States cannot participate in the work of the Commission, putting at risk thousands of square kilometers of resource-rich U.S. continental shelf.²⁷² As a result, the United States' non-signatory status can effectively prevent it from protecting its other oceans interests.²⁷³

would not be affected by this Agreement); *see also* Franklyn Griffiths, *Breaking the Ice on Canada-U.S. Arctic Co-operation*, *GLOBE & MAIL*, Feb. 22, 2006 (describing how 1988 Arctic Cooperation Agreement between Canada and United States did not prejudice territorial claims by either State in any subsequent court dispute).

267. *See* Johnston, *supra* note 46, at 154. For more information on the Arctic Council, see <http://www.arctic-council.org/> (providing information about Member States, secretariat, and other information officially provided by Arctic Council).

268. *See* Johnston, *supra* note 46, at 154. For more information on the Arctic Council, see <http://www.arctic-council.org/> (last visited Apr. 16, 2007) (providing information about purpose of Arctic Council, goals sought to be achieved, and other information about Arctic Council and its operations).

269. *See* Chronological list of ratification of UNCLOS, *available at* http://www.un.org/Depts/los/reference_files/chronologicallists_of_ratifications.htm#The%20United%20NationsConvention%20on%20the%20Law%20of%20the%20Sea (noting all current UNCLOS signatories); *see also* Lieutenant Colonel Andrew S. Williams, *The Interception of Civil Aircraft Over the High Seas in the Global War on Terror*, 59 *AIR FORCE L. REV.* 73, 92 (2007) (detailing signatory status of UNCLOS).

270. *See* Moore, *supra* note 125, at 2-24 (arguing that United States stands virtually alone in not being signatory to UNCLOS); *see also* Williams, *supra* note 269, at 92 (detailing that of all major maritime States, United States is only non-signatory to UNCLOS).

271. *See* Antrim, *supra* note 221, at 15 (noting this novel position of United States as non-signatory); *see also* Williams, *supra* note 269, at 92 (detailing that of all major maritime States, United States is single non-signatory to UNCLOS).

272. *See* Golovko, *supra* note 38 (describing Russian claim under review by Commission as covering amount of oil roughly numbering five billion tons); *see also* Sallot, *supra* note 38, at 1 (highlighting fact that there is significant amount of sediment on seabed as indicator that there is gas and oil underneath seabed).

273. *See* Moore *supra* note 125, at 16-17 (testifying that if United States ratified

Although it is not a signatory State to UNCLOS,²⁷⁴ the United States was the leading participant in its shaping.²⁷⁵ When UNCLOS was formally adopted in 1982,²⁷⁶ however, a provision regulating the exploitation of mineral resources in the deep seabed led to the Reagan Administration's decision not to ratify the agreement,²⁷⁷ even though that Administration accepted other provisions in UNCLOS as a codification of existing customary international law.²⁷⁸ After U.S. State Department representatives consulted with a representative group of countries operating under U.N. auspices, they found common ground regarding the governance of deep seabed mining and, in 1994, completed a successful negotiation that led all major industrial States to ratify UNCLOS.²⁷⁹

UNCLOS, for example, it would be able to see election of U.S. nationals to International Tribunals for UNCLOS ("Tribunal"); *see also* Antrim, *supra* note 221, at 15 (arguing that operating outside of UNCLOS provisions will put United States in inferior bargaining position in its current and future conflicts with UNCLOS signatories).

274. *See* Antrim, *supra* note 221, at 15 (arguing for United States' ratification UNCLOS, Antrim notes novel position of United States as non-signatory); *see also* Williams, *supra* note 269, at 92 (detailing that of all major maritime States, United States is only non-signatory to UNCLOS).

275. *See* Moore, *supra* note 125, at 6-7 (describing United States as principle proponent of UNCLOS); *see also* Antrim, *supra* note 221, at 5 (discussing early lobbying efforts of United States that gave shape to deep seabed mining regime of UNCLOS).

276. *See* David E. Pitt, *U.S. Seeks to "Fix" Mining Provisions of Sea Treaty*, N.Y. TIMES, Aug. 28, 1993 (describing that when UNCLOS was opened for signature in 1982, United States made decision not to sign due to contentions regarding deep seabed mining regime); *see also* Antrim, *supra* note 221, at 6 (detailing U.S. reasons for not ratifying UNCLOS along with other States in 1982).

277. *See* Antrim, *supra* note 221, at 6 (describing Reagan Administration's contention that deep seabed mining regime of UNCLOS economically favored developing States and was, as such, inapposite to U.S. interests); *see also* *The Law of the Sea Treaty and Reauthorization of the Deep Seabed Hard Mineral Resources Act: Hearings Before the Subcomm. On Oceanography, Gulf of Mexico, and the Outer Continental Shelf Deep Seabed Mining*, 103rd Cong. 37 (1994) (Statement of Ambassador David A. Colson, Deputy Assistant Secretary of State for Oceans) (explaining U.S. rationales for not ratifying UNCLOS as rooted in treaty language regarding deep seabed mining regime).

278. *See* CARTER ET AL., *supra* note 8, at 880 (describing that while United States did not sign UNCLOS, United States viewed it as codification of customary international maritime law); *see also* Antrim, *supra* note 221, at 6 (asserting that while United States was not successful in challenging deep seabed mining regime, it was pleased with international stability, otherwise, that UNCLOS ratification provided).

279. *See* CARTER ET AL., *supra* note 8, at 905-07 (detailing compromises struck between major industrial and developing States); *see also* Pitt, *supra* note 276 (examining Clinton Administration's attempts to "renegotiate" sections of UNCLOS that had been disputed by Reagan's Administration).

After this agreement was reached,²⁸⁰ the Administration of President William J. Clinton announced that the United States would sign it and sent UNCLOS to the U.S. Senate for advice and consent.²⁸¹ A group of Senators, however, formerly led by retired five-term Senator Jesse Helms and now led by Senator James M. Inhofe of Oklahoma, have managed to repeatedly block U.S. ratification of the UNCLOS,²⁸² claiming that it will impinge on U.S. sovereignty.²⁸³ This deadlock persists in spite of the support of the American Petroleum Institute²⁸⁴ and the current Administration of President George W. Bush²⁸⁵ in favor of UNCLOS ratification.

III. ARCTIC APPEASEMENT THROUGH UNCLOS RATIFICATION

The Arctic melt is causing a rapid reduction in the ice levels that have covered the Arctic Oceans for centuries.²⁸⁶ This melt

280. See CARTER ET AL., *supra* note 8, at 905-07 (detailing compromises struck between major industrial and developing States); see also Letter of Submittal from the State Department to the President, Message from the President of the United States Transmitting [UNCLOS] and the Agreement Relating to the Implementation of Part XI [the deep seabed mining provision] of the [UNCLOS] Doc. No. 103-39 of Oct. 7, 1994 (explaining to U.S. Senate that compromises reached are responsive to problems cited by Reagan Administration).

281. See CARTER ET AL., *supra* note 8, at 905 (describing details of Clinton Administration's announcement); see also Pitt, *supra* note 276 (providing political context of Clinton Administration's desire for United States to ratify UNCLOS).

282. See Krauss et al., *supra* note 5 (detailing Republican Senators' hostility to UNCLOS); see also Cornelia Dean, *Bush Forms Panel to Coordinate Ocean Policy*, N.Y. TIMES, Dec. 18, 2004, at A13 (explaining that Senate opposition is sole impediment to UNCLOS ratification); Editorial Desk, *Rescuing the Law of the Sea*, N.Y. TIMES, Aug. 22, 2004 (characterizing position currently taken by U.S. Senate as xenophobic).

283. See Krauss et al., *supra* note 5 (describing Republican opposition rooted in fears that it stands in opposition to U.S. sovereignty. *But see* Moore, *supra* note 125, at 10-11 (detailing long history of United States in shaping of UNCLOS provisions and virtual unanimous support it enjoys across whole of U.S. military due to shared belief in centrality of UNCLOS to U.S. interests).

284. See Moore, *supra* note 125, at 2-3, n. 5 (citing letter from President of American Petroleum Institute to Chairman of Senate Committee on Foreign Relations of Oct. 1, 1996, in support of UNCLOS); see also Krauss et al., *supra* note 5 (describing American Petroleum Institute as proponent of UNCLOS).

285. See Dean, *supra* note 284 (describing Administration's of George W. Bush support of UNCLOS); see also Krauss et al., *supra* note 5 (detailing Bush Administration's characterization of UNCLOS ratification as urgent need).

286. See *supra* notes 2-19 and accompanying text (discussing scientific conditions and environmental factors that are causing global warming and, in particular, melting of Arctic ice caps).

will open both extremely valuable shipping routes and previously untapped natural resources.²⁸⁷ These changing conditions heighten the need to address the existing disputes among sovereign States, which have previously been left unresolved due to the region's inaccessibility, and come to satisfactory resolutions for all parties involved.²⁸⁸

A. *Submission to the ICJ is Unlikely*

1. The Northwest Passage in Front of the ICJ

To perfect its title to the Northwest Passage through the ICJ, Canada would submit to, and ultimately convince, the ICJ that the Northwest Passage is outside the scope of the UNCLOS definition of international strait and is determined to be internal waters enclosed by legal straight baselines; or if the Passage were found to be historic waters, assuming the United States and the international community honored an ICJ decision to such effect, Canada would finally perfect title to the Northwest Passage.²⁸⁹ In 1985, Canada announced its establishment of straight baselines around its arctic archipelago in order to enclose the waters surrounding the islands as internal waters, and enable it to exert control over a critical part of the Northwest Passage.²⁹⁰ The assertion of straight baselines could determine the status of the Northwest Passage. If confronted with the legitimacy of such action, the ICJ will likely base its decision on the *Fisheries Case*.²⁹¹

287. See *supra* notes 5-7, 20-25 and accompanying text (discussing potential for new, valuable shipping routes from Europe to Asia, as well as possibility that precious natural resources such as oil deposits could exist below sea floors that lie beneath ice of Northwest Passage).

288. See *supra* notes 5, 20-33 and accompanying text (detailing potential conflicts over sovereignty in region, in particular current and future disputes over sovereignty and innocent travel of Northwest Passage).

289. See *supra* notes 45-185 and accompanying text (discussing existing international law dealing with international strait and analyzing whether Northwest Passage would fit that definition).

290. See *supra* notes 46-77 and accompanying text (discussing Canada's establishment of straight baselines in 1985 as attempt to enclose Arctic waters north of Canada, thereby making them internal waters of Canada).

291. See *supra* notes 49-57 and accompanying text (discussing *Fisheries Case* and, particularly, requirements necessary to establish legal straight baselines around coastal regions, namely: (1) baselines must not depart to any appreciable extent from general direction of coastline; (2) waters lying within baselines must be closely linked to coastal State's domain as to be considered internal waters; and (3) that waters represent economic interests which are particular to region and which have an importance evidenced by long history of use).

An evaluation of the ICJ's test for establishing baselines suggests that the ICJ would most likely find that the baselines significantly depart from the Canadian coastline when viewed as a whole. Irrespectively, because the Canadian coastline is varied with peninsulas and indentations, coupled with the argument that outer coasts of the archipelagic islands together make up the northern Canadian coastline, the ICJ would most likely find that the first requirement of the *Fisheries Case* is satisfied with regard to the Canadian baselines.²⁹² When analyzing the second factor of the test, the ICJ would most likely determine that the waters lying within the baselines are sufficiently closely linked to Canada's domain as to be considered internal waters due to the fact that Canada's Arctic Archipelago has a higher ratio of land to sea than that of the Norwegian *skjaergaard* in the *Fisheries Case*, a test that some experts have advocated.²⁹³ The ICJ would then determine that Canada has sufficient economic interests, evidenced by a long history of use, meeting the third requirement of the test. The Court would also find that the history of Canadian exploration and trade, along with the economic harm derived from any potential environmental damage due to unregulated foreign travel, would give Canada a sufficient economic interest. The Court could determine that the habitation of the region by the Inuit would be sufficient to satisfy the third requirement.²⁹⁴ If the questions of the legality of the Canadian straight baselines came before the ICJ, the Court would likely uphold their legitimacy, essentially freezing the analysis of whether the Northwest Passage was an international strait to only the activity in the region up until 1985.²⁹⁵

If the Court found the Northwest Passage to be an international strait before 1985, foreign vessels could have the right of

292. See *supra* notes 57, 60-65 and accompanying text (discussing first prong of test for baselines set forth in *Fisheries Case*, and potential problems that Canada might have in trying to persuade court that this prong is satisfied with respect to baselines drawn around Canadian coastline).

293. See *supra* notes 57-80 and accompanying text (discussing second prong of test set forth in *Fisheries Case* and comparing it to baselines drawn around Norwegian *skjaergaard* in *Fisheries Case*).

294. See *supra* notes 49-80 and accompanying text (discussing third prong of test set forth in *Fisheries Case* and how certain factors specific to Canadian Arctic could lead ICJ to find that prong was satisfied).

295. See *supra* notes 55-74 and accompanying text (describing development of existing international law with regard to establishment of straight baselines around coasts and analyzing Canada's establishment of straight baselines in 1985).

innocent passage through the Arctic waters despite the establishment of straight baselines.²⁹⁶ Additionally, if the Court declined to uphold the establishment of the straight baselines, innocent passage would still exist if the Court found the Northwest Passage to be an international strait, before or after 1985.²⁹⁷ Because UNCLOS failed to define the term “international strait,” the ICJ would likely rely on its *Corfu Channel Case*, which remains the basis of customary international law governing the existence of an international strait. That case established two requirements for recognition of an international strait—a geographic element and a functionality element. The ICJ would likely find the geographic element to be met due to the Northwest Passage connecting two high seas, the Atlantic and the Pacific Oceans and also connecting EEZs.²⁹⁸

While a subsidiary inquiry, the second element of functionality is far more ambiguous, with questions looming as to whether it is actual use or potential use that matters.²⁹⁹ The ICJ clearly stated that it is actual use that matters, making the potential Arctic melt and its impact in opening up shipping routes in the Northwest Passage irrelevant to determining whether or not the passage is an international strait.³⁰⁰ More telling is whether the frequency of transits through the Northwest Passage are sufficient to establish use of that area. Although less than fifty completed transits of the Northwest Passage have been made since 1903—far less than the number of transits through the Corfu Channel—it is possible that the Arctic conditions that make passages more difficult may lower the ICJ’s standards to deter-

296. See *supra* notes 79-85 and accompanying text (discussing importance of whether Northwest Passage is an international strait or whether critical parts of this Passage are internal waters of Canada, subject to their control and sovereignty).

297. See *supra* notes 78-80 and accompanying text (discussing possibility that even if establishment of baselines is found to be legal, there still might be pre-existing right of innocent passage for foreign vessels).

298. See *supra* notes 88-129 and accompanying text (discussing geographic element that was established in *Corfu Channel Case* and must be met to designate straits as international straits and also discussing potential analysis of whether this requirement is met with respect to Northwest Passage).

299. See *supra* notes 88-97 and accompanying text (describing second prong, functionality prong, of test established in *Corfu Channel Case* and differing opinions of what level of traffic is necessary to satisfy this prong, as well as whether this prong would be met with respect to Northwest Passage).

300. See *supra* notes 91-128 and accompanying text (discussing number of transits so far of Northwest Passage and also conditions that exist in region and difficulty of making transits under such conditions).

mine a sufficient level of functionality.³⁰¹

The Court would likely find the Northwest Passage to be an international strait due to meeting the geographic element and would allow the small number of transits to meet the functionality element.³⁰² From an equitable standpoint, it is likely that the functional element would be met and the ICJ would categorize the Northwest Passage as an international strait due to the difficult temperate conditions, the existence of actual historical transits, and the inequitable consequences of not allowing the international community to shave off thousands of miles and fuel necessary to traverse the alternative South American route. The equitable argument would grant safe passage to the international community, while UNCLOS would still allow Canada to control its waters under Article 234.³⁰³

Although the ICJ could base its decision on the international law governing international straits and straight baselines, it might instead base any decision it rendered upon the international law of historic waters or historic consolidation of title.³⁰⁴ The ICJ defined the legal theory of historic waters in the Anglo-Norwegian *Fisheries Case* as waters that are treated as internal waters due to the existence of historic title.³⁰⁵ The ICJ would also likely look to the U.S. Supreme Court decision, *U.S. v. Alaska*, where the Court established three requirements for a claim of historical internal waters: (1) the State exercised authority over the area, (2) the authority was continuous, and (3) there was acquiescence by foreign States.³⁰⁶ When analyzing these requirements, the ICJ would likely find that Canada has not exercised sufficient control over the waters of the Northwest Passage to

301. See *supra* notes 113-126 and accompanying text (discussing functionality prong of this test established in *Corfu Channel Case* and also analyzing whether environmental factors present in Northwest Passage would change analysis of this prong with respect to this route).

302. See *supra* notes 95-115 and accompanying text (discussing functionality requirement and number of actual transits of Northwest Passage and predicting whether this level of traffic would be sufficient to satisfy functionality requirement for Passage).

303. See *supra* notes 231-237 and accompanying text (discussing principles of equity that ICJ might use and how they might use these principles in resolving question of whether Northwest Passage is international strait).

304. See *supra* notes 133-138 and accompanying text (discussing these two theories and elements necessary to support such claims).

305. See *supra* notes 139-168 and accompanying text (discussing and analyzing *Anglo-Norwegian Fisheries Case* and, in particular, definition of theory of historic waters).

306. See *supra* note 142 and accompanying text (discussing *Alaska*).

meet the first requirement, due in large part to the fact that the Canadian government, in 1985, publicly admitted that no Canadian government had ever even defined the boundaries of its internal waters or territorial sea.³⁰⁷ The ICJ would also likely conclude that any authority that Canada exercised over the waters was not continuous, because the travels of the early British and French explorers were simple expeditions and once again, Canada did not even define its waters, concluding that it could not assert any control over territory it did not recognize as its own.³⁰⁸ Moreover, there has hardly been acquiescence by foreign States, in particular the United States, to Canadian control, extinguishing Canadian claims under the third prong.³⁰⁹ It follows, therefore, that the ICJ would not find that Canada has sovereignty over the Passage based on the theory of historic internal waters.³¹⁰

Similar to the theory of historic waters, it would be unlikely that the ICJ would find for Canadian sovereignty based on historic consolidation of title, despite the fact that Canada may have acquired title from discovery by English explorers, because of the questionable claims of control over the waters of the Northwest Passage.³¹¹

The Canadian claims would similarly be weak under the doctrine of *uti possidetis*, due to the fact that the ICJ has traditionally used this theory where there is a disputed border between two countries, not where a State attempts to claim waters as internal. Although Canada may claim that the transfer of its territory from Great Britain and its many assertions of control over the waters of the Northwest Passage establish a valid claim under the theories of historic claims of ownership, the lack of acquiescence by the United States and the lack of defined territory over which its control has historically been exerted is fatal to its

307. See *supra* notes 46-48 and accompanying text (discussing Canadian Secretary of State declaring Canadian sovereignty over Arctic Archipelago and Northwest Passage).

308. See *supra* notes 133-135, 145-147 and accompanying text (discussing early exploration of Arctic region).

309. See *supra* notes 151-168 and accompanying text (discussing third prong of theory of historic waters and analyzing this prong with respect to Northwest Passage).

310. See *supra* notes 136-168 and accompanying text (analyzing theory of historic internal waters with respect to Northwest Passage).

311. See *supra* notes 169-176 and accompanying text (analyzing theory of historic consolidation of title with respect to Northwest Passage).

claims under the three historic theories previously addressed.³¹²

2. Hans Island in Front of the ICJ

Before the dispute over the Northwest Passage comes before the ICJ, Canada would most likely prefer to submit a claim to the ICJ for a resolution of the dispute over Hans Island. The ICJ would have to examine similar issues and arguments in the latter dispute, and so it would be an important test case for the more important dispute over the Northwest Passage.³¹³ Canada would likely make a claim of sovereignty over Hans Island based on historic consolidation of title.³¹⁴ While any argument based on this theory is hampered by the fact that there are no inhabitants that have or do peacefully possess the island, the ICJ should overlook this factor and focus on the requirements of administrative control and discovery. Despite the actions that both Denmark and Canada have taken in recent years to assert control over the island, the ICJ would likely find that there has not been sufficient control by either State, as the existence of plaques and flags are probably not enough to qualify as control.³¹⁵ Both States have similar claims to discovery: although British explorers may have noticed or landed on the island since the 1840s, the island was named after a Greenlander, traveling with a U.S. explorer, in 1871. To distinguish one State's claim from the other under this theory, the ICJ might look to the use of the surrounding waters by the Inughuit of Greenland, who could be considered to have control or even be peaceful possessors since the fourteenth century.³¹⁶ Given this last piece of information, the ICJ would likely find that this was sufficient to grant sovereignty to Denmark in the dispute, if it based its decision on historic consolidation of title.³¹⁷

312. *See supra* notes 130-185 and accompanying text (analyzing specific case of Northwest Passage with respect to theories of historic ownership).

313. *See supra* notes 26-32 and accompanying text (discussing dispute over Hans Island and reasons that Canada and Denmark would submit this dispute to ICJ for resolution).

314. *See supra* notes 190-203 and accompanying text (discussing early exploration of Hans Island).

315. *See supra* notes 186-187, 199-201 and accompanying text (describing recent activity involving Hans Island and also arguing that dependence on plaques does not make strong case for sovereignty).

316. *See supra* note 186-203 and accompanying text (discussing history and discovery of Hans Island and how this might impact dispute over it).

317. *See supra* notes 186-203 and accompanying text (discussing historical use of

The ICJ might decide that the theory of historic consolidation of title was an inadequate means to make a decision over the small rock's nationality. The Court might then utilize either factors of geography, as it did in the dispute over the rock of Gibraltar, or even the more innovative idea that it could determine the sovereignty over Hans Island based on its inclusion in either State's EEZ.³¹⁸ Based on history and previous dispute resolutions, it is difficult to predict the outcomes under both of these theories. Therefore, the only theory which would result in a clear outcome would be that for Denmark under historic consolidation of title.³¹⁹

B. *Entering into a Treaty like the Antarctic Treaty*

While the resolution of either the dispute over the Northwest Passage or Hans Island in front of the ICJ would produce an all-or-nothing result, an alternative solution both disputes, as well as the other disputes and considerations in the Arctic region, is to form a treaty similar to the Antarctic Treaty in the Arctic region. Following from the success of the Antarctic Treaty in postponing territorial disputes in Antarctic so that compromise could be reached on more pressing and important environmental issues, there have been a few agreements between Arctic States that have attempted to put off territorial claims in the same manner to focus on more pressing issues.³²⁰ Unfortunately, the Arctic Council and the Arctic Cooperation Agreement have not been as successful as the Antarctic Treaty. One solution to this problem would be to devote more effort and resources to ensure the success of either. Although each of these attempts, along with the Arctic Waters Pollution Prevention Act, were based on the best intentions, none has had the desired ef-

Hans Island and its surrounding areas and how this might impact claims of sovereignty based on historic consolidation of title).

318. See *supra* notes 204-211 and accompanying text (discussing EEZ's and how they are defined, as well as their potential effect on this dispute over Hans Island).

319. See *supra* notes 26-32, 186-215 and accompanying text (discussing dispute over Hans Island, especially history of rock and how this would affect claim of historic consolidation of title).

320. See *supra* notes 253-268 and accompanying text (discussing Antarctic Treaty and how similar treaties could act to solve many Arctic problems and disputes, such as dispute over Hans Island and claims of sovereignty over waters of Northwest Passage).

fect, and therefore, starting over might be the best decision.³²¹ The Arctic States should join together in forming an Arctic Treaty, perhaps with identical language to that of the Antarctic Treaty. While such a treaty would solve many of the environmental issues in the region, it might not have a strong enough effect on the territorial disputes, and so it might not satisfy all States, some of whom are more concerned with their sovereignty claims than environmental issues.³²²

C. *Ratification of UNCLOS*

As evidenced by the 1988 Arctic Cooperation Agreement between the United States and Canada,³²³ both countries acknowledge the need to collaborate in the navigation of the Northwest Passage and are sensitive to the unique maritime environment. As both a signatory to UNCLOS and a coastal State, it can implement the provisions of Article 42 into its laws and regulations concerning the conduct of vessels in transit passage through the Northwest Passage.³²⁴ Due to Canada's long-expressed concern with the protection of its Arctic marine environment,³²⁵ and because of scientific projections regarding the danger that the Arctic melt may be causing,³²⁶ Canada has a strong argument that the provisions of Article 234 of UNCLOS should apply to the Northwest Passage.³²⁷

In order for vessels to pass safely through the Northwest Passage, the United States should acknowledge Canada's superior position in the management of the Northwest Passage under

321. *See supra* notes 253-268 and accompanying text (discussing measures attempted in Arctic to settle various disputes in this region).

322. *See supra* notes 253-268 and accompanying text (discussing potential for Arctic treaties that would settle all disputes and discussing how such possibilities might not be probable given differences between situations in Antarctic and situations in Arctic).

323. *See supra* notes 253-268 and accompanying text (describing Arctic Cooperation Agreement and its formation).

324. *See supra* notes 62-64, 84-85, 108-112 (discussing codification, by UNCLOS, of existing international law with regards to establishment of straight baselines and also innocent passage through international straits).

325. *See supra* notes 151-157 and accompanying text (discussing attempts by Canada to control its Arctic waters, including its enactment of AWPPA).

326. *See supra* notes 12-19 and accompanying text (discussing scientific research suggesting that Arctic may undergo rapid climate change within next century).

327. *See supra* note 62-129 and accompanying text (discussing likelihood that Northwest Passage would be found to be legally enclosed by Canada's straight baselines and whether there would be right of innocent passage due to Northwest Passage being deemed international strait).

UNCLOS, not only due to Canada's geographic proximity and experience with navigating the Northwest Passage, but also because of the decreased ability of the United States to operate in the Arctic Ocean.³²⁸ The UNCLOS transit passage regime, in conjunction with Article 234 provides Canada ample jurisdiction to enforce stringent environmental standards commensurate with the risks that exist in Arctic waters.³²⁹ Indeed, becoming a signatory to UNCLOS would actually provide the United States guaranteed freedom of navigation through the Northwest Passage.³³⁰ Finally, commercial shipping of the Northwest Passage can consequently be developed without the fear that every transit would be considered a threat to Canadian national security and sovereignty.

As is the case with any determination of the Hans Island issue, the Russian claim will be resolved by a factual finding under UNCLOS committees.³³¹ States that have not signed UNCLOS are barred from making appointments to these committees, thereby leaving significant matters of national interest in the hands of other States.³³² As such, it would behoove any non-signatory State with interests in the Arctic region, such as the United States, to ratify UNCLOS, as not doing so will leave these interests in the cold.

CONCLUSION

The scientific evidence makes it clear that the Arctic Circle is warming rapidly, leading to ice-free summers in the Arctic Ocean in the near future—a state that will persist for centuries. This warming is projected to make vast quantities of natural resources available for exploitation, and create access to an incred-

328. *See supra* note 122 and accompanying text (detailing possibility that transits of Northwest Passage may become more difficult in short term).

329. *See supra* notes 23-24 and accompanying text (listing rights and obligations that were codified by UNCLOS for State's internal waters and discussing rights that Canada would have if Northwest Passage were found to be legally enclosed by its straight baseline system, no matter if there was right of innocent passage).

330. *See supra* note 23 and accompanying text (discussing effects of United States becoming signatory to UNCLOS).

331. *See supra* note 5 and accompanying text (discussing how some disputes might be settled under authority of UNCLOS and its systems).

332. *See supra* note 5 and accompanying text (discussing how some disputes between States could be resolved through system established under UNCLOS rather than ICJ or other method).

ibly valuable shipping lane between the Atlantic to the Pacific Oceans. Despite these clear economic benefits, or because of them, there are disputes in the region that could impede its use. There are three possibilities for resolution, which have varying advantages and disadvantages. The most desirable resolution would come from universal adoption of UNCLOS. Universal adoption would benefit all States, because currently any non-signatory Arctic State, such as the United States, cannot take full advantage of the potential benefits in the region without ratification of UNCLOS. While a resolution before the ICJ offers a far more permanent resolution of territorial disputes in the Arctic, the zero sum game of such a resolution makes it unlikely that Canada and the other States involved would submit to the Court's jurisdiction. An Antarctic-like treaty, or a strengthened and properly charged Arctic Council, could be a useful mechanism to postpone territorial disputes and foster temporary cooperation amongst signatories. Yet, potential uncertainties stemming from any Arctic treaties make this option potentially undesirable.

It is clear from the foregoing analysis that universal adherence to UNCLOS is the most efficient mechanism through which to balance the interests of the Arctic States. Denmark and Canada, having both ratified UNCLOS, could potentially resolve their dispute over Hans Island by controlling the water surrounding Hans Island under the EEZ. Similarly, Canada, the United States, and other Arctic States could use UNCLOS to resolve the disputed issues surrounding the Northwest Passage. In order to protect interests in the Arctic region, non-signatory countries must join the rest of the international community in ratifying UNCLOS.