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« The Northwest Passage »

The Northwest Passage is, in theory, the alternative maritime shipping route across the Arctic. Beyond the specific operational constraints mapping out commercial navigation within the Canadian archipelago, the fundamental question arises regarding the legal status of this vast maritime network: should it be classified as internal waters or an international strait? The geopolitical standoff between Ottawa and Washington represents as much a question of international law as it is a question of historical and contemporary usage.

A unique and distinct maritime route

The Northwest Passage is well-known by explorers and navigators for having been attempted multiple times since the 16th century, leaving behind the names of Frobisher, Davis, Hudson, Baffin, Ross, and Franklin. Their objective was to discover a northern shortcut to the Orient departing from Europe or the Americas. These historical attempts systematically failed due to ice sheet density during both winter and summer. It was not until 1906 that the Norwegian explorer Roald Amundsen successfully discovered and navigated the Northwest Passage (NWP), which remains navigable for only a few days a year at the absolute peak of the summer thaw.

However, climate change is progressively rendering it increasingly accessible: the Arctic region is warming at least twice as fast as the rest of the planet. This rapid geographical reshaping of the Arctic zone will eventually enable ocean carriers to transit via the NWP during the summer season, drastically contracting voyage durations and associated operating costs. The NWP offers a maritime shortcut of approximately 6,000 km between Europe and Asia, translating into 18 to 20 days of transit time saved compared to traditional routing via the Suez Canal or the Strait of Malacca—trade chokepoints whose transits are chronically subject to scheduling waitlists, heavy canal dues, and complex administrative procedures.

Nevertheless, Arctic navigation demands specialized equipment, particularly regarding the specific nature of raw structural materials utilized (such as heavy ice-strengthened hulls). The NWP presents a high commercial interest for trade lanes situated in the Northern Hemisphere (linking Northern Europe, Japan, Canada, and Alaska). Another distinct advantage characteristic of certain Northwest Passage routes is the absolute absence of vessel dimension limits or draft constraints (*tirant d'eau*), unlike artificial canals. Conversely, drifting pack ice (*banquise dérivante*) poses a continuous physical hazard for navigation and commercial cargo flows. It cannot be denied that the contemporary NWP remains a route virtually unexploitable for mainstream international maritime trade due to the extreme hydrographic complexity mapping out the southeastern portion of the Canadian archipelago. While a direct deepwater route exists through the Melville and McClure Straits, it is currently utilized exclusively by military submarines and remains non-viable for commercial shipping.

The legal status governing the waters of the NWP is fiercely contested: Canada defines these corridors as internal waters subject to its absolute national sovereignty, whereas the United States views them as an international strait where foreign vessels command a legal right of transit passage, as established under the framework of the United Nations Convention on the Law of the Sea (UNCLOS / Montego Bay Convention).

The Canadian legal and sovereign position

The Canadian sovereign claims encompass overlapping identity, national security, environmental protection, commercial, and macroeconomic stakes. Two successive legal hypotheses must be analyzed: that of Canada's full and unshared sovereignty over the NWP, versus that of a national sovereignty burdened by the foreign right of innocent passage.

Hypothesis 1: The absolute consecration of the internal waters status

Under both customary and conventional international law, the flag State holds the primary obligation to administer and monitor the vessel, the flag representing the legal bond of nationality binding a ship to a sovereign State. The Canadian State possesses comprehensive regulatory power over vessels flying the Canadian flag. However, regarding foreign-flagged vessels, Canada can only intervene under the restricted capacities granted to a coastal State or a Port State. Consequently, the baseline margin of maneuver available to sovereign States to enforce navigation safety and marine preservation mandates remains structurally weak.

Within this first hypothesis, the NWP is fully assimilated into internal waters, over which Canada exercises total and unshared sovereignty. The maritime territory is thus legally equated to terrestrial land. The State can subject access to its waters to strict compliance with national conditions and, where appropriate, deploy enforcement and penal sanctions. It commands the legal capacity to establish mandatory sea lanes, mandate compliance with traffic separation schemes, compel vessels to hand over the helm to accredited local ice pilots, prescribe stringent vessel design and hull construction criteria, and strictly prohibit operational maneuvers deemed hazardous to the marine environment, such as the discharge of oil, sewage, or waste cargo into Arctic waters¹.

In the event of non-compliance with any of these mandates, the vessel may be denied access to the Arctic archipelago. This refusal must be strictly non-discriminatory and grounded upon a formally published normative text.

Hypothesis 2: Internal waters status burdened by the right of innocent passage

The alternative legal hypothesis centers on a status of internal waters burdened by the right of innocent passage, as formulated under Article 8 of UNCLOS. Innocent passage is strictly governed within Part II, Section 3 of the Convention. According to Articles 18 and 19 of UNCLOS, transit must be continuous, expeditious, and must not be "*prejudicial to the peace, good order or security of the coastal State.*" Article 19, paragraph 2 specifies that actions prejudicial to the coastal State encompass any "*exercise or practice with weapons,*" any "*act aimed at collecting information,*" any "*act of willful and serious pollution contrary to this Convention,*" fishing activities, or any "*other activity not having a direct bearing on passage.*" Under Article 25 of UNCLOS, the coastal State retains the right to temporarily suspend passage.

Notably, pollution is explicitly classified as an activity prejudicial to the State, provided it is willful and serious. This threshold remains deeply regrettable, given that operational negligence—which constitutes the primary driver of environmental and structural damage at sea—is completely excluded from this scope. Consequently, in this case, the coastal State can only intervene *a posteriori*: it must wait for actual environmental damage to materialize before it can legally close access to its waters. Outside the explicit criteria mapped out in Article 19 of UNCLOS, the coastal State cannot hamper the passage of a foreign vessel, as mandated by Article 24 ("*The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea, except in accordance with this Convention*"), nor can it deploy discriminatory enforcement measures, notably against vessels flying flags of convenience.

Furthermore, Article 21 of UNCLOS allows the coastal State to adopt international standards relating to the design, construction, manning, and equipment of foreign vessels—meaning the MARPOL Convention for the prevention of ship-source pollution, the SOLAS Convention for the safety of life at sea, and the COLREG Convention for preventing collisions at sea. It is undeniable that these standards, born out of international consensus, remain significantly below the strict regulatory threshold desired by Ottawa. Canada would be required to demonstrate that its national security is directly jeopardized, and that non-compliance with its domestic standards constitutes a direct threat to its stability. Navigation conditions remain exceptionally perilous within a frontier region where iceberg collisions represent a non-negligible hazard, and where extremely low ambient temperatures severely slow down the biological degradation of pollutant waste by marine bacteria.

An environmental catastrophe in the Arctic would impact the region for hundreds of years. Can damage to the environment be perceived as a threat to national security? The legal reasoning remains fragile, and invoking environmental protection has never been utilized as a valid ground to challenge or impact

¹ Frédéric Lasserre, *Passages et mers arctiques géopolitique d'une région en mutation*, Québec, Presse Universitaire du Québec, 2010.

a State's security. What would be Canada's powers regarding environmental protection under the hypothesis that the NWP is classified as an international strait?

Hypothesis 3: The NWP as an "international strait" and the consecration of transit passage

Navigation through an international strait allows vessels to enjoy the right of unimpeded transit passage. According to Article 38 of UNCLOS, this transit must be continuous and expeditious. Article 44 explicitly mandates that the coastal State can neither hamper nor suspend this right of transit passage. Article 41 of UNCLOS allows the coastal State to designate sea lanes and prescribe traffic separation schemes. However, these measures must strictly comply with international law and therefore meet IMO criteria; its prior approval remains indispensable. Article 42 of UNCLOS grants normative powers to the coastal State to ensure: *"a) the safety of navigation and the regulation of maritime traffic, as provided in article 41; b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait..."* In terms of marine environmental preservation, the coastal State can only enforce measures already governed by international law, representing a relatively low regulatory threshold.

Concretely, how can the coastal State enforce its prescriptions? Article 233, which specifically addresses safeguards regarding environmental protection in international straits, states: *"However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening to cause major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures..."* This article applies to all commercial vessels or warships. What is understood by "appropriate enforcement measures" (*mesures de police appropriées*)? Can the coastal State formally suspend transit passage? Given the strict regime of freedom of navigation governing international straits, the legal answer appears to be no. The coastal State can only prosecute the owner of the "substandard" vessel on a civil or potentially criminal level after actual damage has occurred.

The interpretation of Article 233 of UNCLOS poses a significant problem. What exactly constitutes a "major damage" (*dommage important*)? Legal scholars seem to agree that the formal suspension of the right of transit passage can only occur in cases of extreme necessity. The coastal State must possess near-certainty that the structural damage will occur. The weight of the potential environmental damage must appear as prevailing over the fundamental freedom of the right of transit passage. It is the sole responsibility of the coastal State to provide definitive proof of this imminent threat.

The defense of the freedom of navigation within the NWP

The United States has historically and systematically protested against Canadian sovereign claims over the NWP, firmly classifying it as an international strait. The crux of this geopolitical opposition lies in ensuring unimpeded free access for foreign vessels through the NWP.

The definition of an international strait by the ICJ: The "Corfu Channel Case"

As early as 1970, following Canada's promulgation of the *Arctic Waters Pollution Prevention Act*, the United States explicitly opposed this claim. Washington views the NWP as an international strait linking two expanses of the high seas: Baffin Bay communicates directly with the Arctic Ocean via the Beaufort Sea. The question remains to determine whether the NWP is legally an international strait, and thus, what defines an international strait? This specific question was raised for the very first time during the famous "Corfu Channel Case" in 1949 before the International Court of Justice (ICJ)².

The Corfu Channel separates the coast of Albania from the Greek island of Corfu, linking the Adriatic Sea to the Ionian Sea. Vessels belonging to the British *Royal Navy* carried out minesweeping operations within the strait without obtaining prior authorization from Albania. The United Kingdom argued that freedom of navigation applied by virtue of the strait's international character. The mines scattered within the channel blocked access, which stood in direct contradiction with the principle of free innocent passage. Albania countered that this unauthorized minesweeping intervention violated its territorial sovereignty, arguing that the passage was not an international strait but formed an integral part of its territorial sea.

² Judgment in the Corfu Channel Case, International Court of Justice (Albania v. United Kingdom), April 9, 1949.

The ICJ ultimately ruled in favor of the United Kingdom. The Court established two core criteria to characterize a strait as international: a geographical criterion and a functional criterion. The geographical criterion is straightforward: according to the Larousse dictionary, a strait is defined as a *"more or less long and narrow arm of the sea enclosed between the two coasts bordering it, and connecting two marine or lacustrine expanses."* Geographically, the NWP is indeed a narrow arm of the sea enclosed by land masses, connecting the Labrador Sea to the Beaufort Sea.

It is the functional criterion that remains subject to intense scrutiny. In the 1949 ICJ judgment, reference is made to the *"volume of traffic passing through the strait, or its greater or lesser importance for international navigation..."* The strait must be used for the purposes of international navigation. The North Corfu Channel had nonetheless been a useful route for international traffic. This international usage of the passage must be actual, and not merely hypothetical. In that milestone ruling, the judges explicitly quantified this operational frequency.

However, the functional criterion established in 1949 is not entirely satisfactory, as it leaves a distinct layer of uncertainty regarding the exact degree of "importance" a strait must possess to be formally classified as international. Should this assessment be based strictly on the number of vessels transiting through it? What is the mandatory threshold? Can the economic value represented by the cargo be factored into the equation? Can this evaluation evolve over time? Furthermore, could the specific and harsh characteristics of the Arctic region lower the expected standards of frequency, thereby granting the NWP the status of an international strait?

Charles De Visscher, who served as a judge in the Corfu Channel case, provides a detailed list of elements characterizing an international strait: *"It cannot (...) be doubted that the degree of interest of a strait for international maritime trade is attested above all by the importance of its traffic, as reflected by the number of ships using the strait, their total tonnage, the value of their cargo, and the number and diversity of the flags represented."*³ The melting of Arctic ice sheets opens the pathway toward an internationalization of the NWP, which is admittedly hypothetical today but could mutate tomorrow into a genuine maritime highway. This legal status of the NWP is bound to evolve over time, driven by climate change and its actual, effective usage by commercial shipping. Does the UNCLOS framework provide further elements regarding the definition of an international strait?

The definition of an international strait under the UNCLOS framework

The legal concept of an international strait is governed within Part III of UNCLOS, which details the right of unimpeded transit passage. The Convention itself does not explicitly define what constitutes an international strait. Article 37 merely states: *"This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."*

Thus, the UNCLOS framework strictly incorporates the geographical and functional criteria originally carved out by the ICJ in the Corfu Channel case.

Article 38 establishes that the right of free transit passage applies within these corridors. However, Article 37 of UNCLOS remains subject to divergent interpretations: for certain legal scholars, the phrase *"which are used for international navigation"* can be transposed to a strait that is potentially usable. Others argue that a single successful transit is sufficient to characterize a strait as international⁴.

The United States pursues a specific, restrictive interpretation of UNCLOS, arguing that the geographical attribute is paramount. Conversely, alternative scholars place the geographical and functional criteria on an equal footing, highlighting the enduring legal authority of the 1949 *Corfu Channel Case*. Legal doctrine does not evade the functional aspect; quite the contrary: *"While the ICJ did not fully adopt this reasoning, numerous commentaries nonetheless emphasize the requirement of a certain traffic volume⁵: a merely potential status cannot justify the legal classification of an international strait, according to Tommy Koh, President of the Conference on the Law of the Sea in 1981 and 1982."*⁶ The terms *"are used for international navigation"* in Article 37 of UNCLOS imply actual operational effectiveness rather than the mere potential for a strait to become international. As of now, this effective

³ Ch. De Visscher, *Problèmes de conflit en droit international public*, Paris Pedonne, 1969, p. 142 Cité par Frédéric Lasserre

⁴ Frédéric Lasserre, (2010), *Ibid*

⁵ Lalonde, S. (2004) Increased traffic through Canadian Arctic waters: Canada's state of readiness, *Revue juridique Thémis*, vol 38 n°1, p70 cité par Frédéric Lasserre

⁶ Frédéric Lasserre, (2010), *Ibid*

usage is not met in the case of the NWP. Alternative authors evaluate this "international importance" of maritime traffic through a strictly quantified assessment.

To counter the claims regarding the international character of the strait, the prominent Canadian jurist Donat Pharand meticulously cataloged the frequency of transits through the NWP, tracking both the number of vessels in transit and the diversity of their flags. The studied historical period spans from 1903 (the first successful transit) to 2005: *"This research yields the following classification: 69 transits over a period of more than 100 years, distributed among 15 different nationalities. This represents an average of approximately one transit every year and a half."*⁷

The operational frequency therefore remains exceptionally low. Furthermore, yachts and small pleasure crafts are subject to strict supervision by Canadian authorities, while icebreakers must comply with a mandatory prior authorization procedure. Despite the lack of precision within the text of UNCLOS and the residual ambiguity in international jurisprudence, a strait must display a baseline volume of traffic to be qualified as international. The contemporary navigation volumes within the NWP appear insufficient to be characterized as international navigation. The NWP is consequently not an international strait. The applicable legal regime remains that of innocent passage, identical to the rules governing the territorial sea.

The battle between "pro-Canadian" and "pro-American" jurists persists; yet, could these two North American nations not resolve their bilateral divergences through a diplomatic consensus?

Canada-United States cooperation and pragmatic compromise

The 1988 Arctic Cooperation Agreement between the United States and Canada, which subjects foreign icebreakers to prior authorization from Canadian authorities within the NWP, allows the United States to maintain a strategic statu quo. This framework avoids creating a legal precedent capable of undermining American national security interests elsewhere in the world.

The formal recognition of Canadian sovereign claims could have triggered a proliferation of similar territorial demands across highly strategic corridors for the United States, such as the Strait of Hormuz or the Strait of Malacca. This statu quo effectively normalizes the bilateral relationship between Canada and the United States. However, a strategic re-evaluation by the United States could emerge driven by the accelerating shrinkage of the pack ice and the emergence of greenfield challenges, notably the expansion of potentially hazardous human activities within the Arctic theater. The sheer immensity of the region renders even partial operational monitoring exceptionally difficult. Currently, the United States commands only a single active polar icebreaker stationed in Alaska.

A pooling of investments in personnel, technical expertise, and capital to ensure maritime safety, pursue hydrographic mapping missions, and perform continuous pack ice observation would be deeply beneficial for both nations. The frontier region is undergoing a profound transformation, rendering it paramount to rethink the wider security and cooperative dimensions. Fostering a joint Canada-United States Arctic maritime police force capable of safeguarding the economic, scientific, and cultural interests represented by the Arctic would constitute a major step forward. Such a collaboration is highly textually viable to confront shared vulnerabilities. Under this framework, Ottawa would abandon its strict territorial internal waters claims to recognize freedom of navigation, while Washington, while maintaining its statu quo doctrine, would significantly reinforce its cooperative links with Canada across regional security, policing surveillance, defense, commercial shipping, and environmental protection.

A pragmatic compromise appears as the absolute cornerstone to resolve this historical legal impasse. Climate change has successfully driven a mutual awareness of the shared interests binding Canada and the United States to cooperate. From this institutional collaboration will emerge a rational, coherent, and secure management of the Arctic environment.

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⁷ Hélène De Pooter, *L'emprise des Etats côtiers sur l'Arctique*, Paris, édition A Pedone 2009