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Oh Canada: Why Canada Should Recognize the Northwest Passage as an International Strait

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**OH CANADA: WHY CANADA SHOULD RECOGNIZE THE
NORTHWEST PASSAGE AS AN INTERNATIONAL STRAIT**

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INTRODUCTION

The ownership status of the Northwest Passage has become a highly contested topic in the recent decade. Running through the Canadian Arctic and connecting the Atlantic and Pacific Oceans, the Northwest Passage provides an extremely efficient sea shipping route that cuts days from the travel time of ships carrying cargo between hemispheres. The novelty of this issue exists due to the waterway being located in the Arctic, which was traditionally frozen through for the great majority of the calendar year. As global warming intensifies and the Arctic ice continues to melt, the Northwest Passage can be travelled through with greater ease. This makes the use of it a highly attractive route for foreign ships as it is shorter and thus cheaper.

The increased use of the waterway brings about issues of debated ownership as well as issues surrounding safety and maintenance of the waterway. Canada claims that the Northwest Passage is their internal waters and thus it has full ownership. Other countries, including the United States, claim that it is an international strait subject to the Law of the Sea thus giving foreign vessels the right of transit passage. Regardless of what the status of the Northwest Passage is now, after the prolonged use that is anticipated in the future, the argument for an international strait will prevail. In order for all parties to gain the most benefit possible, Canada's control and maintenance of the waterway is essential. This paper will argue that Canada should concede that the Northwest Passage is an international strait that is subject to the Law of the Sea in order to gain uncontested control of the waterway.

I. WHAT IS THE NORTHWEST PASSAGE?

Running through and along the top of Northern Canada and the Arctic, the Northwest Passage is a sea route that connects the Atlantic and Pacific oceans.¹ Historically, the landscape of the Northwest Passage has been frozen in the Arctic Ocean.² The traditional shipping route used for sea transportation between the Atlantic and Pacific oceans is the Panama Canal.³

Prior to the Panama Canal being built, to travel by sea, ships transporting goods between the east and west coasts of North America had to go all the way

¹ Hobart M. King, *What is the Northwest Passage?*, GEOLOGY.COM, <https://geology.com/articles/northwest-passage.shtml> [https://perma.cc/ZH8M-STST]

² *Id.*

³ Burton L. Gordon, et al., *Panama Canal*, ENCYCLOPAEDIA BRITANNICA (Mar. 3, 2023), <https://www.britannica.com/topic/Panama-Canal> [https://perma.cc/B62E-Z74F].

around the island of Cape Horn, Chile – the southernmost point of South America.⁴ The construction of the Panama Canal eliminated thousands of miles from the routes of ships travelling between the Atlantic and Pacific oceans.⁵ The Panama Canal is a widely used shipping route today, moving 516.7 million tonnes of goods in 2021, which accounts for 3.5% of all global maritime trade.⁶ While still thriving today and the ability to incur 30% more traffic before hitting capacity, finding a shorter alternative to the Panama Canal is something that would benefit global commerce via cheaper transportation costs.⁷ Climate change is an important consideration in modern times and the use of fuel-powered cargo ships to transport goods accounts for more greenhouse gas emissions than all airline transportation and travel.⁸ Finding the shortest, most fuel-efficient route is crucial as the global climate worsens. The climate crisis impacts every corner of the globe, with Panama being no exception.⁹ Climate change is placing strain on the Panama Canal and its operations, with rainfall in the tropical country 20% less than what it was prior to 2019.¹⁰ The irregular weather patterns and more intense periods of rainfall accounting for less total rainfall can cause the locks in the Panama Canal to overflow and pose more issues.¹¹ Many potential solutions have been proposed that include deepening and widening the locks,¹² but it is clear that an alternative that not necessarily replaces, but can at least lessen the burden on the Panama Canal is necessary.

⁴ *Id.*

⁵ *Id.*

⁶ David Alire Garcia, *Flow of goods through Panama Canal hits record*, REUTERS (Oct. 28, 2021), <https://www.reuters.com/world/americas/flow-goods-through-panama-canal-hits-record-2021-10-29>.

⁷ Greg Miller, *How war, shipping boom, China lockdowns impact Panama Canal*, FREIGHT WAVES (May 2, 2022), <https://www.freightwaves.com/news/how-war-shipping-boom-china-lockdowns-impact-panama-canal> [<https://perma.cc/B4LZ-738E>].

⁸ Sarah Kennedy, *Maritime shipping causes more greenhouse gases than airlines*, YALE CLIMATE CONNECTIONS (Aug. 2, 2021), <https://yaleclimateconnections.org/2021/08/maritime-shipping-causes-more-greenhouse-gases-than-airlines> [<https://perma.cc/7MBT-KGPM>].

⁹ BBC, *Panama Canal grapples with climate change threat*, BBC (Aug. 9, 2022), <https://www.bbc.com/news/world-latin-america-62407514> [<https://perma.cc/N644-ER4V>].

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

The Northwest Passage offers a solution to the problems that the Panama Canal faces.¹³ As a consequence of climate change and the global climate crisis posing risks to the entire globe, the ice caps in the Arctic have begun melting thereby opening up the Northwest Passage more than ever before.¹⁴ The accessibility of the Northwest Passage caused by climate change is paradoxically away that emissions could be reduced in the commercial shipping sector.¹⁵ Shorter shipping routes through the Arctic would save fuel and shrink the amount of greenhouse gas being emitted into the atmosphere.¹⁶ While the Northwest Passage does not completely ameliorate these problems, it will improve them.¹⁷

The Northwest Passage was not always an option as a shipping route.¹⁸ The Northwest Passage was first conquered in 1905 after many failed attempts.¹⁹ The first successful crossing was not economically successful nor created a shipping route.²⁰ It took three years and used a path that was too shallow for commercial shipping.²¹ When the trip was finally completed in

¹³ *See id.*

¹⁴ King, *supra* note 1.

¹⁵ *See id.*; Peter Adams & Maxwell J. Dunbar, *Arctic Archipelago*, THE CANADIAN ENCYCLOPEDIA (Oct. 26, 2015), <https://www.thecanadianencyclopedia.ca/en/article/arctic-archipelago> [<https://perma.cc/99E2-H2PW>] (stating that “[t]he Arctic is experiencing climate warming faster and more intensely than lower-latitude parts of the world. Changes have already been noticed in the High Arctic, including reduced sea ice. In addition, the glaciers of the archipelago are already retreating and thinning, some quite rapidly. Annual mean temperatures in the Arctic are predicted to increase by 4– 7°C during this century, with the greatest warming to occur in winter (as much as 12°C according to one emissions scenario).”).

¹⁶ King, *supra* note 1.

¹⁷ *Id.*

¹⁸ Amy Tikkanen, *Northwest Passage*, ENCYCLOPAEDIA BRITANNICA (Feb. 2023), www.britannica.com/place/Northwest-Passage-trade-route [<https://perma.cc/V35E-H9JG>].

¹⁹ *Id.*; King, *supra* note 1 (stating that failed attempts included when “Francisco de Ulloa started searching the Baja California peninsula area for it in 1539. English explorers, including Martin Frobisher, John Davis, and Henry Hudson searched for it from the Atlantic side in the late 1500s and early 1600s. These expeditions were unsuccessful. Explorations continued through the 1600s and 1700s without success. Then in 1849 Robert McClure passed through the Bering Strait with the intent of sailing through to the Atlantic. His ship was trapped in the ice not far from making it to Viscount Melville Sound and probable passage to the Atlantic. Finally, after spending three winters on the ice and some members dying of starvation, McClure and crew were rescued by a sledge party from one of Sir Edward Belcher’s ships and transported by sledge to the Sound. McClure and his crew became the first to survive a trip through the Northwest Passage. Norwegian explorer Roald Amundsen and his crew were the first to cross the Northwest Passage entirely by sea in 1906.”).

²⁰ King, *supra* note 1.

²¹ *Id.*

one season in 1944, the route taken was also too shallow for commercial shipping.²² The United State Coast Guard successfully completed a trip across the Northwest Passage that was in waters deep enough for commercial shipping in 1957 over the course of 64 days.²³

Twelve years later in 1969, the first cargo ship was sent through the Northwest Passage following behind an icebreaker ship.²⁴ This trip was a test to see whether the Northwest Passage was a viable alternative to the Alaska Pipeline.²⁵ With the low economic value that the Northwest Passage was perceived to have in 1969, it was determined that it was not a viable option and the Alaska Pipeline was built.²⁶

The route was not a widely utilized waterway because the ice in the Arctic made it only travelable during some summers when the climate became warm enough.²⁷ Over time as temperatures have risen and technology has improved, the Northwest Passage has become a more viable option as an international commercial shipping route.²⁸ This is mainly due to its location in the Arctic Archipelago.²⁹ The islands above Canada's mainland are part of the Arctic Archipelago and are all considered part of Canada.³⁰ The Northwest Passage

²² *Id.*

²³ *Id.*

²⁴ *Id.*; Marine Insight, *What Is an Ice Breaker Ship and How Does It Work?*, MARINE INSIGHT (Aug. 28, 2019), <https://www.marineinsight.com/types-of-ships/how-does-an-ice-breaker-ship-works> [<https://perma.cc/K5EH-4MCV>] (defining icebreaker ship as “a special class of ships that are designed to break even thickest of the ice and make some of the most inhospitable paths accessible to the world, navigating through the ice-covered waters, especially in the Polar Regions. The significant features that make the ice-breakers different from other vessels are its strengthened hull to resist ice waters, a specially designed ice-clearing shape to make a path forward and extreme power to navigate through sea ice.”).

²⁵ King, *supra* note 1; Michael Ray, *Trans-Alaska Pipeline*, ENCYCLOPAEDIA BRITANNICA (May 16, 2014), <https://www.britannica.com/topic/Trans-Alaska-Pipeline> [<https://perma.cc/WRD9-ZR35>] (stating that the “Trans-Alaska Pipeline . . . connects the oil fields of Prudhoe Bay in northern Alaska, U.S., with the harbour at Valdez, 800 miles (1,300 km) to the south.”).

²⁶ King, *supra* note 1.

²⁷ See Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15 (discussing that “[t]he sea ice cover, with an average thickness of about 1.5 to 2 m is complete in winter throughout the [Arctic], with the exception of several recurring polynyas (areas of open water surrounded by sea ice).”).

²⁸ Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15 (saying that “[t]he ice cover has been thinner in recent years, and it is now normal for large areas of the channels to be open in late summer to the point where cruise ships quite commonly sail through the Northwest Passage.”).

²⁹ Tikkanen, *supra* note 18; Adams & Dunbar, *supra* note 15.

³⁰ Adams & Dunbar, *supra* note 15 (stating that “[l]ying north of mainland Canada, the Arctic Archipelago consists of 94 major islands (greater than 130 km²) and

flows through these islands and all the way through the Arctic Circle.³¹ While there are many different ways to get through the Arctic Archipelago, the route that can be utilized for shipping is approximately 900 miles long linking the Pacific and Atlantic oceans on either end.³²

The opportunity provided by the Northwest Passage and the potential economic value continues to increase as global temperatures rise. Nearly half of the Arctic ice that is melting is located north of Canada in the Arctic Archipelago.³³ While the amount of ice that is melting in the Arctic Archipelago is large, the rate at which the ice is melting is also accelerating.³⁴ As more ice melts, the Northwest Passage will only become easier to access. In summer of 2007, the waterway melted enough for ships to pass through without an ice breaker ahead of them for the first time.³⁵ While parts of it refroze and the path remains quite treacherous in the wintertime, the summer months offer an opportunity for commercial shipping.³⁶

Despite the opportunity, the Northwest Passage is still not widely used.³⁷ The waterway saw only 27 commercial ships pass through in 2019, compared to the 13,785 commercial ships that passed through the Panama Canal in 2019.³⁸ This can be attributed to the need for icebreakers in the winter months

36,469 minor islands covering a total of 1.4 million km². Apart from Greenland, which is almost entirely ice covered, the Canadian Arctic Archipelago forms the world's largest High Arctic land area. It contains six of the world's 30 largest islands.”)

³¹ *Id.* (discussing that “[t]he depths of the channels between the islands range from less than 100 m to about 600 m in eastern Lancaster Sound. The continental shelf varies from over 550 m in depth in the west and north to 200 m in the east. . . . The depth and extent of the channels offer commercial possibilities—for example, as a passageway for submarine tankers.”); *Northwest Passage*, HISTORY.COM (Mar. 3, 2021), <https://www.history.com/topics/exploration/northwest-passage> [https://perma.cc/D9DE-QFQ5].

³² *Northwest Passage*, *supra* note 31.

³³ Jesse Allen & Robert Simon, *Ice Loss in the Canadian Arctic Archipelago*, NASA, <https://earthobservatory.nasa.gov/images/50726/ice-loss-in-the-canadian-arctic-archipelago> [https://perma.cc/GRE5-QA8F] (last visited Feb. 26, 2024).

³⁴ *Id.* (proving that “[i]n the six years studied, the Canadian Arctic Archipelago lost an average of approximately 61 gigatons of ice per year. (A gigaton is a billion tons of ice.) The research team also found the rate of ice loss was accelerating. From 2004 to 2006, the average mass loss was roughly 31 gigatons per year; from 2007 to 2009, the loss increased to 92 gigatons per year.”).

³⁵ *Northwest Passage*, *supra* note 31.

³⁶ *Id.*

³⁷ See Levon Sevunts, *2019 saw Increase in Commercial Shipping Through Northwest Passage*, RADIO CANADA INT'L (Dec. 11, 2019), <https://www.rcinet.ca/en/2019/12/11/2019-commercial-shipping-through-northwest-passage>.

³⁸ *Id.*; Martin Placek, *Number of transits in the Panama Canal from 2014 to 2022*, STATISTA (Nov. 28, 2022), <https://www.statista.com/statistics/710163/transits-panama-canal>.

as well as the fact that the ice is not guaranteed to fully melt each summer solidifying a clear path.³⁹ The need for ice breakers to lead commercial ships creates additional costs for shipping, but as the Arctic ice continues to melt, the need for ice breakers will decline especially during the summer months.⁴⁰

Utilizing the Northwest Passage is beneficial for economic reasons and climate reasons. The Northwest Passage is 7,000 kilometers shorter when traveling between the east and west coasts of the United States than using the Panama Canal.⁴¹ This will cut costs for shipping companies in numerous ways, but the most notable expenses are fuel and crew costs.⁴² Less storage for fuel and supplies on board also allows for more cargo to be transported.⁴³ Since the Northwest Passage is not manmade, it will be able to accommodate larger ships than the Panama Canal, resulting in further economic and climate benefits.⁴⁴ The shorter route resulting in less fuel being used also results in less greenhouse gas emissions being released into the atmosphere.⁴⁵

Costs and climate benefits are not the only positives that can be reaped from the usage of the Northwest Passage. It has been discovered that 25% of the untapped oil on the globe is located in the Arctic region.⁴⁶ There are also a

³⁹ Jessica Murphy, *Is the Arctic set to Become a main Shipping Route?*, BBC (Oct. 31, 2018), <https://www.bbc.com/news/business-45527531> [<https://perma.cc/Q5VS-MJUH>].

⁴⁰ See Walt Meier, *Ice Persists in the Northwest Passage*, NASA (August 22, 2021), <https://earthobservatory.nasa.gov/images/148802/ice-persists-in-the-northwest-passage> [<https://perma.cc/R28M-DK9S>] (discussing that “[t]he . . . route still has ice [b]ut it’s possible a channel could open up in the [summer] weeks before freeze-up starts.”).

⁴¹ *Northwest and Northeast Passages?*, DISCOVERING THE ARCTIC, <https://discoveringthearctic.org.uk/arctic-challenges/troubled-water/northwest-northeast-passages> [<https://perma.cc/7NKG-M3RH>] (last visited Feb. 26, 2024).

⁴² “*Historical*” *North West Passage Voyage Saves \$80,000 in Fuel Costs*, SHIP & BUNKER (Sept. 25, 2013), <https://shipandbunker.com/news/world/824810-historical-north-west-passage-voyage-saves-80000-in-fuel-costs> [<https://perma.cc/DKF6-72LE>] (discussing that in 2013 ships were estimated to save \$80,000 USD on fuel and \$80,000 USD on bunker costs); *U.S. All Grades All Formulations Retail Gasoline Prices*, U.S. ENERGY INFO. ADMIN. (Feb. 27, 2023), https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=p&s=emm_epm0_pte_nus_dpg&f=m [<https://perma.cc/57Z6-J8G4>] (in 2013, fuel was approximately \$3.49/gallon).

⁴³ “*Historical*” *North West Passage Voyage Saves \$80,000 in Fuel Costs*, *supra* note 42 (comparing the Northwest Passage to the Panama Canal, “the Arctic journey is shorter and allows the ship to operate at capacity, carrying 25 percent more cargo.”).

⁴⁴ Tikkanen, *supra* note 18.

⁴⁵ Adams, *supra* note 15. It is quite paradoxical that the globe warming contributed to by commercial shipping is allowing for a new shipping route to open which in turn will reduce emissions created by commercial shipping.

⁴⁶ *Discovering the Arctic*, *supra* note 41.

number of other natural resources that are plentiful in the Arctic region.⁴⁷ The utilization of the Northwest Passage will make the Arctic region more familiar and accessible to humans and the melting of the ice will make the extraction of these resources easier.⁴⁸ Additionally, the transportation of these resources is much simpler if the Northwest Passage runs through the Arctic and can take the resources wherever they need to go.⁴⁹ The exploration of Arctic waters and the strategies used to combat them such as advanced ice breaking techniques and Arctic navigation could also benefit other geographical areas in Arctic climates, providing new avenues to harvest other natural resources or opening up new waterways in the Eastern Hemisphere.⁵⁰

The numerous benefits that can be reaped from the utilization of the Northwest Passage demonstrate that it needs to be utilized, and with the current state of the climate in the Arctic there has never been a better time. A lot of the benefits will be gained by private shipping companies and other capitalist entities, however, there are numerous benefits that will be provided to whoever owns the waterway. The opportunities for taxes, tariffs, ports, as well as monitoring and emergency services expenses must be taken on by an owner.

Canada claims ownership of the Northwest Passage since it runs through the Arctic Archipelago, within the Northwest Territories, and Nunavut, all of which they consider part of their territory.⁵¹ A number of other countries, including the United States, actively disagree with Canada's alleged ownership.⁵² The United States military has sent vessels through the Northwest Passage without notifying Canadian authorities.⁵³ The United States claims, with many other countries in agreement, that the Northwest Passage is international waters, not Canadian owned.⁵⁴ As the usage of the Northwest Passage becomes more prevalent it is important that the question of who owns the waterway gets answered. If the ambiguity continues, nations could miss out on benefits but more importantly, accountability of maintenance and costly disadvantages to the waterway could cause all those who want to use the Northwest Passage to suffer.

⁴⁷ *Id.* (giving examples such as nickel, iron ore, phosphate, copper, cobalt, uranium, and gold).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Tikkanen, *supra* note 18.

⁵¹ King, *supra* note 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

II. LAWS GOVERNING INTERNATIONAL SHIPPING WATERWAYS

The implications of deeming a channel or inland waters as international waterways allow a right of passage for international shipping.⁵⁵ From a legal standpoint “international waterways are straits, canals, and rivers that connect two areas of the high seas or enable ocean shipping to reach interior ports on international seas, gulfs, or lakes that otherwise would be landlocked. International waterways also may be rivers that serve as international boundaries or traverse successively two or more states. [The] right [of passage] is based on customary international law and treaty agreements.”⁵⁶ In Jamaica in 1982 at the most recent United Nations Convention, the Law of the Sea (sometimes called the “Constitution for the Oceans”) was developed with over 160 countries participating in it to date.⁵⁷ The Law of the Sea governs waters off the coasts of countries and allows those countries some enforcement and protection powers.⁵⁸

The Law of the Sea says that countries control their territorial waters beginning at the shoreline and out to 12 miles (called the “12-mile limit”).⁵⁹ Within those 12 miles, the country who controls the water has their own laws apply.⁶⁰ Countries with territorial waters also have their own “Exclusive Economic Zone” (EEZ) which extends 200 miles from the end of the 12-mile limit.⁶¹ Within the EEZ, the country of ownership owns the natural resources

⁵⁵ *International Waterways*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/international-waterways> (last visited Feb. 22, 2024) [<https://perma.cc/4MAZ-DMAE>].

⁵⁶ *Id.*

⁵⁷ John P. Rafferty, *Are There Laws on the High Seas?*, ENCYCLOPAEDIA BRITANNICA <https://www.britannica.com/story/are-there-laws-on-the-high-seas> [<https://perma.cc/JDF9-R6G4>]; Robin R. Churchill, *Law of the Sea*, ENCYCLOPAEDIA BRITANNICA (February 11, 2023), <https://www.britannica.com/topic/Law-of-the-Sea> [<https://perma.cc/8BPG-QRGU>].

⁵⁸ Churchill, *supra* note 57.

⁵⁹ U.N. Convention on the Law of the Sea, art. 3, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994), [hereinafter Law of the Sea].

⁶⁰ *Id.*; Rafferty, *supra* note 57 (stating that the country can “build, extract natural resources, and either encourage or forbid sea passage through it (or flights over it) just as if it were a parcel of land.”).

⁶¹ Law of the Sea, *supra* note 59, art. 57; Rafferty, *supra* note 57 (stating that “[t]he sizes of some EEZs may be limited by the presence of the EEZs of other countries, in which case the overlapping area is often divided equally between the various parties.”).

and sea life within the zone.⁶² In both the 12-mile limit and the EEZ of the country, they cannot prohibit foreign vessels merely moving through the waters innocently.⁶³ Passage becomes prejudicial when foreign ships engage in a number of activities including threatening sovereignty, using weapons, loading or unloading commodities, pollution, fishing, research, and other activity “not having a direct bearing on passage.”⁶⁴

In areas 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[,]” international ships passing through have the right of transit passage.⁶⁵ The Right of Transit Passage is broader than The Right of Innocent Passage. The right of transit allows ships to follow their normal conduct and international regulations pertaining to sea safety procedures but ensures they follow the law of the State of registry for all survey activities and traffic separation schemes.⁶⁶

There are special exceptions from the distance requirements that include archipelagic waters.⁶⁷ The archipelagic baselines may be drawn around the perimeter of the outermost points of the outermost islands so long as the ratio of island to water is at most 1:9.⁶⁸ The length of the perimeter lines may not exceed 125 miles long, and after three lines that reach 125 miles, the rest may not exceed 100 miles.⁶⁹ The country in ownership of the archipelagic waters may block them off if it is for national safety purposes or delineate specific paths for foreign ships.⁷⁰ If neither of those options have been taken up by the country of ownership, all foreign ships have the right of innocent passage.⁷¹

There are waters that are far enough from shorelines that they are not covered by 12-mile limits and EEZs nor considered archipelagic.⁷² These are

⁶² Law of the Sea, *supra* note 59, art. 58.

⁶³ Law of the Sea, *supra* note 59, art.19 (stating that “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”).

⁶⁴ *Id.*

⁶⁵ Law of the Sea, *supra* note 59, art. 37.

⁶⁶ *Id.*; V.D. Bordunov, *The Right of Transit Passage Under the 1982 Convention*, 12 MARINE POL’Y 219, 220 (1988), (discussing “[u]nder the Convention, 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 EEZ and another part of the high seas or EEZ (Article 38(2), 1982 Convention). The regime of transit passage originates in the customary norm of free passage through international straits.”).

⁶⁷ Law of the Sea, *supra* note 59, art. 2.

⁶⁸ Law of the Sea, *supra* note 59, art. 47.

⁶⁹ *Id.*

⁷⁰ Law of the Sea, *supra* note 59, art. 52.

⁷¹ *Id.*

⁷² Law of the Sea, *supra* note 59, art 2.

true international waters and there is no singular governing body.⁷³ In these areas, ships may move freely through the waters and extract natural resources.⁷⁴ When crimes are committed on international waters, the law governing the country owning the vessel applies.⁷⁵ For international crimes, any entity could claim authority over the crime using universal jurisdiction.⁷⁶

The laws applied within the bounds of waters depend on how many miles offshore a ship is travelling, as well as the purpose of the travel, and the width of the waterway. The Law of the Sea controls those who have signed it and enforces countries' laws up to 212 miles off their shores.⁷⁷ A very pressing issue with the Law of the Sea is that not every country has signed it.⁷⁸ The United States has not signed the Law of the Sea which presents issues pertaining to the Northwest Passage as they are a dominant country that has used and will use the waterway.⁷⁹ The implications are that if the Northwest Passage is deemed to be within the Canadian Archipelago, 12-mile limit, or EEZ, despite the fact that Canada has signed the Law of the Sea, the United States could attempt to argue that the Law of the Sea does not apply to American ships because the United States is not bound.⁸⁰

III. CURRENTLY ESTABLISHED INTERNATIONAL SHIPPING WATERWAYS

The Panama and Suez Canals and the laws that govern them play an important role in the analysis of international waterway law and waterway shipping laws due to their size and frequency of use. Additionally, the Northwest Passage will be taking on a lot of the traffic currently flowing through the Panama Canal. Also important for analysis is the Northeast Passage, sometimes called the "Eurasian equivalent of the . . . Northwest

⁷³ Rafferty, *supra* note 57.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Law of the Sea, *supra* note 59, art 2.

⁷⁸ See Law of the Sea, *supra* note 59.

⁷⁹ See *id.*; Anya Wahal, *On International Treaties, the United States Refuses to Playball*, Council on Foreign Relations (Jan. 7, 2022), <https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball> [<https://perma.cc/QG4A-X52W>] (explaining that "[t]he United States did not ratify UNCLOS because of fears among conservative Republicans that it would undermine U.S. sovereignty by transferring "ownership" of the high seas to the United Nations. Opponents argued that UNCLOS would also allow global bureaucrats to overrule U.S. naval operations and require U.S. companies to pay royalties to the International Seabed Authority. The Reagan administration also feared being sued for failing to meet environmental standards for the high seas, should the United States accede to UNCLOS.").

⁸⁰ See generally Law of the Sea, *supra* note 59.

Passage,” because it plays a similar role in the Arctic regions of the Eastern Hemisphere.⁸¹ The Northeast Passage connects the Pacific and Atlantic Oceans along the northern coast of Russia.⁸²

A. *THE PANAMA CANAL*

The Panama Canal is the waterway that currently dominates shipping traffic between the Atlantic and Pacific Oceans in the Western Hemisphere.⁸³ A short history of the Panama Canal is necessary to articulate the evolution of the laws and ownership over the canal. New Granada, which in present-day includes Panama and Colombia, began building a canal in 1513, but abandoned the project.⁸⁴ In 1881, France and Panama began official construction of the Panama Canal following France’s success in building the Suez Canal approximately ten years earlier.⁸⁵ The French control of the project had numerous problems including engineering and the death of over 25,000 workers.⁸⁶ The United States entered the Hay-Bunau-Varilla Treaty of 1903 and leased the land that the Panama Canal was on and began working on the canal in 1904.⁸⁷ This gave the United States “exclusive and permanent possession of the Panama Canal Zone.”⁸⁸ With much greater success than France, ten years later in 1914, the Panama Canal was complete.⁸⁹

The United States had control of the Panama Canal beginning in 1903 as it was considered American territory via the Hay-Bunau-Varilla Treaty.⁹⁰ While the site was leased land and was supposed to be neutral, the Americans had

⁸¹ Kenneth Pletcher, *Northeast Passage*, ENCYCLOPAEDIA BRITANNICA (June 19, 2013), <https://www.britannica.com/topic/Northeast-Passage> [<https://perma.cc/5T47-MWSY>].

⁸² *Id.*

⁸³ *Who Owns the Panama Canal?*, CONSTITUTIONUS.COM, <https://constitutionus.com/economy/who-owns-the-panama-canal> [<https://perma.cc/B29D-TGF8>].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*; *Hay-Bunau-Varilla Treaty*, ENCYCLOPAEDIA BRITANNICA (Nov. 11, 2022), <https://www.britannica.com/event/Hay-Bunau-Varilla-Treaty> [<https://perma.cc/5AGV-AHXL>] (explaining that “[the] Hay–Bunau-Varilla Treaty . . . agreement between the United States and Panama granting exclusive canal rights to the United States across the Isthmus of Panama in exchange for financial reimbursement and guarantees of protection to the newly established republic.”).

⁸⁸ *Panama Canal*, HISTORY.COM (Sept. 6, 2022), <https://www.history.com/topics/landmarks/panama-canal> [<https://perma.cc/BL9H-RX7E>].

⁸⁹ *Id.*

⁹⁰ *Id.*

significant military control and the right to defend the canal.⁹¹ This created public upset throughout all of Latin America as many were not allowed on the land and were overwhelmed by the American presence.⁹² As a newly sovereign nation, Panamanians did not support the “infringement” by the United States.⁹³

The most significant benefit for the United States in having control of the Panama Canal was the mere development of it, as 66% of traffic through it is destined for or originates from the United States providing significant commerce benefits.⁹⁴ While there was toll revenue that was obtained, the majority of it was used to service the canal.⁹⁵ Overtime, the United States saw the Panama Canal as more of a liability than an asset as tensions within Latin America rose.⁹⁶ The potential national security threat ultimately drove President Carter and Omar Torrijos, the respective leaders of the United States and Panama at the time, to ratify the Torrijos-Carter Treaties.⁹⁷

The Torrijos-Carter Treaties granted Panama full control of the Panama Canal in December of 1999.⁹⁸ This meant that Panama was responsible for defending the canal and would receive all of the profits obtained from the canal.⁹⁹ Panama has fully controlled the Panama Canal since 1999, and the tolls make it financially self-sustaining and support the Panamanian economy with

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Panama Canal*, *supra* note 83.

⁹⁴ *Background on Panama Canal Transfer*, U.S. DEP'T STATE (Dec. 7, 1999) https://1997-2001.state.gov/regions/wha/panama/991207_fs_pancanal.html [<https://perma.cc/6RYU-5ER8>].

⁹⁵ Noel Maurer & Carlos Yu, *What T.R. Took: The Economic Impact of the Panama Canal, 1903-1937*, 68 J. ECON. HIST. 686, 694 (2008); Mary Cooper, *Panama Canal: Does transferring it to Panama threaten U.S. security?*, CQPRESS (Nov. 26, 1999), <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1999112600> [<https://perma.cc/M6AQ-XVFC>].

⁹⁶ Cooper, *supra* note 95.

⁹⁷ *Panama Canal*, *supra* note 83; *The Panama Canal and the Torrijos-Carter Treaties*, U.S. DEP'T ST., OFF. HISTORIAN, <https://history.state.gov/milestones/1977-1980/panama-canal> [<https://perma.cc/FKA8-AYTB>] (discussing that “[t]he negotiators decided that their best chance for ratification was to submit two treaties to the U.S. Senate. The first, called *The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal*, or the *Neutrality Treaty*, stated that the United States could use its military to defend the Panama Canal against any threat to its neutrality, thus allowing perpetual U.S. usage of the Canal. The second, called *The Panama Canal Treaty*, stated that the Panama Canal Zone would cease to exist on October 1, 1979, and the Canal itself would be turned over to the Panamanians on December 31, 1999. These two treaties [which together were the Torrijos-Carter Treaties] were signed on September 7, 1977.”).

⁹⁸ *Panama Canal*, *supra* note 83.

⁹⁹ *Id.*

the additional revenue.¹⁰⁰ Panama reaps other benefits from its sole control of the Canal outside of financial benefits. These include employment opportunities for thousands across the country, the ecotourism benefits for those who travel to marvel the canal, and the lessening of tensions with the United States.¹⁰¹ Panama has benefitted from the sole ownership of the Panama Canal that is located in their territory while the United States was relieved of a burden upon the ratification of the Torrijos-Carter Treaty and still receives the benefits from usage of the waterway.

B. *THE SUEZ CANAL*

Spanning 120 miles through Egypt, the Suez Canal is longer than the Panama Canal and receives more traffic as well.¹⁰² The Suez Canal is also a manmade shipping waterway that connects the Atlantic Ocean to the Indian Ocean allowing for a shorter shipping route between Europe and Asia.¹⁰³ Egyptian rulers gave France permission to build a canal through their country in the 1850s, and France created the Suez Canal Company to conduct the construction.¹⁰⁴ The company was an Egyptian joint-stock company, with the French owning 52% of the shares.¹⁰⁵ The company had a 99-year lease over the waterway and surrounding area.¹⁰⁶ The Suez Canal opened in November of 1869 and played a key role in the colonization of Africa by European powers.¹⁰⁷

At the time, both France and Britain had rule over Egypt, but France

¹⁰⁰ Aditya Giri, *How Much Does Panama Earn From the Panama Canal?*, MARITIME POST (Sept. 10, 2022), <https://themaritimepost.com/2022/09/how-much-does-panama-earn-from-the-panama-canal> [<https://perma.cc/4745-UMFR>] (stating that “The Panama Canal Authority regulates the Panama Canal. Its revenue is generated chiefly (roughly 80%) by the transit toll paid by the vessels. Tolls are based on the vessel type, size, and type of cargo. The average transit toll is around \$54000. The canal generates about \$2 billion a year, and approximately 40% (\$800 million) goes to Panama’s General Treasury each year. The proceeds contribute to around 3% of Panama’s annual GDP.”).

¹⁰¹ *Panama Canal*, *supra* note 83.

¹⁰² *Suez Canal*, HISTORY.COM (March 30, 2021), <https://www.history.com/topics/africa/suez-canal> [<https://perma.cc/32JE-Z8ZR>]; *Panama Canal vs. Suez Canal: Global Shipping Insights*, Ascent (last visited Jan. 31, 2024), <https://ascentlogistics.com/blog/the-panama-canal-vs-the-suez-canal> [<https://perma.cc/NRM6-LNG3>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ William B. Fisher & Charles G. Smith, *Suez Canal*, ENCYCLOPAEDIA BRITANNICA, INC. (Feb. 13, 2023), <https://www.britannica.com/topic/Suez-Canal/The-economy> [<https://perma.cc/66NX-47TP>].

¹⁰⁶ *Suez Canal*, *supra* note 102.

¹⁰⁷ *Id.*

maintained their majority share in the Suez Canal Company.¹⁰⁸ In 1875, financial troubles caused Egypt to sell their share to Britain thereby giving them a controlling stake.¹⁰⁹ By 1888, the British had taken control of the areas surrounding the canal, and the Convention of Constantinople made the Suez Canal a neutral zone open to ships of all nations and provided that it would be protected by the British.¹¹⁰ The British protected the canal during World War I and later signed the Anglo-Egyptian Treaty of 1936, affirming their control and military powers over the canal.¹¹¹ This became crucial in defending the canal during World War II when Germany and Italy both tried to capture it.¹¹² Following World War II in 1951, Egypt demanded termination of the British military presence at the Suez Canal.¹¹³ In 1956, the British troops left Egypt and sole control of the Suez Canal went to the Egyptian government.¹¹⁴ The Egyptian government established the Suez Canal Authority in replacement of the Suez Canal Company which is the organization that still governs the Suez Canal today.¹¹⁵

The Suez Canal is essential to global trade, especially the oil sector given its proximity to countries that are major players in the oil industry.¹¹⁶ The Suez Canal charges tolls to utilize it, earning the Egyptian government over \$7 billion in 2022, which is enough to sustain the canal and provide Egypt with revenue.¹¹⁷ Commerce flourishes in areas surrounding the Suez Canal with

¹⁰⁸ *Id.*

¹⁰⁹ Rob Picheta, *Why the Suez Canal is so important – and why its blockage could be so damaging*, CNN (March 26, 2021), <https://www.cnn.com/2021/03/26/africa/suez-canal-importance-explainer-scli-intl/index.html> [https://perma.cc/5ZZZ-FJMZ].

¹¹⁰ *Suez Canal*, *supra* note 102; Fisher & Smith, *supra* note 105.

¹¹¹ *Suez Canal*, *supra* note 102; Laura Etheredge, *Anglo-Egyptian Treaty*, ENCYCLOPEDIA BRITANNICA (July 15, 2008), <https://www.britannica.com/event/Anglo-Egyptian-Treaty> [https://perma.cc/RL6P-S5CB] (discussing that “Anglo-Egyptian Treaty . . . signed in London on August 26, 1936, that officially brought to an end 54 years of British occupation in Egypt; it was ratified in December 1936. Nevertheless, Egyptian sovereignty remained circumscribed by the terms of the treaty, which established a 20-year military alliance that allowed Great Britain to impose martial law and censorship in Egypt in the event of international emergency, provided for the stationing of up to 10,000 British troops and 400 Royal Air Force pilots in the Suez Canal Zone until the Egyptians should be capable of protecting the area, and permitted Great Britain to retain its naval base at Alexandria for a maximum of eight years.”).

¹¹² *Suez Canal*, *supra* note 102.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ SUEZ CANAL AUTHORITY, <https://www.suezcanal.gov.eg/English/Pages/default.aspx> (last visited Feb. 1, 2024) [https://perma.cc/B9JU-MFX5].

¹¹⁶ Fisher & Smith, *supra* note 105.

¹¹⁷ Mahmoud Salama & David Goodman, *Egypt's Suez Canal revenue hits \$7*

many industrial developments and settlements having been established since the opening of the canal.¹¹⁸ The early days of the Suez Canal in which many countries held ownership stakes made access to the canal extremely political. The Suez Canal is currently owned by the Egyptian government, allowing it to effectively be governed and protected by the state-operated Suez Canal Authority.¹¹⁹ This results in Egypt reaping many benefits from the waterway that they control and is located within their borders.

C. THE NORTHEAST PASSAGE

Most similar to the Northwest Passage is the Northeast Passage. Running through the Arctic across the Northern end of Russia, the Northeast Passage remains icebound for the majority of the year.¹²⁰ The first successful trip across the Northeast Passage in one season was completed in 1934 by a Russian (Soviet at the time) icebreaker.¹²¹ Following that, Russia used the Northeast Passage as a domestic shipping route with icebreakers that allowed for an extension of shipping season.¹²² This was critical in bringing ally ships filled with supplies to Russia (the Soviet Union at the time) during World War II.¹²³

The Northeast Passage is located within Russia's Exclusive Economic Zone, so it is considered Russian territory.¹²⁴ In 1991, the Northeast Passage opened to foreign ships and increased the quality of icebreakers and ports.¹²⁵ Similarly to the Northwest Passage, the warming global temperature has been melting the ice in the Eastern Hemisphere as well, making the Northeast Passage increasingly accessible as years pass.¹²⁶

The Northeast Passage also mimics the Northwest Passage in the sense that it wants to compete with the Suez Canal the same way the Northwest Passage wants to compete with the Panama Canal. The Northeast Passage is one-third of the distance of the Suez Canal, making it a very attractive option for

billion record peak, REUTERS (July 5, 2022), <https://www.reuters.com/business/egypts-suez-canal-revenue-hits-7-bln-record-peak-2022-07-04>.

¹¹⁸ Fisher & Smith, *supra* note 105.

¹¹⁹ FAQ, SUEZ CANAL AUTHORITY, <https://www.suezcanal.gov.eg/English/Pages/FAQ.aspx> [<https://perma.cc/8A7U-3LL4>] (last visited Feb. 1, 2024); SUEZ CANAL AUTHORITY, *supra* note 115.

¹²⁰ Pletcher, *supra* note 81.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Heinter Kubny, *Development of the Northeast Passage Becomes a Problem for Moscow*, Polar J. (June 15, 2022),

<https://polarjournal.ch/en/2022/06/15/development-of-the-northeast-passage-becomes-a-problem-for-moscow> [<https://perma.cc/Y6XY-ENUK>].

¹²⁵ Pletcher, *supra* note 81.

¹²⁶ *Id.*

international shipping due to the money that can be saved.¹²⁷ Russia wants to increase the traffic of the Northeast Passage for the economic potential as well as the ability to exploit the natural Arctic resources that will be more easily accessible once their northern lands are more populous.¹²⁸

Just as with the Northwest Passage, the United States argues that Arctic waters cannot be owned and therefore the Northeast Passage does not belong to Russia.¹²⁹ This issue has become more prevalent with climate change as the opportunity to use the Northeast Passage is more viable. The political tensions between Russia and the United States make it likely that the issue of the Northwest Passage will be resolved first and could be used as precedent in the situation of the Northeast Passage.¹³⁰

There is currently no precedent explicitly indicating who owns the Arctic waters that could belong to Canada and Russia. What has been demonstrated from established shipping routes such as the Panama Canal and the Suez Canal is that sole control by the country that the waterway is located in provides greater benefit for the waterway and the country in control. It also allows for neutral access permitting use by all foreign vessels, so the sole control does not inhibit any commerce nor disadvantage any countries.

¹²⁷ *Northwest and Northeast Passages?*, *supra* note 41 (stating that “using the Northeast Passage instead of the Suez Canal would save up to \$180,000 in fuel costs. There are also much reduced level [sic] of piracy through these northern routes, compared to the risk of piracy for ships in the Indian Ocean that are using the Suez Canal.”).

¹²⁸ *Id.*

¹²⁹ Willy Ostreng, *The Northern Sea Route and Jurisdictional Controversy*, ARCTIS KNOWLEDGE HUB (2010) <http://www.arctis-search.com/Northern+Sea+Route+and+Jurisdictional+Controversy> [<https://perma.cc/N3VJ-L3BY>].

¹³⁰ Fred Weir, *Russia breaks the (polar) ice on its Northeast Passage aspirations*, CHRISTIAN SCI. MONITOR, (Oct. 13, 2021), <https://www.csmonitor.com/World/Europe/2021/1013/Russia-breaks-the-polar-ice-on-its-Northeast-Passage-aspirations> [<https://perma.cc/J444-HA7Q>] (stating that “Russia’s competitors in the Arctic worry about the presence of the Russian military in the region, and what it could signal for its future. But that is a result of geographical and climate realities, Russian officials claim, and that the government’s goal is to bolster the economic potential of Arctic ports like Murmansk, not its military might in the far north.”); Jack Kakasenko, *US-Russia Tensions*, THE WARSAW INST. REV. (Dec. 30, 2022), <https://warsawinstitute.review/news-en/us-russia-tensions/> [<https://perma.cc/7PGX-HZWG>] (discussing that “[t]he United States and Russia have a long and tense relationship. At times relations appear to be improving. Recent acts of aggression in Ukraine have fomented political unrest, as the United States has scrambled to enact sanctions and other restrictions against the Kremlin. The U.S. is at a strategic crossroads with the war in Ukraine.”).

IV. THE CURRENT STATE OF THE NORTHWEST PASSAGE

Canada currently claims ownership of the Northwest Passage in the form of “internal waters.” Canada’s first reason for the Northwest Passage constituting internal waters is due to acquisition of historic title because the waterway has had a long period of isolated usage by Canada.¹³¹ They also claim that it is internal waters because their archipelago surrounds it.¹³² When the International Court of Justice decided the *Anglo-Norwegian Fisheries Case*, it allowed “waters within straight baselines drawn around a ‘fringe of islands’ along the coast” to be considered “internal waters.”¹³³ Canada draws a “line” around all the archipelagos and the entire Northwest Passage runs through them, thus, in Canada’s eyes, constituting internal waters.¹³⁴ This is what Canada holds, however ownership of the Northwest Passage is still widely debated. The United States along with many other countries disagree with Canada’s self-proclaimed ownership of the Northwest Passage and argue that Canada is an international strait thereby triggering the Law of the Sea and subjecting foreign ships to transit passage rights.¹³⁵

The sea to land ratio in the Canadian Archipelago is 0.822:1 and the longest baseline Canada uses to designate the area is forty-four miles.¹³⁶ This is consistent with the requirements for Archipelagic areas outlined in the Law of the Sea.¹³⁷ This gives Canada the power to either block off the waterway for national security purposes or mark specific paths for foreign vessels to have the right of innocent passage.¹³⁸ However, these various powers are only available to Canada and foreign vessels under the Law of the Sea if Canada is deemed an international strait.¹³⁹

For the Northwest Passage to be an international strait as opposed to a Canadian internal water, international law outlined a two-part test that must be fulfilled in the *Corfu Channel Case*.¹⁴⁰ The geographic component outlines that

¹³¹ Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 *Ocean Dev. & Int'l L.* 3, 7 (2007).

¹³² Brill, *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea*, 448 (Helene Ruiz Fabri et al. eds. 2020).

¹³³ *Anglo-Norwegian Fisheries Case (U.K. v. Norway)*, Judgment, 1951 I.J.C. Rep. 116 (Dec. 18); Donat Pharand, *Canada’s Arctic Waters in International Law* 215 (1988); Brill, *supra* note 132.

¹³⁴ Brill, *supra* note 132, at 447–48.

¹³⁵ *Id.* at 448.

¹³⁶ Pharand, *supra* note 131, at 22.

¹³⁷ *Law of the Sea*, *supra* note 59, art. 2.

¹³⁸ *Law of the Sea*, *supra* note 59, art. 52.

¹³⁹ Brill, *supra* note 132.

¹⁴⁰ *Corfu Channel (U.K. v. Albania)*, Judgment, 1949 I.J.C. Rep. 4 (April 9); Pharand, *supra* note 131, at 216.

the waterway must connect two parts of the high seas, and the functional part outlines that the strait be a “useful route for international maritime traffic.”¹⁴¹ The geographic prong is easily fulfilled by the Northwest Passage, but the functional prong has been a topic of debate for decades. The *Corfu Channel Case* demonstrates that number of ships can fulfill the traffic requirement, however the Northwest Passage likely fails this due to its limited use in history.¹⁴² Even though traffic has grown and will continue to grow, the *Corfu Channel Case* also points to the diversity of nationality of the foreign vessels, which the Northwest Passage likely fails as most of the ships that have been through have been Canadian or American.¹⁴³

This tension over ownership rights between the United States and Canada has existed for decades.¹⁴⁴ For the same reason the United States desperately wanted the Panama Canal, the United States wants the Northwest Passage: to further their capitalistic interests. In 1988, Canada and the United States formed an Agreement on Arctic Cooperation, however uncertainty surrounds what was agreed upon and whether the rights of the United States go beyond Arctic marine research.¹⁴⁵ The agreement still exists today but does little to resolve the dispute between Canada and the countries that oppose Canada’s ownership. As the utilization of the Northwest Passage will only grow, it is important that the question of who has the controlling interest is answered.

V. FUTURE OUTLOOK: CANADA AS THE OWNER OF THE NORTHWEST PASSAGE

In evaluating Canada’s arguments for ownership, it is likely that the Northwest Passage currently stands as internal waters within Canada. Their argument for ownership due to history can be debated and invalidated by the fact that other countries have had ships go through without Canada’s permission.¹⁴⁶ Whether that completely erases Canada’s claim over the waterway is a question that does not fall within the scope of this paper nor would be dispositive of Canada’s overall ownership claim. Canada’s claim of internal waters is very strong given the nature of the Canadian Archipelago and the geography surrounding the Northwest Passage. While the Northwest Passage could technically fall in Canada’s 12-mile limit or EEZ, it is undoubtedly part of the Canadian Archipelago because of the Canadian land that surrounds it on either side.

¹⁴¹ Pharand, *supra* note 133, at 216, 224; *Corfu Channel*, *supra* note 140.

¹⁴² Pharand, *supra* note 133, at 224; *Corfu Channel*, *supra* note 140.

¹⁴³ Pharand, *supra* note 133, at 224; *Corfu Channel*, *supra* note 140.

¹⁴⁴ Brill, *supra* note 132, at 449.

¹⁴⁵ *Id.*; Agreement on Arctic Cooperation, Can.-U.S., Jan. 11, 1988, 1852 U.N.T.S. 60.

¹⁴⁶ Pharand, *supra* note 133, at 224–25.

Using the *Anglo-Norwegian Fisheries Case* as precedent, Canada's drawing of lines around their archipelago to designate their borders is an obvious indicator of internal waters.¹⁴⁷ The internal waters have implications if they are found to comply with the Law of the Sea requirements to be an international strait. These implications include the power to either block off the waterway for national security purposes or mark specific paths for foreign vessels to have the right of innocent passage.¹⁴⁸ Canada can make a very strong argument that the Law of the Sea does not apply to the Northwest Passage because the functional prong of the two-part test is not fulfilled. The lack of number and diversity of ships currently going through the Northwest Passage is likely not sufficient to meet the requirements of an international strait. Thus, the Law of the Sea does not apply to the Northwest Passage as it stands as Canadian internal waters.

Since the Law of the Sea does not apply, Canada does not have to claim a national security threat or result in transit passage for all ships. They could technically close off the waterway and not allow any foreign vessels through. However, much like Russia and the Northeast Passage, it makes a lot of sense economically for both Russia and Canada to open up their northern waterways to foreign vessels and make them international shipping routes that compete with the respective dominant canals on their same hemispheres.

If Canada wants to take advantage of the numerous benefits they can obtain from having the Northwest Passage as a common shipping route, they could allow foreign vessels through their internal waters on their own terms. However, that would involve a large number of foreign vessels passing through from many different origins and to many different destinations. Resultingly, the same conversation about the status of the Northwest Passage as an international strait would be had as the popularity of the waterway grows. At that future time, the countries opposing Canada's sole ownership of the Northwest Passage as internal waters will have a strong argument that it is an international strait. The heightened frequency and diversity of vessels passing through will be enough to satisfy the functional prong and deem the Northwest Passage an international strait.

If the Northwest Passage was classified as an international strait, the Law of the Sea would apply and foreign vessels would have at least the right of innocent passage, but likely the right of transit passage due to the connective nature of the waterway.¹⁴⁹ The location of the waterway in Canada's archipelago would allow Canada to either block off the waterway for national security purposes or designate a route for ships to follow with the right of innocent passage. Due to Canada's interest in improving the climate change

¹⁴⁷ Brill, *supra* note 132, at 448.

¹⁴⁸ Law of the Sea, *supra* note 59, art. 52.

¹⁴⁹ *Id.*

situation,¹⁵⁰ it would be counterintuitive of them to claim national security threats to block a shipping route that drastically reduces pollution without the appearance of actual threat. Additionally, it would get rid of all of the benefits that Canada wants from the waterway. It aligns with Canada's climate initiatives to open the Northwest Passage to foreign vessels and if that is done the country will receive numerous other benefits.

Canada could attempt to designate a route for ships to follow and allow them innocent passage. However, the right of transit passage would likely be held by foreign vessels as the Northwest Passage is 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."¹⁵¹ This would allow Canada to control all survey activities and traffic separation schemes; however, foreign vessels are allowed to follow their normal conduct and international regulations pertaining to sea safety procedures.¹⁵² Canada would still maintain *control*; however, the Northwest Passage would be an international waterway. This is similar to the Panama Canal and the Suez Canal in which the country where the waterway is located controls it; however, both canals are considered international waterways.

While Canada's argument claiming that the Northwest Passage is their internal waters holds up today, if they intend to capitalize on the growing ability to use the waterway, then their argument will be destroyed in itself. It is foreseeable that countries sending vessels through the waterway will argue that the Northwest Passage is an international strait and because it connects two parts of the high seas all ships get the right of transit passage. Transit passage rights for foreign vessels is not particularly negative for Canada: there is the potential to receive massive economic value and still control the waterway. Canada should concede to the Northwest Passage being an international strait

¹⁵⁰ See generally, *Environment and Climate Change Canada*, GOV'T CAN. (March 8, 2023), <https://www.canada.ca/en/environment-climate-change.html>; see also, *Climate Change: our Plan*, GOV'T CAN. (Oct. 27, 2023), <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html> [<https://perma.cc/SB8D-6EGU>] (stating Canada's climate plan involving emissions targets, carbon pollution pricing, clean fuel regulations, clean electricity regulations, net-zero emissions by 2050, oil and gas emissions cap, and reducing methane emissions); see also, *Canada's Priorities on Climate Change*, GOV'T CAN. (Jan. 27, 2020), <https://www.canada.ca/en/environment-climate-change/services/climate-change/canada-priorities.html> [<https://perma.cc/DEC5-859F>] (outlining Canada's international action on climate change which include putting the Paris Agreement into action, clear commitments to keep emissions in check, enhanced action on adaptation, promoting collaborative approaches to climate action, investing toward a low-carbon future for all, promoting transparency and accountability, sharing knowledge and experiences, and sustaining the momentum.).

¹⁵¹ Law of the Sea, *supra* note 59, art. 37.

¹⁵² Law of the Sea, *supra* note 59, art. 39–41.

and allow foreign vessels the right of transit passage in order to maximize the social and capitalistic benefits the waterway can provide.

VI. IMPLICATIONS OF CANADA'S CONTROL

In 1969, Pierre Trudeau, the Prime Minister of Canada at the time, said that “to close off [the Northwest Passage] . . . and to deny passage to all foreign vessels in the name of Canadian sovereignty . . . would be as senseless as placing barriers across the entrance of Halifax and Vancouver harbours.”¹⁵³ Following this comment, “the Secretary of State for External Affairs made it clear that it was the policy of the Government ‘to make the Northwest Passage a reality for Canadian and foreign shipping, as a Canadian waterway.’”¹⁵⁴ It is clear that Canada recognizes that this is an opportunity it should pursue, however their current efforts are not sufficient.

As demonstrated by the cases of the Panama Canal and the Suez Canal, it makes the most sense when the country in which the waterway is located has control of it. This benefits the country of control the most as well as the other countries utilizing the waterway. Other countries are allowed to use the waterway with the right of transit passage while the country in control manages all costs and problems associated with the operation of the waterway. The country in control is allowed to charge tolls to supplement the cost of operating the waterway.¹⁵⁵

Canada has significant benefits that they can reap from the control of the Northwest Passage. Obvious economic benefits occur from the supplemental revenue the waterway brings in through tolls, however other potential economic benefits include those in surrounding communities as ports and other infrastructure open, similarly seen in the case of the Suez Canal. It will be difficult to incentivize people to live in the Canadian Arctic due to the climate and the remoteness of it, however, as climate change progresses and the Arctic becomes more inhabitable communities surrounding the Northwest Passage will develop.

Canada will also benefit from the sheer amount of commerce passing through the Northwest Passage thereby making imports cheaper and more abundant. Exporting and distributing oil from the Canadian oil sands in Alberta will be easier and likely more frequent.¹⁵⁶ Additionally, the plethora of

¹⁵³ Pharand, *supra* note 133, at 234.

¹⁵⁴ *Id.* The result of Trudeau's statement in combination with the Secretary of State for External Affairs statement was the “actual enclosure of the Northwest Passage with straight baselines.”

¹⁵⁵ Law of the Sea, *supra* note 59, art. 42; see Hugh Caminos & Vincent P. Cogliati-Batanz, The legal regime of straits: contemporary challenges and solutions 377–79, 384, 390 (Cambridge University Press, 2014).

¹⁵⁶ See generally *Northwest and Northeast Passages?*, *supra* note 41.

resources located in the Arctic region will be able to be explored and harvested with greater ease as access to the Arctic becomes easier via infrastructure development as the waterway becomes popularized.¹⁵⁷

Canada has well stated intentions to contribute to solving the global climate crisis.¹⁵⁸ It is an unfortunate paradox that global warming which is caused by greenhouse gasses opens up an avenue to reduce greenhouse gasses in commercial shipping. The Northwest Passage will allow less greenhouse gasses to be emitted into the atmosphere by shortening the trips that ships must take to transport their cargo.¹⁵⁹ This does benefit Canada as it aligns with their climate priorities.

Since the Northwest Passage is located in Canada's Archipelago, Article 234 of the Law of the Sea will allow Canada to impose non-discriminatory pollution regulations on ships entering the waterway.¹⁶⁰ This is allowed because the area is ice-covered and the anti-pollution regulations are meant to be enacted to preserve the ice.¹⁶¹ While the melting ice is what opens up the Northwest Passage, the Arctic ice will still be there to some extent, allowing Canada to enact regulations.¹⁶² These regulations will further Canada's climate mission by controlling how much individual ships may pollute.¹⁶³ This in combination with the shorter shipping route align with Canada's climate priorities.

¹⁵⁷ *Id.*

¹⁵⁸ See Gov't of Canada, *Environment and Climate Change Canada*, *supra* note 150.

¹⁵⁹ Gordon et al., *supra* note 3.

¹⁶⁰ Law of the Sea, *supra* note 59, art. 234 (outlining that "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.").

¹⁶¹ *See id.*

¹⁶² *The fastest way to save melting sea ice: EDF Study*, Env't DEF. FUND (March 14, 2022), <https://www.edf.org/article/fastest-way-save-melting-sea-ice-edf-study> [<https://perma.cc/52FP-MM92>].

¹⁶³ *Carbon pollution pricing systems across Canada*, GOV'T CANADA (July 5, 2023), <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html> [<https://perma.cc/25JE-Y4PL>] (explaining that Canada currently has carbon pricing in place, "[s]ince 2019, every jurisdiction in Canada has had a price on carbon pollution . . . The federal pricing system has two parts: a regulatory charge on fossil fuels like gasoline and natural gas, known as the fuel charge, and a performance-based system for industries, known as the Output-Based Pricing System." If they could implement this system in an extent to apply to the Northwest Passage and foreign vessels it would provide them with additional revenue and also incentivize ships to pollute less.).

The United States contests Canada's ownership of the Northwest Passage, however it is clear that the waterway is Canadian. If Canada is to agree to the waterway being an international strait, the United States would be best suited to accept that assertion. The United States should not contest Canada's control of the Northwest Passage; they should look to the problems that were caused by their control of the Panama Canal that led to them ultimately resigning control to Panama as an example of why it makes the most sense for Canada to control the Northwest Passage. The United States would be allowed to send their vessels in with the right of transit passage and use the waterway for their imports and exports. Similarly, to the benefits that the United States receives from the Panama Canal, the United States' capitalistic interests would benefit immensely from the Northwest Passage becoming a common shipping route. The ability to import and export more quickly and cheaply will provide greater economic benefit than the Panama Canal does.

While the United States has not signed the Law of Sea, this proves to be more of an issue when dealing with their own waters than with international straits.¹⁶⁴ United States' vessels must still comply with Panama's regulations when using their Canal,¹⁶⁵ and similarly would have to comply with Canada's regulations while using the Northwest Passage. The United States "may be bound by a norm of customary international law notwithstanding its failure to enter a treaty."¹⁶⁶ As a party who has signed the revised deep seabed mining provision in the Law of the Sea, "the United States has incurred an international legal obligation to not act contrary to the 'object and purpose' of the treaty."¹⁶⁷ Thus, United States vessels undoubtedly must comply with the Law of the Sea when operating in international straits, including the Northwest Passage.

The benefits to global commerce from frequent use of the Northwest Passage would be immense. Being quicker, cheaper, and better for the environment is just the beginning, however these perks come at a cost. The investment that Canada will have to make to develop the initial infrastructure to accommodate this waterway will be significant. The primary capital will be worth it given the benefits Canada will reap from the investment. The continued monitoring and management that come with control of the Northwest Passage will also be costly, however as the Suez and Panama canals have both become self-sustaining through tolls, so too should the Northwest Passage. The investment in the Northwest Passage will provide immense benefit to not only Canada, but also the countries that utilize the waterway.

¹⁶⁴ James Houck, *The Opportunity Costs of Ignoring the Law of Sea Convention in the Arctic*, HOOVER INST. Feb. 2014, at 1, 18.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 18.

¹⁶⁷ *Id.*

CONCLUSION

It is important that the debated ownership status of the Northwest Passage that has grown in the past decades is settled. As the climate continues to warm, the Northwest Passage will provide a viable shipping route resulting in immense benefit to the countries that use it. Determining who has control of the waterway is essential in maintaining not only the waterway, but also political controversy between countries and legal implications of the waterway.

Analyzing other waterways that are used for analogous purposes, it is clear that it is most beneficial when the waterway is controlled by the country in which it is located. Thus, Canada should maintain control over the Northwest Passage. The increased usage of the Northwest Passage as shipping seasons continue will ultimately satisfy the criteria for an international strait. To gain the most benefit and save themselves time and money in rearguing this case in years to come, Canada should agree to deem the Northwest Passage an international strait where they maintain full control. Allowing foreign vessels through with transit passage will give both Canada as well as those in control of the vessels immense economic benefit. The climate benefits and the advantages to global commerce also make the frequent use of the waterway attractive. In order to use the waterway to its fullest extent, it is clear that Canada must concede that the Northwest Passage is an international strait.

