

CANADA'S LEGAL CLAIMS OVER ARCTIC TERRITORY AND WATERS

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INTRODUCTION

The Arctic region features prominently in debates about Canadian sovereignty. Canada has a long tradition of asserting sovereignty and/or jurisdiction in relation to both the territorial and maritime realms of the Arctic. Canada's claims and use of the Arctic are connected to opportunities offered and threats encountered, including the following: strategic defence issues related to potential incursions into the Canadian Arctic; protection of the environment and the Arctic ecosystems; the preservation of the way of life of Aboriginal peoples, including the Inuit; the good governance of local communities; and the exploitation and management of the Arctic's economic potential, including both its renewable and non-renewable resources.

In recent years, Canada has been asserting its *nordicité* (nordicity) with a louder voice and greater emphasis than before.⁽¹⁾ Such renewed focus on the Arctic is largely linked to the anticipated effects of climate change in the region, which are expected to be among the greatest effects of any region on Earth.⁽²⁾ By making the region more easily accessible, both threats and opportunities are amplified and multiplied. Canada's claims over the Arctic are thus likely to emerge as a more central dimension of our foreign relations. Hence, it appears timely to highlight the extent of Canada's sovereignty and jurisdiction over Arctic waters and territory, and to identify issues that are controversial.

(1) This issue has notably attracted media attention in the past weeks and months. Recent articles and reportages in important magazines and newspapers are too numerous to list here, but see *inter alia* Doug Saunders, "Battle for the North," *The Globe and Mail*, Toronto, 20 October 2007; "Canada's North," Policy Briefing, *The Hill Times*, 20 August 2007; "Special Arctic Issue," *The Walrus*, November 2007.

(2) For a discussion of the extent to which climate change has an impact on Arctic interests and presents a challenge to Canadian claims to sovereignty, see the debate in: Rob Huebert, "Climate Change and Canadian Sovereignty in the Northwest Passage," *ISUMA*, Winter 2001, pp. 86-94. Franklyn Griffiths, "The shipping news – Canada's Arctic sovereignty not on thinning ice," *International Journal*, Vol. 58, No. 2, Spring 2003, pp. 257-282; Rob Huebert, "The shipping news part II – How Canada's Arctic sovereignty is on thinning ice," *International Journal*, Vol. 58, No. 3, Summer 2003, pp. 295-308.

The international legal principles and the type of power that states can claim in relation to land and waters differ. While states may claim sovereignty over land, generally their powers over adjacent waters and sea beds are described in terms of possession of rights and jurisdiction. Bordering waters are classified according to the law of the sea, with the extent of rights and jurisdiction of the coastal state varying according to the type of maritime zone involved. Consequently, this paper will deal first with legal principles and claims dealing with the territorial dimension of the Canadian Arctic – i.e., the mass of islands north of Canada’s landmass – before turning to the Arctic waters as such.

Each of the two main sections contains a brief introduction of the main relevant international legal principles and a summary of Canada’s position vis-à-vis the Arctic islands and waters. While Canada’s Arctic claims are by and large well accepted, some of them remain more controversial. In that regard, it can be noted that Canadian maritime claims are more disputed than land claims. The paper will briefly address the areas in which Canadian claims are controversial.

Three issues have been predominantly contentious, though others may emerge as well. First, in relation to territorial sovereignty, Hans Island is an object of controversy, with Canada and Denmark both claiming it. The other two existing areas of controversy deal with maritime rights. Canada’s assertion that the Northwest Passage represents internal waters has been challenged by other countries, notably the United States, which argues that these waters constitute an international strait. Moreover, the delimitation of Canada’s maritime zones in the Beaufort Sea has not been settled with the United States. In addition, it is likely that claims to exploit the resources of the region – not necessarily the “Canadian Arctic,” but the circumpolar region more broadly – will be more numerous and perhaps more actively pursued, with the potential for conflict that this may generate.

CANADA’S CLAIMS OVER ARCTIC TERRITORY

A. International Law and the Acquisition of Territorial Sovereignty

The legal title or foundation of sovereignty on a state’s territorial core is rarely articulated.⁽³⁾ In regard to the mainland and most of the territory, states can usually rely on the acquiescence or recognition of other states.⁽⁴⁾ However, when a piece of territory is claimed by two or more states (e.g., an island or a boundary region), the methods of acquiring sovereignty

(3) See Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th rev. ed., Routledge, London, 1997, p. 148 [Akehurst].

(4) See Akehurst, p. 154.

become relevant and shape the claims of states. Under international law, the traditional means for a state to acquire territory and to become sovereign over it include cession (transfer of territory by treaty), occupation (applicable to territory belonging to no state, i.e., *terra nullius*), prescription, operations of nature and conquest.⁽⁵⁾ Also, self-determination considerations by the people inhabiting a given territory are significant.⁽⁶⁾

Occupation deals with the acquisition of territory that did not previously belong to any other sovereign. As it seems relevant to Canada's claims on the Arctic islands, it is worth examining the concept of occupation. A key criterion for an occupation claim to be upheld is that the territory must be brought under "effective control."⁽⁷⁾ But effective control is regarded as a relative concept, varying according to the nature of the territory at stake. Factors determining the effectiveness of a nation's control could include the degree to which the territory is inhabited and defended, or the degree to which it is also claimed by another jurisdiction.⁽⁸⁾ Another criterion has been considered necessary for a proper occupation claim to succeed: the intention and will to act as a sovereign. In particular, this criterion means that purely private activities by nationals of a given state in a territory are not sufficient as such to establish its sovereign title.

B. Canada's Claim to Sovereignty Over the Arctic Islands

Canada claims sovereignty over a large set of islands north of its mainland, i.e., the Arctic Archipelago. The case for Canadian sovereignty over the Arctic islands rests

(5) Conquest is no longer considered to be a valid mode of acquisition, but, through the effect of the principle of intertemporal application of the law, acquisitions of territory brought about through conquest while it was still considered a valid form of acquisition of territory remain valid.

(6) See *Case Concerning East Timor* (Portugal v. Australia), Judgment, 1995 I.C.J. Reports 90; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12.

(7) See *Case Concerning the Legal Status of Eastern Greenland* (Denmark v. Norway), 1933 P.C.I.J. series A/B, No. 53 [*Eastern Greenland Case*].

(8) This has been summarized as follows in Akehurst, p. 149:

"It is, for instance, much easier to establish effective control over barren and uninhabited territory than over territory which is inhabited by fierce tribes; troops would probably have to be stationed in the territory in the latter case, but not in the former. Effective control is also relative in another sense, which was stressed by the Permanent Court of International Justice in the *Eastern Greenland* case:

Another circumstance which must be taken into account ... is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to sovereignty, and the tribunal has had to decide which of the two is the stronger ... in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."

predominantly on a mix of cession and occupation, to which self-determination considerations could be added.⁽⁹⁾ Cession refers to grants of territory by the United Kingdom;⁽¹⁰⁾ occupation involves state activities over the region since cession took place; self-determination concerns the will of the inhabitants of the Arctic islands to be governed under Canadian institutions. Given the remoteness of the Arctic islands and the harshness of the climate, there has been limited human activity in the Archipelago. Consequently, acts that could amount to effective occupation by Canada are limited.

Still, Canada's claim to territorial sovereignty has enjoyed sufficient recognition and acquiescence from other states, over a long period, to be robust from a legal standpoint. Indeed, studies mention that Canadian claims to sovereignty over Arctic islands have not been formally disputed by other states since the 1930s.⁽¹¹⁾ One of the main Canadian textbooks on international law sums it up clearly: "There is no debate that the islands of the Arctic Archipelago are Canadian."⁽¹²⁾ This position has been reconfirmed lately at the highest political level, with US President Bush recognizing that Canada is sovereign over the Arctic islands.⁽¹³⁾

This state of affairs means that Canada has exclusive sovereignty rights, powers and privileges in relation to the territory. It can apply and enforce its laws, it can regulate the conduct of activities, and it has the right to exclude aliens and foreign nations who would enter its territory without permission. Moreover, title to the territory comes with another advantage,

(9) Note that for a while, the Canadian claim to territorial sovereignty seems to have been articulated on the basis of the "sector theory," according to which Canada claimed an entire sector, land and water/ice alike, between specific geographical lines. Most commentators indeed cite as the first noticeable properly Canadian claim to the Arctic a statement by Senator Poirier in 1907 during Parliamentary debates: he advocated Canada's hold of the Arctic "sector," a triangular zone linking the mainland to the North Pole, between the 60th and the 141st meridians of west longitude. Canada has since consistently and repeatedly claimed sovereignty over the islands that form what is now called the Arctic Archipelago, though not predominantly through the sector theory. The sector theory appears to have been abandoned and is seen as having weak legal foundations in international law. See John Currie, *Public International Law*, Irwin Law, Toronto (2001), chap. 7; Ivan L. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 29 April 1960, (LL.M. Thesis), at 70; see also Donat Pharand, *Canada's Arctic waters in international law*, C.U.P., Cambridge, 1988, pp. 1-80 [Pharand 1998].

(10) Two cession deeds are particularly relevant: the acquisition by Canada of the "Rupert's Land and the North-Western Territory" from the Hudson's Bay Company, in 1870; and the transfer to Canada by the United Kingdom of "all British possessions on the American continent not hitherto annexed to any colony," in 1880 by order in council, and subsequently confirmed in the 1895 *Imperial Colonial Boundaries Act*. See Hugh M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed., Montgomery Publishing, Toronto, 2006, p. 455 [Kindred et al.].

(11) Notably, a Norwegian claim to some islands was withdrawn in 1930: Kindred et al., p. 456.

(12) Kindred et al., p. 455.

(13) See Alexander Panetta, « Harper et Bush confirment leur désaccord sur l'Arctique », *Le Devoir*, 22 August 2007.

which is the capacity to claim, as a coastal state, rights in relation to the waters in which those islands sit. This dimension will be covered in more detail in the second part of this paper.

It is perhaps useful to note that with Canadian sovereignty over the Arctic islands being fairly uncontroversial, concerns that Canada is not sufficiently present and active as an effective sovereign in the North are not likely to affect title to territory.⁽¹⁴⁾ In theory, there could be two exceptions to such a statement: the adoption of a clear policy of abandonment of territory, or the toleration of the effective presence of another state in the Arctic islands as a competing sovereign.

C. Area of Controversy: Who has Sovereign Rights Over Hans Island?

There is, however, one exception to this discussion of Canada's territorial sovereignty in the Arctic Archipelago: the case of Hans Island. Hans Island is situated between Canada's Ellesmere Island and Greenland, a territory of Denmark, in the centre of the Kennedy Channel of Nares Strait (the strait that separates the larger islands).⁽¹⁵⁾ Hans Island is uninhabited and is only 1.3 square kilometres.

Both Canada and Denmark claim Hans Island as their own. When Canada and Denmark concluded an agreement on the delimitation of their respective continental shelves in 1973, the line was discontinued over a short distance around Hans Island.⁽¹⁶⁾ In other words, the issue of sovereignty over Hans Islands was not settled in the bilateral agreement. Still, Denmark and Canada cooperated in some regards, as they signed a cooperation agreement on the marine environment in the Nares Strait in 1983.⁽¹⁷⁾ The dispute on sovereignty was then left aside.

Recently, both Canada and Denmark have engaged in clear acts of assertion of sovereignty over the disputed island. In 2002 and 2003, the Danish navy visited the island. Canada has made similar visits. In July 2005, then-Minister of National Defence Bill Graham visited the island, as did Canadian military personnel, who placed a Canadian flag on the territory. The visit was made less than a month after the signature of a Memorandum of

(14) See Kindred et al., p. 455; see also Donald McRae, "Arctic Sovereignty? What is at Stake?," *Behind the Headlines*, Vol. 64, No. 1, January 2007 [McRae].

(15) Note that, in 1933, the Permanent Court of International Justice dealt with the status of Greenland, in a dispute between Norway and Denmark. While it recognized the sovereignty of Denmark over Greenland, the Court's decision did not address whether Hans Island was part of Greenland or not: *Eastern Greenland Case*.

(16) Agreement between the Government of Canada and the Government of the Kingdom of Denmark relating to the delimitation of the continental shelf between Greenland and Canada, in force on 13 March 1974, Canada Treaty Series, CTS 1974/9. See Article 2, para. 4 and Annex 4.

(17) Agreement between the Government of Canada and the Government of the Kingdom of Denmark for cooperation relating to marine environment, CTS 1983 No. 19.

Understanding between Natural Resources Canada and the Geological Survey of Denmark, which established surveys to be carried out collaboratively in the disputed region. In September 2005, the two countries issued a joint statement declaring that “we will continue our efforts to reach a long-term solution to the Hans Island dispute.”⁽¹⁸⁾ But neither country has abandoned its claim over the island, and Canada and Denmark continue to disagree on the matter.

Note that Arctic and/or international law specialists regard the dispute as relatively mild. Similarly, the non-delimited maritime zone around the island left open in the 1973 agreement is relatively confined. For Canadian commentators, the value for Canada is important as part of keeping intact its entire set of claims over the Arctic, and thus remaining immune to challenges.⁽¹⁹⁾

If Denmark were to emerge as the recognized sovereign over Hans Island, what would the consequences be for Canada? First, Canada would lose any claim to the island itself – which means that it could not apply and enforce its laws thereon, it could not use the island without the permission of Denmark and it could not exercise rights thereon (including exploiting resources). Second, this would have an impact in terms of delimitation of the maritime zones that both Canada and Denmark can claim around the island. Because of the 1973 agreement, the area at stake is rather limited. The likely impact would be that the line separating Danish from Canadian waters would include the island and a maritime zone surrounding it.

CANADA’S CLAIMS OVER ARCTIC WATERS

A. The Law of the Sea

Coastal states have various sets of rights in relation to the waters that surround them. International law regulates the questions of the extent of the various maritime zones as well as the more or less extensive sets of rights that attach to each. What is discussed here reflects, in a simplified form, what the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides. UNCLOS rules are relevant in relation to Canada’s maritime boundaries and jurisdiction over Arctic waters. Canada was a key player in the elaboration of UNCLOS, which it ratified in 2003.

(18) Foreign Affairs Canada, “Canada and Denmark Issue Statement on Hans Island,” 19 September 2005, http://w01.international.gc.ca/minpub/Publication.asp?publication_id=383048&Language=E (accessed 2007)

(19) See Rob Huebert; See Michael Byers, *Intent for a Nation: What is Canada for?*, Douglas & McIntyre, Toronto, 2007, p. 155 (arguing that the dispute is disproportionate to the actual stake).

However, two important caveats add layers of complexity to this picture. First, UNCLOS is not the only relevant source of law with respect to jurisdiction over maritime zones. It coexists with international customary law, which is sometimes similar and sometimes slightly different from what UNCLOS provides. This cohabitation of treaty and customary rules is important in two regards. First, UNCLOS does not deal with every dimension of the law of the sea. When an issue is not covered in UNLCOS or when a provision specifically leaves the question regulated by general international law, other sources of international law, such as customary law, come into play. Second, treaties are binding only on their signatories. Customary international law remains important to dealings with non-signatories of UNCLOS, the United States being the only polar state in this situation (though there is ongoing talk of its ratification of UNCLOS).⁽²⁰⁾

Second, complexity arises out of the length of time during which Canada has asserted claims over the Arctic and the fact that the rules have evolved during that period. Canada's claims predate UNCLOS and its ratification by Canada. It is natural for claims of sovereignty over a region to rest on long-term considerations and to be asserted over a somewhat prolonged period. Given that the rules changed during that period, older Canadian claims must necessarily be looked at having in mind that UNCLOS (or similar) rules did not always apply.

In order to fully understand the debates on Canadian claims over Arctic waters, a set of legal principles is particularly important: five of them are the basic maritime zones under international law, while the other four refer to principles or techniques of delimitation of coasts and maritime zones that are more particular.

1. The Five Basic Maritime Zones

Maritime zones are measured or determined from a line that is called the *baseline*. Baselines thus represent the end point of a state's territory and the beginning of its maritime extension. Normally, baselines follow the coast at the low-tide line.⁽²¹⁾ Five basic maritime zones can be delimited on the basis of such baselines.

(20) On this issue, see "A Treaty Whose Time Has Come," *The New York Times*, 25 August 2007; "Former Legal Advisers' Letter on Accession to the Law of the Sea Convention," *American Journal of International Law*, Vol. 98, 2004, p. 307. The US Commission on Ocean Policy recommended in 2004 that the United States ratify UNCLOS. The issue is currently before the US Senate.

(21) United Nations, United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (accessed 8 January 2008), Article 5.

First, waters that are not along the coast, or that are along the coast or islands, but that are on the landward side of baselines used for the delimitation of the territorial sea are considered *internal waters*.⁽²²⁾ A state is fully sovereign over such waters, and international law does not limit that sovereignty. This principle means that the state can fully apply and enforce its laws over persons, goods and incidents therein. It can also exclude any foreigner or foreign ship from those waters. UNCLOS, however, provides for one exception to this absolute sovereignty: when waters that were not considered internal become so considered pursuant to the use of the straight baseline method of delimitation of the territorial sea (cf. below), then a right of innocent passage exists in such waters.⁽²³⁾

Second, the *territorial sea* is the first maritime zone that is not purely internal; it runs from a state's baseline (i.e., normally the coast at low tide) up to 12 miles toward the ocean.⁽²⁴⁾ A state is sovereign over that zone, including over the waters, the air space above it and the bed and subsoil.⁽²⁵⁾ But as opposed to internal waters, sovereignty over the territorial sea is subject to limits and exceptions set out under international law.

The main exception to sovereignty is the right of innocent passage enjoyed by ships of all states.⁽²⁶⁾ UNCLOS further defines the terms of this right, but it refers by and large to the right to transit through the waters toward the coast of the state or toward the high sea, prohibiting specifically listed activities disruptive to peace and order. Importantly, commercial navigation usually qualifies as a proper exercise of the right of innocent passage; submarines can also pass through territorial waters, though they must surface to do so. The coastal state can, however, regulate certain matters such as “the safety of navigation and the regulation of maritime traffic,” “the conservation of the living resources of the sea,” “the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.”⁽²⁷⁾ The coastal state cannot levy charges for mere passage, though fees for services provided can be imposed.⁽²⁸⁾

(22) Ibid., UNCLOS, Article 8.

(23) Ibid., Article 8, para. 2.

(24) Ibid., Articles 3-5.

(25) Ibid., Article 2.

(26) Ibid., Article 17.

(27) Ibid., UNCLOS, Article 21. For further measures that the coastal state specifically can or cannot take, see UNCLOS, Articles 24-25.

(28) Ibid., UNCLOS, Article 26.

Third, a state can claim a *contiguous zone*, which can extend to another 12 miles from the outer limit of the territorial sea. In that zone, the coastal state is entitled to “exercise the control necessary” for the prevention of “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea,” and to punish such infringements.⁽²⁹⁾

Fourth, UNCLOS consecrated the right of coastal states to claim an *exclusive economic zone* (EEZ) beyond their territorial waters, extending up to 200 miles seaward from the baselines.⁽³⁰⁾ UNCLOS specifies the extent of coastal state jurisdiction and rights in the EEZ. They include sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” of the waters (including living and non-living resources), the seabed and its subsoil, and rights of economic exploitation of the zone (e.g., for energy purposes).⁽³¹⁾ In any state’s EEZ, other states enjoy freedom of navigation and of overflight.⁽³²⁾

Fifth, Article 76 of UNCLOS defines a state’s *continental shelf* as “compris[ing] the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,”⁽³³⁾ In other words, the length of continental shelf that a state can claim is, by default, 200 miles from the baselines, or the natural prolongation of the land mass, subject to certain limits. Article 76 provides for two ways to measure the maximum length of the extended continental shelf: 350 miles from the baseline or 100 miles beyond the 2,500-metre isobath.⁽³⁴⁾ How these two different ways to measure the possible extension of the continental shelf are applied depends on the situation and on the type of submarine elevation that exists.⁽³⁵⁾

(29) Ibid., Article 33.

(30) Ibid., Article 57.

(31) Ibid., Articles 55-56.

(32) Ibid., Article 58.

(33) Ibid., Article 76.

(34) The 2,500-meter isobath is the point or the line at which a 2,500-metre segment measuring depth arrives.

(35) For further details, see Marc Benitah, “Russia’s Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS,” *ASIL Insight*, Vol. 11, Issue 27, 8 November 2007.

A coastal state enjoys exclusive sovereignty rights over its continental shelf for purposes of its exploration and exploitation of its resources.⁽³⁶⁾ When exploitation of non-living resources takes place beyond the 200-mile mark but still within a state's continental shelf, UNCLOS provides that the state must pay a royalty to the International Seabed Authority.⁽³⁷⁾

2. Particular Delimitation and Jurisdictional Legal Notions Relevant to Canada's Claims on Arctic Waters

Special circumstances invoke other, more specific rules. The following four legal notions are relevant to Canada's claim over the Arctic. The first two are in fact legal methods of delimitation. The third and fourth notions are maritime zones of a more exceptional nature, but relevant to the Arctic context.

In some cases, geographical considerations push states to depart from using baselines starting at low-tide along their coast and to claim more generous maritime zones.

When its coast is severely indented with numerous small bays, rather than closely following the coast as a starting point for tracing the maritime delimitation of the various zones, a state can draw *straight baselines* that will include all the bays and simplify the "coast" line.⁽³⁸⁾ When a state uses this technique, as provided under UNCLOS, waters that are on the landward side of the straight baselines are considered internal waters – though a right of passage can sometimes exist in such circumstances.⁽³⁹⁾ Arguably, the straight baseline simplifying technique can be used not only in relation to the mainland's coasts, but also when a state's mainland is bordered by an archipelago, i.e., a grouping of islands in proximity to the mainland and that constitutes a natural extension thereof. In that case as well, the baselines used to measure the territorial sea, the EEZ and the continental shelf can be traced in a way that encompasses the entire archipelago. The result is that waters within the archipelago are internal waters – subject to the preservation of a right of passage, if applicable.

(36) UNCLOS, Article 77.

(37) UNCLOS, see Article 82. Note that developing states that are net importers of the resource being exploited are exempt from paying such royalties, in respect to the exploitation of the resource in question. See also Aldo Chircop and Bruce A. Marchand, "International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore," *Dalhousie L. J.*, Vol. 26, 2003, No. 2, pp. 273-302.

(38) UNCLOS, Article 6.

(39) *Ibid.*, Article 8.

Second, *historic title* enables a state to supersede purely geographical considerations to prevent the application of the rules and principles applicable to the territorial sea, the EEZ or the high seas and to maintain a maritime area entirely within its domestic jurisdiction. There are three constitutive elements for historic title to exist: (1) exclusive exercise of state jurisdiction; (2) a long lapse of time; and (3) acquiescence by foreign states.⁽⁴⁰⁾ For instance, Hudson Bay has a very wide opening. If one were to apply strictly the general rules of international law, the first 12 miles along the coast's baselines would be regarded as territorial sea, and there would be a zone in the middle of the bay, i.e., beyond the 200-mile distance from coasts, which would be considered high seas. But through historic title, waters within the Bay are considered as Canada's internal waters.⁽⁴¹⁾

In addition, there are two more exceptional maritime zones that come with particular sets of rights: international straits and ice-covered areas. No definition of *international strait* exists in UNCLOS or in other conventions on the law of the sea.⁽⁴²⁾ The only authoritative definition is found in the International Court of Justice's *Corfu Channel Case* and refers to two elements; one geographical, one functional. The geographical component of a strait is that it is a water corridor between adjacent land masses that links two bodies of the high seas or other waters. The functional component is that the corridor is used as a route for international maritime traffic.

When a water corridor qualifies as an international strait, non-coastal states enjoy a right of transit.

Finally, Article 234 of UNCLOS creates rules that are specifically applicable to "*ice-covered areas*." Article 234 can be regarded as a convention-based response of UNCLOS signatories to certain claims that Canada makes vis-à-vis Arctic waters.⁽⁴³⁾ It recognizes the right of coastal states "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

(40) Donald Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development and International Law*, Vol. 38, Issue 182, January 2007, pp. 3-69 (p. 7) [Pharand 2007].

(41) See para. 10 (6) UNCLOS.

(42) See Pharand (1988), pp. 215-23.

(43) See below, notably the adoption of the *Arctic Waters Pollution Prevention Act*, R.C.S. 1985, c. A-12.

hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.” The exercise of such a right must consider navigation interests. However, the protective jurisdiction that Article 234 provides has been interpreted as not giving jurisdiction to coastal states in relation to foreign warships or other government ships.⁽⁴⁴⁾

B. Canada’s Claims to Jurisdiction Over Arctic Waters

Canada has exercised its rights and formulated claims over Arctic waters. The concrete geographical extent of Canada’s claims to Arctic maritime zones is, as discussed above, dependent on the baselines used. In that regard, Canada traces baselines around the entire Arctic Archipelago. In a nutshell, current Canadian maritime claims are as follows:

- First, Canada claims a 12-mile territorial sea seaward of the straight baseline surrounding the Arctic Archipelago.⁽⁴⁵⁾ Canada claims that waters within the straight baseline at the external edge of the archipelago are internal waters – a claim contested as explained below in relation to the Northwest Passage.⁽⁴⁶⁾ Under section 7 of the *Oceans Act*, both internal waters and the territorial sea are part of Canada.
- Second, it claims a contiguous zone of 12 miles beyond the territorial sea.⁽⁴⁷⁾ In that zone, Canada asserts a dual jurisdictional capacity in relation to federal customs, fiscal, immigration or sanitary law: the capacity to prevent the commission of an offence of such law, and the capacity to enforce such law through a power of arrest, search and seizure.⁽⁴⁸⁾
- Third, under the *Oceans Act* (section 13), Canada has established a 200 nautical mile EEZ, again, around the Archipelago.⁽⁴⁹⁾ In that EEZ, Canada claims the following prerogatives:
 - sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil;”
 - sovereign rights on “activities for the economic exploitation and exploration of the exclusive economic zone of Canada, such as the production of energy from the water, currents and winds;”

(44) See McRae, p. 9.

(45) Section 4 and 25 of the *Oceans Act*, S.C., 1996, c. 31; *Territorial Sea Geographical Coordinates (Area 7) Order*, SOR/85-872, 10 September 1985.

(46) On the general principle, see section 6 of the *Oceans Act*.

(47) Section 10 of the *Oceans Act*.

(48) *Ibid.*, sections 11 and 12.

(49) *Ibid.*, sections 13 and 25.

- jurisdiction over (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research, and (iii) the protection and preservation of the marine environment; and
 - in particular, it claims rights and jurisdiction over fishery activities in that zone.⁽⁵⁰⁾
- Fourth, Canada also claims rights in the continental shelf. Under the *Oceans Act*, the by-default length of the continental shelf extends to 200 miles from the baselines.⁽⁵¹⁾ However, the *Oceans Act* also provides for the possibility of claiming an extended continental shelf (as permitted under UNCLOS), the precise length of which is to be determined by lines traced on the basis of specific geographical coordinates of points prescribed by regulation.⁽⁵²⁾ No such coordinates of points have been adopted yet in relation to the Arctic waters. However, Canada also is currently undertaking a mapping exercise.⁽⁵³⁾ The results of such an exercise will enable Canada to draw, on the basis of precise geographical coordinates, the contours of the extended continental shelf that it claims in the region. Over the continental shelf, Canada claims sovereign rights of exploration and exploitation of “mineral and other non-living natural resources of the seabed and subsoil” and of “living organisms belonging to sedentary species.”⁽⁵⁴⁾

Controversies aside (cf. below), such claims are fairly straightforward and fit within the general framework of the law of the sea. In addition to such claims, Canada has formulated claims that are more particular and that pertain specifically to its Arctic waters – through its *Arctic Waters Pollution Prevention Act* (AWPPA), adopted in 1970. In the AWPPA, the term “Arctic waters” refers to “the waters adjacent to the mainland and islands of the Canadian arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of west longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles.”⁽⁵⁵⁾ Between Greenland and the Canadian Arctic islands, the Arctic waters stop at the equidistant line when the line is shorter than 100 miles. Canada has put in place the following measures over its Arctic waters:

(50) Section 16 of the *Oceans Act*; *Fishing Zones of Canada (Zone 6) Order*, C.R.C., c. 1549.

(51) Section 17(1)(b) of the *Oceans Act*.

(52) Section 17(1)(c) of the *Oceans Act*.

(53) For information on such project, see http://geo.international.gc.ca/cip-pic/geo/continental_shelf-en.aspx.

(54) Section 18 of the *Oceans Act*. Note that, arguably, states might enjoy fewer rights in relation to the extended continental shelf than they do in relation to the 200-mile continental shelf. The reason behind such a distinction would be that states enjoy rights in the EEZ, i.e., in the water column above the continental shelf, for the first 200 miles only. If a state may enjoy rights in an extended continental shelf, the extension also applies to the water column beyond 200 miles and/or to the resources found therein. See Joanna Mossop, “Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles,” *Ocean Development & International Law*, Vol. 38, Issue 3, July 2007, pp. 283-304.

(55) Section 2 of the AWPPA.

- the creation of the offence of depositing wastes, and the creation of a regime of civil liability for the violation of such an offence;
- the creation of a regulatory power to create shipping safety control zones and to adopt construction standards for ships navigating the Arctic waters;
- the empowerment of pollution prevention officers to take enforcement measures;
- the creation of related offences; and
- the creation of a power of seizure and forfeiture.

Finally, in 2005, Canada asserted additional environmental protection powers in the EEZ and on the continental shelf. The application of the *Migratory Birds Convention Act, 1994* has been extended to Canada's EEZ, with enforcement powers against vessels involved in deposits of substances harmful to migratory birds.⁽⁵⁶⁾ Similarly, enforcement powers in relation to environmental offences can be exercised in the EEZ under the *Canadian Environmental Protection Act, 1999*.⁽⁵⁷⁾

In most regards, what Canada claims is fairly uncontroversial and seems to conform to what the principles of the law of the sea permit. However, some claims have been, remain or may become controversial. The assertion of protective jurisdiction over waters was controversial, but the controversy seems to have subsided with the adoption of Article 234 of UNCLOS. Three issues – the status of the Northwest Passage, the delimitation in the Beaufort Sea and the straight line off Davis Strait – can be considered ongoing disputes. Finally, as Canadian (and other) claims over the continental shelf remain to be articulated more precisely, this is an area of potential future dispute with other states. The following subsections touch on some of those issues.

C. A Glance at the Most Contentious Issues

Canada's position vis-à-vis its Arctic waters is not, as a whole, contested. The absence of opposition on most elements of its assertion and exercise of rights and jurisdiction suggests that its claims are by and large recognized by other states. But there are exceptions. There are currently two major contentious issues in relation to waters, i.e., the extent to which

(56) See the changes brought to the *Migratory Birds Convention Act, 1994*, 1994 c. 22, by the *Act to amend the Migratory Birds Convention Act, 1994* and the *Canadian Environmental Protection Act, 1999*, 53-54 Elizabeth II, 2004-2005.

(57) See section 217 (4)–(6) of the *Canadian Environmental Protection Act, 1999*, 1999 c. 33.

Canada can fully claim the Northwest Passage, and the question of where to draw the line that separates the American and the Canadian zones in the Beaufort Sea. In addition, Arctic states can formulate claims to an extended continental shelf, and one can envisage that controversies might emerge in that regard in the future.

What is offered below is a summary of the controversies. It does not attempt to consider all the legal aspects of the disputes.

1. The Northwest Passage

The Northwest Passage is a maritime path connecting the Davis Strait and Baffin Bay in the east to the Bering Strait in the west. As there are up to seven routes, though two main ones, the Northwest Passage is in a sense a moving target.⁽⁵⁸⁾ While it is ice-covered, its future openness for navigation for a few weeks yearly is being forecasted (with estimates varying as to when this will happen).

Canada considers that it is sovereign over the waters of the Northwest Passage on the ground that those waters are internal waters. It invokes two legal bases in support of its position: waters are internal by virtue of a historic title, and/or by virtue of their being on the landward side of baselines drawn around the entire Arctic Archipelago in 1985.⁽⁵⁹⁾ Donat Pharand, perhaps the most authoritative Canadian legal expert on the question, and others indicate that the historic title argument is weak.⁽⁶⁰⁾ By contrast, Pharand considers the claim based on straight baselines around the Arctic Archipelago to be Canada's best case, contending that it is strong enough in international law.⁽⁶¹⁾ Considering the Northwest Passage as part of Canada's internal waters would enable Canada to regulate activities therein and to enforce its laws in the Passage – with foreign states and ships enjoying no maritime rights under international law.

(58) Pharand (2007), pp. 29-30.

(59) The most comprehensive recent discussion of that question can be found in Donat Pharand, Pharand (2007). See also Donat Pharand, *Canada's Arctic waters in international law*, University Press, Cambridge, 1988 [Pharand 1988]. Note that claims to Arctic waters were also formulated on the basis of the sector theory, but this avenue does not seem to be embraced any longer. Contemporary claims are formulated on one of the two bases indicated above. On sector theory, see Pharand (1988), pp. 1-79 (mostly stating that such a theory has never found reception in customary law).

(60) See Pharand (2007). For reviews of the opinions of various experts on the weak value of the historic title, see Erik Franckx, *Maritime Claims in the Arctic – Canadian and Russian Perspectives* (1993), Martinus Nijhoff Publishers, Dordrecht, Holland, 1993, p. 103 [Franckx]; Lalonde, pp. 77-78.

(61) See Pharand (2007).

This position is however contested. The United States, the most vocal opponent of Canada's contention, considers that the Passage qualifies as an international strait, i.e., a water corridor linking two open seas and used for maritime navigation. The advantage of such qualification is that foreign states gain navigation rights (formally, a right of transit) through the strait. The weak point of the US position may be that the Passage has seldom been used for international traffic, which is an essential element of the legal definition of an international strait. However, with the predicted increase in maritime traffic through the Passage, some experts have started to raise the prospects of a process of internationalization of the Passage, i.e., it is gradually becoming an international strait.⁽⁶²⁾ If the international strait qualification were to prevail, Canada would not necessarily lose all rights and powers over the waters of the Passage, but its rights would be diluted as it would have to respect the navigational rights of other states.

In theory, a third alternative could be possible: considering the waters of the Northwest Passage as territorial waters or as subject to a right of passage. This would be the case if the Passage is considered not to meet the requirements to qualify as an international strait, but not to be entirely enclosed by Canada's 1985 drawing of baselines. If this were the case, foreign states would enjoy a right of innocent passage through the Passage.

The dispute between Canada and the United States on the status of the Passage is ongoing. Although there has been no formal change to the US position, some authors have recently suggested that the United States may regard the Canadian claim as more palatable given the concern about ensuring continental security and the necessity of policing the Passage.⁽⁶³⁾

2. Maritime Delimitation in the Beaufort Sea

The dispute in the Beaufort Sea is a simple boundary dispute between two neighbours. It concerns the maritime extension of the land boundary between Yukon and Alaska. Canada claims that the boundary runs along the 141st meridian, a position which the United States rejects. Instead, the United States argues that the boundary must be determined by using the equidistance principle – a fairly classic and nowadays widely accepted mode of maritime delimitation that traces a line at equal distance to the closest land point of each state. This produces a line that reflects more closely the direction of the respective coast lines. Of

(62) See McRae, p. 16; Pharand (2007), pp. 44-59.

(63) Byers, at 158; Charron, p. 847.

course, both Canada and the United States are pushing for the use of a delimitation method that will best serve their interests and that will produce, from their perspective, the largest maritime zones. The dispute is still pending.

3. Possible Future Controversies: Clashes Over Claims for Extended Continental Shelves

Finally, states can claim extended continental shelves beyond the normal 200-mile limit, so as to include the natural prolongation of the continental margin. States seeking a continental shelf extending beyond the 200-mile mark from baselines must submit their claim to the United Nations' Commission on the Limits of the Continental Shelf (the UN Commission) within 10 years of their ratification of UNCLOS.⁽⁶⁴⁾

In that vein, Russia has formulated a formal claim in relation to the Lomonosov Ridge, which extends beyond the Siberian shelf.⁽⁶⁵⁾ However, its claim has been rather coolly received by the UN Commission, on the grounds that it lacks supporting evidence.⁽⁶⁶⁾ Recently, Russia indicated to the UN Commission that it intends to submit additional information.⁽⁶⁷⁾ The Russian exploration of the North Pole and the deposit of a Russian flag at the bottom of the ocean, which were highly publicized over the summer of 2007, appear to be related to the process of buttressing Russia's position.

Most Arctic states, including Canada, are currently mapping the area so as to specify the extent of the continental shelf that they claim.⁽⁶⁸⁾ In the eastern part of its Arctic,

(64) United Nations, Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11, 13 May 1999, http://www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm.

(65) See Benitah.

(66) United Nations, Oceans and the Law of the Sea, *Report of the Secretary General, Addendum*, 57th Session, U.N. Doc. A/57/57/Add.1 (8 October 2002), para. 27-56.

(67) United Nations, Division for Ocean Affairs and the Law of the Sea, *Report of the Seventeenth Meeting of States Parties*, SPLOS/164, 16 July 2007, para. 77, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/426/82/PDF/N0742682.pdf?OpenElement>.

(68) See Defining Canada's Extended Continental Shelf, http://geo.international.gc.ca/cip-pic/geo/defining_cs-en.aspx. Note that the possibility of an extended continental shelf already exists in domestic law. Under section 17 of Canada's *Oceans Act*, the by-default 200-mile continental shelf co-exists with the possibility of an extended continental shelf. In that regard, geographical coordinates can be prescribed under the *Oceans Act* to form delimitation lines that would go beyond the 200-mile mark (or, in theory, that would stop before such mark): See Article 16, para. (1), subpar. (c); and subparagraph 25(a)(iii) of the *Oceans Act*. This is done through the adoption of an order by the Governor in Council.

Canada collaborated with Denmark in the conduct of an expedition aiming at claiming part of the Lomonosov Ridge.⁽⁶⁹⁾ In the western part of Canada's Arctic territory and waters, Canada is gathering seismic data and conducting bathymetry (study of underwater depth) work, with a view to a future submission to the UN Commission. Such operations are planned to continue in the years ahead. Canada must submit particulars of intended limits and scientific and technical evidence in support of its claim to an extended continental shelf by the end of 2013.

Depending on the sets of specific claims formulated by the other Arctic states, it is possible that there will be a degree of overlap or overextension that will generate disputes in the region.

(69) Ibid.