

**CONTROVERSIAL CANADIAN CLAIMS OVER ARCTIC WATERS  
AND MARITIME ZONES**

**Robert Dufresne**  
Law and Government Division

**10 January 2008**

**The Parliamentary Information and Research Service of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Analysts in the Service are also available for personal consultation in their respective fields of expertise.**

**CE DOCUMENT EST AUSSI  
PUBLIÉ EN FRANÇAIS**

## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
THE STATUS OF THE NORTHWEST PASSAGE .....	1
A. Claim I: Internal Waters by Historic Title .....	2
B. Claim II: Internal Waters Through Inclusion Within Straight Baselines.....	3
C. Brief Assessment of Canadian Claims .....	4
D. The Claims of Foreign States in the Passage I: Is There a Right of Innocent Passage?.....	5
E. The Claims of Foreign States in the Passage II: Is There a Right of Transit?.....	6
F. The Road Ahead: Between Internationalization of the Passage and Consolidation of the Canadian Claims Over It.....	8
THE DELIMITING LINE BETWEEN THE CANADIAN AND THE AMERICAN ZONES IN THE BEAUFORT SEA .....	10
A. Canada's Claim .....	10
B. The U.S. Claim.....	11
POSSIBLE CLAIMS FOR EXTENDED CONTINENTAL SHELVES .....	12
A. The Regime Set Up Under UNCLOS .....	12
B. Claims Made to an Extended Continental Shelf .....	13
C. Canada's Delimitation of its Continental Shelf.....	15
CONCLUSION.....	16



CANADA

LIBRARY OF PARLIAMENT  
BIBLIOTHÈQUE DU PARLEMENT

## CONTROVERSIAL CANADIAN CLAIMS OVER ARCTIC WATERS AND MARITIME ZONES

### INTRODUCTION

Canada asserts several claims over Arctic lands and waters. By and large, Canada's claims and assertions are regarded as well-founded by other states.<sup>(1)</sup> Canada can thus benefit from recognition of title and jurisdiction in relation to those claims. However, for some claims, other states have expressed opposition to Canada's claims.

The only ongoing controversy regarding Canadian Arctic land claims involves the status of Hans Island. Given that the issue has been explored elsewhere, that controversy will not be discussed here.<sup>(2)</sup> This paper focuses instead on controversial claims over Arctic waters that affect Canadian interests. Three controversies are examined, two of them ongoing and the last one potential: the status of the Northwest Passage; the maritime delimitation in the Beaufort Sea; and the extent to which claims over an extended continental shelf by the various Arctic states may generate future controversies.

### THE STATUS OF THE NORTHWEST PASSAGE

The Northwest Passage is unusual in the sense that it is not a fixed geographical location, but rather a water route. It connects 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 preferred ones, the Northwest Passage is in a sense a moving target.<sup>(3)</sup> It would represent a potentially attractive and valuable commercial shipping route if it were to become more accessible to navigation and for longer portions of the year.

---

(1) See Robert Dufresne, Canada's Legal Claims on Arctic Territory and Waters, **PRB ???**, Parliamentary Information and Research Service, Library of Parliament, Ottawa, **DATE**.

(2) Ibid.

(3) Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development and International Law*, Vol. 38, Issue 1 & 2, January 2007, pp. 3-18 (pp. 29-30) [Pharand 2007].

Canada considers the Northwest Passage as part of its internal waters. It relies upon two legal bases for such position.<sup>(4)</sup> First, the waters that make up the Northwest Passage are Canada's internal waters by virtue of a historical title that Canada enjoys. Second, the waters are internal as they are on the landward side of straight baselines that Canada draws around the Arctic Archipelago. By contrast, other states claim that the waters of the Northwest Passage are not internal waters and that states enjoy navigation rights there by virtue of the law of the sea. There are two possibilities in that regard. First, states could enjoy a right of passage, which would result from the preservation of a right in existence prior to the enclosing of the Passage through straight baselines. Second, states could enjoy a right of transit if the Passage qualifies as an international strait. Another possibility is that the Passage could become an international strait and that a right of transit could develop over time.

There are thus three basic options as to the legal status of the area: internal waters, a territorial sea or an international strait. These three positions will be examined briefly below. However, no matter the outcome of the dispute, rules giving Canada protective jurisdiction over the Passage for its qualification as an ice-covered area would continue to apply. As is seen in a subsequent section of the paper, controversy over that claim has abated.

#### **A. Claim I: Internal Waters by Historic Title**

Canada claims that the Arctic waters of the Northwest Passage constitute internal waters under historic title, and thus fall under full Canadian sovereignty. The first clear statement of the Canadian position to that effect was made in 1973 by the Bureau of Legal Affairs and read as follows:

Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on a historical basis, although they have not been declared as such in any treaty or by any legislation."<sup>(5)</sup>

---

(4) The most comprehensive recent discussion of that question can be found in Pharand 2007. See also Donat Pharand, *Canada's Arctic waters in international law*, Cambridge 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 rejecting the idea that such a theory has ever found reception in customary law).

(5) Quoted in Pharand 2007, p. 11.

In 2002, officers of the Department of Foreign Affairs and International Trade continued to use the argument, though it was framed in the following way:

Canada's full sovereignty over these waters, including the Northwest Passage, is based on historic title and no right of passage is therefore recognized. Further strengthening Canada's sovereignty position is the ongoing use and occupation of the covering ice by its Inuit people "from time immemorial."<sup>(6)</sup>

Moreover, when Canada ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 2003, it attached a declaration excluding from adjudication "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles."<sup>(7)</sup> No doubt, the latter dimension was partly aimed at disputes over Arctic waters.

### **B. Claim II: Internal Waters Through Inclusion Within Straight Baselines**

Alternatively, or in addition to historical title, Canada claims that the waters of the Northwest Passage are internal as waters on the landward side of straight baselines. Like the historical title argument, this argument is not specific to the Passage itself, but has been articulated in connection to related challenges to Canadian sovereignty. Following the controversial transit of the U.S. Coast Guard icebreaker *CGS Polar Sea* in 1985 (see below), the Minister for External Affairs announced two measures: (1) the adoption of an Order in Council establishing straight baselines around the Arctic Archipelago, taking effect on 1 January 1986,<sup>(8)</sup> and (2) the enactment of the *Canadian Laws Offshore Application Act*, extending the application of federal and provincial laws to offshore areas along the coast.<sup>(9)</sup> The *Canadian Laws Offshore Application Act* has since been repealed and replaced by the *Oceans Act*.

---

(6) Quoted in Hugh M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada*, 7<sup>th</sup> ed., Montgomery Publications, Toronto, 2006, p. 461 [Kindred et al.].

(7) Quoted in Pharand 2007, p. 5.

(8) See *Territorial Sea Geographical Coordinates (Area 7) Order*, SOR/85-872 (10 September 1985).

(9) Kindred et al., p. 461.

### C. Brief Assessment of Canadian Claims

Experts who have examined the issue draw different conclusions as to the merits of the Canadian claims to full sovereignty over Arctic waters. Some seem to accept the historic title argument.<sup>(10)</sup> But Donat Pharand, perhaps the most authoritative Canadian legal expert on the question, and others indicate that the historical title argument is weak.<sup>(11)</sup> By contrast, Pharand considers the claim based on straight baselines around the Arctic Archipelago to be Canada's best claim and strong enough in international law.<sup>(12)</sup>

After reviewing whether Canada succeeds in its claim of historic title, Pharand concludes that "Canada is not in a position to discharge the heavy burden of proof that it has exercised exclusive jurisdiction over the Arctic waters for a sufficiently long period of time and with the acquiescence of foreign states, particularly those primarily affected by its claim."<sup>(13)</sup> He notes four elements to support his view: (1) the fact that no one took possession of Arctic waters when British and Canadian explorers claimed the North; (2) the making of the historic title claim only in 1973; (3) the immediate protest reaction of other states to such a claim; and (4) the fact that Canada was not successful in forcing all foreign ships – especially US ones – to obtain prior authorization.<sup>(14)</sup>

After a review of the relevant considerations, Pharand is much more positive regarding Canada's ability to claim that waters on the landward side of straight baselines drawn around the Arctic Archipelago are internal waters.<sup>(15)</sup>

---

(10) Robert R. Roth, "Sovereignty and Jurisdiction Over Arctic Waters," 28 *Alberta Law Review*, 1990, 845-872 (expresses support for the cogency of the claim based on historic title); Andrea Charron, "The Northwest Passage," *International Journal*, Vol. 60, 2005, pp. 831-59 (p. 847).

(11) 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*, Nijhoff Dordrecht, Boston, 1993, p. 103 [Franckx]; Suzanne Lalonde, "Increased Traffic through Canadian Arctic Waters: Canada's State of Readiness," *Revue judiciaire Thémis*, Vol. 38, No. 1, 2004, pp. 49-124 (p. 53).

(12) See Pharand 2007.

(13) Pharand 2007, p. 13.

(14) *Ibid.*

(15) The considerations included the following: the generality of straight baseline as a method of delimitation, the geographical peculiarity of the Archipelago, the general direction of the coast, the closeness of the link between land and sea, regional economic interests evidenced by long usage, the length of straight baselines, the consolidation of title for certain straight baselines through exercise of state authority, long usage and general toleration. Pharand 2007, pp. 17-28.

#### **D. The Claims of Foreign States in the Passage I: Is There a Right of Innocent Passage?**

The claim that the Northwest Passage is located in internal waters has been disputed by the European Union and the United States, particularly the latter.<sup>(16)</sup> Two arguments target part of Canada's claim of sovereign control over the Northern Passage. Neither of those arguments entirely denies that Canada enjoys a measure of control, but both arguments claim that other states enjoy navigational rights: either a right of innocent passage, or a right of transit passage.

The question of whether other states have a right of innocent passage in the Northwest Passage is linked to the drawing of straight baselines around the Arctic Archipelago. In other words, if the claim that Canada holds the Passage relies on historic title, then the question of whether a right of innocent passage exists is not even raised. But it can be raised if the only valid basis for Canada's position is the straight baselines drawn in 1985. Under Article 8 of UNCLOS, when straight baselines are drawn around waters that were not previously considered internal, a right of innocent passage remains – as it does elsewhere on the territorial seas. Does this rule affect Canada's position?

On this point, some argue that what governs the issue is the law applicable at the time when the baselines were drawn, i.e. 1985.<sup>(17)</sup> When Canada adopted its position of drawing straight baselines in 1985, it was not bound by UNCLOS; it was acting under customary international law. The distinction between treaty law and customary law is significant. The principle of preservation of a right of innocent passage expressed under Article 8 of UNCLOS is regarded as a new treaty-law rule, which did not exist under customary international law. This principle means that foreign states could not claim that a right to innocent passage continues to exist on waters enclosed through the straight baseline method. Under such a view, foreign states could not claim a right of innocent passage in the Northwest Passage.

However, others argue that, by ratifying UNCLOS, Canada became bound by the rule enunciated at Article 8 – and therefore cannot defeat the right of innocent passage through its drawing of baselines.<sup>(18)</sup> They argue that the issue is not debatable.

---

(16) The opposition of European states to Canada's claim in relation to the Northwest Passage is often asserted by experts, but it is little documented: see e.g. Rob Huebert, "Climate Change and Canadian Sovereignty in the Northwest Passage," *Isuma*, Vol. 2, 2001, pp. 86-94 (p. 90) [Huebert 2001].

(17) See Donald McRae, "Arctic Sovereignty? What is at Stake?", *Behind the Headlines*, Vol. 64, January 2007, pp. 1-23 (pp. 13-14) [McRae]; see also Michael Byers, *Intent for a Nation: What is Canada for?*, Douglas & McIntyre, Vancouver, 2007, p. 156 [Byers].

(18) Franckx, pp. 105-07.

### **E. The Claims of Foreign States in the Passage II: Is There a Right of Transit?**

If there is no right of innocent passage, is there a right of transit passage under international law? A right of transit passage exists for waterways that are considered an international strait. So the question becomes: is the Northwest Passage, as the United States contends, an international strait?

The United States has consistently argued that the Northwest Passage represents an international strait. Two voyages by the US tanker *S.S. Manhattan* in 1969-1970 and the US icebreaker *CGS Polar Sea* in 1985 highlighted the clash of positions between Canada and the United States on this issue. In relation to transits by both ships, the position of the United States was that it did not have to obtain Canada's permission given that the ships were navigating through an international strait. In that regard, the United States argues, invoking a decision of the International Court of Justice in support, that the volume of international traffic is not relevant for the Passage to qualify as a strait.<sup>(19)</sup> Moreover, the United States seems to consider that the *potential* for the Passage to be used for international maritime traffic, as opposed to its *actual* use, is sufficient to make the Northwest Passage an international strait.<sup>(20)</sup> The European Union also expressed its opposition to Canada's use of straight baselines around the entire Arctic Archipelago – which could have an impact on how other countries view the Northwest Passage.<sup>(21)</sup>

In 1988, the dispute between Canada and the United States was in a sense partly set aside. They concluded an agreement on "Arctic Cooperation," which pledges that voyages of US icebreakers "will be undertaken with the consent of the Government of Canada." But the Agreement did not otherwise alter either country's legal position vis-à-vis the Arctic waters. In 2003, Paul Cellucci; then the US Ambassador to Canada, confirmed that the agreement to disagree on the status of the Northwest Passage continues.<sup>(22)</sup>

---

(19) See Byers, p. 157. The decision of the ICJ that deals with international straits is *Corfu Channel case*, Judgment of 9 April 1949, *I.C. J. Reports* 1949, p. 4.

(20) See McRae, p. 15.

(21) See Hubert 2001, p. 91; Byers, p. 157.

(22) "As you know, we have a disagreement, Canada and the United States, on the Northwest Passage. Canada claims it as part of the internal jurisdiction of Canada; the United States has said it's an international waterway. We have not resolved that dispute and there's not really a lot of need to do so right now.": Transcript of a press conference during visit to Yellowknife, 13 May 2003, quoted in Rob Huebert, "The shipping news part II – How Canada's Arctic sovereignty is on thinning ice," *International Journal*, Vol. 58, No. 2, Spring 2003, pp. 295-308 (pp. 306-307).

As mentioned above, international straits are water corridors meeting the geographical requirements of being narrower than 24 miles (or 12 miles from both coasts) and of linking two parts of the high seas, and the functional requirement of being used for international maritime traffic.<sup>(23)</sup> The key and most difficult question in relation to the Northwest Passage is whether the functional element is met.

In a recent study, Donat Pharand revisits this issue.<sup>(24)</sup> He examines the history of foreign transits through the Northwest Passage to determine whether the functional criterion is met. He noted only two, potentially three, transits by naval ships, all US submarines and at least two of the visits were undertaken under common defence arrangements.<sup>(25)</sup> He also discussed the famous transits by the *Manhattan* and the *Polar Sea* ships – the former voyaging through the high seas (as the territorial sea could then only be three miles wide) and the latter being the only instance passage of a foreign icebreaker that did not obtain prior authorization. He then concludes:

It is evident that the Northwest Passage has not had a history as a useful route for international maritime traffic. The transit by the USCGS *Polar Sea* icebreaker seems to constitute the one single exception, where prior authorization was not sought, either expressly or by implication. However, it must be remembered that this took place in 1985, prior to the establishment of straight baselines making the waters of the Northwest Passage internal waters of Canada. That one transit, which was strongly protested by Canada, is surely not sufficient to turn the Northwest Passage into an international strait subject to the right of transit passage.<sup>(26)</sup>

Nevertheless, a modification of the American position may be possible. There have been some suggestions that US concerns about continental security since the terrorist attacks of 11 September 2001 could temper its assertions that Canada's Arctic waters constitute an international strait. Michael Byers explains the rationale for a possible modification in the US view of its interests in the Northwest Passage in the following terms:

Americans interests have changed, and they may well be more willing to accept Canadian sovereignty. During the Cold War, the United States was focused on maintaining open access for its navy and

---

(23) See Pharand 2007, p. 30.

(24) Pharand 2007, pp. 30 ss.

(25) Pharand 2007, p. 37.

(26) Pharand 2007, p. 42.

especially its submarines. Under the law of the sea, submarines may pass through an international strait without surfacing or otherwise alerting the adjacent coastal state or states, something not permitted in internal waters. From Washington's perspective, the Canadian claim threatened to create an inconvenient precedent for straits and channels elsewhere.

Today, Washington is more concerned about terrorism sneaking into North America using the oceans to transport weapons of mass destruction. And these challenges would best be addressed through a domestic legal system's criminal, customs and immigration laws, rather than the much looser constraints of international law. As it happens, the Canadian system is the only one that could plausibly be applied in the Northwest Passage. It simply does not benefit the United States – or most other countries – to have foreign vessels shielded from reasonable regulations and scrutiny by maintaining that the passage is an international strait.<sup>(27)</sup>

Under such a view, Canada might perhaps manage relations with the United States over the Northwest Passage by controlling the passage “as a way of securing the North American perimeter,” and also thereby diminishing the opposition to its claim.<sup>(28)</sup> Lately, Paul Cellucci, after he ceased to be ambassador, has made public comments suggesting that the United States should recognize the Canadian claim over the Passage.<sup>(29)</sup>

#### **F. The Road Ahead: Between Internationalization of the Passage and Consolidation of the Canadian Claims Over It**

Experts working on Arctic sovereignty start from a common premise: climate change will render navigation in Arctic waters, and in the Northwest Passage in particular, more feasible. From a legal standpoint, this raises the question of whether increasing maritime traffic could modify Canada's legal position in relation to the Passage.

If the Northwest Passage is in Canadian internal waters and is not currently subject to maritime rights of other states, could this change? More specifically, could the Northwest Passage become an international strait? As things currently stand, the weak element

---

(27) Byers, p. 158.

(28) Charron, p. 847.

(29) See Brian Flemming, Comment: “Northwest Passage: a voyage Canada and the U.S. can take together,” *The Globe and Mail* [Toronto], 18 December 2007.

in claims that the Northwest Passage is an international strait is that international traffic through it has been minimal. But the possibility that a higher and more sustained flow of foreign navigation could contribute to internationalizing the passage and creating a legal right of transit passage has been raised by some experts.<sup>(30)</sup> In that regard, Pharand notes that “A pattern of international shipping across the Passage, developed over relatively few years, might be considered sufficient to make it international.”<sup>(31)</sup> This view suggests that, even if one considers the Northwest Passage as currently part of Canada’s internal waters, a higher flow of international maritime traffic that failed to seek Canadian consent, or to which Canada did not react, could be a force in favour of the internationalization of those waters.

In the case of internationalization, other states – and their ships and aircraft – would enjoy rights of transit passage.<sup>(32)</sup> Such a right is defined under UNCLOS as “the exercise [in accordance with Part III of the UNCLOS] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone.” The transit right is bounded by obligations provided under articles 39, 40 and 41 of UNCLOS. These include obligations to proceed without delay, and to refrain from any threat or use of force or from activities not incidental to their transit – except for *force majeure* or distress. Ships must comply with accepted international safety and pollution prevention and control regulations. They must also obtain the prior authorization of states to conduct scientific activities, and respect sea lanes. Pharand also considers that transit rights would equally benefit warships and submarines, which would not have to surface.<sup>(33)</sup>

In all likelihood, Canada could also continue to exercise protective environmental jurisdiction in the waters, as recognized under Article 234 of UNCLOS.<sup>(34)</sup>

However, internationalization is only a possibility, and it is by no means unavoidable. The pull towards internationalization of the Passage could be resisted and countered by Canada, through concrete acts of assertion of sovereignty. In that regard, Pharand notes: “The possible internationalization of the Northwest Passage will depend essentially on two factors: the importance of navigation by foreign flags and the effectiveness of the measures

---

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

(31) Pharand 2007, p. 44.

(32) McRae, p. 18.

(33) Pharand 2007, p. 45.

(34) McRae, p. 17.

taken by Canada to control such navigation.”<sup>(35)</sup> He formulates a series of recommendations to improve Canada’s capacity to exercise effective control in a way that will enable it to maintain its claim that the waters of the Passage are internal, and not part of an international strait. Measures include making NORDREG (an information and guiding system for ships navigating the waters) compulsory, rather than voluntary; acquiring a polar icebreaker; developing sea- and land-based services in the region; completing the setting in place of a radar satellite to monitor surface vessels; ensuring a submarine detection and control capacity; patrolling the regions, ensuring rescue capacity; and creating a deep-water seaport.<sup>(36)</sup> What is fundamental, in Pharand’s view, is to focus on the enforcement of whatever measures are taken – through internal and international cooperation.<sup>(37)</sup>

## **THE DELIMITING LINE BETWEEN THE CANADIAN AND THE AMERICAN ZONES IN THE BEAUFORT SEA**

The second dispute involving Arctic waters relates to the offshore boundary between Canada and the United States in the Beaufort Sea. The Beaufort Sea is a large body of water north of the Northwest Territories, the Yukon, and Alaska and west of Canada’s Arctic islands, and is a part of the Arctic Ocean. Its northwestern boundary is defined by a line connecting Point Barrow, Alaska, and Land’s End, Prince Patrick Island. There is an ongoing dispute between Canada and the United States over the delimitation of the maritime boundary in the Beaufort Sea. As opposed to the dispute regarding the Northwest Passage, this one pertains to the drawing of a boundary line between neighbours, and it is therefore purely bilateral in nature.

### **A. Canada’s Claim**

Canada relies on the 1825 treaty between Russia and Great Britain that established the boundary between what is now Alaska and the Yukon along the 141<sup>st</sup> meridian.

---

(35) Pharand 2007, p. 48.

(36) Pharand 2007, pp. 51-52.

(37) Pharand 2007, p. 52.

The Treaty provides that the boundary extends as far as “the Frozen Ocean.”<sup>(38)</sup> Canada considers that this is the proper basis on which to determine the maritime boundary, and that the line must run along the 141<sup>st</sup> meridian. It notably uses this meridian to delimit the waters over which it claims pollution prevention jurisdiction, and for the delimitation of its fishing zone.<sup>(39)</sup>

While such acts demonstrate that Canada considers its claim to be well founded, they are also important as they could be relevant as a fallback argument. If Canada’s claim on the 141<sup>st</sup> meridian is rejected, these acts of sovereignty could become relevant as special circumstances in relation to the use of another method of delimitation. In effect, since the United States argues that the equidistance method should be used to draw the boundary, the acts of sovereignty could come into play as considerations justifying a modification of the equidistance line in order to attain an equitable result – as is permissible under the law of maritime boundary delimitation.<sup>(40)</sup>

## **B. The U.S. Claim**

The US position rejects the use of the 1825 treaty to determine the maritime boundary between the two states. It considers that the treaty clearly intended to delimit a land boundary, but that there was no intent to establish a maritime one. The US position receives some support from Donat Pharand. On the claim that the 1825 treaty governs the issue, he argues that “the parties could not have envisaged establishing a boundary for the continental shelf at a time when that concept was absolutely unknown in international law.”<sup>(41)</sup> Even if one cannot consider the treaty itself as disposing of the matter, it can be noted that the 141<sup>st</sup> meridian line has in practice been used by Canada three times to determine its northwestern boundary.<sup>(42)</sup>

---

(38) Article 3, Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, done on 16 February 1825, 75 Consolidated Treaty Series 95.

(39) See the definition of “Arctic waters” under Article 2 of the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12; see section 16 of the *Oceans Act*, S.C., 1996, c. 31, as well as the *Fishing Zones of Canada (Zone 6) Order*, C.R.C., c. 1549.

(40) Donat Pharand, “The Legal Regime of the Arctic: Some Outstanding Issues,” *International Journal*, Vol. 49, Autumn 1984, pp. 742-99 (p. 754) [Pharand 1984].

(41) *Ibid.*

(42) See Donat Pharand, “Les problèmes de droit international dans l’Arctique,” *Études internationales*, Vol. 49, 1989, pp. 131-164 (pp. 138-139) (in 1965, Canada granted exploitation permits up to the limit; in 1970, it used the 141<sup>st</sup> meridian limit to define the zone of application of its jurisdictional claim on environmental protection; in 1977, the same line was used in the determination of Canada’s 200-mile Exclusive Economic Zone).

Two alternative methods of delimitating the boundary have been put forward by the United States: equidistance and perpendiculars. First, the United States suggests that the maritime boundary should be traced on the basis of the equidistance principle, i.e. by drawing a median line every point of which is equally distant from the nearest points on the baselines.<sup>(43)</sup> In regard to the use of the equidistance method, Pharand seems to favour a modified application:

In this particular geographic situation, ... the equidistance method favors the United States because of the slightly convex coast of Alaska and the concave coast of the Yukon. It would therefore appear that the special configuration of the coast of Canada in the area to be delimited might constitute a special circumstance and warrant a certain modification of the equidistance line.<sup>(44)</sup>

Second, another method that the United States has argued for is the use of a perpendicular line to the coast, at the point where the land boundary meets the sea.<sup>(45)</sup>

The dispute is still ongoing.

## **POSSIBLE CLAIMS FOR EXTENDED CONTINENTAL SHELVES**

### **A. The Regime Set Up Under UNCLOS**

A significant implication of the ratification of UNCLOS is that the convention allows a state to establish the outer limits of its continental shelf beyond 200 nautical miles in accordance with section 76 (or subsection 76(4)) of the Convention, but the state must submit its claim to the United Nations' Commission on the Limits of the Continental Shelf (the Commission) within 10 years of ratifying UNCLOS. A state that ratifies UNCLOS, and that seeks full international recognition of its claims to a continental shelf extending beyond the 200-mile mark from baselines, must follow a prescribed procedure under UNCLOS's Annex II and the guidelines found in two documents adopted by the Commission on the Limits of the

---

(43) See Donald R. Rothwell, *Maritime Boundaries and Resource Development: Options for the Beaufort Sea*, Canadian Institute for Resources Law, Calgary, 1988, pp. 25-40.

(44) Pharand 1984, p. 754.

(45) Pharand 1989, p. 138.

Continental Shelf: a set of rules (*Modus Operandi*)<sup>(46)</sup> and Scientific and Technical Guidelines.<sup>(47)</sup>

The Commission is made up of 21 experts from state parties to UNCLOS. In cases where it disagrees with the merits of a state submission, the Commission can formulate recommendations. In response, the coastal state may make a revised or new submission. The functioning of the system can be summed up as follows:

Any such claim [to extended continental shelf] must be submitted, with scientific data, to the Commission on the Limits of the Continental Shelf, a body of scientists elected by parties to the UN convention. The commission's recommendations are not legally binding. Its role is to alert countries to exaggerated claims, as well as to help legitimize reasonable claims. It is left to those countries whose claims overlap to negotiate mutually satisfactory agreements among themselves or to take their disputes to an international court or tribunal.<sup>(48)</sup>

## **B. Claims Made to an Extended Continental Shelf**

As seen, parties to UNCLOS have 10 years from the moment they become bound by the treaty to map out their continental shelf and to formulate specific claims. Among Arctic states other than Canada, Denmark, Finland, Norway, Russia and Sweden are concerned by such obligations. The United States is the only state member of the Arctic Council that has not ratified UNCLOS. However, it is considering doing so, and there is significant backing for such a move.<sup>(49)</sup>

So far, only two Arctic states have made a submission to the Commission: Russia and Norway. In 2001, Russia submitted a claim to an extended continental shelf which, if accepted, would give it rights over two segments beyond the normal 200-mile limit, one of which ends at the North Pole. Russia claims part of the Lomonosov Ridge, as an extension of

---

(46) *Modus Operandi* of the Commission, CLCS/L.3, 12 September 1997, available online at [http://www.un.org/Depts/los/clcs\\_new/commission\\_mo.htm](http://www.un.org/Depts/los/clcs_new/commission_mo.htm).

(47) 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](http://www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm)).

(48) Byers, p. 166.

(49) See e.g. "Editorial: 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, No. 2, April 2004, pp. 307-308.

the Siberian continental shelf.<sup>(50)</sup> Because submissions to the Commission are confidential, it is difficult to determine the legal basis of the Russian claim.<sup>(51)</sup> However, one can deduce that Russia argues that at least some of the extended continental shelf qualifies as “submarine elevations,” given that this is the only legal qualification that permits it to go beyond the 350-mile mark.<sup>(52)</sup>

In January 2002, Canada reacted officially to the Russian submission.<sup>(53)</sup> First, it declared itself unable “to determine whether it agrees with the Russian Federation’s Arctic continental shelf submission without the provision of further supporting data.” It specified that its inability to comment at this stage should be viewed as neither rejection nor acceptance of the Russian claim. Moreover, it maintained that it considered the Russian submission and the Commission’s response thereto without prejudice to the question of the delimitation of the boundary between Canada and Russia’s continental shelves. Canada does not seem to have since changed its position. However, one might note the vocal opposition by Canada’s Minister of Foreign Affairs to the Russian dropping of a flag on the North Pole, near the tip of the region claimed by Russia.<sup>(54)</sup>

The Commission considered Russia’s submission and made recommendations in relation to the various elements raised by the Russian submission, some of which concerned boundary delimitations with Russia’s neighbors.<sup>(55)</sup> As for the Russian claim that perhaps most concerns Canada, the extended continental shelf north of its central land mass that culminates near the North Pole, the Commission squarely recommended that Russia revisits its claim. It held:

As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.<sup>(56)</sup>

---

(50) Note that the ridge is an area over which Denmark and Canada might also formulate claim if the data gathered supports it.

(51) See Marc Benitah, “Russia’s Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS,” *ASIL Insight*, Volume 11, Issue 27 (8 November 2007).

(52) See Benitah; see also Article 76(6) UNCLOS.

(53) Canada: Notification regarding the Submission made by the Russian Federation to the Commission on the limits of the continental shelf, 26 February 2002, UN Doc. CLCS.01.2001.LOS/CAN ([http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_CANtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_CANtext.pdf)).

(54) *Ibid.*

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

(56) *Ibid.*, para. 41.

Recently, Russia indicated to the UN Commission that it intends to submit additional information.<sup>(57)</sup> 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 related to the process of buttressing Russia's position. But recently, Canada and Russia jointly stated their intent to deal with their territorial claims in the Arctic through international law and processes.<sup>(58)</sup>

On 27 November 2006, Norway also submitted a claim to an extended continental shelf in the Arctic to the Commission.<sup>(59)</sup> Canada did not react to this submission. The Commission has yet to finalize its position on the claim.<sup>(60)</sup>

### **C. Canada's Delimitation of its Continental Shelf**

From the perspective of its international undertakings, Canada has to 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. This requirement obviously applies to its Arctic claims as well.

The possibility of an extended continental shelf already exists in domestic law. Under section 17 of Canada's *Oceans Act*, the default 200-mile continental shelf coexists 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 short of it).<sup>(61)</sup> This act could be accomplished through the adoption of an order by the Governor in Council.

---

(57) United Nations, Division for Ocean Affairs and the Law of the Sea, Commission on the Limits of the Continental Shelf, *Report of the seventeenth Meeting of States Parties*, SPLOS/164, 16 July 2007, para. 77, available at: [http://www.un.org/Depts/los/meeting\\_states\\_parties/SPLOS\\_documents.htm](http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm).

(58) See "Canada, Russia to respect international rules over Arctic," *Ottawa Citizen*, 30 November 2007.

(59) [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_exec\\_sum.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf).

(60) United Nations, Oceans and the Law of the Sea, *Report of the Secretary General*, 62<sup>nd</sup> sess., U.N. A/62/67/Add.1, 31 August 2007, para. 48-51.

(61) See Article 16, para. (1), subpar. (c); and subparagraph 25(a)(iii) of the *Ocean Act*.

Canada is currently undertaking a cartographic exercise aimed at mapping out and gathering evidence in support of its claims to an extended continental shelf.<sup>(62)</sup> In the eastern part of its Arctic, Canada collaborated with Denmark in the conduct of an expedition aimed at claiming part of the Lomonosov Ridge.<sup>(63)</sup> 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 Commission.

## CONCLUSION

In most regards, Canada's position in relation to Arctic territory and waters is secure, benefiting from the recognition of other states. But for a specific set of maritime areas, Canadian claims are met by opposition and the formulation of counter claims. This is currently the case for the Northwest Passage and the delimitation of the boundary with the U.S. in the Beaufort Sea, and this could also be the case regarding claims to extended continental shelves by Arctic states.

By default, the controversies examined in this paper will continue to exist. However, they could also die down and be resolved over time, through negotiations, the abandonment of a claim and/or adjudication.

---

(62) Foreign Affairs and International Trade Canada, Defining Canada's Extended Continental Shelf ([http://geo.international.gc.ca/cip-pic/geo/defining\\_cs-en.aspx](http://geo.international.gc.ca/cip-pic/geo/defining_cs-en.aspx)).

(63) Ibid.