

2010–2011
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

**A Dispute Arising Under the
Statute of the International Court of Justice**

February 2011

**THE GOVERNMENT OF CANADA
(Applicant)**

v.

**THE GOVERNMENT OF THE UNITED STATES OF AMERICA
(Respondent)**

MEMORIAL OF THE RESPONDENT

Team#: 2011-18R

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TABLE OF AUTHORITIES

International Cases

Application for Revision and Interpretation of the Judgment Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1985 I.C.J. (December 10)	8
Asylum (Colom./Peru), 1950 ICJ 266 (Nov. 20).....	8
Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway) 1993 I.C.J. 38 (Jun. 14)	4
Continental Shelf (Libya v. Malta) 1984 I.C.J. 13 (Mar. 21)	4
Fisheries case (UK v. Nor.), 1951 ICJ 116 (Dec. 18);.....	passim
Legal Status of Eastern Greenland Case (Nor. v. Den.), 1933 P.C.I.J. (Ser. A/B) No. 53 (Apr. 5)	15
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).	8
Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, 1995 I.C.J. 6 (Feb. 15)	4, 17
North Sea Continental Shelf Cases (Germany v. Denmark and The Netherlands) 1969 I.C.J. 3 (Feb. 20).....	4, 8
Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) (Int'l Ct. Justice Oct. 8, 2007)	2

Treaties and Other International Agreements

Agreement for the Implementation of the provisions of the 1982 U.N. Convention on the Law of the Sea relating to conservation and management of straddling stocks and highly migratory fish stocks, adopted 4 August, 1995, <i>opened for signature</i> , 4 December 1995; 34 ILM 1542 (1995).....	6, 8
Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71	4
Arctic Waters Pollution Prevention Act of 1970, R.S.C. (1985), <i>reprinted in</i> 9 ILM 543 (1970);	7
Convention on Biological Diversity Preamble, June 5, 1992, 31 ILM 818 (1992).....	8
Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.....	2

Rio Declaration on Environment and Development, U.N. GAOR, 27th Sess., UN Doc. A/CONF.151/5/Rev.1 (1992).....	6, 8, 9
Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.....	xii, 8
Treaty of Paris (1783).....	3
U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397	passim
United Nations Framework Convention on Climate Change art. 3.3, May 9, 1992, 1771 U.N.T.S. 107.....	8
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331	3

Domestic Statutes

Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C.)	6
Federal Food and Drugs Act of June 30, 1906, ch. 3915, 1, 34 Stat. 768, repealed by Section 902(a) of Act of June 25, 1938, ch. 675, 52 Stat. 1059 (current version at 21 U.S.C. 301).....	7

Other Authorities

<i>Alaska queries BP oilfield checks</i> , BBC NEWS, http://news.bbc.co.uk/2/hi/business/4778833.stm (last updated Aug. 10, 2006).....	10
Arctic Economics, <i>Northwest Passage Transits</i> , available at http://benmuse.typepad.com/arctic_economics/2008/07/northwest-passage-transits.html (last visited Dec. 04, 2010)	14, 15
<i>Big-Fish Stocks Fall 90 Percent Since 1950, Study Says</i> , May 15, 2003, NAT'L GEOG. NEWS, http://news.nationalgeographic.com/news/2003/05/0515_030515_fishdecline.html	7, 9
BING BING JIA, <i>THE REGIME OF STRAITS IN INTERNATIONAL LAW</i> (Oxford University Press, 1998)	11, 12, 16, 20
British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.....	16
<i>Canada Ratified United Nations Convention on the Law of the Sea</i> , CENTRE FOR MARINE BIODIVERSITY, Nov. 6, 2003, http://www.marinebiodiversity.ca/cmb/Members/carterl/canada-ratified-united-nations-convention-on-the-law-of-the-sea ; 60 <i>Law of the Sea Bulletin</i> 8 (2006). http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin60e.pdf ..	6

Carolin Hilpert, <i>Hot Issues in the Arctic</i> , Aug. 14, 2008, ISN SECURITY WATCH, available at http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?lng=en&id=89665	9
CBC News, <i>The Northwest Passage--The Arctic Grail</i> , August 08, 2010, available at: http://www.cbc.ca/news/background/northwest-passage (last visited Dec. 04, 2010).....	14
<i>Chronological List of Ratifications of, accessions and successions to the Convention and related Agreements as at 15 November 2010</i> , United Nations, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Nov. 15, 2010).....	2
Donald R. Rothwell, <i>The Canadian-U.S. Northwest Passage Dispute: A Reassessment</i> , 26 CORNELL INT'L L.J. 331 (1993).....	12, 15
Donat Pharand (1989), <i>Canadian Council on International Law</i> , http://www.cciil-ccdi.ca/index.php?option=com_content&task=view&id=62&Itemid=62 (last visited Jan. 17, 2011)	3
DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW (1988).....	passim
<i>Drilling for Oil in the Arctic, Too Risky, Too Soon</i> (Dec. 1, 2010), http://www.worldwildlife.org/what/wherewework/arctic/WWFBinaryitem18711.pdf	10
Eduardo Jimenez de Arechaga, <i>Custom, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING</i> (Joseph H. H. Weiler ed., 1988).....	8
Eric Posner & Alan O. Sykes, <i>Economic Foundations of the Law of the Sea</i> , 104 A.J.I.L. 569 (2010).....	2
Gerald Fitzmaurice, <i>The General Principles of International Law Considered from the Standpoint of the Rules of Law</i> , 92 RECUEIL DES COURS 1 (1957 II).....	8
HUGO GROTIUS, THE FREEDOM OF THE SEAS, CH. V (TRANSLATED FROM THE 1633 TEXT, BATOCHÉ BOOKS LIMITED, 2000)	11
Index Mundi, Norway Geography, available at http://www.indexmundi.com/norway/coastline.html (last visited Jan. 1, 2011).	17
INDUR M. GOKLANY, THE PRECAUTIONARY PRINCIPLE (Cato Institute 2001).....	6
Ivan L. Head, <i>Canadian Claims to Territorial Sovereignty in the Arctic Regions</i> , 9 MCGILL L. J. 200, 205 (1963).....	3, 4
J. ASHLEY ROACH AND ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2 nd ed., Shigeru Oda ed., 1996).....	16

James C. Kraska, <i>The Law of the Sea Convention and the Northwest Passage</i> , DEFENCE REQUIREMENTS FOR CANADA’S ARCTIC (Brian MacDonald, ed. 2007), available at: http://www.cda-cdai.ca/cdai/uploads/cdai/2008/12/vimy_paper2.pdf	13
Kenneth T. Frank, Brian Petrie, Jae S. Choi, William C. Leggett, <i>Trophic Cascades in a Formerly Cod-Dominated Ecosystem</i> , SCIENCE (2005).	7
Laurel Brubaker Calkins and Margaret Cronin Fisk, <i>New York, Ohio Pensions Named to Lead Roles in BP Suit</i> , BLOOMBERG BUSINESSWEEK (Dec. 28, 2010), http://www.businessweek.com/news/2011-01-05/new-york-ohio-pensions-named-to-lead-roles-in-bp-suit.html	10
<i>Law of the Sea Convention</i> , U.S. DEP’T OF STATE, http://www.state.gov/g/oes/ocns/opa/convention/index.htm (last visited Jan. 9, 2010).....	6
Lewis M. Alexander, <i>Baseline Delimitations and Maritime Boundaries</i> , 20 VA. J. INT’L L. 503 (1983).....	16
LEWIS M. ALEXANDER, INTERNATIONAL MARITIME BOUNDARIES 268 (Jonathan I. Charney & Lewis M. Alexander, eds. Martinus Nijhoff Publishers 1998).	2
M. MCDUGAL & J. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962).....	2
Mark Jarashow, Michael B. Runnels & Tait Svenson, <i>UNCLOS And the Arctic: The Path of Least Resistance</i> , 30 FORDHAM INT’L L.J. 1587 (2007).....	18
Mark Killas, <i>The Legality of Canada’s Claims to the Waters of its Arctic Archipelago</i> , 19 OTTAWA L. REV. 95 (1987).	18
Mia Bennett, <i>BP, ExxonMobil, and Imperial Oil form joint venture in Arctic</i> , THE ARCTIC, WORLD AFFAIRS BLOG NETWORK (Jan. 20, 2010), http://arctic.foreignpolicyblogs.com/2010/08/02/bp-exxonmobil-and-imperial-oil-form-joint-venture-in-arctic/	9, 10
Michael Virtanen, <i>NY Comptroller Wants Lead Status in BP Lawsuit</i> , ASSOCIATED PRESS, June 23, 2010, available at http://abcnews.go.com/Business/wirestory?id=10994598&page=1	10
National Security Presidential Directive and Homeland Security Presidential Directive, NSPD-66/HSPD-25, Jan. 9, 2009, available at http://www.fas.org/irp/offdocs/nspd/nspd-66.htm	3
<i>Natural Resources Canada</i> , Coastline, available at http://gsc.nrcan.gc.ca/coast/facts_e.php (last visited Jan. 1, 2011).	17

OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE INTERNATIONAL BOUNDARY STUDY, No. 14, Oct. 1, 1965, at, <i>available at</i> http://www.law.fsu.edu/library/collection/limitsinseas/ibs014.pdf	3
<i>Oil drilling accidents prompting new safety rules</i> , USA TODAY (Apr. 24, 2010), http://www.usatoday.com/news/nation/2010-04-23-louisiana-oil-rig-explosion_N.htm	8, 9
PETER W. BARNES, DONALD M. SCHELL, & ERK REIMNITZ, THE ALASKAN BEAUFORT SEA: ECOSYSTEMS AND ENVIRONMENTS (Academic Press 1984).....	3
Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).....	6
R.P. Anand, <i>Freedom of Navigation Through Territorial Waters and International Straits</i> , 14 IJIL 169 (1974).....	16
Randy Boswell, <i>Canada considers Beaufort Sea fishing moratorium</i> , NATIONAL POST (Aug. 24, 2009), <i>available at</i> http://www.nationalpost.com/news/story.html?id=1925427	7
Richard J. Grunawalt, <i>United States Policy on International Straits</i> , 18 OCEAN DEV. AND INT'L L. 455 (1987).....	13
Rob Heubert, <i>Climate Change and Canadian Sovereignty in the Northwest Passage</i> , 4 CAN. J. POL'Y RES. 2 (2001).....	20
Roy A. Perrin III, <i>Crashing Through the Ice: Legal Control of the Northwest Passage or Who Shall be 'Emperor of the North,'</i> 113 TUL. MAR. L.J. 139 (1988).....	12, 18
S.N. Nandan and D.H. Anderson, <i>Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982</i> , 87, in THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW: LAW OF THE SEA (Hugo Caminos ed., 2001).	12, 14
Sean D. Murphy, <i>Principles of International Law</i> , CONCISE HORNBOOKS SERIES (2006).....	16
Shekhar Ghosh, <i>The Legal Regime of Innocent Passage through the Territorial Sea</i> , 20 INDIAN J. OF INT'L L. 216 (1980).....	16
SHELL EXPLORATION & PRODUCTION CO., SHELL'S BEAUFORT SEA EXPLORATORY DRILLING PROGRAM OIL SPILL PREVENTION AND RESPONSE (Oct. 1, 2007).....	10
Statement of the Minister of Northern Affairs, Jean Lesage, 7 Can. H.C. Deb. 6955 (1956)....	3, 4
Steven Ferry, <i>The Failure of International Global Warming Regulation to Promote Needed Renewable Energy</i> , 37 B.C. ENV'T'L. AFF. L. REV. 67 (2010).	9

Ted Stein, <i>The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law</i> , 26 HARV. INT’L L.J. 457 (1985).....	8
The Encyclopedia of Canada, <i>Arctic Archipelago</i> , available at http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0000292 (last visited Jan. 1, 2011)	18
The Encyclopedia of Canada, <i>Arctic Archipelago</i> , available at http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0000292	19
Tommy B. Koh, <i>The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea</i> , 29 MALAYA L. REV. 163 (1987).....	14
Transport Canada, <i>Vessel Registration Query System</i> , available at http://wwwapps.tc.gc.ca/Saf-Sec-Sur/4/vrqs-srib/a.aspx?lang=e (last visited Jan. 1, 2011).	15
U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, <i>LAW OF THE SEA BULLETIN NO. 60</i> (2006).....	6
U.S. DEP’T OF COMMERCE AND U.S. DEP’T OF THE INTERIOR, <i>CRUISE REPORT FOR THE 2008 BEAUFORT SEA SURVEY 8</i> (July 27, 2008–Aug. 30, 2008), available at http://www.afsc.noaa.gov/REFM/Stocks/fit/PDFS/Beaufort_sea_cruise_report.pdf	7
U.S. Dep’t of the Interior, <i>Environmental Assessment, Beaufort Sea Planning Area</i> , Jul. 2010, available at http://alaska.boemre.gov/ref/EIS%20EA/2010_BF_EA/2010_022_bf_ea.pdf	10
U.S. Dep’t of the Interior, <i>Questions and Answers: The Next Five-Year OCS Oil and Gas Leasing Program (2012-2017)</i> , http://www.doi.gov/whatwedo/energy/ocs/QA_2012-2-17.cfm (last visited Jan. 17, 2011)	5
W.T. Burke, <i>Who Goes Where, When and How: International Law of the Sea for Transportation</i> , 31 INTERNATIONAL ORGANIZATION 167 (1977)	16
World Res. Inst., <i>Principle 10 of the Rio Declaration</i> , http://www.wri.org/publication/content/8078 (last visited Jan. 21, 2011)	9

Domestic Cases

2001 Can. Sup. Ct. LEXIS 42 (Can. Sup. Ct. 2001).....	7
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QUESTIONS PRESENTED

- I. Are the U.S.-imposed temporary bans on fishing and oil exploration in the Beaufort Sea, including the disputed 21,436 square kilometers of ocean and seabed, consistent with international law?
- II. Do United States military vessels have a right, under international law, to transit the area known as the Northwest Passage without obtaining the consent of Canada?

STATEMENT OF JURISDICTION

The United States of America (“U.S.” or “Respondent”) and Canada (“Canada” or “Applicant”), collectively (“Parties”), have submitted their differences regarding the Beaufort Sea and Northwest Passage to the International Court of Justice (“ICJ”) in accordance with Article 40(1) of the Statute of the International Court of Justice (“Statute”).¹ The Parties have agreed to the facts presented in the Compromis and any subsequent clarifications.² Pursuant to Article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision. The Parties have agreed to accept the judgment of the International Court of Justice as final and binding.

¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

² Compromis Between the United States of America and Canada to Submit to the International Court of Justice Their Differences Concerning Certain Arctic Waters, (jointly notified to the Court on 29 August 2010) [hereinafter Compromis].

STATEMENT OF FACTS

I. THE BEAUFORT SEA

The Beaufort Sea is in the Arctic Ocean just north of the Northwest Territories, the Yukon Territory, and Alaska and just west of Canada's Arctic islands.³ It is about 450,000 km in area.⁴ Canada argues that the Beaufort Sea's maritime boundary should follow the 141st meridian to the North Pole.⁵ The U.S. supports the equidistance approach, where the boundary would objectively follow a perpendicular line out 200 nautical miles from each country's coast.⁶ This disagreement has created a disputed area that represents 3% of the total Sea.⁷

On April 20, 2010, the Transocean Deepwater Horizon disaster hit the Gulf of Mexico.⁸ In response to this devastating tragedy, the U.S. imposed a temporary two-year moratorium on oil drilling in its exclusive economic zone off the coast of Alaska to ensure future deepwater drilling is done safely.⁹ Canada responded harshly in a June 15, 2010 memorandum, in which the Government stated that the temporary moratorium was an affront to Canada's "economy and national security."¹⁰ Canada decided to permit Shell Oil Corporation to continue drilling exploratory wells in the Beaufort Sea, three of which were scheduled to commence in August

³ *Id.* ¶ 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* ¶ 7.

⁹ *Id.*

¹⁰ *Id.* ¶ 8.

2010.¹¹ The U.S. responded on July 30, 2010 that the Gulf of Mexico tragedy had shown that oil drilling was not as safe as they had been previously informed.¹² To this end, the U.S. continued to peacefully enforce the moratorium in the Beaufort Sea in order to protect its uniquely “pristine and vulnerable waters.”¹³

Historically, the Beaufort Sea has been frozen during much of the year.¹⁴ Yet in the past five years, the frozen water in the Sea has been thinning and receding, causing southern fish populations to inundate the region.¹⁵ To protect sensitive and vital ecosystem,¹⁶ on April 10, 2010, the U.S. Government announced a temporary moratorium on commercial fishing in 200,000 square miles of waters off the Alaskan.¹⁷ The ban—recommended by the North Pacific Fishery Management Council—would only remain until scientific studies could be done on the Beaufort Sea to study its vulnerability.¹⁸ The moratorium includes an area of 6,250 square

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* ¶ 9–10.

¹⁴ *Id.* ¶ 3.

¹⁵ *Id.*

¹⁶ *Id.* ¶ 5.

¹⁷ *Id.* ¶ 4.

¹⁸ *Id.*

nautical miles that is currently claimed by both the U.S. and Canada.¹⁹ Canada protested this moratorium in a diplomatic note on April 12, 2010.²⁰

II. THE NORTHWEST PASSAGE

The Northwest Passage (“NWP”) is the body of Arctic water between the Davis Strait and Baffin Bay in the east and the Bearing Strait in the west.²¹ The NWP offers a substantial reduction in distance and time for any vessel attempting to travel between the Atlantic and Pacific Oceans.²² In comparison to the route through the Panama Canal, the transportation of goods through the NWP saves approximately 4,000 kilometers (“km”) from Europe to the Far East.²³ Even though explorers have sought the NWP for hundreds of years, it was never considered navigable because it was covered with too much ice.²⁴ However, on September 14, 2007 the European Space Agency reported ice loss due to global warming trends had rendered the NWP “fully navigable to commercial shipping . . . for the first time since records began.”²⁵

Consistent with international law, the United States has always maintained that the NWP represent an international strait, which allows the right of transit passage.²⁶ However, on July 1, 2010, Canada passed the Northwest Passage Act, which restricted transit through the Northwest

¹⁹ *Id.*

²⁰ *Id.* ¶ 5.

²¹ *Id.* ¶11.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* ¶13.

Passage.²⁷ The Northwest Passage Act: (1) renamed the Northwest Passage the “Canadian Northwest Passage;” (2) required that any ship of 300 tonnes or more passing through the Northwest Passage must first report its identity, purpose, and intended route to the Canadian Coast Guard; and (3) imposed civil and criminal penalties on any vessel not in compliance with Canada’s new exercise of control over the NWP.²⁸ Canada announced that it did not yet have enough vessels or manpower to enforce the Northwest Passage Act, so they claimed they would triple the number of personnel at its Canadian Forces Northern Area (CFNA) headquarters in Yellowknife and add five new icebreakers and ten armed coast guard vessels associated with CFNA.²⁹

In response to Canada’s actions, the United States sent two of its icebreakers, the USCGC *Polar Sea* and the USCGC *Healy*, through the NWP.³⁰ On August 10, 2010, the Government of Canada received a U.S. Diplomatic Note formally protesting Canada’s violation of the United States internationally protected right to transit the NWP.³¹ While Canada protested, they made no action to stop the transit of the USCGC *Polar Sea* or the USCGC *Healy*. The United States has always been sympathetic to the Canadian goals of preserving the Arctic Archipelago,

²⁷ *Id.* ¶ 12.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* ¶ 13.

³¹ *Id.*

however does not believe that this allows Canada to violate international law by restricting transit through the Northwest Passage.³²

In order to preserve the relationship between the United States and Canada, both parties agreed to submit the dispute to this Court and to implement its decision.

³² *Id.*

SUMMARY OF ARGUMENT

International law requires Canada to adhere to the temporary moratorium in order to study how to safely and sustainably exploit the Beaufort Sea's resources. First, treaties bind Canada and the U.S. to use equidistance to delineate the Beaufort Sea. To that end, this area is U.S. territory. Canada cannot rely on a two-hundred year old treaty to delineate the Sea. The parties to that agreement neither intended to delineate the Sea nor had the right to do so under the antiquated and internationally rejected theory that Canada advances. Moreover, special circumstances do not require deviation from equidistance because the division here would be fair. Even if this is not U.S. territory, international law requires a temporary moratorium in order to first research how to exploit the Beaufort Sea's resources safely and sustainably.

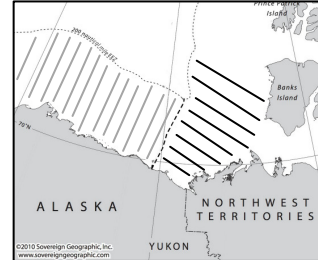
Canada violated the rights of U.S. military vessels and the international community by requiring consent to transit the Northwest Passage. U.S. military vessels have a right of transit passage through the Northwest Passage because it is an international strait. U.S. military vessels also have a right of innocent passage through the Passage because it is wholly outside of Canada's internal waters. Canada's use of straight baselines in 1985 to bring the Northwest Passage within Canadian internal waters was unsuccessful because these baselines contravene international law. Canada's insistence that ships obtain Canadian consent before transiting the Northwest Passage violates the U.S. military's internationally protected right to transit the Passage as an international strait, and of the right to innocent passage through a state's territorial waters.

ARGUMENT

I. INTERNATIONAL LAW REQUIRES CANADA’S ADHERENCE TO A TEMPORARY FISHING AND OIL DRILLING MORATORIUM IN THE BEAUFORT SEA.

A. The U.S. has Territorial Claim to this Area in the Beaufort Sea.

Canada must observe the temporary fishing and oil-drilling moratorium because the equidistance principle places this maritime area within the U.S.’s territory. As seen in this map, equidistance objectively delineates maritime boundaries by drawing lines equally from coastlines.¹ The equidistance principle is the international standard because it is the most fair and objective delineation method.² Article 6(2) of the Continental Shelf Convention requires the equidistance principle to resolve boundary disputes.³ Canada and the U.S. have signed and ratified this Convention⁴ and both have used equidistance to divide their own maritime boundaries.⁵ Thus, this dispute must be resolved using the equidistance principle.



Canada incorrectly argues that Article 6(2) of the Continental Shelf Convention requires this Court to apply a two-hundred year agreement between Russia and Great Britain to divide the

¹ Eric Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 A.J.I.L. 569, 586 (2010); *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, ¶ 281 (Int’l Ct. Justice Oct. 8, 2007) [hereinafter *Nicar. v. Hond.*].

² M. McDOUGAL & J. BURKE, *THE PUBLIC ORDER OF THE OCEANS*, 724–27 (1962).

³ *Convention on the Continental Shelf art. 6(2)*, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; *See also Nicar. v. Honduras, supra* note 1, ¶ 281.

⁴ *Chronological List of Ratifications of, accessions and successions to the Convention and related Agreements as at 15 November 2010*, United Nations, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Nov. 15, 2010).

⁵ LEWIS M. ALEXANDER, *INTERNATIONAL MARITIME BOUNDARIES* 268 (Jonathan I. Charney & Lewis M. Alexander, eds. Martinus Nijhoff Publishers 1998).

Beaufort Sea.⁶ Two flaws exist in this argument. First, the signatories to this treaty never intended to delineate this maritime property. Treaties must be interpreted through their ordinary language and context.⁷ Here, the parties agreed to a border “as far [north] as the Frozen Ocean.”⁸ Parties do not use such vague language for a material term in of a boundary delineation because it leads to disputes. Moreover, unlike “the Frozen Ocean,” parties use fixed boundaries. For example, when Great Britain delineated the now U.S.-Canadian border in 1783 it used specific language.⁹ The vague language here was merely a convenient way to deal with a highly risky and worthless maritime area that would not even be surveyed until the late 1800s.¹⁰

Further, this treaty is based on the sector theory, which has been rejected internationally, by the U.S., and even by Canada.¹¹ Under sector theory, a country can claim maritime areas

⁶ 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 art. 3, Feb. 16, 1825, 75 C.T.S. 95 [hereinafter 1825 Treaty of Saint Petersburg].

⁷ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

⁸ 1825 Treaty of Saint Petersburg, *supra* note 6, art. 3.

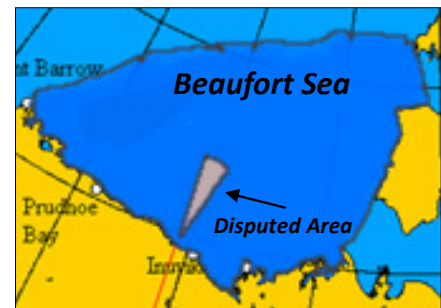
⁹ *See, e.g.*, Treaty of Paris art. II (1783).

¹⁰ PETER W. BARNES, DONALD M. SCHELL, & ERK REIMNITZ, *THE ALASKAN BEAUFORT SEA: ECOSYSTEMS AND ENVIRONMENTS* 11 (Academic Press 1984).

¹¹ DONAT PHARAND, *CANADA’S ARCTIC WATERS IN INTERNATIONAL LAW* 26–27, 42–43, 78–79 (1988); Donat Pharand (1989), *Canadian Council on International Law*, http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=62&Itemid=62 (last visited Jan. 17, 2011); OFFICE OF THE GEOGRAPHER, U.S. DEP’T OF STATE INTERNATIONAL BOUNDARY STUDY, No. 14, Oct. 1, 1965, at, *available at* <http://www.law.fsu.edu/library/collection/limitsinseas/ibs014.pdf>; *See generally* National Security Presidential Directive and Homeland Security Presidential Directive, NSPD-66/HSPD-25, Jan. 9, 2009, *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>; Ivan L. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCGILL L. J. 200, 205 (1963); *See also* Statement of the Minister of Northern Affairs, Jean Lesage, 7 Can. H.C. Deb. 6955, 6958 (1956).

along longitudinal lines to the poles.¹² This theory’s rejection is well-founded; it dangerously places property law upside-down by allowing countries to claim undiscovered areas.¹³ Unsurprisingly, Canada provides no instance of an international court applying this theory. In fact, when the international community—with Canada—divided Antarctica, prior sector theory claims went unrecognized.¹⁴ As Canadian minister of Northern Affairs said, “[Canada] has never adhered to . . . sector theory. If you adhere to [that] theory you claim that you have sovereignty over waters beyond your territorial waters. [Canada] has never done that.”¹⁵

With the sector theory unavailable, Canada falls back on the failed argument that special circumstances require deviation from the equidistance principle. While Article 6(2) of the Continental Shelf Convention does allow for such deviation, doing so here would be inconsistent with this Court’s precedent and would



effectively write the equidistance rule out of the Convention. This Court only applies the special circumstances exception when equidistance results in grossly disproportionate division.¹⁶ For instance, this Court finds special circumstances when a tiny inconsequential island between two

¹² Pharand, *supra* note 11.

¹³ Head, *supra* note 11, at 205.

¹⁴ Antarctic Treaty art. 4, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

¹⁵ Statement of the Minister of Northern Affairs, Jean Lesage, *supra* note 11.

¹⁶ *See, e.g.*, Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, 1995 I.C.J. 6 (Feb. 15) [hereinafter Qatar v. Bahrain]; Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway) 1993 I.C.J. 38 (Jun. 14); Continental Shelf (Libya v. Malta) 1984 I.C.J. 13 (Mar. 21) [hereinafter Libya v. Malta]; *See, e.g.*, North Sea Continental Shelf Cases (Germany v. Denmark and The Netherlands) 1969 I.C.J. 3 (Feb. 20) [hereinafter Denmark v. Norway].

countries drastically skewed an equidistance delineation.¹⁷ Here, no such dramatic imbalance exists: the difference is only 3% of the total Sea.¹⁸ Equidistance can never create perfectly equal distributions because it relies on natural coastlines. Canada's very low threshold for special circumstances would render the equidistance principle in-existent because it would require the principle obtain impossibly perfect divisions.

Canada's insistence on considering other factors is misguided. This Court considers subjective factors, but only after an objective land distribution analysis.¹⁹ Since that distribution would be fair here, analyzing subjective resource distribution is inappropriate. Moreover, Canada provides no proof that equidistance creates an unfair resource distribution. Studies only exist for the entire Sea, not this small contested area.²⁰ Additionally, the statistics for the Sea at large are rough estimates, ranging into the billions.²¹ Even at the highest estimate, oil reserves in *this* area only represent two-hundred million barrels.

B. The Precautionary Principle Requires Canada to Adhere to the Temporary Fishing and Oil Drilling Moratorium.

Canada's hasty attempt to drill and fish the Beaufort Sea could irreversibly decimate the delicate ecosystem found there. The U.S. does not seek a permanent ban; it only seeks a temporary moratorium to study this unknown fragile region so resources can be extracted safely

¹⁷ *Id.*

¹⁸ Compromis ¶ 2.

¹⁹ See, e.g., Qatar v. Bahrain, *supra* note 16; Libya v. Malta, *supra* note 16; Denmark v. Norway, *supra* note 16.

²⁰ U.S. Dep't of the Interior, *Questions and Answers: The Next Five-Year OCS Oil and Gas Leasing Program (2012-2017)*, http://www.doi.gov/whatwedo/energy/ocs/QA_2012-2-17.cfm (last visited Jan. 17, 2011).

²¹ *Id.*

and sustainably. This is not only prudent; the precautionary principle mandates this approach. The precautionary principle requires countries to err on the side of caution before acting in ways that might permanently harm the environment.²² The principle *mandates* member states to establish, absent scientific consensus, that their action will not harm the environment.²³ If a state cannot meet this burden, it must not act. Canada and the U.S. are members to binding treaties that mandate using the precautionary principle with fish stocks.²⁴ Canada has signed and ratified the U.N. Convention on the Law of the Sea (UNCLOS) and the U.N. Fish Stocks Agreement.²⁵ The U.S. signed and ratified the Fish Stocks Agreement,²⁶ has signed UNCLOS, and considers UNCLOS customary international law, abiding by its terms since the 1980s.²⁷ Canada and the U.S. have adopted the precautionary principle statutorily and judiciously.²⁸

²² Rio Declaration on Environment and Development, U.N. GAOR, 27th Sess., principle 15, UN Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration].

²³ *Id.*

²⁴ U.N. Convention on the Law of the Sea arts. 61(2) and 119(I), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; Agreement for the Implementation of the provisions of the 1982 U.N. Convention on the Law of the Sea relating to conservation and management of straddling stocks and highly migratory fish stocks art. 6, adopted 4 August, 1995, *opened for signature*, 4 December 1995; 34 ILM 1542 (1995) [hereinafter Fish Stocks Agreement].

²⁵ *Canada Ratified United Nations Convention on the Law of the Sea*, CENTRE FOR MARINE BIODIVERSITY, Nov. 6, 2003, <http://www.marinebiodiversity.ca/cmb/Members/carter1/canada-ratified-united-nations-convention-on-the-law-of-the-sea>; 60 *Law of the Sea Bulletin* 8 (2006). http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin60e.pdf

²⁶ U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, *LAW OF THE SEA BULLETIN* No. 60, at 8 (2006).

²⁷ *Law of the Sea Convention*, U.S. DEP'T OF STATE, <http://www.state.gov/g/oes/ocns/opa/convention/index.htm> (last visited Jan. 9, 2010); *See* Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

²⁸ INDUR M. GOKLANY, *THE PRECAUTIONARY PRINCIPLE* 4 (Cato Institute 2001) (citing Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C.); Federal Food and Drugs Act of June 30, 1906, ch. 3915, 1, 34

The precautionary principle mandates a temporary fishing moratorium to study fish stock fragility in the Beaufort Sea. As scientist and federal appointee to Canada's Fisheries Joint Management Committee said in 2009, the "world's management of fisheries . . . has been a disaster: failure after failure. We don't have enough knowledge about what is in the Arctic."²⁹ Concern here is warranted. Cavalier commercial fishing has devastated fish stocks worldwide. Since 1950, some species have declined by 90%.³⁰ For instance, the Atlantic Cod dropped 95% and has failed to recover, despite cessation of fishing.³¹ As environmental organizations agree, a temporary moratorium on commercial fishing is necessary in the Beaufort Sea.³²

Canada's arguments against the temporary moratorium are incorrect. First, an increase in species like Arctic Cod³³ is misleading because these are nonnative species. While studies establish this increase in population,³⁴ few studies show how native species will react to increased competition from invasive species. Adding unfettered commercial fishing could deal a second—and potentially lethal—blow to native fish stocks.

Stat. 768, repealed by Section 902(a) of Act of June 25, 1938, ch. 675, 52 Stat. 1059 (current version at 21 U.S.C. 301)); *See also* Arctic Waters Pollution Prevention Act of 1970, R.S.C., ch. A-12 (1985), *reprinted in* 9 ILM 543 (1970); 2001 Can. Sup. Ct. LEXIS 42 (Can. Sup. Ct. 2001).

²⁹ Randy Boswell, *Canada considers Beaufort Sea fishing moratorium*, NATIONAL POST (Aug. 24, 2009), *available at* <http://www.nationalpost.com/news/story.html?id=1925427>.

³⁰ *Big-Fish Stocks Fall 90 Percent Since 1950, Study Says*, May 15, 2003, NAT'L GEOG. NEWS, http://news.nationalgeographic.com/news/2003/05/0515_030515_fishdecline.html.

³¹ Kenneth T. Frank, Brian Petrie, Jae S. Choi, William C. Leggett, *Trophic Cascades in a Formerly Cod-Dominated Ecosystem*, SCIENCE (2005).

³² Boswell, *supra* note 29.

³³ Compromis at ¶ 3.

³⁴ U.S. DEP'T OF COMMERCE AND U.S. DEP'T OF THE INTERIOR, CRUISE REPORT FOR THE 2008 BEAUFORT SEA SURVEY 8 (July 27, 2008–Aug. 30, 2008), *available at* http://www.afsc.noaa.gov/REFM/Stocks/fit/PDFS/Beaufort_sea_cruise_report.pdf.

The precautionary principle also requires Canada to first study how to safely drill for oil in the Beaufort Sea. The 2010 Gulf of Mexico and the Exxon Valdez oil disasters are not isolated incidents.³⁵ And the Beaufort Sea's extreme environment makes drilling uniquely difficult. The precautionary principle protects the environment broadly because it has crystallized into customary international law. Under the Statute of this Court, custom is "evidence of a general practice accepted as law."³⁶ A rule becomes custom through widespread state practice and *opinio juris*.³⁷ Modern custom can develop quickly through multilateral treaties and declarations.³⁸ A country is only exempt if it persistently objects.³⁹

The precautionary principle has crystallized into customary international law. Beyond the precautionary principle's presence in aforementioned legally binding treaties, myriad declarations apply the principle to the environment broadly.⁴⁰ For instance, the Rio Declaration,

³⁵ *Oil drilling accidents prompting new safety rules*, USA TODAY (Apr. 24, 2010), http://www.usatoday.com/news/nation/2010-04-23-louisiana-oil-rig-explosion_N.htm.

³⁶ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945.

³⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 253 (July 8).

³⁸ Denmark v. Norway, *supra* note 16, at 44; Eduardo Jimenez de Arechaga, *Custom, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 48 (Joseph H. H. Weiler ed., 1988).

³⁹ Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 RECUEIL DES COURS 1, 49–50 (1957 II); Ted Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 457 (1985); Fisheries case (UK v. Nor.), 1951 ICJ 116, 131 (Dec. 18) [hereinafter Fisheries Case]; Asylum (Colom./Peru), 1950 ICJ 266, 277–78 (Nov. 20).

⁴⁰ See *supra* note 24; Rio Declaration, *supra* note 22, principle 15; Convention on Biological Diversity Preamble, June 5, 1992, 31 ILM 818 (1992); United Nations Framework Convention on Climate Change art. 3.3, May 9, 1992, 1771 U.N.T.S. 107.

signed by one-hundred and seventy eight countries,⁴¹ states that “the precautionary approach shall be widely applied by states.”⁴² Neither Canada nor the U.S. has raised persistent objections to this principle; instead, both have accepted it in domestic statutes and case law.⁴³

Scientific uncertainty in the Beaufort Sea warrants application of the precautionary principle. Otherwise, hasty drilling could devastate this fragile ecosystem. From 2001 and 2007, there have been over 1,400 deep-sea oil-drilling accidents world-wide.⁴⁴ Drilling in the Beaufort Sea will be even riskier. For one, the area is covered by drifting ice most of the year.⁴⁵ In one Canadian National Energy Report, the agency concluded that drilling in the Sea could only be done safely if relief wells could be drilled in a single season.⁴⁶ But Canada’s own regulators admit a spill in the Beaufort Sea similar to the Gulf of Mexico’s would take three years to cap.⁴⁷ A three-year spill in the Beaufort Sea, filled with numerous threatened species, could cause

⁴¹ World Res. Inst., *Principle 10 of the Rio Declaration*, <http://www.wri.org/publication/content/8078> (last visited Jan. 21, 2011).

⁴² Rio Declaration *supra* note 22, principle 15 (emphasis added); Steven Ferry, *The Failure of International Global Warming Regulation to Promote Needed Renewable Energy*, 37 B.C. ENVTL. AFF. L. REV. 67 (2010).

⁴³ *See supra* note 30.

⁴⁴ *Supra* note 35.

⁴⁵ Carolin Hilpert, *Hot Issues in the Arctic*, Aug. 14, 2008, ISN SECURITY WATCH, available at <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?lng=en&id=89665>.

⁴⁶ *Id.*

⁴⁷ Mia Bennett, *BP, ExxonMobil, and Imperial Oil form joint venture in Arctic*, THE ARCTIC, WORLD AFFAIRS BLOG NETWORK (Jan. 20, 2010), <http://arctic.foreignpolicyblogs.com/2010/08/02/bp-exxonmobil-and-imperial-oil-form-joint-venture-in-arctic/>.

irreversible damage to international economic and environmental interests.⁴⁸ Moreover, drill relief ships are ill equipped for arctic travel so cleanup efforts would be far more complicated.⁴⁹

Canada incorrectly argues that it is safe to drill in the Beaufort Sea and that a permanent moratorium would be too costly. First, Canada can only claim that drilling here is safe by pointing to private oil companies' assertions.⁵⁰ But as British Petroleum (BP) illustrated in 2010, oil companies overstate their cleanup capabilities and understate estimates during disasters.⁵¹ This was the case in a 2006 pipeline leak in Prudhoe Bay, an area just south of the Beaufort Sea.⁵² In fact, this Court need only look to the nearby Chukchi Sea to see that Shell's preparedness there falls far below BP's in the Gulf of Mexico.⁵³ Moreover, the ice and slush cover and absorb oil, making traditional cleanups complicated.⁵⁴ Finally, this temporary moratorium will prevent economic disasters, not create ones. The moratorium is on the Beaufort

⁴⁸ U.S. Dep't of the Interior, *Environmental Assessment, Beaufort Sea Planning Area*, Jul. 2010, available at http://alaska.boemre.gov/ref/EIS%20EA/2010_BF_EA/2010_022_bf_ea.pdf.

⁴⁹ *See supra* note 47.

⁵⁰ *See* SHELL EXPLORATION & PRODUCTION CO., SHELL'S BEAUFORT SEA EXPLORATORY DRILLING PROGRAM OIL SPILL PREVENTION AND RESPONSE (Oct. 1, 2007).

⁵¹ Michael Virtanen, *NY Comptroller Wants Lead Status in BP Lawsuit*, ASSOCIATED PRESS, June 23, 2010, available at <http://abcnews.go.com/Business/wirestory?id=10994598&page=1>; Laurel Brubaker Calkins and Margaret Cronin Fisk, *New York, Ohio Pensions Named to Lead Roles in BP Suit*, BLOOMBERG BUSINESSWEEK (Dec. 28, 2010), <http://www.businessweek.com/news/2011-01-05/new-york-ohio-pensions-named-to-lead-roles-in-bp-suit.html>.

⁵² *Alaska queries BP oilfield checks*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/4778833.stm> (last updated Aug. 10, 2006).

⁵³ *Drilling for Oil in the Arctic, Too Risky, Too Soon* 22 (Dec. 1, 2010), <http://www.worldwildlife.org/what/wherewework/arctic/WWFBinaryitem18711.pdf>.

⁵⁴ *Id.*

Sea, but current drilling in the region is limited to Prudhoe Bay further south.⁵⁵ Accordingly, this moratorium prevents costly future accidents at very little current economic consequence.

II. U.S. MILITARY VESSELS HAVE A RIGHT UNDER INTERNATIONAL LAW TO TRANSIT THE NORTHWEST PASSAGE WITHOUT CANADA'S CONSENT.

A. U.S. Military Vessels Have a Right of Transit Passage to Transit the NWP Because the NWP is an International Strait.

All vessels, including U.S. military vessels, enjoy a right of transit passage through the NWP because it is an international strait. The right of transit passage has been recognized for hundreds of years.⁵⁶ In the *Corfu Channel* case, this Court held that states have no right to require consent or prohibit transit passage through an international strait.⁵⁷

Canada ratified the Third UNCLOS, which recognizes transit passage through an international strait, if: (1) the strait connects two high seas or exclusive economic zones and (2) is used for international navigation.⁵⁸ These criteria were established in *Corfu Channel*. There, this Court held that any strait that is a useful maritime route and connects the high seas is an international strait, stating:

[T]he decisive criterion is [Corfu Channel's] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. It [cannot be] decisive that this Strait is not a necessary route between two parts of the high seas . . . It has nevertheless been a useful route for international

⁵⁵ *Beaufort Sea Exploration Wells*, http://alaska.boemre.gov/fo/wellhistory/bs_wells.htm (last visited Jan. 21, 2011).

⁵⁶ See HUGO GROTIUS, *THE FREEDOM OF THE SEAS*, CH. V (TRANSLATED FROM THE 1633 TEXT, BATOCHÉ BOOKS LIMITED, 2000); BING BING JIA, *THE REGIME OF STRAITS IN INTERNATIONAL LAW* 82 (Oxford University Press, 1998); UNCLOS, *supra* note 24, art. 38.

⁵⁷ *Fisheries Case*, *supra* note 39, ¶ 28.

⁵⁸ UNCLOS, *supra* note 24, art. 37.

maritime traffic.⁵⁹

Any interpretation of UNCLOS' definition of an international strait must be read in the light of the *Corfu Channel* decision.⁶⁰

1. The Northwest Passage Meets the Geographic Requirements of an International Strait.

The NWP connects two parts of the high seas or exclusive economic zones.⁶¹ A state's exclusive economic zone is the area of the seas within 200 nautical miles of a state's coast; any area beyond is high seas.⁶² The waters of the NWP are linked on the eastern side to the Davis Strait, Labrador Sea, and Atlantic Ocean, which encompass parts of Canada and Greenland's exclusive economic zones. The Beaufort Sea, Bearing Strait, and Pacific Ocean link the NWP to the western side, which encompasses parts of Canada, Russia and the U.S.' exclusive economic zones. The Atlantic and Pacific Oceans constitute high seas on both sides.

2. The Northwest Passage Meets the Functional Requirements of an International Strait.

Never before has the international community seen such a potentially useful maritime route suddenly become available due to environmental or geologic conditions. Mariners have searched for an accessible route through the NWP for hundreds of years and for the first time in

⁵⁹ Fisheries Case, *supra* note 39, ¶28.

⁶⁰ S.N. Nandan and D.H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982*, 87, in THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW: LAW OF THE SEA, (Hugo Caminos ed., 2001).

⁶¹ See PHARAND, *supra* note 11, at 216, 224; Jia, *supra* note 56, at 7; Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 348 (1993); Roy A. Perrin III, *Crashing Through the Ice: Legal Control of the Northwest Passage or Who Shall be 'Emperor of the North,'* 113 TUL. MAR. L.J. 139, 158 (1988).

⁶² UNCLOS, *supra* note 24, arts. 55, 57, & 86.

2007 that route has become fully navigable.⁶³ International law must adapt to entirely new situations. The evaluation of a strait that becomes available for the first time cannot be restricted to past uses or else new passages could never become international strait.⁶⁴ This is entirely consistent with this Court's analysis of the Corfu Channel's usefulness.⁶⁵

The NWP qualifies as an international strait under any interpretation of *Corfu Channel* or UNCLOS. This Court determined the Corfu Channel was an international strait based on its usefulness as a maritime route, and this Court should continue that policy in the present dispute. However, even if this Court departs from *Corfu Channel* by ignoring the usefulness of the NWP and examining only past physical transits, it still qualifies as an international strait because it has been used numerous times for international navigation.

a. *The Northwest Passage has been a useful route for international maritime traffic.*

Not only has the NWP been a useful maritime route, under present climate conditions the NWP is among the most useful maritime routes in the world. In *Corfu Channel*, this Court used the phrase "used for international navigation" but broadened the analysis by examining whether Corfu Channel was "a useful route for international maritime traffic."⁶⁶

⁶³ Compromis ¶ 11.

⁶⁴ See Richard J. Grunawalt, *United States Policy on International Straits*, 18 OCEAN DEV. AND INT'L L. 455, 456 (1987); See also James C. Kraska, *The Law of the Sea Convention and the Northwest Passage*, DEFENCE REQUIREMENTS FOR CANADA'S ARCTIC (Brian MacDonald, ed. 2007), available at: http://www.cda-cdai.ca/cdai/uploads/cdai/2008/12/vimy_paper2.pdf.

⁶⁵ Fisheries Case, *supra* note 39.

⁶⁶ *Id.* at 28 (emphasis added).

The NWP represents a 4,000 km shorter route between Europe and the Far East and a two-week reduction in travel time.⁶⁷ Military vessels and aid relief would be able to more efficiently respond to environmental disasters such as oil spills, tsunamis or earthquakes, and to global security concerns such as terrorist acts. The NWP's drastically shorter Pacific-Atlantic route allows for a substantial reduction in shipping distances and fuel costs, which makes shipping cheaper and faster. Consequentially, the costs of goods shipped decrease, lowering prices for all consumers and benefitting the global economy.

b. The Northwest Passage is used for international navigation.

The language of UNCLOS states that transit passage applies to straits "used for international navigation."⁶⁸ Tommy Koh, the UNCLOS President stated that any use at all is sufficient to satisfy the functionality prong of the international strait criteria.⁶⁹

The NWP meets this requirement because it has been used extensively for international navigation since 1903, with no fewer than 101 full transits by at least seven states.⁷⁰ Transits have almost doubled every decade since 1970, and currently there are 25,958 non-Canadian

⁶⁷ Compromis ¶ 11; CBC News, *The Northwest Passage--The Arctic Grail*, August 08, 2010, available at: <http://www.cbc.ca/news/background/northwest-passage> (last visited Dec. 04, 2010).

⁶⁸ UNCLOS, *supra* note 24, arts. 34 & 37.

⁶⁹ See Tommy B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea*, 29 MALAYA L. REV. 163, 178–79 (1987); see also Nandan & Anderson, *supra* note 60, at 75–77.

⁷⁰ Pharand, *supra* note 11, at 205, 215; Arctic Economics, *Northwest Passage Transits*, available at http://benmuse.typepad.com/arctic_economics/2008/07/northwest-passage-transits.html (last visited Dec. 04, 2010); Compromis, ¶ 13.

ships registered with Canada that operate in or around the NWP.⁷¹ The use of the NWP cannot be judged by full transits alone. In *Corfu*, the majority of the transits through the Corfu Channel were only partial transits through the North to the ports of Saranda and Pataski.⁷² There were at least 764 partial transits through the NWP between 1983 and 1988 alone.⁷³ While, this Court noted that over an extended period of time the Corfu Channel had been transited 2,884 times by ships from seven states, there was no indication that any future straits would have to reach such a threshold.⁷⁴ Additionally, the amount of transits required to meet the actual use test is fewer for polar regions where weather conditions restrict travel through the channel.⁷⁵

B. U.S. Military Vessels Have a Right of Innocent Passage to Transit the Northwest Passage Because the Northwest Passage Exists Wholly Outside of Canada's Internal Waters.

Canada also has no right to require consent to transit the NWP because it is located outside Canada's internal waters. U.S. military vessels enjoy a right of innocent passage through any waters outside Canada's internal waters, provided the passage is not prejudicial to the peace, good order or security of Canada⁷⁶

⁷¹ Arctic Economics, *supra* note 70; Transport Canada, *Vessel Registration Query System*, available at <http://www.wapps.tc.gc.ca/Saf-Sec-Sur/4/vrqs-srib/a.aspx?lang=e> (last visited Jan. 1, 2011).

⁷² See Jia, *supra* note 56, at 41; Fisheries Case, *supra* note 39, ¶ 28.

⁷³ Pharand, *supra* note 11, at 209.

⁷⁴ *Id.* at 219.

⁷⁵ See Legal Status of Eastern Greenland Case (Nor. v. Den.), 1933 P.C.I.J. (Ser. A/B) No. 53 (Apr. 5); Pharand, *supra* note 11, at 217–30; Donald R. Rothwell and Stuart Kaye, *Law of the Sea and the Polar Regions: Reconsidering the Traditional Norms*, in THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW: LAW OF THE SEA, (Hugo Caminos ed., 2001).

⁷⁶ UNCLOS, *supra* note 24, arts. 17–26; Fisheries Case, *supra* note 39, ¶ 28; R.P. Anand, *Freedom of Navigation Through Territorial Waters and International Straits*, 14 IJIL 169, 171–

The delimitation of Canada's internal waters depends on the position of Canada's baselines. Baselines are the lines from which a state's maritime zones of jurisdiction are measured. Absent exceptional circumstances, Canada must use normal baselines drawn from the low water line along the coast as marked on large-scale charts.⁷⁷ Internal waters are any waters on the landward side of the applicable baseline.⁷⁸ For the entirety of Canada's existence until 1985, Canada used normal baselines that excluded the NWP from Canada's internal waters.⁷⁹ In 1985, however, Canada attempted to bring the Arctic Archipelago within its internal waters using straight baselines, despite the U.S. and European Community's vehement protest.⁸⁰

1. Canada's 1985 Straight Baselines Were Drawn in Contravention of International Law.

Canada's straight baselines have no effect in law because they were improperly drawn. As a threshold matter, a state may not use straight baselines unless they have certain geographic features.⁸¹ Additionally, the baselines must be drawn according to three criteria: (1) the baselines must not depart from the general direction of the coast; (2) the area brought within the

⁷⁷ (1974); W.T. Burke, *Who Goes Where, When and How: International Law of the Sea for Transportation*, 31 INTERNATIONAL ORGANIZATION 167, 167–89 (1977); Shekhar Ghosh, *The Legal Regime of Innocent Passage through the Territorial Sea*, 20 INDIAN J. OF INT'L L. 216 (1980).

⁷⁷ UNCLOS, *supra* note 24, art. 5; Sean D. Murphy, *Principles of International Law*, CONCISE HORNBOOKS SERIES, 340–342 (2006); Lewis M. Alexander, *Baseline Delimitations and Maritime Boundaries*, 20 VA. J. INT'L L. 503, 509–16 (1983).

⁷⁸ UNCLOS, *supra* note 24, arts. 8, 17 & 18.

⁷⁹ Jia, *supra* note 56, at 82; J. ASHLEY ROACH AND ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS, 120–21 (2nd ed., Shigeru Oda ed., 1996).

⁸⁰ Roach, *supra* note 79; British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.

⁸¹ UNCLOS, *supra* note 24, art. 7; *See Fisheries Case*, *supra* note 39, at 26.

straight baselines must have a close connection to the mainland; and (3) certain peculiar economic interests may be considered.⁸²

a. Straight baselines are not applicable to the geography of Canada's northern coast.

This Court addressed the applicability of straight baselines in the *Fisheries* Case—a dispute between the United Kingdom and Norway over the right of innocent passage off Norway's coast that had been enclosed by straight baselines.⁸³ This Court held that straight baselines apply: (1) “where a coast is deeply indented and cut into, or (2) where it is bordered by an Archipelago such as the ‘skjaergaard,’” and that these tests “must be applied restrictively.”⁸⁴

The Canadian coast is not deeply indented or cut into. Norway's coastline is 25,148 km long, but 22,498 km of Norway's coastline (90%) consists of indentations and fjords.⁸⁵ Conversely, the northern Canadian coast is 243,792 km and indentations only account for roughly 15% of the total coastline.⁸⁶ Moreover, Canada is not bordered by an archipelago like the skjaergaard. UNCLOS interpreted this requirement to mean that a fringe island lies directly off the coast in the *immediate vicinity* of the border of the coastal state.⁸⁷ The Arctic Archipelago is a massive 1.4 million square km area consisting of ninety-four major islands and

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Fisheries Case*, *supra* note 39. at 26, 33; *See Qatar v. Bahrain*, *supra* note 16.

⁸⁵ Index Mundi, Norway Geography, *available at* <http://www.indexmundi.com/norway/coastline.html> (last visited Jan. 1, 2011).

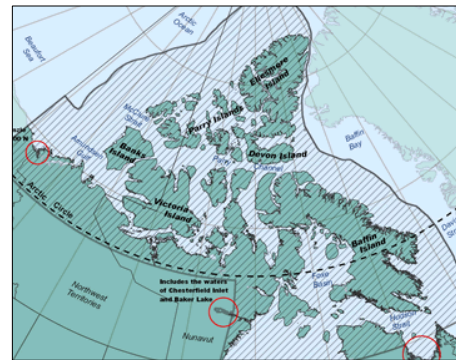
⁸⁶ *Natural Resources Canada*, Coastline, *available at* http://gsc.nrcan.gc.ca/coast/facts_e.php (last visited Jan. 1, 2011).

⁸⁷ UNCLOS, *supra* note 24, art. 7 (emphasis added).

36,469 minor islands, which stretches along 3,000 km of Canadian coastline, and extends north within 900 km of the North Pole.⁸⁸ The skjaergaard, on the other hand, is very small and directly off the coast of Norway, with the furthest island only sixty miles away.

b. Canada's straight baselines depart appreciably from the direction of the coast.

Canada's straight baselines depart significantly from the direction of the coast and are therefore void.⁸⁹ The Northern Canadian coast runs generally in an east-west direction that slopes to the south. However, as the map demonstrates, the 1985 straight baselines draw a large triangle around the entire Arctic Archipelago.⁹⁰ As such, "[Canada can not] maintain that their straight baseline system does not depart from the general direction of the coastline," and this rough



Arctic triangle is drastically a different shape from the general direction of the Canadian coast, and "[a]n evaluation of the [this Court's] test for establishing baselines suggests that the baselines significantly depart from the Canadian coastline when viewed as a whole."⁹¹

⁸⁸ The Encyclopedia of Canada, *Arctic Archipelago*, available at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0000292> (last visited Jan. 1, 2011); Mark Killas, *The Legality of Canada's Claims to the Waters of its Arctic Archipelago*, 19 OTTAWA L. REV. 95, 101 (1987).

⁸⁹ Fisheries Case, *supra* note 39, at 36; Application for Revision and Interpretation of the Judgment Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1985 I.C.J. (December 10).

⁹⁰ *Northern Canada Vessel Traffic Services (NORDREG)*, TRANSPORT CANADA, <http://www.tc.gc.ca/eng/marinesafety/debs-arctic-shipping-operations-nordreg-357.htm> (last visited Jan. 25, 2011).

⁹¹ Perrin III, *supra* note 61, at 147–48; Mark Jarashow et al., *UNCLOS And the Arctic: The Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1644 (2007).

c. There is no close connection between the Canadian coast and the Arctic Archipelago.

There is not a close connection between the Canadian coast and the Arctic Archipelago as there was in the *Fisheries* case. Norway used straight baselines to incorporate the skjaergaard, which constitutes “some 120,000 insular formations carved out of a mainland coast, broken by large and deeply indented fjords, obliterating any clear dividing line between the mainland and the sea,” and the “large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland.”⁹² The same cannot be said about Canada’s coast and the Arctic Archipelago. Many of the islands in the Arctic are far away from Canada’s mainland and are separated from each other and the mainland by channels so big that they would qualify as seas if situated elsewhere in the world.⁹³

d. Canada’s straight baselines do not protect any peculiar economic interests.

Canada’s 1985 straight baselines offer no protection over peculiar economic interests. In the *Fisheries* case, a substantial portion of Norway’s economy and identity were dependent on fishing in the skjaergaard. Canada does not have a similar reliance on the Arctic Archipelago. The most important consideration Canada has in the Arctic is the Inuit. However, the straight baselines give no extra protection to the health or prosperity of the Inuit. Even with transit or innocent passage through the NWP, Canada retains a wide range of rights to protect the interests of the Inuit people.⁹⁴ Canada may take any action they wish to protect the Inuit or the Arctic,

⁹² Pharand, *supra* note 11, at 134; *Fisheries Case*, *supra* note 39, at 22.

⁹³ The Encyclopedia of Canada, *Arctic Archipelago*, available at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0000292>.

⁹⁴ UNCLOS, *supra* note 24, art. 17–26, 30–32, 37–44, 46–54, 234.

provided they do not restrict or qualify transit. Also, under the present circumstances, the NWP is fully available to vessels due to geologic conditions that have melted the Arctic ice. The areas available to ships are ice free in the summer and only get a thin one-year sheet of ice in the winter, making these areas uninhabitable to the Inuit.

2. Even if the Straight Baselines Were Accepted, Canada still does not have Authority to Restrict Transit through the Northwest Passage.

U.S. military vessels would still have the right to innocent passage even if the straight baselines are upheld. UNCLOS states: “where the establishment of a straight baseline in accordance with the method set forth in [A]rticle 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage shall exist.”⁹⁵ Prior to the 1985 baselines, Canada had, for the entirety of its existence as a nation, delimited the Northwest Passage out of its internal waters.⁹⁶

III. CONCLUSION

Temporary moratoria on fishing and oil exploration in the Beaufort Sea are necessary under international law to protect the delicate ecosystem and economic interests. Canada’s Northwest Passage Act violates the rights of U.S. military vessels and the international community by requiring consent to transit the NWP because there is a non-suspendable right of transit passage and innocent passage. For these reasons, the U.S. asks this Court to uphold the temporary moratoriums on fishing and oil exploration, and recognize the right to transit the NWP without consent.

⁹⁵ *Id.* art. 7; See also Rob Heubert, *Climate Change and Canadian Sovereignty in the Northwest Passage*, 4 CAN. J. POL’Y RES. 2 (2001).

⁹⁶ Jia, *supra* note 56, at 7.