

## *Chapter 11*

# **The U.S.-Canada Northwest Passage Disagreement: Why Agreeing to Disagree Is More Important Than Ever**

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We do not seek the unanimity that comes to those who water down all issues to the lowest common denominator—or to those who conceal their differences behind fixed smiles—or to those who measure unity by standards of popularity and affection, instead of trust and respect. We are allies. This is a partnership, not an empire. We are bound to have differences and disappointments—and we are equally bound to bring them out into the open, to settle them where they can be settled, and to respect each other’s views when they cannot be settled.

—President John Kennedy, Address before the Canadian Parliament, May 17, 1961

For over fifty years, and while remaining “premier partners”<sup>1</sup> in the Arctic, Canada and the United States have had to acknowledge and manage a significant disagreement over the status of the Northwest Passage (NWP). Ottawa and Washington’s respective positions regarding the Northwest Passage are well established and have been for decades. Successive Canadian governments have declared that all of the waters within Canada’s Arctic Archipelago, including the various routes that make up the NWP, are Canadian historic internal waters over which Canada exercises full and exclusive authority, including the power to govern access by foreign ships.<sup>2</sup> The United States has long held the view that the different routes through the Northwest Passage constitute an international strait in which the ships and aircraft of all nations, both civilian and military, enjoy an unfettered right of transit passage.<sup>3</sup>

Canada’s position was recently reaffirmed in the Trudeau Government’s 2019 *Arctic and Northern Policy Framework*. The second operative paragraph under the “International Chapter” declares:

The Government of Canada is firmly asserting its presence in the North. Canada's Arctic sovereignty is longstanding and well established. Every day, through a wide range of activities, governments, Indigenous peoples, and local communities all express Canada's enduring sovereignty over its Arctic lands and waters. Canada will continue to exercise the full extent of its rights and sovereignty over its land territory and its Arctic waters, including the Northwest Passage.<sup>4</sup>

This language echoes earlier government pronouncements, including Prime Minister Stephen Harper's 2009 *Northern Strategy*. Acknowledging the importance of the Arctic in the collective Canadian psyche, the Strategy identified "exercising Canada's Arctic sovereignty" as the country's first priority, emphasizing that "Canada's Arctic sovereignty is long-standing, well established and based on historic title, founded in part on the presence of Inuit and other Indigenous peoples since time immemorial."<sup>5</sup>

The long-established American position was explicitly stated in President George W. Bush's January 2009 *National Security Presidential Directive and Homeland Security Presidential Directive*, in which he emphasized that freedom of the seas was a top national priority for the United States: "The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits."<sup>6</sup> His successor, President Barack Obama, also expressly reaffirmed the official United States position in his 2013 *National Strategy for the Arctic Region*: "Accession to the Convention [1982 United Nations Law of the Sea Convention] would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and overflight through the Northwest Passage and the Northern Sea Route."<sup>7</sup>

A number of reasons explain the long-standing stalemate over the Northwest Passage: decades of public pronouncements reiterating the official Canadian and U.S. positions have severely limited the two governments' political *marge de manoeuvre*. Canada asserts that the Arctic is a fundamental part of its heritage, its identity as a country and its future. It therefore claims the right to act as a responsible steward of the region for the prosperity of its citizens, the protection of its sensitive

environment and the defence of its national interests. For the United States, defending the freedom of the seas has long been a cornerstone of its foreign policy to ensure the mobility of American naval assets around the world. Washington is concerned that ‘giving in’ to Canada over the NWP would set a bad precedent.<sup>8</sup> It might encourage coastal states bordering important international straits to adopt unilateral, arbitrary rules that would severely harm American national interests. Ambiguities in the legal rules, including the very definition of an international strait, have allowed both states to craft solid, reasonable, and persuasive arguments in support of their position.

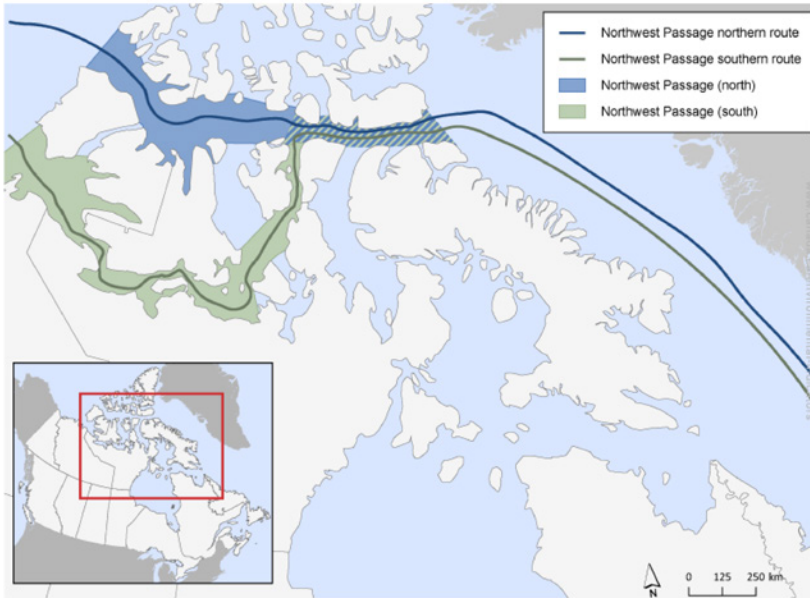
Despite these stark “differences and disappointments,” to quote President Kennedy, Canada and the United States have a long history of respectful collaboration in the Arctic. One of the key aspects of this long-standing commitment to cooperation is the 1988 *Arctic Cooperation Agreement*<sup>9</sup> in which the two parties agreed to set aside their legal differences and proceeded to set out a regime governing transits of the NWP by American icebreakers engaged in research.<sup>10</sup> This pragmatic approach—agreeing to disagree and getting on with the business of resolving issues of mutual interest and concern—is arguably more important than ever as the Arctic region bears the brunt of climate change.

This chapter will explore two major developments linked to climate change with a profound impact on the Northwest Passage debate: increased access to and foreign interest in Canada’s Arctic waters and the strengthened voice of Canada’s Indigenous peoples. Both developments have the potential to harden Ottawa and Washington’s traditional positions on the NWP. This chapter will consider, however, whether they might not in fact strengthen the two neighbors’ resolve to work collaboratively and present a unified front.

### **An Increasingly Accessible Northwest Passage**

As the Earth’s changing climate has deepened into a climate crisis, the Arctic region has emerged as one of the clearest indicators of the scale and pace of that change.<sup>11</sup> Scientific reports, like the most recent IPCC Special Report,<sup>12</sup> confirm that the Arctic is warming at two to three times the global average with profound implications for the physical, chemical and biological components of Arctic ecosystems as well

**Figure 1. The Main Northern and Southern Routes through the Northwest Passage**

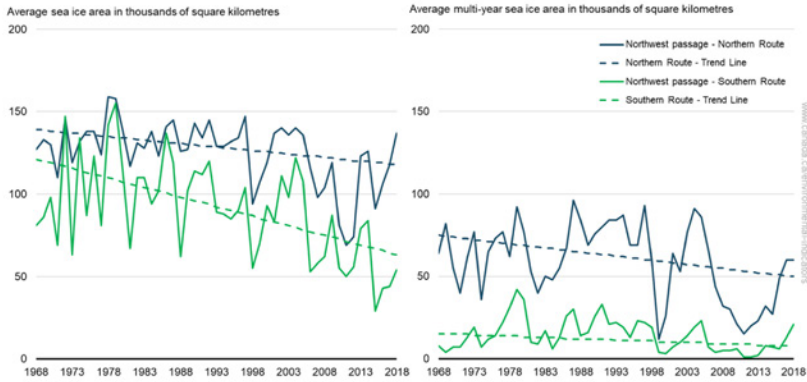


Source: Environment and Climate Change Canada website, accessed April 23, 2020, <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/sea-ice.html>.

as for the estimated four million people who call it home.<sup>13</sup> Experts at the Marine Mammal Commission also warn that the effects of a warmer Arctic are “myriad, far-reaching and accelerating.”<sup>14</sup>

One of the most visible and compelling symptoms of a warming Arctic has been the rapid melting of the sea-ice. A September 2019 report published on the website of the National Snow and Ice Data Centre provides some stark statistics: “Compared to when the satellite record began in 1979, sea ice extent is down about 40 percent in September.”<sup>15</sup> Indeed, the IPCC indicated in its 2019 Special Report that sea ice changes experienced in the Arctic were “unprecedented for at least 1,000 years” with a thinning of sea ice together with a transition to younger ice and a 90 percent decline in the areal proportion of multi-year ice in the period 1979-2018.<sup>16</sup> The IPCC also reported with high confidence that loss of summer sea ice and spring snow cover

**Figure 2. Average Summer Sea-Ice and Multi-year Sea Ice Area, Canada’s Northwest Passage, 1968 to 2018**



Source: Environment and Climate Change Canada website, accessed April 23, 2020, <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/sea-ice.html>.

have contributed to feedback loops that serve to amplify warming in the Arctic.<sup>17</sup>

Canada’s Northwest Passage is a system of gulfs, straits, sounds and channels in the Canadian Arctic Archipelago connecting the Beaufort Sea in the west with Baffin Bay in the east. The Northwest Passage provides two main navigation routes on its western side: a northern route and a southern route (Figure 1).<sup>18</sup> According to a 2019 report by Environment and Climate Change Canada, while year-to-year fluctuations were recorded, “statistical decreasing trends were detected” for the 1968 to 2018 period for the summer sea ice and multi-year sea ice areas in both the northern and southern routes (Figure 2).<sup>19</sup> A key finding was that the “southern route was virtually free of multi-year sea ice for several of the recent years.” As summer ice melts, the Northwest Passage is expected to become significantly more navigable by 2050, increasing opportunities for shipping, tourism, resource exploitation and industrial activities.

Robert Headland and his colleagues at the Scott Polar Research Institute at Cambridge University document 313 complete maritime transits of the Northwest Passage from 1903 to the end of the 2019 navigation season.<sup>20</sup> While this number attests to the very limited at-

tention the NWP has historically garnered as a shipping route, recent years have seen a significant increase in both the number of vessels and flags transiting through the Passage. If 1988 is taken as a point of reference—an important year in the history of Canada-U.S. collaboration in the Arctic with the conclusion of the Arctic Cooperation Agreement—the increase in navigation activities emerges more starkly.

Between 1903 and 1988, a period of 85 years, Headland et al. document 39 transits. Of those transits, 21 were completed by Canadian flagged ships and nine by American vessels. Single transits were completed by ships registered in the Bahamas, France, Japan, the Netherlands, Norway, Singapore and Sweden. Two British vessels also completed transits of the NWP in the late 1980s. Thus, in the first 85 years of recorded transits, 54 percent of the transits were completed by Canadian vessels and 23 percent by American vessels. Together, ships from the two continental partners accounted for 77 percent of all transits of the Northwest Passage and only eight foreign flags are documented.

In marked contrast, in the period from 1988 to 2019 (31 years), there were 274 transits of the Northwest Passage, a 75 percent increase from the first 85 years. Of note, Canadian and American ships accounted for only 9.5 percent and 9 percent respectively of those more recent transits—a very significant decrease compared to the earlier period described above. Since 1988, Russian flagged vessels have completed the same number of transits as Canadian ships. The statistics show that in the past three decades, vessels flagged in 37 different jurisdictions, from South Africa to Finland, transited through the Northwest Passage. Of some concern, six of the jurisdictions are listed on the International Transport Workers Federation website as ‘flags of convenience’<sup>21</sup>: Antigua and Barbuda, Bahamas, the Cayman Islands, Malta, the Marshall Islands and Panama.<sup>22</sup> Ships registered in the Bahamas accounted for nearly 10 percent of successful transits while ships registered in the Cayman Islands completed close to 5 percent of the 274 transits.

### **Growing Foreign Interest in the Northwest Passage**

Beyond the physical presence of a wider array of foreign flagged vessels within the Passage, some non-Arctic states’ policies appear to be increasingly attuned to the potential of the emerging Arctic shipping

routes. While much of the current interest and activity is focused on Russia's Northern Sea Route (NSR), official policies and programs do not always distinguish between the NWP, the NSR and the Transpolar Sea Route (TSR).<sup>23</sup>

Positing that environmental changes were altering the “geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests,” the European Commission released in 2008 an official Communication setting out EU interests and proposals for action by member states in the region. Under Section 3.3 entitled “Transport,” member states and the Community were exhorted to defend “the principle of freedom of navigation and the right of innocent passage in the newly opened routes and areas.”<sup>24</sup> Section 4 of the Communication on “Enhanced Arctic Multilateral Governance” specifically targeted the Northwest Passage in its introductory paragraph: “Moreover, there are different interpretations of the conditions for passage of ships in some Arctic waters, especially in the Northwest Passage.” The Council of the European Union welcomed the Communication and issued “Council Arctic Conclusions” in December 2009, which provide at Article 16: “With respect to the gradual opening, in the years to come, of trans-oceanic Arctic routes for shipping and navigation, the Council reiterates the rights and obligations for flag, port and coastal states provided for in international law, including UNCLOS, in relation to freedom of navigation, the right of innocent passage and *transit passage*, and will monitor their observance.”<sup>25</sup>

In September 2013, the German Federal Foreign Office released *Guidelines of the Germany Arctic Policy* which announced that the German Federal Government was “campaigning for freedom of navigation in the Arctic Ocean (Northeast, Northwest and Transpolar Passages) in accordance with high safety and environmental standards.”<sup>26</sup> In terms of owner nationality, Germany's merchant fleet is ranked 4<sup>th</sup> in the world (after Greece, Japan and China) and it holds around 29 percent of all container-carrying capacity worldwide.<sup>27</sup> Germany is also an acknowledged leader in shipbuilding, the development of innovative and sustainable maritime technologies and in the training of a highly specialised maritime workforce. It is therefore a powerful voice in global maritime affairs.

On 12 March 2014, the European Parliament adopted a resolution on “EU Strategy for the Arctic” which called on “the states in the [Arctic] region to ensure that any current transport routes—and those that may emerge in the future—are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than *internationally agreed measures* aimed at increasing security or protection of the environment.”<sup>28</sup> The preamble to the Resolution lists a number of specific considerations said to have informed its substantive content, including the United Nations Convention on the Law of the Sea and the national strategy of Canada among others.

The most recent articulation of the European Union’s Arctic policy released on April 27, 2016 by the Commission and the High Representative for Foreign Affairs and Security Policy does not wade into the Northwest Passage controversy.<sup>29</sup> Instead, it stresses the need for safe and secure maritime activities in the Arctic and EU participation in the development of innovative technologies and tools to more efficiently monitor spatial and temporal developments. Emphasis is placed on ensuring the effective implementation of the Polar Code and enhancing search and rescue capabilities. As Adam Stepien and Andreas Raspotnik explain, the EU Arctic policy domain encompasses many issues, sectors and stakeholders, “some interlinked, some connected only via an ‘Arctic’ label; of both an internal and external nature.”<sup>30</sup> The 2016 *Joint Communiqué* was a deliberate attempt to limit this broad spectrum by focusing on three specific themes only: climate change and the environment, sustainable development and international cooperation.<sup>31</sup>

Germany’s updated *Arctic Policy Guidelines—Assuming Responsibility, Creating Trust, Shaping the Future*, released in August of 2019 contains a chapter dedicated to “The Security policy dimension of Germany’s Arctic policy.”<sup>32</sup> The opening paragraph of the chapter identifies the “increasing navigability of Arctic sea routes” as a “potential source of non cooperative behaviour” which “endangers economic, environmental and security policy stability in the region and thus also affects Germany’s security interests.” Among the indicators of such non cooperative behaviour, according to the German policy, will be the “kind of agreement that is reached” on the “status, legislation and regulations with regard to the use of the Northwest Passage and Northeast Passages.”<sup>33</sup> Seven policy objectives and commitments are then listed,



including that “[t]he Federal Government is committed to the protection of freedom of navigation in Arctic waters in accordance with the regulations of UNCLOS.”<sup>34</sup>

Speaking at the Arctic Council meeting in Reykjavik a few months later, in October 2019, the EU Ambassador for the Arctic warned that regional security is at risk and called for the introduction of a new Arctic governance structure. Ambassador Marie-Anne Coninx acknowledged that the 2016 EU Policy was already outdated and announced that work was underway on a new EU Arctic strategy. “The developments that are now taking place are so dramatic that there is a call for the EU to get more strongly engaged.”<sup>35</sup> She stressed that the new strategy would have to address security, “because all developments in [the] region affect the security situation.” Her comments echoed an official statement released earlier that month at the conclusion of the EU’s first Arctic Forum which emphasized that the “EU has a strategic role and interest in the Arctic remaining a ‘low tension-high cooperation’ area.”<sup>36</sup>

Beyond Europe, Arild Moe and Olav Schram Stokke comment that “Arctic sea routes feature prominently but soberly in the Japanese and the [South] Korean policy documents.”<sup>37</sup> Under Part 3 of the 2015 Japanese policy, entitled “Need to Address Arctic Issues,” a specific section is devoted to “Ensuring the Rule of Law and Promoting International Cooperation.”<sup>38</sup> The section includes a reminder that the Arctic Ocean is subject to international laws, including the UNCLOS. “Freedom of navigation and other principles of international law,” it asserts, “must be respected.” A reference is then made to “ice covered areas” of the Arctic Ocean and the need to cooperate with the coastal States “to ensure appropriate balance between the freedom and safety of navigation, and the protection and preservation of the marine environment under the principle of international law.” This reference to the limited powers afforded to Canada by Article 234 of the UNCLOS,<sup>39</sup> while at the same time emphasizing freedom of navigation, falls far short of the Canadian historic internal waters position.

In South Korea’s earlier Arctic policy document (2013), business opportunities feature more prominently than in the Japanese policy.<sup>40</sup> The vision statement emphasizes that Korea’s contribution to the sustainable future of the Arctic will be accomplished through enhanced

cooperation with the Arctic States and relevant international organizations. While the sensitive question of the legal status of the Arctic Routes is not broached, the Korean Government's interest in the future of Arctic shipping activities and industries is made abundantly clear. One of the four "Major Goals (2013-2017)" of the Korean policy is defined as the pursuit of "Sustainable Arctic Business" and includes as an action item to "Assess the feasibility of the Arctic Sea Routes." The main themes under the "Implementing Programs" section include: "Accumulate Arctic Sea Route Navigation Experience, Provide Incentives to Encourage Using the Arctic Sea Route, Conduct International Joint Research and Host Seminars to Increase the Use of the Arctic Sea Routes, Develop Arctic Sea Operators' Capacity, Cooperate on Developing Arctic Coastal Ports."

Abandoning its longstanding policy of deliberate vagueness, the State Council Information Office of the People's Republic of China released a White Paper on "China's Arctic Policy" in January 2018.<sup>41</sup> The document contains many references to Arctic sea passages and routes and emphasizes China's role in developing these increasingly strategic shipping routes. The most interesting and nebulous sections are found under Part IV "China's Policies and Positions on Participating in Arctic Affairs," Section 3 "Utilizing Arctic resources in a lawful and rational manner," Subsection (1) "China's participation in the development of Arctic shipping routes." One of the key elements is the definition provided for "Arctic shipping routes" which are deemed to comprise the Northeast Passage (and thus the NSR), the Northwest Passage and the "Central Passage" (the Transpolar Sea Route).

The Arctic shipping routes comprise the Northeast Passage, Northwest Passage, and the Central Passage. As a result of global warming, the Arctic shipping routes are likely to become important transport routes for international trade. China respects the legislative, enforcement and adjudicatory powers of the Arctic States in the waters subject to their jurisdiction. China maintains that the management of the Arctic shipping routes should be conducted in accordance with treaties including the UNCLOS and general international law and that *the freedom of navigation enjoyed by all countries in accordance with the law and their rights to use the Arctic shipping routes should be ensured*. China maintains that disputes over

the Arctic shipping routes should be properly settled in accordance with international law.

While the third sentence might appear supportive of the Canadian position, the question remains as to whether China considers all of the waters within the Canadian Arctic Archipelago to be “subject to [Canada’s] jurisdiction.” In any event, this reassuring statement is completely negated by the passages highlighted in italics. The insistence on “freedom of navigation” in the “Arctic shipping routes,” which explicitly include the NWP, is of course in complete opposition to the official Canadian position. The White Paper also gives some legitimacy to the idea that a “dispute” exists as to the status of the “Arctic shipping routes,” which again include the NWP.

China also acted strategically in regard to the transit of its government research vessel *Xuelong* through the NWP in 2017. Rather than ask Canada’s permission for its vessel to enter and navigate through Canadian internal waters, which would have been a formal acknowledgment of the Canadian position, China relied upon the provisions in the UNCLOS governing marine scientific research (Articles 245 and 246). As Part XIII of the Convention obligates a foreign vessel to obtain the permission of the coastal State to conduct marine scientific research in *any* maritime zone, China was able to sidestep the thorny question of the legal status of the NWP.

It could be argued that the government policies examined above are evidence of a muted but emerging trend—one of contestation of Canada’s position in regards to the Northwest Passage and therefore, one of increased support for Washington’s long-held view. However, while at first blush such a development, if it is real, might appear to be advantageous to the United States, it is arguably in the greater interest of Canada certainly, but also the United States, if the NWP disagreement remains a contained ‘North American affair’. For while Canada and the United States may disagree at the highest political level, they are bound in a close defense and security relationship.

Their decades-old quarrel over the legal status of the Northwest Passage in no way challenges the bilateral mechanisms that serve their common interests. For example, through the NORAD missions (aerospace warning and control and maritime warning), Canada and the United States share domain awareness and assessments, including in

their respective “maritime approaches, maritime areas and internal waterways”.<sup>42</sup> The United States and Canada are also party to an *Agreement for Cooperation in Science & Technology for Critical Infrastructure Protection and Border Security*.<sup>43</sup> Another effective joint mechanism is the annual summit between the Canadian and U.S. Coast Guards, which fosters communication and cooperation at the senior, operational and regional levels in both organizations.

Against this backdrop of commitment, the NWP ‘disagreement’ may be an occasional irritant in Canada-U.S. relations but never a threat to the vital interests of either party. The same cannot be said of claims by outside States to a right of transit passage—which cannot be impeded—for their civilian and military ships and aircraft. The Northwest Passage spans roughly 900 miles (1,450 km) and winds through the 94 major islands<sup>44</sup> and 34,469 minor islands of the Canadian Arctic Archipelago, itself a staggering 40 percent of Canada’s total landmass.<sup>45</sup> No ‘international strait’ in the world cuts through the sovereign territory of the bordering state to this extent. It is indeed rather difficult to imagine any country willing to accept free and largely unrestricted navigation through, and overflight over, one third of its national territory.

As President Kennedy emphasized, Canada and the United States are allies including in the quest for a practical and responsible navigational regime in the Arctic. The two continental partners must continue to find ways to set their legal differences aside and work collaboratively. At the same time, Canada must continue to vigorously defend its claim to exclusive jurisdiction over the NWP at the international level. American officials should not interpret this policy as one of provocation. It is a necessary strategy aimed at a wider audience. In the face of a dramatically changing Arctic and increasing foreign interest, it is only legally prudent and politically wise for Canada to defend a robust and enforceable navigational regime.

### **The Northwest Passage—Inuit Nunangat**

The Canadian Arctic Archipelago is not only a multiform physical space, but also a highly complex political and jurisdictional environment. The territory of Nunavut, or “Our Land” in Inuktitut, is the result of the largest Aboriginal land claims settlement in Canadian

Figure 3. Inuvialuit Settlement Region and Nunavut Settlement Area



Source: Government of Canada <https://www.aawc.ca/inuit/>

history, carved out of the Northwest Territories pursuant to Article 4 of the 1993 *Nunavut Land Claims Agreement* (NLCA).<sup>46</sup> The Nunavut Settlement Area (NSA) covers 1,936,113 km<sup>2</sup> of land and 157,077 km<sup>2</sup> of water in Northern Canada, representing 1/5<sup>th</sup> of Canada’s total area [Figure 3].<sup>47</sup> The territory includes part of the Canadian mainland and encompasses most of the Arctic Archipelago and thus, almost all of the Northwest Passage routes.<sup>48</sup> Over 80 percent of its 35,944 residents are Inuit,<sup>49</sup> living in 25 communities—24 of which are on the shores of Canada’s Arctic waters.

The NLCA is not a hollow expression of intent but rather is “a land claims agreement within the meaning of Section 35 of the *Constitution Act, 1982*.”<sup>50</sup> The NLCA between Canada and the Inuit “enshrines Inuit rights in the constitutional firmament of this country.”<sup>51</sup> The preamble to the NCLA describes the Agreement’s principal objectives. They include:

- to provide for certainty and clarity of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore;
- to provide Inuit with wildlife harvesting rights;
- to provide Inuit with rights to participate in decision making concerning wildlife harvesting;
- to encourage self-reliance and the cultural and social well-being of Inuit.

Inuit self-government rights in the territory are exercised through the governance provisions of the NLCA, including through the territorial government. The constellation of rights and prerogatives assigned to different actors means that the authority to govern navigation and shipping in Nunavut cannot be wielded by any one actor. Most significant issues will require co-management partnerships—an approach also mandated by Canadian federal policy.

Article 5 of the NCLA is devoted to wildlife and recognizes that “the legal rights of Inuit to harvest wildlife flow from their traditional and current use” [5.1.2 (b)] and that the “Government of Canada and Inuit recognize that there is a need for an effective role for Inuit in *all aspects* of wildlife management” [5.1.6]. Recognizing that Government retains ultimate responsibility for wildlife management, Part 2 of Article 5 establishes the Nunavut Wildlife Management Board (NWMB). The NWMB can approve “the establishment, disestablishment and changes to boundaries of Conservation Areas related to the management and protection of wildlife and wildlife habitat (5.2.34). Article 5.7.1 specifies that in addition to the functions assigned to the NWMB, “the exercise of harvesting by Inuit shall be overseen by Hunters and Trappers Organizations (HTOs) and Regional Wildlife Organizations (RWOs).”<sup>52</sup>

Article 8 provides that the Canadian Parks Service must work with the Designated Inuit Organization (DIO), affected communities and the Government of Nunavut (GN) to establish National Parks in the NSA [8.2.1]. Under Article 1 of the NLCA, which provides definitions for key concepts in the Agreement, the term “National Park” is defined as “an area that has been formally and fully dedicated as a National Park or National *Marine* Park under the *National Parks Act*.” Article 9

of the NLCA recognizes that in addition to Parks, other areas that are of “particular significance for ecological, cultural, archaeological, research and similar reasons, require special protection [9.2.1]. Inuit shall enjoy special rights and benefits with respect to these areas.”

Article 9.3.1 mandates that Government, in consultation with Inuit, must conduct a study to determine the need for new legislation or amendments to existing legislation to designate and manage Conservation Areas in the terrestrial and marine environment of the NSA. As determined by Article 9.3.2, the “establishment, disestablishment or changing of the boundaries of Conservation Areas related to management and protection of wildlife and wildlife habitat” is subject to the approval of the NWMB. Of critical importance, the same article declares that “Conservation Areas shall be *co-managed* by Government and the DIO.”

Article 11 is devoted to “Land Use Planning.” The term “land” in this context is said to “include water and resources including wildlife” [11.1.2] and the article applies to both land and marine areas within the NSA and the Outer Land Fast Ice Zone [11.1.4]. It establishes the Nunavut Planning Commission (NPC) with the primary responsibility to establish broad planning policies, objectives and goals for the NSA in conjunction with Government [11.4.1]. In developing planning policies, the NPC is to take into account, among several factors, environmental protection and management needs, including wildlife conservation, protection and management [11.2.3]. Article 11.4.4 assigns to the NPC the responsibility to “contribute to the development and review of Arctic marine policy.”

The NPC is specifically tasked with formulating a “Nunavut land use plan” according to an exhaustive process of development and review in order to guide and direct short term and long-term development in the NSA [11.5.1]. Upon approval by Cabinet (federal) and the Executive Council (territorial), the Nunavut land use plan is to be implemented on the basis of jurisdictional responsibility. All federal and territorial government departments and agencies are to conduct their activities and operations in accordance with the plan. The NPC reviews all applications for project proposals to determine whether they are in conformity with land use plans [11.5.10]. Voyages by cruise ships through the NSA, for example, are considered “projects.”

Article 15, which is comparatively shorter than the articles described above, is entitled “Marine Areas”. Under Article 1 of the NLCA, “marine areas” are defined as “that part of Canada’s inland waters or territorial sea, whether open or ice-covered, lying within the NSA, but does not include inland waters.” Article 15.2.3 stipulates that there are no Inuit Owned Lands in marine areas. In the absence of Indigenous title to any marine areas, there is no *unilateral* authority to control access. However, Article 15.1.1 of the NLCA recognizes that “there is a need to develop and co-ordinate policies regarding the marine areas” and a “need for Inuit involvement in aspects of Arctic marine management, including research.”

The Nunavut Impact Review Board (NIRB), the Nunavut Water Board (NWB), the NPC and the NWMB may jointly, as a Nunavut Marine Council, or severally advise and make recommendations to other government agencies regarding the marine areas, and Government “*shall*” consider such advice and recommendations in making decisions which affect marine areas [15.4.1].

Finally, Article 33 recognizes that the archaeological record of the NSA is of spiritual, cultural, religious and educational importance to Inuit. Accordingly, Inuit involvement in the identification, protection and conservation of archaeological sites and specimens and the interpretation of the archaeological record is both desirable and necessary. Part I of Article 33 unambiguously declares that its provisions apply “to marine areas of the NSA” [33.1.2]. Nunavut Tunngavik Inc. (NTI) is tasked with establishing an Inuit Heritage Trust to assume “increasing responsibilities for supporting, encouraging, and facilitating the conservation, maintenance, restoration and display of archaeological sites and specimens in the NSA.” Under Article 33.3.1, the Trust is to be “invited to participate in developing government policy and legislation on archaeology in the NSA.”

What emerges from this review of the NLCA is that while the power to regulate “navigation and shipping” may be vested in the Federal Government under the Canadian constitution,<sup>53</sup> there is a constitutional and political imperative to consult and actively involve the territory’s Inuit citizens and communities in devising strategies, plans and mechanisms. Furthermore, various agencies and bodies, both at the territorial level and under the NLCA, have been assigned specific



rights and responsibilities in marine areas within the territory of Nunavut. Together with federal departments, they form a complex network of rights holders and authority wielders.

While the formal recognition of Indigenous self-government and the constitutional entrenchment of their fundamental rights has strengthened the Canadian Government's resolve to vigorously exercise its control over the Northwest Passage, it has also debunked the myth that it has a monopoly when it comes to defending the waters and ice of the Canadian Arctic, and all that depends upon them. Indigenous rights holders have an important role to play in deciding how Canada's Arctic waters, including the routes of the Northwest Passage, should be governed.

Acknowledging the reality that "Canada's sovereignty over the waters of the Arctic archipelago is supported by Inuit use and occupancy" (article 15.1.1(c) of the NLCA), the Trudeau Government announced in late December 2016 that it would co-develop a new "Arctic Policy Framework" for Canada in collaboration with Indigenous and territorial partners. With the aim of creating a long-term vision of priorities and strategies for the Canadian Arctic, as well as promoting shared leadership and partnerships, the process adopted a whole-of-government approach involving many federal departments and agencies. National Indigenous organizations were heavily involved and several regional roundtables organized to seek the input of local Indigenous groups. Gatherings of academics and industry experts also ensured a broad spectrum of interests and ideas. This novel and widely inclusive process, challenging to manage in practice, led to the release in early September 2019 of *Canada's Arctic and Northern Policy Framework* [hereinafter Framework].<sup>54</sup>

The Framework is described on the Crown-Indigenous and Northern Affairs Canada website as "a profound change of direction for the Government of Canada."<sup>55</sup> The introduction to the Framework emphasizes that, unlike previous Canadian Arctic policies, it better aligns Canada's national and international policy objectives with the priorities of Indigenous peoples and of northerners. Recognizing that 'made in Ottawa' policies have not been successful in the past, the Framework "puts the future into the hands of the people who live there to realize the promise of the Arctic and the North."<sup>56</sup> A crucial element of this

new, cooperative form of policy-making is the inclusion in the Framework of chapters from Indigenous, territorial and provincial partners: “Through these chapters, our partners speak directly to Canadians and to the world, expressing their own visions, aspirations and priorities.”<sup>57</sup>

In the months leading up to the release of the Framework, Inuit leaders from Nunavut seized a valuable opportunity to assert their resolve to be heard, for their “own visions, aspirations and priorities” for the region to be acknowledged and respected. When U.S. Secretary of State Pompeo denounced Canada’s claim over the NWP as “illegitimate” during a speech at the Arctic Council Ministerial meeting in Finland early in May 2019, Canada’s Foreign Affairs minister Chrystia Freeland was quick to respond, declaring that “Canada is very clear about the NWP being Canadian” and insisting that “[t]here is both a very strong and geographic connection with Canada.”<sup>58</sup> This diplomatic tit-for-tat exchange between high level American and Canadian government officials came as little surprise. The more forceful and compelling rebuttal came from Canadian Inuit, who served notice on Pompeo and the U.S. Government that the NWP is part of Inuit Nunangat, their Arctic homeland, and who reminded all nations of their legally protected right to self-determination.<sup>59</sup>

Inuit are a marine people. Our culture and way of life is inextricably linked to the ocean. The marine environment is central to our identity, the way that we perceive the world, and the way that we think of ourselves. The Northwest Passage is a part of Inuit Nunangat, and future activity has implications for our communities and way of life. Inuit considerations must be central to any conversation about how the Northwest Passage is utilized by Canada and other countries.

Inuit utilized what is now referred to as the Northwest Passage for millennia to migrate across Inuit Nunangat. We see it as a feature of our homeland rather than as a shortcut for enhancing global trade. Furthermore, Inuit co-manage with the federal government and provinces and territories this vast space through comprehensive land claim agreements. We are positioned through existing governance structures to make decisions and advise governments on the potential impacts and opportunities associated with increased marine traffic in the Northwest Passage.<sup>60</sup>

The increasingly strong demand by Canada's Indigenous peoples to be heard, considered and consulted, has altered how the Canadian Federal Government exercises its sovereignty in its Arctic region. It is unlikely, however, to have the power to change Washington's official position. Yet, the fact that the passages that cut through the Canadian Arctic Archipelago are an integral part of an Indigenous homeland should perhaps temper the rhetoric and should certainly distinguish the NWP from other 'Arctic navigation' files. New international customary legal norms are emerging and state attitudes are shifting in favour of a greater respect for the cultural ties that bind Indigenous peoples to their natural environment.<sup>61</sup> Canada and the United States, while continuing to disagree, might find common ground in ensuring that outsiders respect the voice of the NWP's Indigenous guardians.

## **Conclusion**

In 1961, President Kennedy spoke of an American-Canadian alliance strong enough to tolerate differences and even disagreements, of an effective partnership based on mutual trust and respect.<sup>62</sup> Those values have long been the foundation upon which successful collaborative mechanisms have been established in the service of the national interests of both continental partners.

The International Boundaries Commission, which has maintained a peaceful and efficient international boundary between the two neighbours for more than a century, is a telling example. On June 4, 1908, the United States and the United Kingdom (on behalf of Canada) signed a treaty to create the International Boundary Commission (IBC) to accurately define and mark the boundary separating the two countries.<sup>63</sup> In 1925, a second treaty between the United States and Canada was entered into, making the IBC a permanent organization and empowering the two Commissioners (one American and one Canadian) to maintain an effective boundary.<sup>64</sup> Today, the introduction on the official IBC website describes the Commission as "a true sharing of resources, intellect and goodwill in pursuit of a common objective."<sup>65</sup>

The establishment of the North American Air Defense Command (NORAD) in 1957, as a bi-national, centralized air and maritime defense command, and the fulfillment of its sensitive missions in the en-

suing decades, are also compelling evidence of the trust and respect emphasized by President Kennedy. In the third preambular paragraph of the NORAD Agreement, renewed on April 28, 2006,<sup>66</sup> both Canada and the United States attest to their conviction that “such cooperation is a proven and flexible means to pursue shared goals and interests, remains vital to their mutual security, and is compatible with their national interests.” Collaboration is thus recognized not only as a valuable and efficient means to achieve shared objectives, but also as a powerful mechanism for the advancement of national interests. The Canadian Department of National Defence webpage devoted to NORAD readily acknowledges that the bilateral structure “provides both countries with greater continental security than could be achieved individually.”<sup>67</sup>

In March 2016, U.S. President Barack Obama and Canadian Prime Minister Justin Trudeau issued a Joint Statement<sup>68</sup> which proclaimed in its very first paragraph that they “embrace[d] the special relationship between the two countries and their history of close collaboration on energy development, environmental protection, and Arctic leadership.” In the same opening paragraph, they resolved “that the United States and Canada must and will play a leadership role internationally ... including ... to protect the Arctic and its peoples.” The fourth objective of their “shared Arctic leadership model” was the creation of new approaches to strengthen the resilience of Arctic communities and to support the well-being of Arctic residents, in particular by respecting the rights and territory of Indigenous peoples.

While political personalities and agendas may change, the Canada-U.S. relationship of trust and cooperation is long-established and has withstood the vagaries of elections in both countries. Irrespective of short-term rifts, the recognition that collaboration and cooperation serve the interests of both States endures. Climate change, and the foreign interest it has sparked in the Arctic region, has only confirmed the necessity for a strong partnership. Ottawa and Washington must, and will continue, to work together to guarantee an efficient and responsible navigation regime in the North American Arctic. They must also continue to lend their support and extend their respect to the Arctic’s Indigenous Peoples, who rightfully demand that their cultural and spiritual connection to the Arctic waters be recognized and protected.

## Notes

1. The United States is described as Canada's "premier partner in the Arctic" in the second paragraph under the heading "The Way Forward" in its *Statement on Canada's Arctic Foreign Policy—Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad*, Aug. 20, 2010. Available on the Global Affairs Canada website, [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/arctic-arctique/arctic\\_policy-canada-politique\\_arctique.aspx?lang=eng#a6](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/arctic-arctique/arctic_policy-canada-politique_arctique.aspx?lang=eng#a6).

2. According to Canada, as there is no international strait that cuts through the Canadian Arctic Archipelago, there is no international air corridor and all the airspace remains subject to Canadian sovereignty.

3. See Part III of the 1982 United Nations Law of the Sea Convention [UNCLOS] for the rules governing the right of "transit passage" in "straits used for international navigation." *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, entered into force 16 November 1991, 1833 U.N.T.S. 397. For a discussion of the legal arguments invoked by Canada and the United States, see among many other scholarly studies: Donald R. Rothwell, "The Canadian-US Northwest Passage Dispute: A Reassessment," *Cornell International Law Journal* 26, 2 (1993), pp. 331-372; James Kraska, "The Law of the Sea Convention and the Northwest Passage," *International Journal of Marine and Coastal Law*, vol. 22 (2007), pp. 257-282; Suzanne Lalonde, "The Northwest Passage," in P. Whitney Lackenbauer and S. Lalonde, eds, *Canada and the Maritime Arctic: Boundaries, Shelves and Waters* (Peterborough: NAADSN / Trent University, 2020), pp. 107-161.

4. *Arctic and Northern Policy Framework*, September 10, 2019. Available on the website of Crown-Indigenous Relations and Northern Affairs Canada, <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/09/the-government-of-canada-launches-co-developed-arctic-and-northern-policy-framework.html>.

5. "Introduction" in Department of Aboriginal Affairs and Northern Development Canada, *Canada's Northern Strategy—Our North, Our Heritage, Our Future* (Ottawa: Minister of Public Works and Government Services Canada, 2009). See also *Statement on Canada's Arctic Foreign Policy*, supra note 2.

6. Paragraph 5, Section III "Policy," Sub-section B "National Security and Homeland Security Interests in the Arctic," *National Security Presidential Directive and Homeland Security Presidential Directive*, January 9, 2009. Available from the Homeland Security Digital Library, <https://www.hsdl.org/?abstract&did=776382>.

7. Section 3 "Strengthen International Cooperation: Accede to the Law of the Sea Convention," *National Strategy for the Arctic Region*, May 10, 2013.

Available from the Homeland Security Digital Library, <https://www.hsdl.org/?abstract&did=736458>.

8. For an in-depth discussion of the “precedent” argument, see Suzanne Lalonde and Frédéric Lasserre, “The Northwest Passage: A Potentially Weighty Precedent?” *Ocean Development and International Law* 43, 3 (2013), pp. 28-72.

9. *Agreement on Arctic Cooperation*, Jan. 11, 1988, U.S.-Can., reprinted in *International Legal Materials* 28 (1989), p. 142.

10. For an analysis of the specific wording and intent of the 1988 Agreement, see Ted L. McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (New York: Oxford University Press, 2009), at p. 249. See also Michael Byers and Suzanne Lalonde, “Who Controls the Northwest Passage?” *Vanderbilt Journal of Transnational Law* 42, 4 (2009), p. 1133, at pp. 1159-1161.

11. A Greenpeace web article devoted to the Arctic proclaims that “[t]he Arctic is more impacted by global warming than any other place in the world”. Greenpeace, “The Arctic & Global Warming,” accessed March 30, 2020, <https://www.greenpeace.org/usa/arctic/issues/global-warming/>.

12. Intergovernmental Panel on Climate Change, “Special Report on the Ocean and Cryosphere in a Changing Climate [IPCC Special Report],” approved at its 51<sup>st</sup> Session held from September 20-23, 2019. Available on the IPCC website, <https://www.ipcc.ch/srocc/home/>.

13. Of whom 10 percent are Indigenous. IPCC Special Report, *Ibid.*, at pp. 3-11. See also National Oceanic and Atmospheric Administration, “2018 Arctic Report Card,” available on the NOAA website <https://arctic.noaa.gov/Report-Card/Report-Card-2018> and IPCC, “Special Report—Global Warming of 1.5°C,” available on the IPCC website, <https://www.ipcc.ch/sr15/>.

14. “Climate Change and the Arctic,” under the tab “Arctic” in the “Priority topics” folder on the website of the Marine Mammal Commission, 2020, <https://www.mmc.gov/priority-topics/arctic/climate-change/>.

15. According to Mark Serreze, director of the National Snow and Ice Data Centre (NSIDC), as reported in Gloria Dickie, “The Arctic and climate change (1979-2019): What the ice record tells us,” *Mongabay*, September 18, 2019, <https://news.mongabay.com/2019/09/the-arctic-and-climate-change-1979-2019-what-the-ice-record-tells-us/>.

16. “Summary for Policy Makers,” IPCC Special Report, *supra* note 13, at pp. 4-5.

17. “Summary for Policy Makers,” IPCC Special Report, *supra* note 13, at p. 5. See also “Chapter 3: Polar Regions,” *Ibid.*, at p. 3.

18. As Rothwell explains, the Northwest Passage is in reality a series of connected straits passages. “Given the large number of islands that make up the Arctic Archipelago, there exist many potential shipping routes from east to west and west to east. The practical reality, however, is that because of the heavy ice found in these polar waters, and the shallow draught that exists in some of the straits, there are only a handful of viable combinations of straits and channels which can be used to make the complete crossing.” Rothwell, *supra* note 4, at p. 26. According to Pharand, the Northwest Passage consists of five basic routes: Route 1, through Prince of Wales Strait; Route 2, through the M’Clure Strait; Route 3, through Peel Sound and Victoria Strait; Route 3A, through Peel Sound and James Ross Strait; Route 4 through Prince Regent Inlet; Route 5, through Fury and Hecla Strait; and Route 5A, through Fury and Hecla Strait and Prince Regent Inlet. Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), at pp. 189–201 (see map of the various routes at pp. 190–191).

19. Environment and Climate Change Canada, “Canadian Environmental Sustainability Indicators: Sea Ice in Canada,” available on the Government of Canada website, <https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/sea-ice/2019/SeaIce-EN.pdf>.

20. Robert K. Headland et al., “Transits of the Northwest Passage to End of the 2019 Navigation Season,” March 17, 2020, available on the Scott Polar Research Institute website, <https://www.spri.cam.ac.uk/resources/infosheets/northwestpassage.pdf>.

21. According to the US Legal website, a ship is said to be flying a ‘flag of convenience’ if it is registered in a foreign country “for purposes of reducing operating cost or avoiding government regulations.” See “Flags of Convenience Law and Legal Definition.” Available on the US Legal website, <https://definitions.uslegal.com/f/flags-of-convenience/>.

22. “Flags of Convenience,” available on the International Transport Workers’ Federation website, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience>.

23. See the chapters by Alexander Vylegzhanin and Mia Bennett, et al., in this volume.

24. Communication from the Commission to the European Parliament and the Council, “The European Union and the Arctic Region,” Brussels, November 20, 2008, COM (2008) 763 final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0763:FIN:EN:PDF>.

25. Council of the European Union, “Council Conclusions on Arctic Issues,” 2985<sup>th</sup> Foreign Affairs Council meeting, Brussels, December 8, 2009, [https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/docs/body/arctic\\_council\\_conclusions\\_09\\_en.pdf](https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/docs/body/arctic_council_conclusions_09_en.pdf). Emphasis added.

26. Federal Foreign Office (Germany), *Guidelines of the Germany Arctic Policy* (Berlin: Federal Foreign Office, 2013). It is unclear what precisely “campaigning for” entailed. Emphasis added.

27. “Shipping” in Federal Ministry for Economic Affairs and Energy (Germany), *Maritime Agenda 2025—The Future of Germany as a Maritime Industry Hub* (Berlin: Federal Ministry for Economic Affairs and Energy, 2017), at p. 10.

28. European Union: European Parliament, *European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic*, March 12, 2014, P7\_TA(2014)0236. Available at <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0236>.

29. *Joint Communication to the European Parliament and the Council - An Integrated European Union Policy for the Arctic*, 27 April 2016. Available at [http://eeas.europa.eu/archives/docs/arctic\\_region/docs/160427\\_joint-communication-an-integrated-european-union-policy-for-the-arctic\\_en.pdf](http://eeas.europa.eu/archives/docs/arctic_region/docs/160427_joint-communication-an-integrated-european-union-policy-for-the-arctic_en.pdf).

30. Adam Stepien and Andreas Raspotnik, “Can the EU’s Arctic Policy Find True North?,” *CEPS In Brief*, Sept. 11, 2019, <https://www.ceps.eu/can-the-eu-arctic-policy-find-true-north/>.

31. *Ibid.*

32. Chapter 1.4 in The Federal Government, *Arctic Policy Guidelines—Assuming Responsibility, Creating Trust, Shaping the Future* (Berlin: Federal Foreign Office, 2019), at p. 23.

33. *Ibid.*

34. *Ibid.*, at p. 25.

35. As reported by Atle Staalesen, “EU call for introduction of new Arctic governance structure,” *The Independent Barents Observer*, October 15, 2019, <https://www.rcinet.ca/eye-on-the-arctic/2019/10/15/arctic-circle-governance-european-union-iceland-coninsx-policy/>.

36. EU Arctic Forum: Statement by the High Representative/Vice-President Federica Mogherini, Commissioner Karmenu Vella and the Minister for Foreign Affairs of Sweden, Ann Linde, October 3, 2019. Available at [https://ec.europa.eu/maritimeaffairs/press/eu-arctic-forum-statement-high-representativevice-president-federica-mogherini-commissioner\\_en](https://ec.europa.eu/maritimeaffairs/press/eu-arctic-forum-statement-high-representativevice-president-federica-mogherini-commissioner_en).



37. Arild Moe and Olav Schram Stokke, “Asian Countries and Arctic Shipping: Policies, Interests and Footprints on Governance,” *Arctic Review on Law and Politics* 10 (2019), pp. 24–52, at p. 28.

38. The Headquarters for Ocean Policy, *Japan’s Arctic Policy*, October 16, 2015. English translation available on the website of the Cabinet Office of the Government of Japan, [https://www8.cao.go.jp/ocean/english/arctic/pdf/japans\\_ap\\_e.pdf](https://www8.cao.go.jp/ocean/english/arctic/pdf/japans_ap_e.pdf).

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

40. Moe and Stokke, *supra* note 36, at p. 29.

41. The State Council Information Office of the People’s Republic of China, “China’s Arctic Policy,” Jan. 2018. Available at [http://english.www.gov.cn/archive/white\\_paper/2018/01/26/content\\_281476026660336.htm](http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm).

42. “About NORAD,” on the website of the North American Aerospace Defence Command, <https://www.norad.mil/About-NORAD/>.

43. Signed at Washington and entered into force on June 1, 2004. Available on the Global Affairs Canada website, <https://www.treaty-accord.gc.ca/text-texte.aspx?id=105000>.

44. Defined as greater than 130 km<sup>2</sup>. “Arctic Archipelago,” *The Canadian Encyclopedia* (online), <https://www.thecanadianencyclopedia.ca/en/article/arctic-archipelago>.

45. *Ibid.*

46. *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (25 May 1993). Available at [https://www.gov.nu.ca/sites/default/files/Nunavut\\_Land\\_Claims\\_Agreement.pdf](https://www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf).

47. See “Nunavut,” *The Canadian Encyclopedia* (online), <https://www.thecanadianencyclopedia.ca/en/article/nunavut>.

48. The Territory of Nunavut also includes all of the islands in Hudson Bay, James Bay and Ungava Bay. *Ibid.*

49. “Aboriginal Population Profile, 2016 Census.” Available on the Statistics Canada website, <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E>.

50. See Article 2.2.1 of the NCLA. Section 35 of the *Constitution Act, 1982* declares that, “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

51. Kirk Cameron and Alastair Campbell, “The Devolution of Natural Resources and Nunavut’s Constitutional Status,” *Journal of Canadian Studies* 42, 2 (2009) p. 198-219, at p. 210.

52. The powers and functions of HTOs [5.7.3] and RWOs [5.7.6] include the regulation of harvesting practices and technique among community members, the allocation and enforcement of community basic needs levels and the general management of harvesting among members.

53. Section 91 of the *Constitution Act, 1867* confers upon the Parliament of Canada exclusive legislative competence over “all matters” coming within “classes of subjects” that include “beacons, buoys and lighthouses” (para 90), “navigation and shipping” (para 10) and “sea coast and inland fisheries” (para 12).

54. *Supra* note 5.

55. “Foreword from the Minister,” *Ibid*.

56. “A Shared Vision,” *Ibid*.

57. *Ibid*.

58. Hamdi Issawi, “Canada Makes It ‘Very Clear’ the Northwest Passage is Canada’s after Pompeo Questions Legitimacy,” *The Star*, May 7, 2019, <https://www.thestar.com/edmonton/2019/05/07/freeland-makes-it-very-clear-the-northwest-passage-is-canadas-after-pompeo-questions-legitimacy.html>.

59. Jane George, “Canadian Inuit challenge US stance on Northwest Passage,” *Arctic Today*, May 15, 2019, <https://www.arctictoday.com/canadian-inuit-challenge-u-s-stance-on-northwest-passage/>. The report was also published the same day by *Nunatsiaq News*, <https://nunatsiaq.com/stories/article/canadian-inuit-challenge-u-s-stance-on-northwest-passage/>.

60. “Foreword,” in ITK, *Nilliajut 2—Inuit Perspectives on the NWP, Shipping and Marine Issues* (Ottawa: Inuit Tapiriit Kanatami (ITK), 2017), at p. 4, [https://www.itk.ca/wp-content/uploads/2018/01/NilliajutTextPages\\_Draftv4\\_english\\_web.pdf](https://www.itk.ca/wp-content/uploads/2018/01/NilliajutTextPages_Draftv4_english_web.pdf).

61. In its ground breaking 2001 *Awas Tingni* decision, the International Court of Human Rights held that: “Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.” *The Mayagna (Sumo) Awas Ingni Cmty v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 August 2001)* at para 149. Wiessner has argued that the Court’s finding is best understood “in terms of a broader normative shift among states in their understanding of indigenous rights under international law”. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, *European Journal of International Law* 22, 1 (2011), at pp. 121-140, at p. 137. Reflecting this “normative shift,” the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) was adopted on September 13, 2007 by 144 States. Although UNDRIP is ‘soft law’ (not itself a source of binding legal obligations), there is growing evidence that it is contributing to the emergence of new norms of customary international law.

62. *Supra*, note 1.

63. Available under the “History” tab on the International Boundary Commission website, <http://www.internationalboundarycommission.org/en/about/history.php>.

64. *Ibid.*

65. Under the “About Us” tab on the International Boundary Commission website, <http://www.internationalboundarycommission.org/en/>.

66. Agreement between the Government of Canada and the Government of the United States of America on the North American Aerospace Defence Command, available on the Global Affairs Canada website under the Treaty Law Division, <https://www.treaty-accord.gc.ca/text-texte.aspx?id=105060>. The May 2006 renewal added a maritime warning mission to the command’s existing missions.

67. See <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/caf-operations-activities/2020/03/caf-ops-activities/norad.html>.

68. U.S.–Canada Joint Statement on Climate, Energy, and Arctic Leadership, 10 March 2016. Available on The White House website, <https://obamawhitehouse.archives.gov/the-press-office/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership>.

