

The NATIONAL STRATEGY FORUM REVIEW

An Online National Security Journal Published by the National Strategy Forum

Canada's Sovereignty and the Northwest Passage

By **Richard E. Friedman**

Richard E. Friedman is President of the National Strategy Forum and Publisher of the National Strategy Forum Review. He is also a Counselor to the American Bar Association Standing Committee on Law and National Security.

Canada claims that the waters of the Canada Arctic Archipelago are internal waters. In August 1985 a westerly crossing of the Northwest Passage (NWP) was made by a U.S. Coast Guard icebreaker. Canada advised the U.S. that the waters of the Arctic Archipelago, which include several routes through the NWP, are Canada's internal waters. The U.S. position and that of many states is the contention that the NWP is an international strait.

Canada asserts two legal bases in support of its claim: the drawing of straight baselines that define the dimension of the area over which Canada claims sovereignty and historic title to the disputed area.

The rationale for the formulation of international law was the consequence of the voyages of discovery of Columbus, Magellan, and Vasco de Gama, which resulted in the awakening of cartographic knowledge of the breadth of earth's waterways, sea travel opportunities, and disputes over littorals, bays, and sea routes based on sovereignty.

An objective review of the applicable principles of international maritime law is needed to define, but not to judge, Canada's claims. The concept of historic waters title is the basis for the claim of internal waters which emerged in the nineteenth century regarding Norway's fjords. Canada as a claimant state has the difficult burden of proof to support its historic title argument. Although Canada has launched many expeditions to the Arctic to consolidate its land title, the objective was restricted to the land rather than the water title.

In 1985 Canada asserted its claim that all waters among its Arctic islands were internal waters. To establish its claim, straight baselines from these islands were drawn: "Canada is determined to exercise full sovereignty over the historic internal waters of the Arctic Archipelago." The U.S. and the Member States of the European Community position is that member states cannot recognize the validity of historic title as justification for the baselines drawn by Canada.

In the event that, after vigorous pursuit of an affirmative adjudication of its right, it is determined that the NWP is an international waterway, Canada has a strong fallback position based on *passage* through the NWP. This is conditioned on whether it is a strait for international navigation. The NWP is transit bounded by the Atlantic and Pacific oceans. The consequence of a “strait” is whether passage can be prohibited in time of peace. Two criteria must be met: the use of the strait (for transit purposes) and geography. The latter criterion is met because it links two seas.

Canada opposes the doctrine of “right of innocent passage” which vitiates conditions such as prior approval of transit. Notwithstanding the objective of transit between the two seas, Canada claims that the landlocked waters between the two seas are its internal waters.

The recent shrinking of the icepack and likelihood that more thinning and partial disappearance of ice may occur in the future suggests that this will result in a substantial increase of transit (passage of foreign commercial ships). Canada could regulate pollution, fishing, and loading and unloading, but it would have a lesser degree of power to enforce its regulations.

Apart from domestic political opposition based on nationalism, Canada must decide whether it is in its best interest to block or control foreign shipping through the NWP. Its objectives would be: to protect the Arctic environment and the Inuit inhabitants of the region.

Canada asserts that the waters of the NWP are wholly internal waters and that the unconditional innocent right of passage of foreign ships is legally impermissible. In the event that, after adjudication, this contention is not supported, Canada as the major stakeholder in the circumpolar region could use its considerable diplomatic skill to organize and lead a consortium of states for the protection of the Arctic.