
THE POTENTIAL-USE TEST AND THE NORTHWEST PASSAGE

The official position of the United States government is that the Northwest Passage — a strait between the Atlantic and Pacific Oceans, running through the ice-packed Arctic — is one of the “straits which are used for international navigation” under Article 37 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS III).¹ Canada, on the other hand, asserts that the Northwest Passage constitutes internal waters and does not fall under any definition of international strait.²

While the two nations have amicably agreed to disagree on this issue for the past several decades, the melting of Arctic ice and resultant increase in shipping through the Passage could bring the dispute to a head in the near future.³ Any attempt by Canada to limit or restrict navigation through the Passage in the coming years, for example, could plausibly prompt UNCLOS III member states with interests in the Arctic to bring an action against Canada in an international tribunal.⁴

If the United States’ position were to prevail in this dispute, then ships from any nation would be permitted to conduct “transit passage” through the Northwest Passage without interference.⁵ If Canada’s position were to prevail, Canada would be able to regulate at will the

¹ See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III]; S. EXEC. REP. NO. 110-9, at 20 (2007); OFFICE OF OCEAN AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 112, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 29 (1992).

² See Territorial Sea Geographical Coordinates (Area 7) Order, SOR/1985-872 (Can.) (detailing Canada’s claims to land and waters that include the Northwest Passage); Note from the Canadian Embassy, Washington, D.C., to the U.S. Dep’t of State (June 11, 1985), *reprinted in* 2 MARION NASH (LEICH), DEP’T OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, at 2047 (1994).

³ See Laurence C. Smith & Scott R. Stephenson, *New Trans-Arctic Shipping Routes Navigable by Midcentury*, 110 PROC. NAT’L. ACAD. SCI. E1191, E1992 (2013) (finding that, by 2040, the Northwest Passage will be “more efficacious than any other route 100% of the time” for moderately ice-strengthened vessels traveling between the eastern coast of North America and the Bering Strait). Considering that the opening of the Passage would potentially change the face of global shipping, the stakes of this dispute are incredibly high. See Scott G. Borgerson, *Arctic Meltdown*, 87 FOREIGN AFF. 63, 69-70 (2008) (stating that the opening of Arctic routes could save the shipping industry billions of dollars per year).

⁴ Claims under UNCLOS III can take place in either an international court or an international tribunal. See UNCLOS III, *supra* note 1, art. 287, ¶ 1. When a state accedes to UNCLOS III, it chooses its dispute resolution mechanism. See *id.* As Canada’s disputes go to either the International Tribunal for the Law of the Sea, if the other party also has agreed to resolve disputes before this tribunal, or an arbitral tribunal, if the other party has not, this Note will use the term “tribunal.” See 6. *United Nations Convention on the Law of the Sea, Status of Treaties, Depository, UNITED NATIONS TREATY COLLECTION*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec [<https://perma.cc/9K2Q-P8RN>].

⁵ See UNCLOS III, *supra* note 1, art. 38.

movement of each ship that traverses the Passage.⁶ In assessing whether the Passage is an Article 37 strait, a tribunal would likely conduct both a geographic test (evaluating whether the passageway is considered a strait) and a functional test (evaluating whether the passageway is used for international navigation). The Northwest Passage easily qualifies as a strait under the geographic test.⁷ The dispute is over whether Article 37 requires a functional test at all; and if it does, whether it demands an inquiry into the strait's *historic* use or *potential* use in international navigation.⁸

This Note is the first attempt to provide support for the position that an inquiry into potential use is the appropriate test to determine whether the Northwest Passage is one of the “straits which are used for international navigation” under the functional test of Article 37. Although this is the official position of the U.S. government — and has been since even before UNCLOS III went into effect⁹ — there has been no scholarship to date that has attempted to comprehensively articulate this position.¹⁰

Part I provides context for the debate by laying out the background of the Northwest Passage, the *Corfu Channel*¹¹ decision (the predecessor to Article 37), UNCLOS III, and the claims Canada has asserted to exert its influence on ships transiting the Passage. Part II challenges the Canadian position that the functional test of Article 37 calls for an inquiry into historic use. By applying the framework outlined in the Vienna Convention on the Law of Treaties, it lays out support for the position that the correct test is one of potential use. Part III applies Article 37's geographic and functional tests to the Northwest Passage, finding that the Passage is a strait used for international navigation.

⁶ See, e.g., *id.* art. 25; see also Ed Struzik, *Shipping Plans Grow as Arctic Ice Fades*, YALE ENV'T 360 (Nov. 17, 2016), https://e360.yale.edu/features/cargo_shipping_in_the_arctic_declining_sea_ice [https://perma.cc/MM69-9UXY] (noting that Canada is expected to “charge shipping companies fees . . . when they sail through the Northwest Passage”).

⁷ See Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 36 (2007).

⁸ See *id.* Even if the argument of this Note were to fail and the historic-use test were to be accepted as international law, there is still a strong argument that the Passage would qualify as an Article 37 strait. See J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 478–79 (3d ed. 2012).

⁹ See Richard J. Grunawalt, *United States Policy on International Straits*, 18 OCEAN DEV. & INT'L L. 445, 454–56 (1987).

¹⁰ While some scholars have advocated for the potential-use test, see, e.g., *id.* at 456, this Note represents the first full defense of this position.

¹¹ (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

I. BACKGROUND AND LEGAL FRAMEWORK

In the decades that followed the first crossing of the Northwest Passage in the early twentieth century, technological advances in transportation, refrigeration, and oil drilling led to an explosion of maritime travel and shipping.¹² Coastal states, seeking to capitalize on the rich resources found just off their shores, reacted by staking their territory further out from land than ever before.¹³

This rush to “enclose the oceans” within territorial boundaries “led to the possibility that many straits of the world — previously open to free navigation — would slip in whole or in part under national jurisdiction.”¹⁴ The conflict between states that bordered straits and those that did not led to much of the development of the law of the sea throughout the latter portion of the twentieth century, and culminated in UNCLOS III in 1982.¹⁵

A. *The Northwest Passage*

For hundreds of years, the existence of the Northwest Passage was a mere hypothesis; many explorers died attempting to find a route from the Atlantic Ocean, around the northern reaches of North America, and through to the Pacific Ocean.¹⁶ Governments and international corporations all hoped that this new “Silk Road” would efficiently link Western Europe to East Asia,¹⁷ yet each attempt to find the passage was met with failure. Finally, in 1906, the Norwegian explorer Roald Amundsen discovered a navigable pathway¹⁸ — but the explorer’s ability to make the trip did not mean the Passage was a viable route for commerce.¹⁹ It was another sixty-three years before the SS *Manhattan*, a tanker specially fitted to withstand the Arctic ice, completed the first

¹² See David D. Caron, *The Great Straits Debate: The Conflict, Debate, and Compromise that Shaped the Straits Articles of the 1982 United Nations Convention on the Law of the Sea*, in NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW 11, 11–12 (David D. Caron & Nilufer Oral eds., 2014).

¹³ See *id.* at 12.

¹⁴ *Id.*

¹⁵ *Id.* at 12–14.

¹⁶ For a comprehensive account of the history of expeditions to the Northwest Passage, see generally DONAT PHARAND, *THE NORTHWEST PASSAGE: ARCTIC STRAITS* 22–39 (1984).

¹⁷ The Northwest Passage is half the distance of the shipping routes that currently connect East Asia and Europe. See MICHAEL BYERS, *WHO OWNS THE ARCTIC?* 12 (2010).

¹⁸ ROALD AMUNDSEN, *MY LIFE AS AN EXPLORER* 58–60 (1928).

¹⁹ His vessel had a shallow draft, constructed to navigate stretches of water where ice lay below the surface. See *id.* at 38. Large commercial vessels, then, were unable to take the same route.

purely commercial voyage.²⁰ Since then, only a handful of commercial vessels have traversed the Passage, albeit with increasing frequency.²¹

The international community has been split on the Passage's legal status since the 1960s.²² The United States and the European Community have argued that the Passage is an international strait,²³ while Canada has vehemently contended that the Passage is squarely within Canadian territory.²⁴ To date, however, this question has largely been moot: although the United States asserts it is free to send its vessels through the Passage at will, it has done so without prior consent from Canada only once.²⁵

As a result of the 1988 Agreement of Arctic Cooperation,²⁶ the United States and Canada have avoided conflict over the Passage,²⁷ but its legal status will become increasingly important as it becomes ice free during longer spans of time each year.²⁸ A full evaluation of Article 37's applicability to the Northwest Passage, however, first requires an understanding of the legal precedent on straits.

B. *The Corfu Channel Case*

In 1949, the International Court of Justice (ICJ) ruled on a dispute between the United Kingdom and Albania over the legal status of the Corfu Channel following an incident in which two U.K. warships struck Albanian mines.²⁹ One of the central issues was whether the Channel qualified as a "strait used for international navigation."³⁰ The ICJ held that the Corfu Channel was indeed an international strait, meaning that

²⁰ See John Kirton & Don Munton, *The Manhattan Voyages and Their Aftermath*, in *POLITICS OF THE NORTHWEST PASSAGE* 70–71 (Franklyn Griffiths ed., 1987).

²¹ Including the voyage of the SS *Manhattan*, there have been eleven transits of shipping vessels — four of which occurred in the 2019 navigation season. See R. K. HEADLAND ET AL., SCOTT POLAR RES. INST., TRANSITS OF THE NORTHWEST PASSAGE TO END OF THE 2019 NAVIGATION SEASON 1, 3–12 (2020), <https://www.spri.cam.ac.uk/resources/infosheets/northwestpassage.pdf> [<https://perma.cc/4VAH-FQ44>].

²² See Kirton & Munton, *supra* note 20, at 73–75.

²³ See ROACH & SMITH, *supra* note 8, at 112.

²⁴ See Pharand, *supra* note 7, at 10–13.

²⁵ See *id.* at 42.

²⁶ Agreement on Arctic Cooperation, Can.-U.S., Jan. 11, 1988, 1852 U.N.T.S. 59.

²⁷ See Pharand, *supra* note 7, at 12.

²⁸ See Smith & Stephenson, *supra* note 3, at E1191.

²⁹ Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9). The Corfu Channel is the strip of water between the Albanian and Greek mainlands and the Greek island of Corfu. 1 AARON L. SHALOWITZ, U.S. DEP'T OF COMMERCE, SHORE AND SEA BOUNDARIES: WITH SPECIAL REFERENCE TO THE INTERPRETATION AND USE OF COAST AND GEODETIC SURVEY DATA 75 (1962).

³⁰ Had the Channel not been a strait used for international navigation, the presence of the British ships would have violated Albanian sovereignty. See *Corfu Channel*, 1949 I.C.J. at 28.

British ships had the right of “innocent passage” when in the Channel.³¹ In its holding, the court stated: “[T]he decisive criterion is . . . [the Channel’s] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.”³²

In *Corfu Channel*, then, the ICJ concluded that both a geographic test and a functional test applied to the determination of whether the Corfu Channel was an international strait. While the geographic test (whether the strait “connect[s] two parts of the high seas”³³) left little room for interpretation, the court’s application of the functional test (whether the strait is “used for international navigation”³⁴) left tremendous uncertainty.³⁵ The subjectivity surrounding the question of what qualifies as an international strait — and many other questions like it — led many of the United Nations member states to call a convention to discuss and codify the law of the sea.³⁶

C. *The United Nations Convention on the Law of the Sea*

The first iteration of the United Nations Convention on the Law of the Sea (UNCLOS) took place in 1958, with the goal of codifying and clarifying the regime of the law of the sea that had developed up to that time.³⁷ Over the decades following the 1958 Convention,³⁸ member states held two additional conventions: one in 1960,³⁹ and one in 1982.⁴⁰ The third convention, UNCLOS III, led to the creation and implementation of the agreement that is currently in force.⁴¹

³¹ The specifics of innocent passage were not fully defined — and a broader right of transit passage was not recognized — until UNCLOS III. *See infra* p. 2584.

³² *Corfu Channel*, 1949 I.C.J. at 28.

³³ *Id.*

³⁴ *Id.*

³⁵ In its determination that the Channel satisfied the functional test, the ICJ did not sketch out the minimum criteria by which other straits should be measured, instead narrowly deciding the reasons that the Corfu Channel *did* qualify. While many authors have postulated the significance of the court’s brief treatment of functional use, *see, e.g.*, Pharand, *supra* note 7, at 37–42, there is good reason to believe that the court simply emphasized the Corfu Channel’s historic use to justify its status as an international strait *despite the existence of an alternative route through the high seas*, not because it considered such use necessary for recognition as an international strait, *see infra* pp. 2597–98.

³⁶ *See* Caron, *supra* note 12, at 11–12.

³⁷ *See id.* at 12.

³⁸ The first convention “did not succeed in fixing the outer limit of the territorial sea,” *id.*, thereby failing to resolve the ambiguity surrounding international straits.

³⁹ The main purpose of the 1960 convention was to “determin[e] the outer limit of the territorial sea.” *Id.* However, the parties to the six-week UNCLOS II failed to reach an agreement. *See id.*

⁴⁰ The third convention began in 1973 and lasted until 1982. *See id.* at 14.

⁴¹ UNCLOS III superseded the products of UNCLOS I, including the Convention on the Territorial Sea and the Contiguous Zone. *See* UNCLOS III, *supra* note 1, pmb1.

Nearly every area of the law of the sea was up for debate at UNCLOS III,⁴² but the impetus for the convention was the question of how states would define territorial waters.⁴³ Bound up with this question was the question of how straits would be treated. The two issues are inextricably linked: as a nation's territorial sea expands outward, more and more geographic straits risk coming within the jurisdiction of bordering states, thereby limiting the ability of other states to navigate what had previously been the high seas.⁴⁴

UNCLOS III ended with several important contributions to the regime of straits. First, it established a new right of transit passage, which allowed international vessels to travel through "straits which are used for international navigation"⁴⁵ without any interference by the strait-bordering state,⁴⁶ provided they do so "without delay" and while "refrain[ing] from any activities other than those incident to their normal modes of continuous and expeditious transit."⁴⁷ Prior to UNCLOS III, travel through international straits was protected only by the regime of innocent passage; after UNCLOS III, the new transit passage applied to international straits, whereas innocent passage applied to entirely different classes of straits.⁴⁸ There are significant differences between the two rights. Under innocent passage, for example, carriers may not launch aircraft,⁴⁹ submarines must travel on the surface,⁵⁰ and states may heavily regulate the movement and activities of foreign ships.⁵¹ With some exceptions, those restrictions do not apply under transit passage.⁵²

Second, UNCLOS III succeeded in setting the limits of the territorial sea at twelve nautical miles⁵³ — a significant achievement, as the previous conventions had failed to resolve this issue.⁵⁴ Although the breadth of the territorial sea was a contentious topic, this article passed

⁴² Issues dominating the convention included "the legal regime of the deep sea bed," "the regimes of the territorial sea and the contiguous zone," and "the preservation of the marine environment and scientific research." R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 16 (3d ed. 2017).

⁴³ See Caron, *supra* note 12, at 12–13.

⁴⁴ See *id.* at 11–12.

⁴⁵ UNCLOS III, *supra* note 1, art. 37.

⁴⁶ See *id.* art. 38.

⁴⁷ *Id.* art. 39(1).

⁴⁸ See *infra* note 56 and accompanying text.

⁴⁹ See UNCLOS III, *supra* note 1, art. 19.

⁵⁰ See *id.* art. 20.

⁵¹ See *id.* art. 21.

⁵² See *id.* arts. 39–44.

⁵³ *Id.* art. 3.

⁵⁴ See Caron, *supra* note 12, at 12. Following each of the previous conventions, the breadth of the territorial sea remained at three nautical miles in accordance with customary international law. See JAMES KRASKA, *MARITIME POWER AND THE LAW OF THE SEA* 115–16 (2011).

as a result of the bargain for transit passage, ensuring that robust freedom of navigation through straits would be preserved for all nations.⁵⁵

Third, the Convention succeeded in creating a far more granular regime governing straits, allowing states to more clearly know where transit passage was permitted, and where foreign ships were subject to the requirements of innocent passage. However, although UNCLOS III provides for at least four types of international straits,⁵⁶ only Article 37 protects the right of transit passage that was so ardently fought for at the Convention.⁵⁷ This article reads as follows:

This section⁵⁸ applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁵⁹

While the article seems straightforward on its face, the member states failed to define international straits more precisely than the ICJ had in *Corfu Channel*.⁶⁰ Accordingly, the ambiguity of the phrase “used for international navigation” has continued to engender significant controversy following UNCLOS III, particularly regarding the article’s application to the Northwest Passage. This uncertainty, combined with Canada’s sweeping claims to the Passage, has resulted in a long-running dispute between Canada and the international community.

D. Canadian Claims to Jurisdiction over the Northwest Passage

The Canadian government has, over the past century, inconsistently used a variety of justifications to provide support for the claim that the Arctic Archipelago north of Canada — including the Northwest

⁵⁵ See Caron, *supra* note 12, at 14–15.

⁵⁶ See Jon M. Van Dyke, *Rights and Responsibilities of Strait States*, in NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW, *supra* note 12, at 33–34. Article 35(c) exempts from the treaty regime straits governed by “long-standing international conventions.” UNCLOS III, *supra* note 1, art. 35(c). Article 38(1) provides an exception to straits that would otherwise fall under the transit-passage regime, guaranteeing innocent passage through straits “formed by an island of a State bordering the strait and its mainland . . . if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience.” *Id.* arts. 38(1), 45(1)(a). Article 45(1)(b) guarantees innocent passage through straits that connect “a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.” *Id.* art. 45(1)(b).

⁵⁷ See Van Dyke, *supra* note 56, at 35.

⁵⁸ Section 2 of UNCLOS III, which governs the right of transit passage. See UNCLOS III, *supra* note 1, art. 37.

⁵⁹ *Id.* An “exclusive economic zone” (EEZ) is a 200-nautical-mile “area beyond and adjacent to the territorial sea,” *id.* arts. 55, 57, where a bordering coastal state has fewer rights than those associated with a territorial sea, but far more than those on the high seas, *see id.* art. 56.

⁶⁰ The language of this article closely follows the language of the *Corfu Channel* decision, which references “straits used for international navigation.” See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 28 (Apr. 9).

Passage — should be considered Canadian internal waters. Its justifications have ranged from application of the sector principle,⁶¹ claims of historic title,⁶² and its current position, the usage of straight baselines.⁶³

If a strait meets the requirements of Article 37, however, a claim to sovereignty under a straight baselines theory has no bearing on the rights of vessels transiting the strait: the vessels' movements are subject to transit passage.⁶⁴ Thus, even if Canada's claim to straight baselines encompassing the entire Arctic Archipelago were to succeed in an international tribunal, a finding that the Passage is an Article 37 strait would mean that international-flagged vessels would be able to freely transit the Passage without interference from the Canadian government.

E. Dispute over the Appropriate Test for Article 37 Straits

The key question, then, is whether the Northwest Passage qualifies as a strait used for international navigation under Article 37. The dispute can generally be reduced to two positions. Both sides agree that there is a geographic requirement as to whether a strait falls under Article 37 — whether the strait connects “one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”⁶⁵ The disagreement rests on whether there is a functional test as well, and if so, how that test should be applied.

⁶¹ See Paul Andrew Kettunen, *The Status of the Northwest Passage Under International Law*, 4 DET. C.L. REV. 929, 972 (1990). In the early years of the twentieth century, officials within the Canadian government attempted to claim the whole of the Arctic Archipelago on this theory, which gives Arctic countries claim to “sectors” propagating out from the pole, see Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 336 (1993), although there is some dispute as to whether the theory was ever fully adopted by the Canadian government, see Pharand, *supra* note 7, at 10. The theory has since fallen out of favor in the international community. See Rothwell, *supra*, at 336-37.

⁶² A country may claim land through historic title if it can prove “the exclusive exercise of State authority, long usage or the passage of time, and the acquiescence of foreign States.” Donat Pharand, *Canada's Sovereignty over the Northwest Passage*, 10 MICH. J. INT'L L. 653, 656 (1989). Even strong advocates of Canada's claim to the Passage concede that this approach is without merit, as the United States' consistent protests to Canada's inconsistent proclamations are basis enough to discard application of the theory. See *id.* at 656-60.

⁶³ See Territorial Sea Geographical Co-ordinates (Area 7) Order, SOR/1985-872 (Can.). Straight baselines refer to notional geographic boundary lines. Under the straight baseline theory, “where a coast is deeply indented or is bordered by an archipelago, it is permissible to draw straight baselines across the indentations and between the outermost points of the islands, and measure the territorial sea from those baselines.” Pharand, *supra* note 62, at 661.

⁶⁴ See UNCLOS III, *supra* note 1, art. 35(a); *id.* art. 37; see also *id.* art. 34(2) (“The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.”). The only exception to this statement is when “the strait is formed by an island of a State bordering the strait and its mainland.” *Id.* art. 38(1). In this case, “transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience . . .” *Id.* This is not the case for the Northwest Passage.

⁶⁵ *Id.* art. 37.

Those who believe that the Northwest Passage is Canadian (the “straits-states” view⁶⁶) assert that there *is* a functional test and that the specific question is whether the strait has “a history of use for international maritime traffic.”⁶⁷ In applying this test to the Northwest Passage, straits-states scholars argue that the Passage fails to meet the threshold for historic use, as nearly all transits of the Northwest Passage were completed with Canada’s “prior authorization . . . either expressly or by implication.”⁶⁸

The opposing view is that the Northwest Passage is an international strait under Article 37 (the “non-straits-states” view). Within this position are two distinct viewpoints. One holds that there is no functional test whatsoever.⁶⁹ The other contends that, although there *is* a functional test, the appropriate question is that of *potential* use — whether a strait could plausibly be used for international navigation, not whether the strait has historically been used for it.⁷⁰ Although the two non-straits-states positions seem identical, under the second viewpoint, a strait may still fail the test of potential use if it lacks features that make it appropriate for international navigation (such as requisite depth and width). This Note seeks to lend weight to this second viewpoint and argues that the correct functional test under Article 37 is whether a strait has the potential for use in international navigation.

II. ANALYSIS OF ARTICLE 37 OF UNCLOS III

Evaluating whether the Northwest Passage is an Article 37 strait is an exercise in treaty interpretation. If the disagreement between Canada and other states claiming a right to transit passage were to come to a head, either Canada or another signatory to UNCLOS III could settle the dispute in an international tribunal.⁷¹ The decision of the

⁶⁶ “Straits states” and “non-straits states” refer to the two general factions formed at UNCLOS III. The straits states argued in support of their ability to control their bordering straits. The non-straits states advocated for freedom of navigation through straits. See UNCLOS III, *Summary Records of the Meetings of the Second Committee, Second Session: 13th Meeting*, ¶¶ 1, 27, U.N. Doc. A/CONF.62/C.2/SR.13 (July 23, 1974).

⁶⁷ See Pharand, *supra* note 7, at 37.

⁶⁸ *Id.* at 42. The exception to this, according to Professor Donat Pharand, is the USCGS *Polar Sea*’s crossing of the Northwest Passage in 1985. See *id.*

⁶⁹ See, e.g., James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INT’L J. MARINE & COASTAL L. 257, 275 (2007) (“The test is geographic, not functional — if the water connects one part of the high seas or EEZ to another part of the high seas or EEZ, it is a strait.”).

⁷⁰ See, e.g., S. EXEC. REP. NO. 110-9, at 20 (2007) (“[T]he term ‘used for international navigation’ includes all straits capable of being used for international navigation.”); Grunawalt, *supra* note 9, at 456 (“[T]he United States[] place[s] less emphasis on historical use and look[s] instead to the susceptibility of the strait to international navigation.”).

⁷¹ See UNCLOS III, *supra* note 1, art. 287, ¶ 1. For an explanation of Canada’s dispute resolution mechanisms under UNCLOS III, see *supra* note 4.

tribunal would be binding on the two states as well as on all other signatories to UNCLOS III.⁷² In the event the case were decided in favor of Canada's claim, the decision would almost certainly prevent most signatories to UNCLOS III from transiting the Passage without first obtaining Canada's consent — and perhaps paying a fee — thereby diminishing or eliminating the positive economic effects associated with the continued opening of the Northwest Passage.⁷³

Given the weight that a decision from an adjudicative body would have, it is important to understand the context within which the tribunal would evaluate Article 37. As UNCLOS III is a United Nations treaty, any tribunal evaluating its contents would refer to the Vienna Convention on the Law of Treaties (VCLT) for interpretive guidance.⁷⁴ Commonly referred to as the “treaty of treaties,” the VCLT brought together parties who set out to codify customary international law as it pertains to treaty interpretation.⁷⁵

The VCLT provides clear instructions as to how we should interpret Article 37. Under Article 31 of the VCLT, we should first look at “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” along with relevant international law and the subsequent actions of signatories following the conclusion of the treaty.⁷⁶ In the event that the text after interpretation under Article 31 remains ambiguous, we may turn to Article 32 of the VCLT, which provides recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning.”⁷⁷

⁷² See UNCLOS III, *supra* note 1, art. 296, ¶ 1. Of note, the United States is one of the few states that has not acceded to UNCLOS III and would thus not be bound by the decision. See 6. *United Nations Convention on the Law of the Sea*, *supra* note 4. Of course, continued travel of U.S. vessels through the Northwest Passage would put a strain on the otherwise amicable relationship between the two countries.

⁷³ If Canada were to charge fees for international vessels, it could easily make the Passage economically unviable. See Dongqin Lu et al., *An Economic Analysis of Container Shipping Through Canadian Northwest Passage*, 1 INT'L J. E-NAVIGATION & MAR. ECON. 60, 70 (2014).

⁷⁴ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT is “universally accepted as the general guide of treaty interpretation,” ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 313 (2008), and has been affirmed as a reflection of customary international law, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3). All international courts and tribunals interpret treaties in accordance with the VCLT. See, e.g., *Jadhav (India v. Pak.)*, Judgment, 2019 I.C.J. Rep. 1, ¶ 71 (Jul. 17).

⁷⁵ *50 Years Vienna Convention on the Law of Treaties*, U. VIENNA (Nov. 18, 2019), https://deicl.univie.ac.at/en/news-international-law/detail-view/news/50-years-vienna-convention-on-the-law-of-treaties-1/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c453697a2b62c1a403b06e4408c12119 [https://perma.cc/P8QK-F2CD].

⁷⁶ See VCLT, *supra* note 74, art. 31.

⁷⁷ *Id.* art. 32.

A. *Analysis Under Article 31 of the Vienna Convention: Ordinary Meaning*

In accordance with Article 31 of the VCLT, the first step in evaluating UNCLOS III's Article 37 is to assess its ordinary meaning.⁷⁸ Although an inquiry into plain meaning⁷⁹ is a necessary part of this analysis, in cases where the words being scrutinized are ambiguous or unclear — as this Note argues is the case for Article 37 — a tribunal must base its holding on other, contextual forms of analysis.⁸⁰

1. *Plain Meaning.* — The functional test of Article 37 can be broken down to two components: “are used” and “international navigation.”⁸¹ There are at least three possible readings of “international navigation.”⁸² First, “international” could refer to any navigation that begins at the port of one nation and ends at the port of another. Second, it might “simply mean that the interest attached to *the use of* these straits is world

⁷⁸ See *id.*, art. 31, ¶ 1.

⁷⁹ Plain meaning is the generally accepted understanding of the words in the article. See ORAKHELASHVILI, *supra* note 74, at 318–19. An important note is that, as UNCLOS III was drafted in six languages — with each version of the text “equally authentic,” UNCLOS III, *supra* note 1, art. 320 — there is a threshold question of how to approach the multilingual aspect of the Convention. VCLT's Article 33 states that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text,” VCLT, *supra* note 74, art. 33, ¶ 3. Thus, unless a party in arbitration specifically alleges that there is a discrepancy between translations from one language to another, the tribunal “may consider any convenient text unless an argument is addressed to some other text,” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporter's note 2 (AM. LAW INST. 1987). We may therefore confidently proceed with our analysis, as a tribunal would, in the convenient text of English while operating under the presumption that the other texts have the same meaning.

⁸⁰ See Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 8 (Mar. 3) (“If . . . the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean . . .”). In some cases, however, international courts have placed even more weight on contextual forms of analysis than on plain meaning. See, e.g., South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, 1962 I.C.J. Rep. 319, 336 (Dec. 21) (stating that when the plain meaning “results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it”).

⁸¹ The term “strait” is not defined in the Convention and is also potentially ambiguous. See U.N. Office for Ocean Affairs and the Law of the Sea, *Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea* (1992), 68, ¶ 135(tt) [hereinafter *Legislative History of UNCLOS III*] (noting concern during the Convention that there would be confusion between the terms “canal” (an artificial waterway) and “strait” (a natural one)). Since the Northwest Passage clearly passes the geographic test of Article 37 as a strait that connects “one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone,” UNCLOS III, *supra* note 1, art. 37, that debate is outside the scope of this Note.

⁸² If one believes the historic-use test is correct, then the precise meaning of the phrase “international navigation” becomes significantly more important, as the *type* of international navigation that has occurred (or is occurring) can be dispositive in the Article 37 inquiry. However, as this Note advocates for the potential-use test — for which historic use is irrelevant — it is unnecessary to explore the intricacies of such arguments.

wide.”⁸³ Or third, it could mean navigation by vessels from foreign states without the consent or control of bordering states.⁸⁴ Either of the first two readings supports the conclusion that the Passage is an Article 37 strait.⁸⁵ But if “international navigation” refers only to navigation by foreign ships exercising their right of transit,⁸⁶ the question becomes whether Article 37 includes straits that *could* be used for such travel, or only those used historically.⁸⁷

The critical phrase, then, is “are used”: these two words form the core of the controversy between Canada and those states that have opposed its claim to the Northwest Passage over the past several decades. The phrase “are used,” when combined with “for international navigation,” comprises the functional test of whether a strait falls under the jurisdiction of Article 37.

The proper interpretation of this phrase, however, is unclear due to the way that it is structured. Because the phrase “straits which are used for international navigation” is in the present tense,⁸⁸ there is not a strong indication, on the text’s face, as to whether the drafters intended

⁸³ ERIK BRUËL, INTERNATIONAL STRAITS 43 (1947). This definition excludes “straits solely used for local traffic along the coasts of the strait (cabotage) and also traffic across the coasts of the strait, ‘even if shipping moves thereby from one State’s territory to another’ in the case of a strait having several bordering States.” HUGO CAMINOS & VINCENT P. COGLIATI-BANTZ, THE LEGAL REGIME OF STRAITS 117 (2014) (quoting S.N. Nandan & 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*, in LAW OF THE SEA 68, 77 (Hugo Caminos ed., 2001)).

⁸⁴ See Pharand, *supra* note 7, at 37–42 (arguing that, “[g]iven the control exercised by Canada over . . . foreign transits, . . . it is evident that the Northwest Passage has not had a history as a useful route for international maritime traffic,” *id.* at 42).

⁸⁵ See ANA G. LÓPEZ MARTÍN, INTERNATIONAL STRAITS: CONCEPT, CLASSIFICATION AND RULES OF PASSAGE 57–60 (2010); Nandan & Anderson, *supra* note 83, at 76–77 (arguing that a navigable strait that has been used at least once for any type of international navigation qualifies as an Article 37 strait).

⁸⁶ See Pharand, *supra* note 7, at 38. A tribunal could also narrow the term “international navigation” in other ways, such as by considering only transits of commercial vessels. See *id.* at 42 (referencing the “small number of commercial ships” that have transited the Passage).

⁸⁷ If this definition seems circular, it is because it presumes that Article 37 involves a historic-use test. All international navigation could potentially be done without the consent or control of the bordering state. The key question remains: Does the functional test require historic use or just potential use? The answer depends on how we interpret the phrase “are used.”

⁸⁸ Some authors contend that the word “used” places the sentence in the past tense. See, e.g., R. Douglas Brubaker, *Straits in the Russian Arctic*, 32 OCEAN DEV. & INT’L L. 263, 267 (2001) (“The employment of ‘used’ in the term ‘used for international navigation’ implies that there has to be some form of international traffic already ongoing.”); Nicholas C. Howson, *Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage*, 26 COLUM. J. TRANSNAT’L L. 337, 370 (1987) (“The [historic use] view is in accord with . . . an objective understanding of the past-tense ‘used’ . . .”). To be clear, with a passive phrase such as “are used,” we look to the tense of the word preceding the past participle — here, “are” — to determine the tense of the phrase. See *Passive Verbs*, PURDUE ONLINE WRITING LAB, https://owl.purdue.edu/owl/general_writing/grammar/verb_tenses/passive_verbs.html [https://perma.cc/7DFY-G56N]. Article 37 is, accordingly, in the present tense.

that the test be one of historic or potential use. Since both readings are common in everyday language, we must refer to the context of statements that use the phrase “are used” to determine whether the statement refers to historic or potential use.

To illustrate the necessity for context in interpreting the phrase “are used,” consider the following example: while walking through a forest, one might gesture to a grove of trees and say, “those trees are used for making syrup.” If the listener then looks at the trees and sees taps coming out of them, the listener will assume the speaker was referring to historic (or actual) use. Otherwise, the listener would reasonably believe that the speaker is asserting that *type* of tree is used for making syrup; in other words, the trees have the potential for use. As both meanings are reasonable, context — here, the presence or absence of taps — is required for the listener to understand what the speaker intended.

When conducting a plain meaning analysis of Article 37, however, we necessarily lack this context. Evaluating Article 37 on its own, one could reasonably argue that the drafters intended that a *particular strait* must have been historically used for international navigation. One could also argue that the strait must have the *potential* to be used for international navigation.⁸⁹ A third and equally plausible interpretation would be that the test should run forward in perpetuity: rather than the test being “frozen in time” when UNCLOS III entered into force, the use of present tense could indicate that the test should always be conducted at the time of a dispute.

Ultimately, the meaning of Article 37 is ambiguous. The use of present tense does not strongly favor the historic-use test, the potential-use test, or even the third “current-use test.” All interpretations are reasonable if the language of Article 37 is read in a vacuum. It was for situations like this that the drafters of the VCLT included context, object and purpose, and subsequent practice as interpretive tools available to the tribunal. Given the lack of clarity in Article 37 following this plain meaning analysis, the interpretation must turn on other methods.

2. *Context of Article 37.* — Evaluation of the context of a treaty provision in accordance with Article 31 of the Vienna Convention is a variant on the textualist inquiry.⁹⁰ Specifically, the purpose of a contextual analysis under Article 31 is to “ensure that the meaning ascribed to the treaty clause does not contradict the meaning that other clauses of the same treaty may possess, so that the treaty does not prescribe mutually contradictory outcomes” or “undermine[] the meaning of another clause in the same treaty.”⁹¹

⁸⁹ By having the requisite depth and width, for example.

⁹⁰ See ORAKHELASHVILI, *supra* note 74, at 340.

⁹¹ *Id.*; see also Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. Rep. 150, 158–59 (June 8) (basing its holding in part on the need to maintain consistency between different articles within the treaty).

A reading of Article 37 where the functional test is one of historic use would directly undermine Article 22 of UNCLOS III. This clause, which establishes how states should “designat[e] sea lanes” and prescribe “traffic separation schemes” within the territorial sea, instructs states to take into account “any channels *customarily* used for international navigation.”⁹² Under the straits-states position, “customarily” should be implicitly read into the phrase “straits used for international navigation” (effectively reading as “straits customarily used for international navigation”). However, if this term were to be implied in the language of Article 37, it would render the word “customarily” in Article 22 completely meaningless. In light of the canon against surplusage,⁹³ a contextual reading of Article 37 suggests that the drafters did not intend the functional test of Article 37 to be one of historic use.⁹⁴

3. *Object and Purpose of UNCLOS III.* — The object and purpose of a treaty “refers to the rationale of the treaty, its general design; it refers to reasons for which States-parties have adopted the relevant treaty and the aim they desire to achieve through it.”⁹⁵ In the face of ambiguity as to an article’s meaning, a tribunal would seek to arrive at an outcome in line with the “aims of the treaty.”⁹⁶ The tribunal’s inquiry would include an evaluation of the text of the treaty, “including its preamble, and the general design of the treaty.”⁹⁷

The preamble to UNCLOS III lays bare the tensions that brought about the Convention:

*The State Parties to this Convention, . . . [r]ecognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources . . . [h]ave agreed as follows . . .*⁹⁸

There is an inherent tension between the dual aims of protection of national sovereignty and promotion of efficient utilization of the

⁹² UNCLOS III, *supra* note 1, art. 22 (emphasis added).

⁹³ See Stephen M. Schwebel, *May Preparatory Work Be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 541, 545 (Jerzy Makarczyk ed., 1996).

⁹⁴ Diplomats S.N. Nandan and D.H. Anderson conduct a similar analysis in comparing Article 37 to Article 53, which governs the right of archipelagic sea lanes passage. See Nandan & Anderson, *supra* note 83, at 76–77.

⁹⁵ ORAKHELASHVILI, *supra* note 74, at 343.

⁹⁶ RICHARD GARDINER, *TREATY INTERPRETATION* 148 (2008).

⁹⁷ *Id.*; see also VCLT, *supra* note 74, art. 31(2) (“The context for the purpose of interpretation of a treaty shall comprise . . . its preamble and annexes . . .”); Sovereignty over Pulau Litigan and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. Rep. 625, ¶ 51 (Dec. 17) (referring to a treaty’s preamble in assessing object and purpose).

⁹⁸ UNCLOS III, *supra* note 1, pmbl.

seas⁹⁹ — both explicit in the Convention's preamble.¹⁰⁰ UNCLOS III was thus carefully constructed so as to protect both interests.

The dual creation of a twelve-mile territorial sea and a regime of transit passage through international straits represents the parties' clearest attempt to resolve this tension: a wide territorial sea protects national sovereignty, while the regime of transit passage promotes the efficient utilization of the seas. Recall that, prior to UNCLOS III, the limit to a country's territorial sea, according to customary international law, was a mere three nautical miles.¹⁰¹ There was also only partial protection for travel through international straits following UNCLOS I, as the treaty's guarantee of innocent passage to international-flagged vessels allowed for strict limitations on both military and commercial travel.¹⁰²

At UNCLOS III, there was a strong push to expand the territorial sea — but states were also concerned about the effect that this expansion would have on transit through straits. After all, if the territorial sea were measured at twelve miles, then straits of fewer than twenty-four nautical miles in width¹⁰³ could potentially be closed off to unrestricted international travel. This approach would be favorable to national sovereignty, but at the cost of severely limiting utilization of the seas. In order to find an agreeable compromise, the states struck the central bargain of UNCLOS III: a twelve-mile territorial sea would be approved only if unimpeded passage through international straits were also guaranteed.¹⁰⁴

Because the terms of the UNCLOS III bargain were unprecedented, understanding that bargain's significance requires close attention to its historical context. Previous attempts at establishing so large a territorial sea had failed in a matter of weeks at UNCLOS II;¹⁰⁵ even more striking, the regime of transit passage did not even exist as a theoretical concept before UNCLOS III.¹⁰⁶ That the Convention invented an entirely new regime of passage through straits to preserve freedom of navigation points to the member states' desire to hold this right paramount. Given the unambiguous twelve-mile territorial sea afforded to coastal states, it is implausible that the member states would intend for any ambiguity

⁹⁹ See *supra* p. 2583.

¹⁰⁰ UNCLOS III, *supra* note 1, pmb1.

¹⁰¹ See KRASKA, *supra* note 54, at 115–16.

¹⁰² See *supra* p. 2584.

¹⁰³ Representing the width of the territorial sea, measured from each side of the strait.

¹⁰⁴ See UNCLOS III, *Statement by the Chairman of the Second Committee at its 46th Meeting*, 243, U.N. Doc. A/CONF.62/C.2/L.86 (Aug. 28, 1974). In his summary of the work of the Second Committee of UNCLOS III, the chairman stated: "Acceptance of [a twelve-mile territorial sea] is, of course, dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation . . ." *Id.*

¹⁰⁵ See Caron, *supra* note 12, at 12.

¹⁰⁶ See *id.* at 15.

in wording on the other side of that bargain — in a right intended to *preserve* freedom of navigation — to be resolved in a manner that would severely *restrict* freedom of navigation.

The consequences of this reading are stark when considering the specific case of Canada and the Northwest Passage. Canada's territorial sea is one of the largest in the world, with thousands of miles of coastline. At the same time, the Northwest Passage has the potential to become one of the most economically significant straits in the world as Arctic ice continues to recede.¹⁰⁷ Considering the object and purpose of the Convention, it would be counterintuitive to construe the ambiguity in Article 37 in a manner that potentially closes off the Northwest Passage to all international travel, while simultaneously granting Canada exclusive rights to regulate all commercial activity in the Passage (on top of its already immense territorial sea). Such a reading of Article 37 clearly flies in the face of the central bargain of the Convention, struck to strengthen national sovereignty while *preserving* freedom of navigation — not at the *expense* of freedom of navigation.

An additional concern associated with the historic-use test is the gamesmanship that would undoubtedly result if states were able to influence the outcome of the test by their actions.¹⁰⁸ Since a central purpose of UNCLOS III was to ensure the “maintenance of peace,”¹⁰⁹ a tribunal considering the Convention's object and purpose should read the functional test in such a way as to minimize the risk of acrimony and instability among states. As a test whose application is not impacted by states' actions, the potential-use test far outperforms the historic-use test in this regard.

4. *Subsequent Practice.* — An inquiry into the subsequent practice of a treaty is not an evaluation of “practice *per se* but practice establishing agreement, whether explicit or implicit.”¹¹⁰ This test is not particularly useful for the assessment of whether the historic-use test or the potential-use test is the correct interpretation of Article 37, as the narrow nature of this question only applies to a handful of straits in the world. The 1988 Agreement of Arctic Cooperation has successfully defused the issue thus far as it pertains to the Northwest Passage, in that

¹⁰⁷ See Borgerson, *supra* note 3, at 69–70.

¹⁰⁸ These actions could include states restricting access through their bordering straits, see Pharand, *supra* note 7, at 48–52 (discussing ways Canada could prevent an “internationalization of the Northwest Passage” if the historic-use test were to apply, *id.* at 48), or states conducting freedom of navigation exercises through contested straits, cf. Paul Vieira & Jeremy Page, *Canadian Vessels Pass Through Taiwan Strait*, WALL ST. J. (June 19, 2019), <https://www.wsj.com/articles/canadian-vessels-pass-through-taiwan-strait-11560976733> [<https://perma.cc/9A3H-HQP7>] (describing Canadian naval vessels exercising their “freedom of navigation” through the contested Taiwan Strait).

¹⁰⁹ See UNCLOS III, *supra* note 1, pmbl.

¹¹⁰ ORAKHELASHVILI, *supra* note 74, at 356.

it requires the United States to obtain Canada's consent prior to sending icebreakers through the Passage.¹¹¹ By agreement, however, this requirement affects neither Canada's claim that the Northwest Passage is its internal waters, nor the United States' position that the Northwest Passage is a strait used for international navigation.¹¹²

Ultimately, while the text of Article 37 is ambiguous and the subsequent practice uninformative, the context of Article 37 and the object and purpose of UNCLOS III make clear that "straits which are used for international navigation" refers to all straits that have the potential for use in international navigation — including the Northwest Passage.

*B. Analysis Under Article 32 of the Vienna Convention:
Supplementary Means of Interpretation*

Under Article 32 of the VCLT, if the meaning of the treaty remains "ambiguous or obscure"¹¹³ after the Article 31 inquiry into ordinary meaning, then we may begin an inquiry into "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."¹¹⁴ Although an analysis under Article 31 indicates that the potential-use test is the correct interpretation of UNCLOS III's Article 37, an inquiry into preparatory work can further confirm the Article 31 analysis of ordinary meaning.¹¹⁵

The minutes of UNCLOS III, spanning the eleven sessions from 1973 to 1982, clearly show the differing factions that emerged over the course of the Convention. The aforementioned tensions between sovereignty and freedom of navigation were clear throughout: on one hand, the "straits states" sought to maximize their rights and ability to regulate nearby straits; on the other, the "non-straits states" sought to preserve freedom of navigation through straits.¹¹⁶

As representatives of a straits state, the Canadian delegation made a concerted push to include the historic-use test within Article 37 in the first two sessions of the Convention. First, during a discussion on straits,

¹¹¹ See Agreement on Arctic Cooperation, Can.-U.S., art. 3, Jan. 11, 1988, 1852 U.N.T.S. 59.

¹¹² See *id.* art. 4 ("Nothing in this agreement . . . affects the respective positions of the Governments of the United States and of Canada . . .").

¹¹³ See VCLT, *supra* note 74, art. 32, ¶ (a). This inquiry may also be required if the interpretation under Article 31 "[l]eads to a result which is manifestly absurd or unreasonable." *Id.* art. 32, ¶ (b).

¹¹⁴ *Id.* art. 32.

¹¹⁵ See Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 55 (Feb. 3) ("[A]s in previous cases, [the ICJ] finds it possible by reference to the [preparatory work] to confirm its reading of the text . . ."). Preparatory work can take only the form of official statements made during the treaty negotiations that have been documented in official "minutes or conference papers." Young Loan Arbitration (Belg. et al. v. Fed. Rep. of Ger.), Award of 16 May 1980, 19 I.L.M. (1980), 1357, ¶ 34. We are accordingly restricted to the contemporaneous accounts of the UNCLOS III debates in assessing Article 37's preparatory work.

¹¹⁶ See, e.g., UNCLOS III, *Summary Records of the Meetings of the Second Committee, Second Session: 13th Meeting*, ¶¶ 1, 27, U.N. Doc. A/CONF.62/C.2/SR.13 (July 23, 1974).

the Canadian delegate emphasized Canada's position, stating that, "in defining an international strait one must consider . . . that it must be a strait that had traditionally been used for international navigation."¹¹⁷ Then, during the Convention's second session, multiple delegations submitted drafts of the articles pertaining to international straits.¹¹⁸ Part of Canada's submission included a proposal that the definition for an international strait include the requirement that the strait "[h]as *traditionally* been used for international navigation."¹¹⁹

At the conclusion of the second session, the member states drafted a working paper to "reflect in generally acceptable formulations the main trends which have emerged from the proposals submitted."¹²⁰ At this point, it appears Canada had been successful in its efforts, as this working paper included Canada's definition of an international strait: that an international strait "is a natural passage between land formations which . . . [h]as *traditionally* been used for international navigation."¹²¹ Although it is important to note that the working paper was meant to be neither binding on nor reflective of the majority viewpoint of the parties in 1974,¹²² the working paper *was* the baseline from which the member states began discussions at the third session in 1975.¹²³

Despite the inclusion of the historic-use test in this working paper, the member states opted to not include this language in future versions of what would eventually become Article 37.¹²⁴ This shift from inclusion to exclusion is evidence that member states evaluated the merits of this position and affirmatively chose to remove it. Had the historic-use test never been included in a draft of the articles at all, then perhaps one could argue that this position represented the will of the member states despite it not being explicitly spelled out. After all, as the ICJ has stated, "[t]he fact that a particular proposal is not adopted by an international

¹¹⁷ *Id.* ¶ 3.

¹¹⁸ See Legislative History of UNCLOS III, *supra* note 81, at 14, ¶ 133.

¹¹⁹ UNCLOS III, *Canada: Draft Article on a Definition of an International Strait*, 241, U.N. Doc. A/CONF.62/C.2/L.83 (Aug. 26, 1974) (emphasis added).

¹²⁰ UNCLOS III, *Statement of Activities of the Conference During Its First and Second Sessions* prepared by the Rapporteur-general: Mr. Kenneth O. Rattray (Jam.), 109, U.N. Doc. A/CONF.62/L.8/REV.1 (Oct. 17, 1974).

¹²¹ *Id.* at 115, Provision 51, Formula D (emphasis added).

¹²² See *id.* at 109 ("The inclusion of these formulations does not imply any opinion on the degree of support they have commanded . . .").

¹²³ See Legislative History of UNCLOS III, *supra* note 81, at 79, ¶ 139. At the third session, the Second Committee established that it "would, first, undertake a review of the documents produced at Caracas The basic text would be the working paper on main trends." *Id.*

¹²⁴ At the Third Session, the member states created the informal single negotiating text that formed the basis for future discussions. See MYRON H. NORDQUIST, I UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 113-16 (1985). This text excluded the historic-use test entirely from Article 37. See UNCLOS III, *Informal Single Negotiating Text*, 158, art. 37, U.N. Doc. A/CONF.62/WP8/PART II.

organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed.”¹²⁵

However, here we have a case of the historic-use test *being adopted* in a draft, then removed — which is meaningfully different from the scenario contemplated by the ICJ. This distinct step of removing the historic-use test clearly indicates that the parties did not intend to be bound by it when evaluating whether a strait should be classified as used for international navigation, lending further support to the contention that the member states intended instead for a potential-use test to apply to Article 37.

*C. Responses to Arguments from Outside the Vienna
Convention's Interpretive Framework*

i. Flaws in Argument that Corfu Channel Should Be the Default Interpretation. — Some scholars contend that, because the meaning of Article 37 is contested, the construing tribunal should defer to the holding in *Corfu Channel*.¹²⁶ There are two major flaws with this position.

First, this argument misses the central point that the Convention served to expand upon and supplant customary international law, rather than to merely codify what was already in existence. The delegates to UNCLOS III were fully aware of the holding of *Corfu Channel*¹²⁷ and intended this Convention to take the place of previous ICJ decisions, rather than be bound by them.¹²⁸ In the event that non-straits states believed that the ambiguous wording of Article 37 meant that it would be read in the manner most favorable to straits states, then it seems highly unlikely they would have ever agreed to this wording of the article without some form of dialogue (which would have been reflected in the Convention's minutes). The position that the presence of ambiguity in Article 37 means that “existing customary international law must be relied on, mainly as interpreted and applied in the *Corfu Channel* case of 1949”¹²⁹ fails to account for the central purpose of UNCLOS III in

¹²⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 36, ¶ 69 (June 21).

¹²⁶ See Pharand, *supra* note 7, at 30.

¹²⁷ At one point, the delegate from Chile (a straits state) proposed that the working paper published at the end of the second session include a footnote indicating that “straits used for international navigation” should be defined in accordance with *Corfu Channel*. See UNCLOS III, *Summary Records of the Meetings of the Second Committee, Second Session: 14th Meeting*, ¶ 47, U.N. Doc. A/CONF.62/C.2/SR.14 (July 23, 1974). This footnote was never included in any working paper.

¹²⁸ Consider, for example, the creation of the regime of transit passage: if the states at the Convention simply wanted to codify *Corfu Channel*, then ships passing through international straits would have been guaranteed only innocent passage, rather than transit passage.

¹²⁹ See Pharand, *supra* note 7, at 30.

updating the law of the sea: to reconcile the tension between expansions in territorial waters and maintenance of freedom of navigation.

A second problem with copy-pasting *Corfu Channel* onto any application of Article 37 is the narrow nature of the *Corfu Channel* holding: the ICJ held that the Corfu Channel was an international strait, but the court did not hold that all international straits must look precisely like the Corfu Channel.¹³⁰ The unsuitability of the *Corfu Channel* analysis to the Northwest Passage becomes starker when comparing the differences between the two straits. Geographically and functionally, the two straits are inverses of each other: whereas the Corfu Channel is a strait of convenience with long historic use, the Northwest Passage is a strait of necessity with limited historic use.¹³¹

The holding of *Corfu Channel* was written in order to emphasize that the Corfu Channel, specifically, was a strait used for international navigation, *even though* there was another route available. The ICJ never ruled on the logically opposite situation — where a strait is one of necessity but has had limited historic use — such as the Northwest Passage. It would thus be illogical to attempt to apply *Corfu Channel's* reasoning to the Northwest Passage.

2. *Flaws in the Argument that Volume of Scholarship Lends Weight to Historic-Use Test.* — Some straits-states scholars contend that the number of articles published in support of the historic-use test gives the position strength.¹³² It is wise to view this claim with a degree of skepticism, as a relatively high volume of supporting literature does not necessarily correlate with an argument's strength. This is particularly the case here since, as Canada has the most to lose when it comes to control of the Passage, those who hold the straits-states view have the strongest incentive to write in support of their position.¹³³ In any case, any tribunal reading into the meaning of Article 37 must do so based off the bargain struck at the Convention, not on what academics supporting the straits-states position have advocated for in the intervening decades.

¹³⁰ See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep 4, 29 (Apr. 9) (“[T]he Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.”). At no point in the decision does the court define what constitutes an international strait.

¹³¹ The Corfu Channel separates the small Corfu Island from the Albanian and Greek mainland. Travel through the Channel is a mere convenience: if a vessel wanted to travel from the Adriatic Sea to the Ionian Sea, it could simply travel on the other side of the island, where its travel would be unquestionably permissible. The Northwest Passage, on the other hand, is the only efficient route from the Atlantic, around the northern coast of North America, and through to the Pacific.

¹³² See, e.g., BYERS, *supra* note 17, at 55; Pharand, *supra* note 7, at 35–36.

¹³³ Other scholars who advocate for freedom of navigation have myriad other issues to write about and may not devote the bulk of their scholarship to the Northwest Passage, instead focusing on more temporally pressing questions (such as freedom of navigation in the South China Sea).

III. APPLICATION OF ARTICLE 37 TO THE NORTHWEST PASSAGE

Now that we have established the appropriate functional test to determine whether a strait falls under Article 37, we may conduct our specific inquiry into the status of the Northwest Passage. As previously noted, in order to be considered an Article 37 strait, a given strait must pass both geographic and functional tests.

The Northwest Passage passes the geographic test: it is certainly a strait that comports with the geographic description in Article 37. Recall that Article 37 states that an international strait connects “one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”¹³⁴ As the Passage connects the Atlantic and Pacific Oceans — both squarely within the definition of “high seas” — the Passage satisfies the geographic test.¹³⁵

As established in Part II, the appropriate inquiry to determine whether a strait passes the functional test is one of potential use: Does the strait have the potential to be used in international navigation? Considering that international shipping through the Passage is currently taking place, has increased exponentially in the past decade,¹³⁶ and is expected to continue to do so, there is no question that the Passage would pass the potential-use test. There is hardly better evidence for the potential of something to occur than the fact that it is currently occurring.

CONCLUSION

It is evident that potential use is the correct standard for Article 37’s functional test. Evaluation of the ordinary meaning of Article 37, context of the article within the treaty, object and purpose of UNCLOS III, and preparatory work of the Convention all point to the potential-use test as being the appropriate test of whether a given strait should fall under Article 37. The Northwest Passage passes both the geographic and functional tests of Article 37, given that it joins the Atlantic and the Pacific and is currently being used for international navigation. Accordingly, if an international tribunal were to evaluate the Northwest Passage’s legal status, it should find the Passage to be a strait used for international navigation under Article 37 of UNCLOS III.

¹³⁴ UNCLOS III, *supra* note 1, art. 37. “High seas” is defined in UNCLOS III’s Article 86 as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” *Id.* art. 86.

¹³⁵ See Pharand, *supra* note 7, at 36–37.

¹³⁶ See HEADLAND ET AL., *supra* note 21, at 12.

APPENDIX: MAP OF THE NORTHWEST PASSAGE
AND DISPUTED MARITIME CLAIMS



¹³⁷ See Pharand, *supra* note 7, at 18, 29–30.

¹³⁸ See Suzanne Lalonde & Frédéric Lasserre, *The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?*, 44 OCEAN DEV. & INT'L L. 28, 29 (2013).

¹³⁹ See *id.*