THE PACIFIC NORTHWEST BOUNDARY STRAITS: HIGH SEAS OR INTERNAL WATERS

by Craig Allen

The Strait of Juan de Fuca, Haro Strait, Boundary Pass and lower Georgia Strait, the "boundary straits" of the Pacific Northwest, have carried international marine traffic for more than 150 years. Throughout that period, the federal governments of Canada and the United States have managed the straits jointly to balance their common interest in preserving freedom of navigation, while promoting vessel safety and protecting the environment.

Many feel that recent regulatory initiatives in the US threaten the joint management sytstem. Of particular concern are those regulations that may require vessels passing through US waters, en route to or from Canadian ports, to comply with requirements calling for idiosyncratic spill prevention and response plans, tug escorts, certificates of financial responsibility and fees for mandatory oil spill removal organization standby services in other than the destination port. Because the legitimacy of these regulatory initiatives is determined in part by whether the straits are classified as territorial seas or internal waters, a re-examination of their classification under the developing international law of the sea is warranted.

The Canadian-US Boundary

The Strait of Juan de Fuca forms the first link between the sea and the ports of Washington and British Columbia. From Juan de Fuca, ships turn north to Canadian ports, the Inside Passage or Rosario Strait, or south to the ports of Puget Sound.

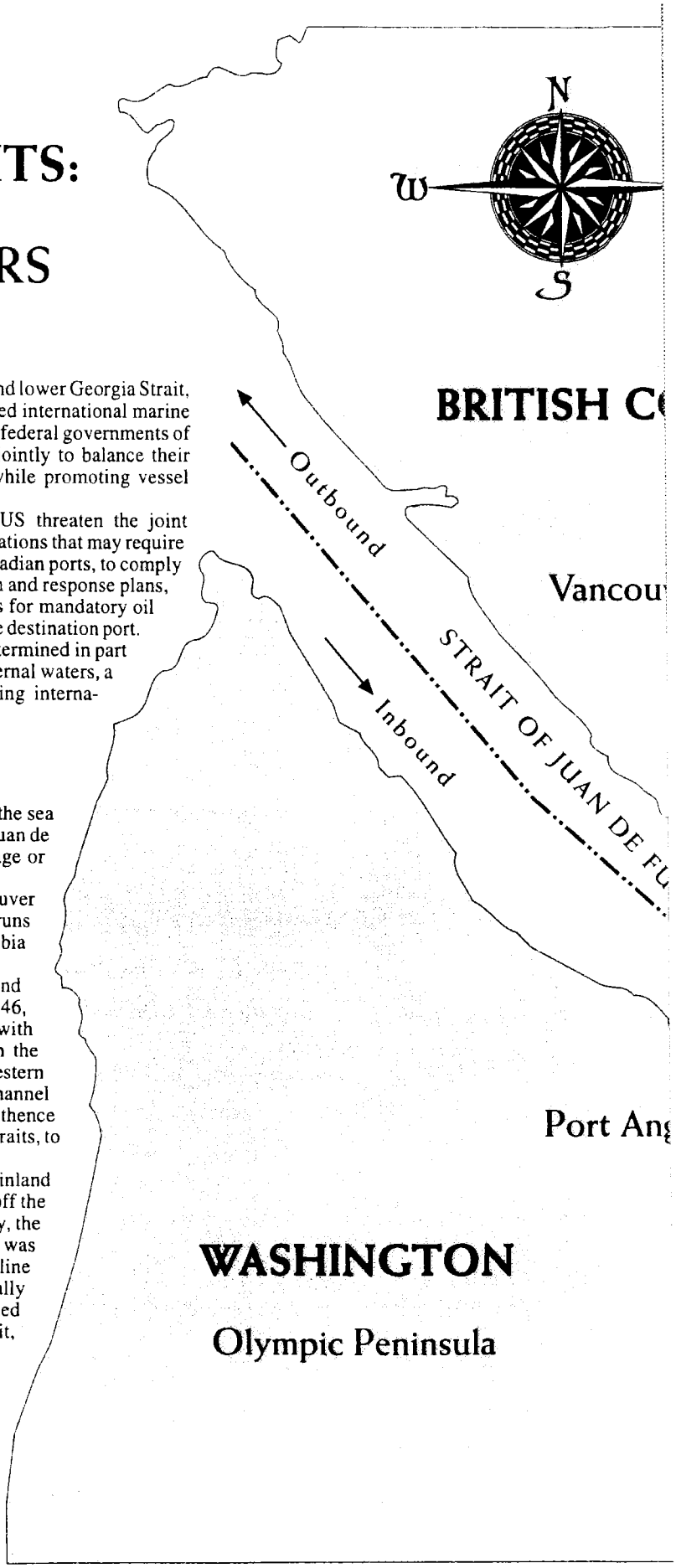
Haro Strait runs north from Juan de Fuca between Vancouver Island and the San Juan Islands to Boundary Pass, which runs east to Georgia Strait, the ports of southern British Columbia and the Inside Passage.

The international boundary through the two straits and Boundary Pass was established by the Oregon Treaty of 1846, between the US and Great Britain. Concerned principally with establishing the land boundary, the treaty drafters began the boundary line at the 49th parallel of latitude, at the western Rockies. From there, it ran west to "the middle of the channel which separates the continent from Vancouver's Island; and thence southerly, through the middle of said channel and of Fuca Straits, to the Pacific Ocean."

The fact that there were two channels between the mainland and Vancouver Island presented a problem that nearly set off the so-called "pig war" in the San Juan Islands. Not surprisingly, the US took the position that the channel referred to in the treaty was Haro Strait. Great Britain, on the other hand, argued that the line should run through Rosario Strait. The dispute was eventually referred to the Emperor of Germany for arbitration; he decided both nations intended the boundary to run through Haro Strait, giving the San Juan Islands to the US.

Territorial Sea Or Internal Waters?

The threshold inquiry in determining how far Canada and the US (or the State of Washington) can go in regulating maritime traffic in the boundary straits is the determination of the straits' legal classification as either "internal



waters" or "territorial seas."

Under international law, a nation has virtually complete jurisdiction to regulate vessels within its internal waters, even to the point of denying access. The US could, for example, forbid a foreign vessel bound for a Canadian port from transiting waters on the US side of the international boundary, if the waters are legally classified as internal waters. In contrast to internal waters, territorial seas, while still within the jurisdiction of the adjacent nation, are subject to the right of innocent passage by foreign vessels. Passage is considered innocent if it is continuous and expeditious and does not prejudice the peace, good order or security of the coastal nation.

"International straits" are accorded a unique legal status that recognizes their critical role in international navigation and commerce. If a particular area of a nation's territorial sea forms an international strait, the adjacent nation may not suspend the right of innocent passage. International straits are defined as those territorial seas of one nation which run between the high seas and the territorial seas of another nation.

A separate regime called "transit passage" applies to international straits which connect one area of the high seas to another, where the strait is completely overlapped by territorial seas.

If the waters of the northwest boundary straits are territorial seas they meet the definition of an international strait. Accordingly, a foreign ship, in the example above, would have a right of innocent passage through the waters on the US side of the boundary.

The US can establish sea lanes and traffic separation schemes and enact and enforce laws designed to promote navigation safety and protect its marine environment in territorial seas forming an international strait. Such laws can not discriminate against foreign vessels and can not apply to vessel design, construction, manning or equipment, unless they are giving effect to generally accepted international standards.

A regulatory exemption for vessels in US navigable waters, while transiting international straits for ports outside the US, or while in innocent passage, was added to the US Port and Tanker Safety Act of 1978; an exemption for foreign vessels in innocent passage through the US territorial sea was more recently included in regulations requiring vessel response plans and tanker overfill devices.

New Law Of The Sea

The legal classification of waters adjacent to a nation's territory is determined by definition and by claim and customary usage. Under the United Nations Convention on the Law of the Sea (LOS Convention) which entered into force on November 16, 1994, the classification of territorial seas depends on their location relative to the low water line along the shore, the "baseline." Waters seaward of the baseline, out to a maximum of 12 nautical miles, are territorial seas, while those shoreward of the baseline are internal waters.

Although the US has not yet ratified the convention, the Federal Government has stated it will respect the navigation provisions, including the articles dealing with navigation through straits.

President Reagan, in extending the US territorial sea to 12 miles in 1988, proclaimed that they were to be measured from a baseline determined in accordance with international law, as reflected in the LOS Convention. Although the baseline can be drawn across the mouth of a river or certain bays where both sides of the entrance are within the same nation, a baseline could not, for example, be drawn across the Strait of Juan de Fuca from the US to Canada. It must instead follow the low water line along the US shore.

In his proclamation, the President also recognized the right of innocent passage through our territorial seas and the right of transit passage through international straits.

Because the waters of the boundary straits, on the US side of the boundary, all lie beyond the US baseline, as defined by the LOS Convention, they are by definition territorial seas, absent a valid claim they are "historic waters." Historic waters are waters that do not meet the definition of internal waters, but are treated as such because the adjacent nation has a valid historic title to them. The strait waters on the Canadian side of the boundary (and perhaps the Inside Passage) would also be classified as territorial seas, under the LOS Convention's definition, absent a valid claim they are historic waters.

Supreme Court Test

Two important decisions by the US Supreme Court help define the issues and interests in maritime boundary questions. First, the Court has ruled that the interests of the federal government in maritime boundaries, as a matter of foreign policy and international relations, far outweigh the interests of individual coastal states which might be affected

by the decision. Second, in litigation over the legal classification of Cook Inlet in Alaska, the Court adopted a three part test, recognized in international law, to determine whether waters beyond the baseline were legally historic waters: 1) whether there was an exercise of sovereign authority over the waters; 2) that had been continuous for a considerable period of time; and 3) that was accepted by foreign nations. To establish historic title, the exercise of authority over the waters must be commensurate with the nature of the title claimed. Imposing regulations no more restrictive than those which would be consistent with innocent passage is not enough to establish historic title as internal waters. Applying its three part test, the Court ruled that Cook Inlet was not historic waters.

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The US government has not been consistent in describing the classification of the waters on its side of the boundary, or the extent of authority it claims over them.

In negotiating the Treaty of 1846, both governments reserved the right of their vessels to freely and openly navigate the boundary straits on either side of the international border. Secretary of State James Buchanan, in a letter to his chief negotiator in London, stated the reason for inserting this provision:

"The Strait of Juan de Fuca is an arm of the sea, and under the public law all nations would possess the same right to navigate it, throughout its whole extent, as they now have to the navigation of the British Channel. Still, to prevent future difficulties, this ought to be clearly and distinctly understood."

It thus appears that Secretary Buchanan, in recognizing a pre-existing right of navigation through the strait, believed that the waters were territorial seas of the adjacent nations, out to the boundary.

Few Court Rulings

US courts have addressed the legal classification of the boundary straits only briefly. In a series of turn-of-century cases, the US Ninth Circuit Court of Appeals ruled that the 1846 Treaty's "free and open" navigation provision did not affect the jurisdiction of Canada or the US over the waters on their respective sides of the boundary; it merely created a navigational easement in favor of the other nation (the right of innocent passage is often called a navigational servitude.) Later, the same court ruled that vessels transiting the Strait of Juan de Fuca beyond the eastern shore of Vancouver Island, were legally engaged in a voyage "by sea;" a conclusion more consistent with waters classified as territorial seas than those classified as internal waters.

The US government has never formally announced that it claims the straits as historic waters, a fact that may in itself be fatal to a finding of historic title, under the Supreme Court's three part test.

Over the past 50 years, the federal agencies which made statements about the straits' classification have voiced changing and conflicting opinions. A 1943 Department of State memorandum opined that the Strait of Juan de Fuca had "the legal status of inland waters." More recently, however, when the State Department provided the Russian government with a comprehensive list of water bodies it claimed as historic internal waters, the Strait of Juan de Fuca was conspicuously absent; perhaps evidence of the government's growing preference for promoting freedom of navigation over making expansive claims to exclusive control over adjacent waters.

The government also opposed claims by the affected states that Mississippi Sound, Vineyard Sound, Santa Monica Bay and Cook Inlet should be deemed historical internal waters. It lost the first two challenges and won the second two.

A 1973 Department of Justice memorandum concluded that the 1846 Treaty had consistently been interpreted by the US as a claim of sovereignty over the waters of the Strait of Juan de Fuca south and east of the international boundary, despite what Secretary Buchanan wrote to his chief negotiator, in 1846. As recently as August 1988, while reviewing a request by Japanese and Korean vessels to transfer fish products in the Strait, NOAA came to the most conservative conclusion yet, ruling that the waters in the Strait of Juan de Fuca, three miles beyond the baseline, are high seas.

The decision came four months before a Presidential Proclamation extending the US territorial sea to 12 miles.

Coast Guard, NOAA Disagree

The Coast Guard disagreed with NOAA. Relying on opinions of other agencies, it concluded that the waters on the US side of the boundary were navigable waters of the US, and that the straits did not constitute an international strait (the Coast Guard's definition of navigable waters includes the territorial sea and internal waters.) Later, however, in a Navigation and Vessel Inspection Circular (NVIC) implementing the tank- vessel response-plan requirement under OPA 90, the Coast Guard exempted vessels in passage through the Strait of Juan de Fuca, bound for Canadian ports, perhaps recognizing their right of innocent passage through an international strait. Soon after issuing the NVIC, however, the Coast Guard issued a change deleting the exemption, further adding to the uncertainty over the straits' classification.

How has the US historically treated the boundary straits? Canadian (and before that, British) and US relations over the straits, during the century and a half since the boundary treaty was executed, have, for the most part, demonstrated a pattern of cooperation and accommodation between the national governments, not exclusion or restricted access. Both nations have long permitted salvors from one nation to cross the border and assist vessels of their common flag in waters within 30 miles of the boundary. Both have adopted the International Regulations for Preventing Collisions for all vessels navigating the straits and adjacent waters.

The western 60 miles of the Strait of Juan de Fuca are, in several respects, treated remarkably like a coastal territorial sea. The US has established a regulatory "boundary line" from Angeles Point, just west of Port Angeles, to Hein Bank, south of San Juan Island, then north through Haro Strait. Vessels navigating seaward of this line must comply with the special rules for sea-going vessels, including the coastwise loadline regulations. It is also significant that neither nation requires vessels in waters west of Port Angeles and Victoria to take pilots.

Canadian Agreements

Two bilateral agreements highlight the commitment of both governments to pursue a coordinated program for the straits, to promote vessel safety and to protect the marine environment. The Joint Canada/United States Marine Pollution Contingency Plan, adopted in 1974, ensures mutual assistance and cooperation in the event of marine pollution incidents. Both nations also signed the International Convention on Oil Spill Response, Preparedness and Cooperation, which enters into force on May 13, 1995.

The US-Canadian Agreement for a Cooperative Vessel Traffic Management System (CVTMS) for the Juan de Fuca Region, executed in 1979, establishes a professional, closely coordinated system for vessel reporting and tracking throughout the principal waters of the straits and Puget Sound. Rather than follow a purely "territorial" approach to traffic management, that places responsibility for traffic control on the nation in whose waters the traffic is located, the Agreement divides the overall management area into "sectors." Each sector is assigned to one of three traffic centers.

The CVTMS includes a Traffic Separation Scheme which has been approved by the IMO. Although officially vessels are not required to adhere to the TSS, while on the US side, any vessel failing to do so risks being found in violation of Rule 10 (or Rule 2a, the rule of "good seamanship") of the International Rules of the Road. The TSS effectively forces in-bound vessels to transit through US waters, regardless of their port of destination. Similarly, out-bound vessels are forced into Canadian waters, regardless of their port of departure.

Perhaps the most important provision in the VTS Agreement, for purposes of this analysis, is the agreement by each nation:

"in applying its regulations to vessels proceeding through its portion of the applicable waters solely en route to or departing from a port of the other Party, [to] consider compliance with the requirements of the other Party to be effectively equivalent to material compliance with its own requirements, so long as the requirements and enforcement practices of the other Party, in their totality, continue to provide a comparable degree of marine safety and environmental protection."

The language in this agreement is consistent with the Canadian position on international straits announced during law of the sea treaty negotiations, which urged a solution "which will admit the minimum force of regulation consistent with the avoidance of damage to the environment."

The US and Canada are both signatories to the principal international conventions governing vessel safety and marine environmental protection, including the new MARPOL Regulation 26, which sets international standards for shipboard oil pollution emergency plans applicable to tankers 150 tons or greater and non-tankers 400 tons and greater. The regulation becomes effective April 4, 1995. If compliance with these internationally accepted treaty standards provides the required "comparable" (not identical) degree of marine safety and environmental protection called for in the CVTMS Agreement, a strong argument can be made that neither nation (or its political subdivision) may impose a more stringent standard on vessels transiting through their waters along the boundary straits, en route to or from a port in the other nation. To do so would violate the Agreement.

A Comprehensive Approach

Under the new LOS Convention, the waters adjoining the boundary straits are, by definition, territorial seas of the adjacent nations. Although statements by a few US Government officials about the straits indicate an occasional intent by some agencies to assert a level of sovereignty over them, the public assertions are, at best, inconsistent and inconclusive. On the other hand, the US has, until very recently, been consistent in permitting vessels bound for Canada to freely navigate waters on the US side of the straits with little or no US regulation, as if they were in innocent passage.

Admittedly, none of the evidence on the straits' classification is conclusive. While some may express an opinion on their classification, most will admit more than a little uncertainty. If, applying contemporary standards under the new LOS Convention and the Supreme Court's test, the boundary straits are classified as territorial seas, it necessarily follows that they form an international strait. Accordingly, both nations would generally be constrained in regulating vessels en route to or from the other nation by the current internationally accepted standards.

The US recognized the need for making such international law accommodations when it amended the Ports and Waterways Safety Act in 1978.

Both the US and Canada voluntarily made such accommodations in the 1979 CVTMS Agreement.

The international straits regime, under the LOS Convention, provides an eminently sensible approach for this vital international marine highway; one wholly consistent with the traditional solicitude of the US and Canadian governments for safety and commerce. It deserves the support of both governments.

Following a regime that recognizes the straits' international character sacrifices little national sovereignty, yet has the potential to add significantly to national credibility worldwide. Of greater local interest, it avoids the invitation to engage in retaliatory regulation and improves the prospects for successfully negotiating a new salmon treaty and preserving the US fishing and towing fleets' free access to the Inside Passage.

Recognizing that our common national maritime concerns far outweigh any differences, provident leaders in Ottawa and Washington, D.C. can seize this opportunity to build on a century and a half of enlightened cooperation in the straits, draw on the new law of the sea convention, and fashion an even broader and stronger management regime for the straits, to solve our trans-boundary problems with trans-boundary solutions. ■

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