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A Diplomatic Solution for the Northwest Passage

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From a position of nearly absolute obscurity in past decades, the Arctic has emerged as an area of enormous potential for energy development and possibly new transportation routes that could transform global shipping. Climate change and melting ice in the Arctic, which is producing a more verdant summer season, is combining with breakthrough technologies for operating in extreme cold weather. These two factors are opening up the Arctic region to vessels from a variety of nations. They come to conduct scientific research, to fish, to admire nature on board eco-cruise ships, to test new transit routes, and to explore for oil. The U.S. Geologic Survey estimates that 13 percent of the world's undiscovered oil reserves and 30 percent of the undiscovered natural gas lies beneath the Arctic, with most of it beneath the seabed of the littoral Arctic Ocean or along the Siberian periphery. At the same time, lengthier periods of ice-free seas in North America, Europe, and Asia may make feasible routine transit through the Northwest Passage and the Northern Sea Route. These changes are being embraced by Russia, which seeks to leverage Arctic energy and transportation development to become a Northern superpower. Canada, however, is much more reticent, concerned that its historic invulnerability along the incomprehensibly desolate northern border will be shattered by a flood of new vessel traffic and foreign oil companies bent on despoiling the Arctic Ocean. Ottawa's greatest fear: the Northwest Passage, which has seen fewer than one hundred complete surface transits during recorded history, could become the "Panama Canal of the North."

The Northwest Passage consists of a series of seven alternate shipping routes through the Arctic Ocean and among the islands and territories of northern Canada, connecting the North Atlantic and Labrador Sea in the east with Beaufort Sea and East Siberian Sea in the west. Most of these waterways, which cut through Canada's northern islands, are amply wide—tens of kilometers in

width—and deep—often measuring hundreds of meters down to the seabed. The Northwest Passage could dramatically alter global shipping patterns since the route shaves 4,000 miles (6,400 km) off a trip between Shanghai and Hamburg, bypassing existing routes through the Suez Canal or Panama Canal. The only obstacle to the Northwest Passage becoming a major international waterway is the ice, which increasingly is disappearing for longer periods during the summer months. But Canada claims sovereignty over not just the land territory of the northern reaches of the North American continent, and numerous uninhabited offshore islands, but also the entire surrounding Arctic Ocean as well.

Under the international law of the sea, all nations are entitled to claim territorial sovereignty over the ocean water extending out to 12 nautical miles from the beach. In recent decades, Canada has thrown this rule aside, and instead drawn an enormous closing line around the arc of North America, claiming territorial sovereignty within a virtual triangle connecting the Atlantic and the Pacific via points in the Arctic Ocean below the North Pole. In exceptional cases, such as Norway, such straight baselines may be drawn along a shoreline that is deeply indented or deeply cut into, or if there is a fringe of islands hugging the coast.¹ Even so, however, straight baselines must fulfill two additional criteria: they must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain.²

Ottawa also has suggested that the ocean area constitutes “historic internal waters.” The United Nations adopted an empirical test for such a claim, however, in order for a body of water to qualify: (1) the claimant nation must exercise authority over the area; (2) there must have been historical continuity of this exercise of authority; and, (3) foreign nations must have acquiesced to the maritime claim.³ This three-part test makes historic claims notoriously difficult to maintain, and the Northwest Passage, which is up to nearly 100-miles wide in places, plainly does not meet the test.⁴ It is particularly important to note that, within the context of the Canadian Arctic, where straight baselines are established that have the effect of enclosing as internal waters areas that had not previously been considered as such, the international community retains the right of innocent passage through those waters.⁵ That is, even if one accepts Canada’s claims for straight baselines or historic internal waters, international shipping still has the right of innocent passage through the waters.

The routes through the Northwest Passage also meet the definition of a “strait used for international navigation,” in which vessels and aircraft are entitled to the non-suspendable right of transit passage. This means submarines can travel under the surface, aircraft can overfly the area, and ships and planes may use the route without the permission of, or prior notice to,

¹ Article 7(1), United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982).

² Article 7(1), Law of the Sea Convention.

³ Juridical Regime of Historic Waters, Including Historic Bays, U.N Doc A/CN.4/143 (1962) at 56.

⁴ Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 *Ocean Dev. Int'l L.* 3, 13.

⁵ Article 8(2), Law of the Sea Convention.

Canada. Waters within 12 nm of the coastline are still under Canadian sovereignty, but superimposed on that sovereignty is the non-suspendable right of transit passage. Canadian laws still apply, but only so long as they do not impede or impair transit through the strait.⁶ Both the United States and the European Community have rejected Canada's claim.⁷ But as the climate changes and the ice melts, however, Ottawa is doubling down. Canada is accelerating its decades-old unilateral campaign to get beyond its Arctic isolation. By employing a full-court press that consists of reasoned pleading for recognition of Canada's maritime claims, combined with threats of enforcement, the Harper government has launched an aggressive campaign to brand Canada as an Arctic power. Canada plans to construct ice-strengthened patrol vessels to enforce unilateral regulations in the Northwest Passage. There is a risk that Ottawa's growing assertiveness will prove off-putting to European states, the export-driven nations of China and Japan, and the United States, with Washington having particular sensitivity toward any nation purporting to impede freedom of the seas.

Amidst all of this, China bears close watching. China seeks to cash in its growing diplomatic currency in order to influence and shape Arctic governance.⁸ Beijing has claimed an interest in the Arctic because of its vast natural resources, which "should be available to all states to exploit."⁹ China believes it has the right to protect the "common interest of the international community in the Arctic oceans."¹⁰ If China seeks to exercise the right all nations enjoy to conduct unimpeded transit through the Northwest Passage, and Canada objects, it could give rise to a conflict in the Arctic Ocean reminiscent of the 1970s-era "Cod War" between Iceland and the United Kingdom, in which British fishing vessels and naval vessels experienced numerous hair-raising encounters with Icelandic law enforcement ships.

So far, China has slowly but firmly asserted its right to operate in the Arctic, while being wary that China's size and status as a rising power could evoke concern among other nations.¹¹ Officials in Beijing have been fairly cautious about formulating their views of China's interests in the Arctic, yet pronouncements from semi-official Chinese scholars have made some fairly bold claims about Beijing's interests in the region. While officially China walks lightly, there is a bevy of Chinese analysts and commentators who, under the theory that the region constitutes a resource for all mankind, have made rather sweeping declarations about the nation's right to participate as a full partner in the region. Already, China operates the world's largest non-nuclear icebreaker, the 21,000-ton *Xue Long (Snow Dragon)*. The nation is also one of world leaders in

⁶ Article 34(1), Law of the Sea Convention.

⁷ European Commission, British High Commission Note No. 90/86 of July 9, 1986.

⁸ Linda Jakobson, China Prepares for an Ice-free Arctic, SIPRI Insights on Peace and Security, 2010/2 (Stockholm International Peace Research Institute, March 2010), at p.1.

⁹ Joelle Garrus, China Sets Sail for the Arctic, AFP, June 30, 2010.

¹⁰ Public Radio International's The World, Interview with Wang Hanling, 19 March 2010.

¹¹ Jakobson, at p.2.

polar research.¹² In 2009, the Chinese Arctic and Antarctic Administration (CAA) completed a two-year research project titled, “Arctic Issues Research,” which involved scholars and officials from throughout the country. Among the ten research topics were: Arctic resources and their exploitation, Arctic transportation, Arctic law, Arctic politics and diplomacy, military factors in the Arctic, China’s strategic position in the Arctic, and China’s Arctic policy and recommendations. The reports have not been released to the public.¹³

The most thorough analysis of China’s likely future course in the Arctic was conducted by the Stockholm International Peace Research Institute. The study concludes, “The notion that China has rights in the Arctic can be expected to be repeated in articles by Chinese academics and in comments by Chinese officials until it gradually begins to be perceived as an accepted state of affairs.” This is exactly how China has approached asserting its maritime rights in the past, such as in the South China Sea. First, carefully calibrated trial balloons are released to lay the groundwork and wrap the issue in a sense of Chinese identity. Second, as Beijing becomes more assertive and other nations begin to resist its encroachments, the issue becomes mixed up in Chinese nationalism, the rights inherent in the weight of “one-fifth of the world’s population” and yet another example of how some countries continue to try to “keep China down.”

Like China, Canada has adopted the same tack, repeatedly declaring that immense swaths of the Arctic Ocean are Canadian “internal waters.” The potential for disagreement is attenuated only by the time required for the melting ice to open previously ice-locked waterways. In such a case, nations in Europe and Asia surely will seek to exercise high seas freedoms throughout the North American Arctic. There is the prospect of crisis, but more importantly, there is ample time for Canada to further develop its approach to the Northwest Passage. Many believe that having walked to the edge of the precipice, it is politically impossible for Canada to now walk back—it might be suggested that no government in Canada could survive “giving away” Canadian sovereignty over the Northwest Passage. It is prudent to set aside the emotional issue of sovereignty, however, which is irrevocably lost in the mythos of Canada’s Arctic identity. Instead, there are several practical solutions.

First, an international strait can be recognized even through internal waters. The Bosphorus and Dardanelles Straits separating Turkey and the Strait of Magellan slicing through southern Chile both cut through internal waters of those two countries. Whether the Northwest Passage constitutes internal Canadian waters is immaterial to whether it also constitutes an international strait open to vessel traffic from all nations.

Second, under the Law of the Sea Convention article 8(2), we may recall that in areas of ocean that were not closed off by straight baselines, but then become so, the international community still retains a right of non-suspendable innocent passage through those areas. Regardless of whether Canada’s straight baselines are lawful, ships of all nations still have a right to transit the area.

¹² K. J. Spears, China and the Arctic: the awakening snow dragon, *China Brief*, vol. 9, no. 6 (18 Mar. 2009).

¹³ Jakobson, at p.5.

Third, it becomes clear, then, that the best recourse is for Canada to seek international recognition and acceptance of some variation of its rules and regulations for transiting the area—effectively obtaining “buy in” from the international community and avoiding the prospect of later conflict. The International Maritime Organization (IMO) is the institution established by the United Nations to consider and adopt such proposals. Sitting on the banks of the River Thames at the Lambeth Bridge in London, the IMO has proven to be an apolitical and effective technical organization with a long track record of developing consensus and fashioning agreement among its 167 state’s parties. By seeking IMO assistance and member state consensus, Ottawa would open the door to widespread international support for appropriate national measures to protect the Arctic ecosystem, ensure Canadian security and sovereignty, and promote safe navigation through designated shipping routes. Doing so would achieve a major diplomatic success for Ottawa, taking off the table the issue that is becoming Canada’s greatest foreign policy albatross.