



Brief to the Standing Committee on Foreign Affairs and International Development

Canada's Sovereignty in the Arctic

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Submitted By

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Executive Summary

This brief provides a concise overview of Canada's Arctic maritime sovereignty, examined through a legal and historical lens. Its objective is to improve the Standing Committee's understanding of the nature of Arctic sovereignty and the ongoing disagreements between Canada and other states in this area.

The focus of this brief is Canadian *maritime* sovereignty, geographically defined as those waters lying to landward of the straight baselines drawn by the Government of Canada on January 1, 1986. The status of these archipelagic waters has been the principal "sovereignty dispute" between Canada and other countries since at least 1969 and remains a point of contention today. This dispute centres on a disagreement over the legal status of the waters, rather than around questions of ownership. Canada defines these waters as historic, internal waters over which it enjoys full sovereignty. The United States has claimed the existence of an international strait through the archipelago and challenges the Canadian assertion that its sovereignty extends beyond the internationally recognized 12 nautical mile territorial sea.

This disagreement has been well managed since the early Cold War, largely because neither Canada nor the United States stand to benefit from an open political confrontation. As such, an 'agree-to-disagree' *modus vivendi* has taken shape and remains in place. This approach has long dominated Canadian-American Arctic relations and was given legal form in the 1988 Canada-US *Agreement on Arctic Cooperation*. This approach has worked well, though some believe that it is now threatened by growing shipping and economic activity in the region, as well as the arrival of new state and non-state actors with Arctic interests.

Responding to this new Arctic reality should not require a radical shift in Canadian strategy, which has long been to exercise control over the Arctic waters while allowing the passage of time to strengthen the state's legal and political position. In fact, Canada can leverage increased activity in the region to strengthen its position. The acceptance of Canadian control by new entrants offers Canada a precedent of implied consent and this will buttress the country's legal position and provide 'facts on the ground'.

I. Sovereignty: The Legal Question

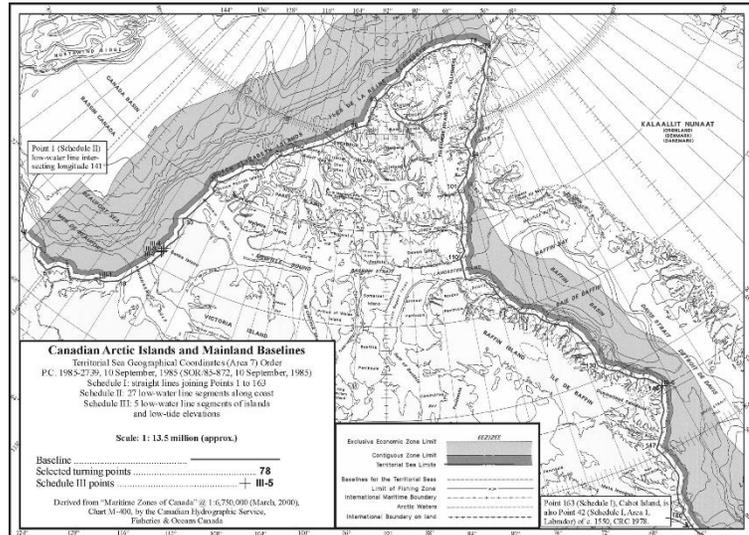
Canada's Position

In Brief

The waters of the Canadian Arctic Archipelago are historic, internal waters of Canada, delineated by straight baselines. Canada enjoys the same sovereignty over these waters as over any other lake or internal body of water within the country. While national policy has long been to support foreign shipping through the channels of the Arctic Archipelago – more commonly referred to as the Northwest Passage(s) – it reserves the right to unilaterally regulate any such activity and access.

Canada's Arctic waters are defined by the straight baselines surrounding the Arctic Archipelago, drawn on January 1, 1986 to officially enclose the Arctic waters within as Canadian. The

establishment of straight baselines represented the first official delineation and definition of the extent of Canada's Arctic maritime sovereignty; however, this was not a claim to sovereignty *per se*. Since the Arctic waters have long been considered historic, the baselines only defined the waters over which Canada has long exercised sovereignty. This sovereignty dates to the late nineteenth century, supported by a long history of government activity exercising authority over the region through the issuance of fishing licences and the application of Canadian laws. It is buttressed as well by the presence and activity of the Inuit since time immemorial.¹ This position is succinctly summed up in the *Statement on Canada's Arctic Policy* (2010), which notes that: Canadian "sovereignty is long-standing, well-established and based on historic title, founded in part on the presence of Inuit and other indigenous peoples since time immemorial."²



Canadian Straight Baselines and Areas of Canadian Jurisdiction

Historic Waters

The Arctic waters are historic, internal waters. While the precise legal definition of this term remains undefined in conventional law, legal scholar L.J. Bouchez offers one of the best definitions in *The Regime of Bays in International Law*, stating that "historic waters are waters over which the coastal state, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."³ This definition reflects three generally agreed upon and basic requirements:

¹ Statement by M. Gaillard, Legal Affairs Bureau, Department of Foreign Affairs and International Trade, "Canada's Sovereignty in Changing Arctic Waters" (March 19, 2001).

² Canada, *Statement on Canada's Arctic Policy*, 2010.

³ L.J. Bouchez, *The Regime of Bays in International Law* (Leyden: Sijthoff, 1964). As quoted in Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development and International Law* 38:1 (2007)

- (i) the exclusive exercise of state jurisdiction,
- (ii) a long lapse of time, and
- (iii) general acquiescence by foreign states.

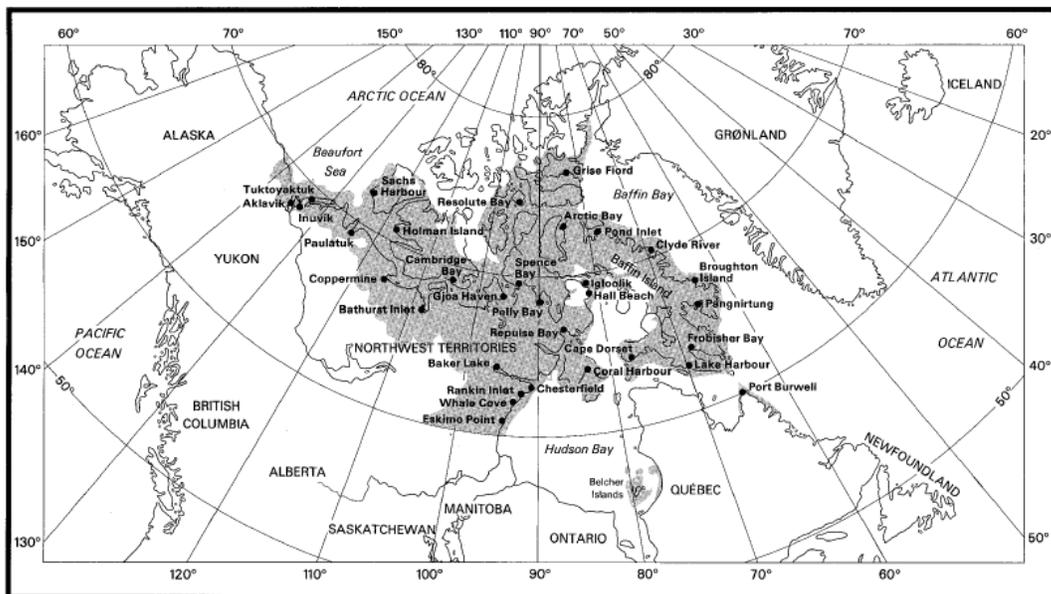
To claim historic rights over a body of water, a state must have a well-documented history of exercising jurisdiction over the area in question and that jurisdiction must have been both exclusive and effective. The state must demonstrate its intent to act as sovereign by the exercise of state power, in the same way as over any part of the national domain.

While a claim to historic waters must also be of long standing, what ‘long standing’ actually means has never been agreed upon. It is a relative question and highly dependent on the situation but, according to legal scholar Donat Pharand, the length of time must be “substantial” if not necessarily immemorial.⁴

Occupancy, and Land Use

The Canadian state’s history of occupation dates to the early 20th century when the government began to undertake fisheries patrols in Hudson Bay and the Eastern Arctic. During the 1940s and 1950s, Canada regulated American defence activity in the region and applied its laws and regulations to foreign ships travelling through the aa waters. Since then, Canada has exercised control over the Arctic waters by implementing pollution control regulations, reporting requirements, and other measures of effective control.

Inuit use and occupancy predates this activity by a millennium. This history is well documented by the *Inuit Land Use and Occupancy Project*, funded by the Department of Indian and Northern Affairs in 1976.⁵ This history allows Canada to demonstrate record of occupation dating back to time immemorial. It also buttresses the legitimacy of Canada’s straight baselines. In its ruling on the *Anglo-Norwegian Fisheries*



Historic Extent of Inuit Sea Ice Use; Report on Inuit Land Use and Occupancy Project, vol. 3 (1976)

⁴ Pharand, “A Final Revisit,” 7.

⁵ Canada, Indian and Northern Affairs, *Inuit Land Use and Occupancy Project* (Ottawa: DINA, 1976).



Case, the International Court of Justice (ICJ) stated that economic interests whose “reality and importance” are “clearly evidenced by a long usage” demonstrate a link between land and water (or ice) and, according to legal scholar Donald McRae, “enhances the legitimacy of enclosing the area with straight baselines.”⁶

For some time, the ability of the Inuit to transfer this claim to the Canadian government was uncertain. Historically, international law has tended to treat aboriginal peoples as something less than international persons capable of transferring title. The 1926 American and British Claims Arbitration Tribunal set a precedent against such a transfer of rights when, in assessing the legal status of the Cayuga Nation, it described the Cayuga Nations as “not a legal unit of international law” and unable to transfer sovereignty.⁷ The 1928 *Island of Palmas* case saw the ICJ reach a similar conclusion. In a ruling closer to the Canadian Arctic, the Permanent Court of International Justice reiterated this view in its decision on the *Legal Status of Eastern Greenland*. A different precedent can be found, however, in the far more recent ICJ decision in the *Western Sahara* case of 1975, which states that “territories inhabited by tribes are not *terrae nullius*.”⁸

Even if Inuit can transfer rights, the question remains whether they ever enjoyed sovereignty over maritime space. The Arctic is unique in this regard. Because ice has historically enabled – rather than prevented – travel, use, and occupancy, the Inuit have long regarded and treated it as land. In its 2008 report *The Sea Ice is our Highway*, the Inuit Circumpolar Council – Canada states: “when defining our “land,” Inuit do not distinguish between the ground upon which our communities are built and the sea ice upon which we travel, hunt, and build igloos as temporary camps. Land is anywhere our feet, dog teams, or snowmobiles can take us.”⁹

Acquiescence

In addition to long usage, a claim to historic waters also requires a degree of acquiescence by the broader international community – particularly those whose interests are most affected. The nature of acquiescence is debated by legal scholars and its precise definition is undetermined. There has always been a school of thought which holds that consent must be explicit. Alternately, acquiescence could be implied from a lack of any challenge, the notion that *I qui tacet consentire videtur* – that silence implies consent. Donat Pharand, Canada’s leading scholar in the field of maritime law in the Arctic, makes a persuasive argument that acquiescence need not be explicit and, in his seminal work on the subject *The Arctic Waters and the Northwest Passage: A Final Revisit*, he writes: “acquiescence need not amount to actual consent or recognition; otherwise, history would cease to play its role as the root of title.”¹⁰

This is an important point for Canada. No foreign state has ever offered its express recognition of Canada’s historic waters claim; however, what may be deemed ‘general toleration’ can be drawn from the absence of any real challenge to Canadian sovereignty. While certain states have expressed their disagreement with the Canadian position, none have ever sought to take Canada to the ICJ or attack the Canadian claim through a direct challenge in the area (for instance, by conducting a ‘freedom of navigation voyage’). Securing implicit foreign recognition of the Canadian position has, therefore, been an important consideration for the Department of Foreign Affairs over the past 70 years.¹¹

⁶ Donald McRae, “Arctic Waters and Canadian Sovereignty,” *International Journal* 38:3 (Summer, 1983), 485.

⁷ David Vanderzwaag and Donat Pharand, “Inuit and Ice: Implications for Canadian Arctic Waters,” *Canadian Yearbook of International Law* 21 (1983), 80.

⁸ *Ibid.*, 81

⁹ ICC Canada, *The Sea Ice is our Highway: An Inuit Perspective on Transportation in the Arctic* (ICC Canada, 2008), 2.

¹⁰ Pharand, “A Final Revisit,” 7.

¹¹ Adam Lajeunesse, *Lock, Stock, and Icebergs: The Evolution of Canada's Arctic Maritime Sovereignty*. Vancouver: University of British Columbia Press, 2016, 89.



Straight Baselines

Baselines are defined by the UN “the line from which the seaward limits of a State’s territorial sea and certain other maritime zones of jurisdiction are measured.”¹² This practice was first recognized in customary international law in 1951 with the ICJ ruling in the *Anglo-Norwegian Fisheries Case*. This ruling affirmed Norway’s right to enclose waters to landward of straight baselines as internal based on a historic claim and offered Canada a potential basis for enclosing its archipelagic waters as internal. This precedent was confirmed in conventional law by Article 4 of the Convention on the Territorial Sea and the Contiguous Zone (1958) and Article 7 of UN Convention on the Law of the Sea (1982).

After four years of study, cabinet made the tentative decision to apply this principle to the Canadian Arctic in 1956, however this was an internal decision and not applied in legislation.¹³ The drawing of straight baselines was considered again in a series of External Affairs studies during the 1970s and 1980s and the decision to draw these lines was continually deferred so as to not prejudice the three law of the sea conferences which took place from 1958 to 1982¹⁴ After the signing of UNCLOS III in 1982, the subject was taken up once again and internal discussions were ongoing until the voyage of the US icebreaker *Polar Sea* forced the government’s hand in 1985. At that time, the Mulroney government made the decision to apply this principle to the Arctic under intense public pressure and on the recommendation of the Department of External Affairs.¹⁵

Foreign Positions

Canadian’s claim that the waters of the Arctic Archipelago are historic internal waters, over which it enjoys complete control, has never been accepted by the United States. This disagreement has persisted since the early 1950s and turned into a political confrontation in 1969, with the voyage of the US tanker *Manhattan* through the Northwest Passage, and again in 1985, with the voyage of the USCGC *Polar Sea* through those same waters.

Historically, the United States has actually shown little interest in maintaining its access to the Arctic waters themselves. Rather, American interest has revolved around global freedom of navigation and the fear that acquiescence to Canada’s claim might weaken America’s position elsewhere. David Colson, a State Department official negotiating with Canada in 1986 put it very simply: “we couldn’t be seen doing something for our good friend and neighbor that we would not be prepared to do elsewhere in the world.”¹⁶ This fear of setting a precedent has dominated America’s approach to the Arctic since the 1950s and continues to be represented in that country’s Arctic policy statements.¹⁷

From a strictly legal perspective the possibility of the Canadian Arctic setting a broader precedent has declined since the signing of the UN Law of the Sea Convention in 1982. This treaty codified rules for free transit through international straits and created a new legal category for “archipelagic” states, such as Indonesia and the Philippines. In so doing the Convention removed the possibility that Canadian

¹² Un Office for Ocean Affairs and the Law of the Sea, *Baselines: An Estimation of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, Appendix I (Glossary of Technical Terms), 40.

¹³ The file cited here quotes heavily from the Cabinet decision. The original remains classified, as does much of the surrounding material: memorandum from Legal Division, July 12, 1968, LAC, RG 25, vol. 15729, file 25-4-1.

¹⁴ Memorandum to Cabinet, 1976, LAC, RI 2069, vol. 145, pt. 8.

¹⁵ On the position of External Affairs in the early 1980s see: Memorandum for Cabinet, “Status of Arctic Archipelagic Waters,” June 1, 1982, LAC, RG 12, vol. 5561, file 8100-15-4-2(s), pt. 4.

¹⁶ David Colson quoted in Christopher Kirkey, “Smoothing Troubled Waters: The 1988 Canada-United States Arctic Co-operation Agreement,” *International Journal* 50:2 (Spring, 1995), p. 409-10.

¹⁷ See: United States. The White House. *National Strategy for the Arctic Region*, May 10, 2013 and Presidential Directive NSPD-66/HSPD-25. “Subject: The Arctic Region,” January 9, 2009.



sovereignty might be held up by such states to close vital trade routes through their own archipelagos (which was a pressing US concern from the 1950s to 1980s).¹⁸ Today there are few straits around the world that might be considered comparable to the Northwest Passage, and therefore affected by any precedent set there.

However, one area that does closely compare are the straits of the Russian Arctic. This has long been an important American consideration. Accepting Canadian control over the Northwest Passage would indirectly buttress Russia's claim to the Kara, Sannikov, Laptev, and Long Strait. During the Cold War, the USSR claimed many of these areas as internal, prompting an American DoD official to state that, even if Canada's Arctic sovereignty claims could be substantiated in law, the risk of this precedent strengthening the Russian claim required the United States to oppose the Canadian position. These strategic concerns likely remain to this day.

Straight Baselines

While the Americans recognize the validity of straight baselines in international law, Washington has asserted that these lines must be drawn in conformity with a more rigid interpretation of the relevant international law. The exact allowable length of baselines has not been specified in law. However, the original precedent in the Fisheries Case saw Norway's baselines stretch from only a few hundred yards to a maximum of 44 miles. Canada's total baseline length in the Arctic is nearly 3,000 miles, with the largest enclosed section being McClure Strait at roughly 130 miles across. When Canada drew straight baselines in 1985 the US government conveyed its belief that any such lines exceeding 24 miles (twice the territorial sea) could not be considered acceptable under international law. Washington also felt that the Arctic Archipelago failed the geographic test laid down in UNCLOS III, namely that an archipelago must consist of a "fringe of islands along the coast in its immediate vicinity."¹⁹

International Straits

An international strait is a body of water passing through a state's territorial sea which is commonly used for international navigation and which connects two parts of the high seas, or the high sea and a state's territorial sea. Under existing conventional law, a right of innocent passage exists through such straits and, should the Northwest Passage be defined as such, Canada's ability to regulate shipping, enforce its laws, and institute certain pollution prevention measures would be restricted. Prior to the 1970s, the US avoided using this term, in large part, because Canada's three-mile territorial sea left a section of high-seas in the centre of the passage. After Canada's adoption of a 12-mile limit (legislated in 1970) the entrances and exits to the passage were covered by territorial sea and rights of transit came to rest on the Northwest Passage as a strait.

The task of defining a strait in conventional international law fell to the United Nations Law of the Sea Conference, though the final convention contained no specific requirements for an international strait – referring instead only to "straits used for international navigation." What "used for navigation" meant was not clearly explained. No precise calculation has ever been made of the amount of traffic required to render a strait international, though the basic criteria was established by the ICJ in the 1949 *Corfu Channel Case*. Here, the court determined that the Corfu Channel constituted an international strait, owing to its "geographic situation as connecting two parts of the high seas" and "the fact of its being used for

¹⁸ On the Northwest Passage and precedent setting see: Suzanne Lalonde and Frédéric Lasserre, "The Northwest Passage: A Potentially Weighty Precedent?" *Ocean Development and International Law* 43:3 (2013).

¹⁹ United Nations, Convention on the Law of the Sea, Part II, Section 2, Article 7.



international navigation.”²⁰ Use of the strait was much higher than in the Canadian Arctic. Traffic through Corfu strait from April 1, 1936 to December 31, 1937 amounted to 2,884 transits by vessels (this excluded transiting ships that did not put into the port).

These two criteria: the geographic (meaning that a strait must connect two bodies of high seas) and functional (meaning that it must have been a useful passage for international traffic) are most commonly used to describe and define international straits. Whether or not the Northwest Passage can be defined as such a strait has been contested since the 1970s. Pharand points out that, while the Northwest Passage clearly meets the requirements of the geographic criteria, it does not meet the functional standards of use.

Some American experts have disagreed with this Canadian interpretation, preferring to view the functional criteria as meaning that a strait need only possess the *potential* for use, rather than a history of *actual* usage. Richard J. Grumwalt, Professor of international law at the US Naval War College, encapsulates the American view very well. In 1987 he wrote:

Some nations take the view that an actual and substantial use over an appreciable period of time is the test. Others, including the United States, place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation. The latter view has the greater merit. Otherwise, the 1982 LOS Convention would be akin to a stop-action photograph, fixing forever all patterns of international navigation.

Other Foreign Positions

Like the United States, the European Union has refused to accept Canada’s interpretation of international law as it applies to the Arctic. In 1985, after the Canadian declaration of straight baselines, the European Community issued a demarche, stating that it was “not satisfied that the present baselines are justified in general” and that the EU member states “reserve the exercise of their rights in the waters concerned according to international law.”²¹ In recent years, the European Union’s interest in Arctic shipping and resource extraction has led to a more explicit policy favouring navigational rights throughout the region. This position was expressed in 2008 through a “communication” from the Commission of the European Parliament that read: “member states and the Community should defend the principle of freedom of navigation and the right of innocent passage in the newly opened routes and areas across the Arctic.” This document mentioned the “dispute” surrounding Canadian sovereignty and, while it did not specifically contest that sovereignty, the implication was clearly that the EU considered the Northwest Passage an international strait.²²

In 2013, Germany released a national Arctic policy statement calling for international regulation of Arctic sea-lanes and freedom of navigation in the Arctic Ocean. According to the Germans, these international sea-lanes included the Northwest Passage.²³

One of the most important new actors in the Arctic is China and there have long been concerns that Beijing may seek to challenge Canada’s Arctic sovereignty, given its interest in northern shipping and resource

²⁰ International Court of Justice, *Corfu Channel Case*, Judgment of April 9, 1949: I.C.J. Reports, 1949, *Merits*, 28.

²¹ British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 254, 1986.

²² Commission of the European Parliament, “Communication from the Commission to the European Parliament and the Council on the European Union and the Arctic Region,” November 20, 2008.

²³ Germany, Federal Foreign Office, *Germany’s Arctic Policy Guidelines: Assume Responsibility, Seize Opportunities*, November, 2013.



extraction. In January 2018 China released its official Arctic policy and its position on Canadian sovereignty was ambiguous. The relevant passage read:

China respects the legislative, enforcement and adjudicatory powers of the Arctic States in the waters *subject to their jurisdiction*. China maintains that the management of the Arctic shipping routes should be conducted in accordance with treaties including the UNCLOS and general international law and that the freedom of navigation enjoyed by all countries in accordance with the law and their rights to use the Arctic shipping routes should be ensured. China maintains that disputes over the Arctic shipping routes should be properly settled in accordance with international law. [italics added]

In this crucial paragraph, the Chinese government states that it respects Canadian sovereignty “in the waters subject to [Canada’s] jurisdiction,” without specifying what those areas might be. It goes on to say that China “enjoys freedom of navigation” in accordance with UNCLOS – a reference to the right of transit passage through international straits, guaranteed in Article 38 of the UN Convention on the Law of the Sea. While this phrasing could be seen to imply a Chinese assumption of free navigation through the region, there are other ways to read that statement. The ambiguity inherent in China’s position is certainly intentional, with the waters muddied just enough to allow Beijing to skirt the issue, neither locking itself into a recognition of Canadian sovereignty or offending a Canadian government.

Domestic Chinese maritime interests make it unlikely that China will challenge Canadian sovereignty. China relies on straight baselines to enclose the Qiongzhou Strait and the country’s longest baseline is 121.7 miles long, only 8 miles shorter than the longest Canadian Arctic baseline (which stretches across McClure Strait), meaning that any challenge to Canadian sovereignty could set a self-defeating precedent.²⁴

III. Possible Catalysts for Future Crisis

Shipping

From Shanghai to Rotterdam, the Northwest Passage is 3,450 km shorter than the Suez Canal, while from Shanghai to New York the difference is 3,850 km.²⁵ Savings in time and fuel along northern routes could, theoretically, be considerable. There is an extensive body of literature on the potential impact of increased shipping through the Northwest Passage and it is almost universally agreed that the Arctic waters will see more activity in the years ahead. If international shipping companies begin to treat the Northwest Passage as a useful route for international navigation, and Canada is unable to control and regulate this traffic, then that traffic could support the American assertion that the passage is a strait “used for international navigation” – the description of an international strait found in UNCLOS III.

A more immediate crisis could arise if a foreign vessel (either state or private) transited the route without regard for Canadian regulations, declaring that it was exercising its right of transit passage. In 2004, political scientist Rob Huebert theorized that such a crisis might be sparked by Canadian action to stop a trespassing ship, which would force the flag nation to react, thus leading to a serious challenge.²⁶

No such dispute has arisen and there seems to be no immediate danger of such a dispute occurring in the foreseeable future. Commercial vessels have no incentive to challenge Canadian sovereignty and every reason to work with Canada to ensure safe transit of their vessels. While the United States and other nations

²⁴ United States, Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, “Straight Baseline Claim: China,” *Limits in the Seas* 117 (July 9, 1996).

²⁵ Frédéric Lasserre, *China and the Arctic: Threat or Cooperation Potential for Canada?* Canadian International Council, China Papers 11 (June 2010), 6.

²⁶ Rob Huebert, “The Coming Arctic Maritime Sovereignty Crisis,” *Arctic Bulletin* 2:4 (July, 2004), 24.

dispute Canada's position, no state has ever shown an interest in actively challenging Canadian sovereignty. Nor is it easy to see what could be gained by any foreign state in doing so.

Historically, challenges to Canadian sovereignty have arisen not by design but through miscalculation. The transit of the *Manhattan* in 1969 was supported by the Canadian government. The voyage of the *Polar Sea* in 1985 was managed at a service-to-service level in a technical capacity, with little input from External Affairs. In both cases, the political crisis was not expected and caught the governments at the time unprepared. The Canadian responses (the Arctic Waters Pollution Prevention Act in 1970 and the declaration of baselines in 1985) were also driven less by concern over American activity than by the Canadian governments' sensitivity to the popular anger generated within Canada over the *perception* of an American assault on Canadian sovereignty.



US Submarine Paths in the Canadian Arctic 1958-1979

Submarine operations

Since the early 1960s, American nuclear attack submarines have operated in the Arctic Ocean and many of these have travelled through the Canadian Arctic Archipelago. In the past, their presence has generated popular concern that the US Navy was challenging Canadian sovereignty.²⁷ While information on these operations remains heavily classified, it is known with reasonable certainty that Canada knew of – and participated in – most, if not all, of the missions in Canadian Arctic waters during the Cold War.²⁸ These voyages have never been intended as a challenge to Canadian sovereignty and the Canadian Navy and other government agencies have participated in them in various ways. Submarine transits are also unlikely to establish a precedent of transit and use since, by definition, a secret activity cannot set a precedent.

Submarine operations are also an important part of joint Canada-US continental defence operations and, as such, fall under the provisions of PJBD Recommendation 52/1. This agreement stipulates that “informal or operational visits” require only “advanced notification through service channels” – hence no formal clearance is required.

IV. Conclusions

Canada's Arctic maritime sovereignty is strong and unlikely to be challenged in the foreseeable future. The state's actions to control, regulate, and protect this area demonstrate that sovereignty and strengthen its position in any future challenge.

²⁷ See for instance: Peter Cowan, “Arctic Claims Hurt by Lack of Vigilance, Experts Say,” *Ottawa Citizen* (December 26, 1986), G17.

²⁸ Adam Lajeunesse, “A Very Practical Requirement: Under-Ice Operations in the Canadian Arctic, 1960-1986,” *Cold War History* 13:4 (November, 2013).



In an increasingly ice-free Arctic, Canada will have to manage more shipping and economic activity in the region. Handled properly, this will strengthen Canada's position. One of the fundamental prerequisites to historic waters claims is the acceptance of Canadian control by those primarily affected and, while this has historically meant foreign governments (particularly the US), in the future it will mean shipping companies and independent operators. As Canada continues to regulate and assist foreign shipping, it reinforces its sovereignty position.

In 2011, the Standing Senate Committee on National Security and Defence welcomed foreign shipping but noted that "the key is just that you do it under our authority."²⁹ If, at some theoretical point, the status of the Northwest Passage were to be challenged and brought to international arbitration, Canada will be able to point to the thousands of commercial vessels that have operated in the Northwest Passage under Canadian regulation and implicitly accepted the route as internal Canadian waters. Against this history of international acceptance there will be very few transits that could be construed as being made outside of the Canadian legal and regulatory framework.

Crucial to this assumption is the idea that Canada can effectively assert its control over foreign activity in the Northwest Passage. In a 2006 legal opinion to the Standing Senate Committee on National Security and Defence, Pharand highlighted the need for Canada to meet any increase in Arctic traffic with better surveillance and an improved "enforcement capability to prevent or terminate activities deemed to be contrary to either its national laws or international law, or both." If the country failed to take these necessary control measures, he warned, "Canada's sovereignty over those waters would be completely amputated."³⁰

Effective control is therefore important. Exercising this control, while providing Canadian support for maritime activity in the region, not only demonstrates Canadian sovereignty but allows Canada to leverage its assets to encourage compliance. Icebreaking services, ice-reporting, and other infrastructure support can be withheld, for instance, if a foreign vessel fails to comply with Canadian instructions.

Conversely, the absence of such support may incentivize foreign actors to operate outside of Canada's reporting and regulatory framework – on the assumption that there is less to lose by doing so. If foreign actors see no advantage to working within the Canadian system, they may begin to treat the Northwest Passage as an international strait, in which Canadian control is nominal at best.

Canada is preparing this enforcement capacity with five (or six) Arctic Offshore and Patrol Ships, now in various stages of construction in Halifax. The Department of National Defence's recently-released White Paper, *Strong, Secure, Engaged*, also offers promising commitments in situational awareness, while Defence Research and Development Canada is spending millions on new monitoring technology for the Arctic waters. More efforts should also be made to map the Northwest Passage, where modern hydrographic surveying covers only 10% of the area.

There is no obvious threat to Canada's Arctic sovereignty. The country's position is well grounded in international law and has never been seriously challenged. While a dispute over the status of the waters does exist, it has been well managed since the early 1950s. Increasing activity in the Arctic will bring new actors and increase the value of the Northwest Passage, but it remains difficult to see how any foreign state or private enterprise could benefit from challenging the Canadian position.

²⁹ Standing Senate Committee on National Security and Defence, "Sovereignty and Security in Canada's Arctic, Interim Report" (March, 2011), 36.

³⁰ Donat Pharand, "Legal Opinion on the Northwest Passage," *Managing Turmoil*, an Interim Report of the Standing Senate Committee on National Security and Defence, 2006, 220-21.



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Dr. Lajeunesse is a fellow of the Canadian Global Affairs Institute, the Arctic Institute of North America, and the Centre for the Study of Security and Development and sits on the editorial board of the Canadian Naval Review. He is a regular lecturer at the NATO Defence College (Rome) and an academic participant in the bi-annual Arctic Security Working Group.