

**STANDING COMMITTEE ON FOREIGN AFFAIRS
AND INTERNATIONAL DEVELOPMENT
OF THE HOUSE OF COMMONS**

“STUDY ON CANADIAN SOVEREIGNTY IN CANADA’S ARCTIC”

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3:30-4:40

- Good afternoon
- As a specialist of the law of the sea, I will confine my remarks to issues identified in the Committee’s Standing Order that raise legal considerations and concern the maritime domain → the NWP and if time permits, the extended continental shelf

1. THE NORWEST PASSAGE

- In terms of my field of expertise → the law of the sea → this is by far the most sensitive issue in terms of Canada’s sovereignty in the Arctic
- I have prepared explanatory notes in regards to the debate surrounding the legal status of the Northwest Passage and its implications for Canada → I would be honoured to share them with members of the Committee if they might be of assistance
- As is well known, the Canadian Government claims all the waters of the Arctic archipelago as Canadian historic internal waters
- Under international law, a State exercises exclusive and absolute authority over its internal waters, including the right to control access to those waters

Article 2 of the LOSC *Legal Status of the territorial sea...*

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters

- Thus, navigation through the Northwest Passage is subject to Canadian laws and regulations and violations can be sanctioned through Canadian law enforcement agencies and mechanisms
- Washington has long held the view → it has been depressingly consistent in this position → that the routes of the Northwest Passage constitute an international strait subject to the right of transit passage

In his January 2009 “National Security Presidential Directive and Homeland Security Presidential Directive”, President George W. Bush emphasized that freedom of the seas was a top national priority for the United States. “The Northwest Passage is a strait used for international navigation,

and the Northern Sea Route include straits used for international navigation; the regime of transit passage applies to passage through those straits.”

See also President Obama’s “National Strategy for the Arctic Region” of May 2013: “Accession to the Convention [1982 United Nations Law of the Sea Convention] would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and overflight through the Northwest Passage and the Northern Sea Route.”

- As defined under Part III of the Law of the Sea Convention → transit passage means freedom of navigation for the ships and aircraft of ALL nations, both civilian AND military

Article 38 of the LOSC *Right of Transit Passage*

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded...

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait...

- It is important to emphasize this often neglected aspect of the legal regime governing international straits
- The regime guarantees a right of navigation for ships and submarines on and under the water BUT ALSO for aircraft in the international air corridor that exists above international straits
- Ships, submarines AND aircraft → both civilian AND military → enjoy a right of unimpeded navigation through international straits
- While this disagreement between Canada and the United States is long-standing → at least 40 years → it has been well-managed and indeed, Washington has never sought to undermine the Canadian legal position by sending, for instance, a warship unannounced through the Northwest Passage
- But the ice which has always been an ally, isolating the Canadian Far North and allowing the issue to be dealt with as a minor, occasional irritant in the special relationship between Canada and the United States → is melting
- This new access has transformed the Arctic into a strategic region, at the heart of global affairs
- Suddenly, the status of the Northwest Passage is no longer an esoteric, quirky debate among Canadian and American academics → it is no longer a bilateral issue

- In September 2013, the German Federal Foreign Office released “Guidelines” of Germany’s Arctic Policy¹ which announced that the German Federal Government was “**campaigning for freedom of navigation** in the Arctic Ocean (Northeast, **Northwest** and Transpolar Passages)
- It is unclear what “campaigning for” (*in the context of the German policy*) means or entails
- But it was certainly a relief to discover that the 2016 “European Union Policy for the Arctic” had **NOT** been influenced by the German view

However, the most recent articulation of European Union policy, “An integrated European Union Policy for the Arctic” released on 27 April 2016 by the Commission and the High Representative for Foreign Affairs and Security Policy does not wade into the Northwest Passage controversy.

Instead, it emphasizes the need for safe and secure maritime activities. “In view of increasing vessel traffic in the Arctic, including some carrying flags from EU Member States,” it asserts, “the EU should contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of spatial and temporal developments of the increasing maritime activities in the Arctic.”

The EU policy only references the “North East Passage” (more commonly referred to as the Northern Sea Route) and, even then, only does so with regards to the stated objective of creating a “network for the Arctic and the Atlantic” to cope with any maritime security threats that might result from increasing activity within the Passage. Emphasis is placed on ensuring the effective implementation of the Polar Code and enhancing search and rescue capabilities – all critical issues for Canada.

- In January 2018, China released an official White Paper² that sets out a perfectly ambiguous Arctic policy, at least in regards to the NWP
- The most intriguing and nebulous passages can be found under Part IV, Section 3, Subsection (1) entitled “China’s participation in the **development** of Arctic shipping routes

Part IV “China’s Policies and Positions on Participating in Arctic Affairs”, Section 3 “Utilizing Arctic Resources in a lawful and rational manner”, Subsection (1) “China’s participation in the development of Arctic shipping routes”

- The key paragraph begins with a definition of what China means by “Arctic shipping routes” → they are deemed to include the Northwest Passage (with the Northeast Passage and the Central Passage)
- The Chinese White Paper goes on to state:

¹ Available at < https://www.bmel.de/SharedDocs/Downloads/EN/International/Leitlinien-Arktispolitik.pdf?__blob=publicationFile > at p. 1.

² Available at < http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm >

As a result of global warming, the Arctic shipping routes → which include the NWP → are likely to become important transport routes (*for international trade*). China respects the legislative, enforcement and adjudicatory powers of the Arctic States in the waters subject to their jurisdiction.

- Sounds great → an acknowledgment, it would seem, of Canada's sovereignty over the NWP
- However, the remainder of the paragraph raises significant concerns:

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.

- The last two sentences completely negate the support expressed in the earlier sentence
- The reference to “freedom of navigation” in the “Arctic shipping routes” → which are defined as including the NWP → is of course in complete opposition to the official Canadian position
- The Chinese White Paper also gives some legitimacy to the idea that a “dispute” exists as to the status of the “Arctic shipping routes”, which again include the NWP
- In any case, any hopes that the Chinese Government might explicitly recognize the Canadian position (as a means to strengthen its own claim to the Qiongzhou Strait) were dashed when it chose to invoke the rules on marine scientific research to cover the transit of its research icebreaker Xuelong (a State vessel) through the NWP in the summer of 2017

Article 245 *Marine scientific research in the territorial sea*

Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.

Article 246 *Marine scientific research in the exclusive economic zone and on the continental shelf*

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

- Therefore, now → more than ever → Canada must be present and exert effective authority over the Northwest Passage

- Over the last half century, this presence has largely taken the form of Canadian Coast Guard vessels, escorting and assisting ships through the Passage and serving the needs of the various Arctic communities
- The addition of the Navy's Arctic and Offshore Patrol Vessels → will be a tremendous asset in showing Canada's resolve and determination in guarding its maritime boundaries and enforcing Canadian rules and regulations within its sovereign maritime territory
- However, to be effective, the Canadian Armed Forces must be equipped with the best possible surveillance and detection technology, not only to track surface but also underwater transits
- To be clear, as territorial sovereign and in order to protect its legal position on the NWP, the Canadian government would have to react vis-à-vis any ship or submarine which had entered the archipelago unannounced and uninvited
- The amount of time available for diplomatic negotiations between Canada and the flag State would be severely limited
- The issuance of a formal letter of protest to the flag State would likely be seen as a fairly weak response and certainly would offer little protection from the potential harm that might be caused by the offending vessel
- In my opinion, and in the absence of a political solution, Canada should be prepared and willing to intercept
- The Canadian Armed Forces must therefore have the capability to interdict a foreign ship navigating through the Northwest Passage without Canadian permission
- Given the distances involved and the harsh conditions, this aspect of the Armed Forces' mission poses a significant challenge
- It would seem appropriate for a specialized unit and a least one military aircraft to be stationed in the Arctic, at the very least during the summer shipping season
- However, claiming the NWP as sovereign internal waters does not only bring powers and prerogatives, control and authority → it also imposes responsibilities and duties upon Canada
- Canada must act as a responsible sovereign over its waters
- The Ocean Protection Plan and the important sums allocated to the Arctic are strong and critical evidence of Canada's commitment to effectively governing its Arctic maritime territory → and I would say, long overdue evidence
- For if Canada's national interest lies in promoting safe and responsible navigation through its fragile Arctic waters, then it must make the necessary investments to provide adequate navigation aids and most critically, modern and accurate nautical charts

- It must designate places of refuge for ships in distress and provide at least a minimum level of search and rescue capability
- Given the immensity of Canada's Arctic waters and the daunting challenge it presents, I strongly support Transport Canada's initiative → with the Coast Guard and assistance from local indigenous communities → in the designation and establishment of Arctic marine corridors
- I can only hope that after more than 5 years of analysis and consultations → a pilot "corridor" will soon be established
- I am also a strong supporter of the creation of Marine Protected Areas in the waters of the Canadian Arctic, particularly where management plans for such areas are devised in collaboration with local indigenous communities
- They are a manifestation of Canada's vision and priorities for its sovereign maritime territory
- Such collaborative initiatives also reinforce the truth that the Canadian Arctic waters are a cultural homeland
- Canada must continue to robustly assert control, authority → and yes, exercise its sovereignty → over the Northwest Passage but it must also convince other interested States → through concrete action and necessary investments → that it can be trusted to be a responsible steward of the NWP

2. THE CONTINENTAL SHELF

- Under general customary international law but also as a party to the 1982 Law of the Sea Convention, Canada enjoys exclusive sovereign rights over the natural resources of its continental shelf, including on its extended continental shelf

Article 76 Definition of the continental shelf :

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin...

Article 77 Rights of the coastal State over the continental shelf :

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

- However, because it is a party to the Law of the Sea Convention, Canada must submit a dossier containing scientific evidence and information on the limits of its continental shelf beyond 200 nm to the UN Commission on the Limits of the Continental Shelf → ART 76(8)
- According to the process established by ART 76, once the Commission has carefully reviewed a State's submission and the scientific evidence it is adducing, it makes recommendations to the coastal State in relation to the establishment of the outer limits of its continental shelf

Article 76 Definition of the continental shelf:

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

- So far, all of the 5 Arctic coastal States are abiding by the “rules of the game”
 - i) RUSSIA was the first to make an official submission to the UN Commission in 2001. However, the Commission in 2002 responded that additional research was needed before recommendations could be made. In August 2015, after years of comprehensive research, Russia filed a revised submission in respect of the Arctic Ocean and is awaiting the Commission's recommendations.
 - ii) NORWAY made its submission to the CLCS in respect of areas in the Arctic Ocean on 27 November 2006 and received recommendations from the CLCS on 27 March 2009. Norway has since established the limits of its extended continental shelf in the Arctic Ocean on the basis of the Commission's recommendations.
 - iii) DENMARK / GREENLAND made its submission in respect of the north-eastern continental shelf of Greenland on 26 November 2013 and is awaiting the Commission's recommendations.
 - iv) CANADA made a submission to the CLCS in respect of the Atlantic Ocean on 6 December 2013 but indicated that it was a partial submission only and confirmed its intention to submit information on the limits of the Canadian continental shelf beyond 200 nm in the Arctic Ocean at a later date.

See for <http://www.un.org/Depts/los/clcs_new/commission_submissions.htm>

- v) THE UNITED STATES while not a party to the 1982 Law of the Sea Convention and therefore not obliged to nor entitled to participate in the Commission process, has nevertheless been gathering scientific evidence on the outer limits of its continental shelf northward of the Alaskan coast using the scientific formulae defined in Article 76 → paragraphs 4 and 5.

- However, it must be emphasized that the last paragraph of ART 76 → paragraph 10 → unambiguously declares that the Commission process does not and cannot prejudice the question of the delimitation of the continental shelf between States with opposite or adjacent coasts

Article 76 Definition of the continental shelf:

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

- Thus, the Article 76 process will have no impact and will not provide a determination of the **lateral** continental shelf boundary between Canada and the United States in the Beaufort Sea or between Canada and Denmark / Greenland in the Lincoln Sea

- The Lincoln Sea is an area of the Arctic Ocean north of Ellesmere Island and Greenland

Articles 74 (and 83) Delimitation of the EEZ (continental shelf) between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

- Nor will the ART 76 process settle the issue of the overlapping **outer** limits of the Arctic States in the central Arctic Ocean → for instance, along the Lomonosov Ridge

Rule 46 Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes:

1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.³

Annex 1 to the Rules of Procedure of the CLCS:

5. (a) In cases where a land or maritime dispute exists, the Commission *shall not consider and qualify a submission* made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

³ CLCS, "Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 April 2008, CLCS/40/Rev.1, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement>>.

(b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute.

6. The Commission may request a State making a submission to cooperate with it in order not to prejudice matters relating to the delimitation of boundaries between opposite or adjacent States.

- The Commission is actually estopped, by its own Rules of Procedure, from considering a submission which includes an area in dispute → unless it has the prior consent of all the parties involved in the dispute
- Confident in the knowledge that the Commission's recommendations cannot, in any event, delimit their mutual continental shelf boundaries in the Arctic, Canada, Denmark and Russia have given their explicit consent to have the Commission proceed with the evaluation of their neighbours' submissions and scientific dossiers
- This is by far the most practical and efficient use of the Commission and Article 76 process
- To allow the Commission to do its work and make its recommendations on the basis of the scientific evidence adduced → will simply provide another layer of critical information for the negotiating process that must inevitably take place between the competing States
- Indeed, the eventual determination of Canada's extended continental shelf in the Arctic will necessarily involve negotiations between all the concerned parties, including Russia of course
- For this reason, I believe it is essential that lines of communication remain open between Canada and its Arctic coastal neighbours
- The Arctic Council has offered a valuable forum to foster such dialogue and such efforts must be maintained
 - There is no doubt, however, that to wait for the Commission's recommendations on the Russian but especially the Danish and eventually Canada's submission, is to push back the start of any meaningful negotiations far into the future.
 - There are precedents where coastal States with overlapping claims in terms of the outer limits of their extended continental shelves have entered into *provisional* arrangements to share the overlap area, reserving however any *final* determination until such time as the Commission's recommendations on all relevant submissions have been received
 - However, given the amount of time such provisional arrangements may be in effect in light of the very long queue of submissions to be analysed and the slow pace of work of the Commission → there is a risk that they may harden into *de facto* resolutions that become difficult to revisit and renegotiate

- But perhaps consideration could be given to the options for a negotiated settlement between Canada, Russia and Denmark ahead of the Commission's recommendations to the individual States

- THANK YOU