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The Northwest Passage Dispute

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What is the Northwest Passage and why is it seen as a disputed area?

The Northwest Passage is a series of passageways through the waters of the Canadian Arctic Archipelago, a group of Canadian islands north of the Canadian mainland. The historical drivers behind the dispute over the Northwest Passage stem primarily from the evolution of the role that the Arctic plays in Canada's national identity, particularly in the Canadian North, combined with competing interpretations of the Law of the Sea concerning how to classify waterways.

As far as Canadians are concerned, the Northwest Passage is Canadian. This is a non-negotiable point so, from the Canadian perspective, there is no dispute. The Government of Canada even went as far as renaming the Northwest Passage the "Canadian Northwest Passage" in 2009 to underscore this point.

Canada claims that the Northwest Passage is part of its historic internal waters. This means that the waterways have the same legal status as a Canadian lake or river and are under the complete control of the government to regulate and enforce Canadian laws. Canada cites historic use of the

waters, particularly the millennium of use by Canadian Inuit peoples, and the International Court of Justice (ICJ) 1951 *Fisheries Case* to support its claim.¹

The *Fisheries Case* ruling stated that Norway had the right to draw straight baselines to encase a large region of its northern waters and designate them as Norwegian waters despite this not being the standard procedure of drawing coastal baselines. Canada argues that like Norway it too has the right to implement straight baselines, which it did in 1985, around the outer limit of the Arctic Archipelago making waters landward of these baselines internal waters.

The United States has historically been the main opponent of Canada's position,² arguing that the Northwest Passage is an international strait, an area of high seas that connects two bodies of water which is open for peaceful use by a vessel from any state. Other states, such as China,³ also have a similar stance on the Northwest Passage's status. The United States cites the ICJ 1949 *Corfu Channel Case* to support its argument.⁴

In the *Corfu Channel Case* Albania lost its bid to classify the Corfu Channel as its territorial waters.⁵ The ruling noted the channel connects two parts of high seas and had a significant volume of international traffic over a long period of time thereby making it an international strait. The ruling permitted innocent passage, meaning passageway that does not threaten the coastal state, through the waters without the need of Albania's permission.

The United States' position stems from its long-standing policy of freedom of the seas as this freedom of movement is essential to its international military role and agenda. A willingness to

¹ Central Intelligence Agency: Geographic Intelligence Report. 1952. "Anglo-Norwegian Fisheries Case and its Implications for Other Nations." CIA/RR-G-1, 29 September 1952.

<https://www.cia.gov/library/readingroom/docs/CIA-RDP79T01018A000100010001-9.pdf>. Accessed 26 January 2018; International Court of Justice. 2018. "Fisheries (United Kingdom v. Norway)." <http://www.icj-cij.org/en/case/5>. Accessed 26 January 2018.

² See: U.S. Department of State. n.d. "Maritime Security and Navigation."

<https://www.state.gov/e/oes/ocns/opa/maritimesecurity/> (Accessed 28 January 2018)

³ See: The State Council The People's Republic of China. 2018. "China's Arctic Policy."

http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm. 26 January 2018. (Accessed 28 January 2018)

⁴ International Court of Justice. 1949. "Reports of Judgments, Advisory Opinions and Orders." <http://www.icj-cij.org/files/case-related/1/001-19491215-JUD-01-00-EN.pdf>. Accessed 26 January 2018.; International Court of Justice. 2018. "Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)." <http://www.icj-cij.org/en/case/1>. Accessed 26 January 2018.

⁵ International Court of Justice. 1949. "Reports of Judgments, Advisory Opinions and Orders." <http://www.icj-cij.org/files/case-related/1/001-19491215-JUD-01-00-EN.pdf>. Accessed 26 January 2018.; International Court of Justice. 2018. "Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)." <http://www.icj-cij.org/en/case/1>. Accessed 26 January 2018.

recognize an ally's claim could have drastic negative implications elsewhere with states that the United States are on less cooperative terms with and who have similar views that waterways are domestic internal waters, such as Russia's stance on the Northern Sea Route.

This disagreement between Canada and the United States was never resolved. Rather, it went dormant with the negotiation of the 1988 *Canada-United States Agreement on Arctic Cooperation* (ACA).⁶ The ACA signaled that both sides agreed to disagree about the Northwest Passage. Presently renewed international interest in the Arctic sparked by global warming, climate change, and the draw of economic opportunities mean that the issue is no longer bilateral. The international interest in access to Arctic's economic opportunities could have implications for the Northwest Passage dispute, as recently signaled on the 26 January 2018 by China's first Arctic Policy document where it articulated its stance that it also sees both the Northwest Passage and the Northern Sea Route as international straits.⁷

How did this dispute develop and how did it impact discussions about Arctic navigation?

The dispute was ignited in earnest in 1969-1970. Up until that period, the Government of Canada did not have a firm stance on its claims to the waters. Canada was able to defer making maritime claims due to a combination of the region's limited use, which reduced pressure for any immediate action, and positive bilateral cooperation and tactful diplomacy with the United States during the 1940s and 1950s, since the Americans were the most present foreign power in the Canadian Arctic at that time. Such diplomatic efforts included how both sides negotiated United States' access and use of the Arctic waters to construct of the Dew Lines Early Warning System.⁸

The well-documented 1969 SS *Manhattan* incident created the paradigm shift in the government's policy toward Canada's sovereignty over the Northwest Passage. The incident involved an American oil tanker, SS *Manhattan*, testing the waterway's viability as a shipping route for oil from Alaska's North Slope to the Eastern seaboard. The United States government triggered the incident by refusing to ask Canadian permission to send an accompanying United States Coast Guard vessel to assist the commercial testing exercise.

⁶ Global Affairs Canada. 2014. "Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation." E101701 – CTS No. 1988/29. <http://www.treaty-accord.gc.ca/text-texte.aspx?id=101701> . Accessed 26 January 2018.

⁷ The State Council Information Office of the People's Republic of China. 2018. "China's Arctic Policy." http://www.xinhuanet.com/english/2018-01/26/c_136926498.htm. Accessed 26 January 2018.

⁸ Lajeunesse, Adam. 2016. "Lock, Stock, and Icebergs: A History of Canada's Arctic Maritime Sovereignty." Vancouver, UBC Press.

Motivated by concerns about sovereignty erosion and environmental risks (e.g. oil spills) the incident ignited Canadian public awareness and outrage about the Government of Canada's lack of formal claims to Arctic sovereignty and jurisdiction, particularly over the Northwest Passage which had long been viewed as part of Canada. The fallout of the SS *Manhattan* incident motivated the Government of Canada to begin the process of establishing its layered claims to jurisdiction and sovereignty over the Northwest Passage and other Arctic waters, which continued throughout the 1970s and 1980s.

Canada's efforts to establish its claims over the Northwest Passage developed into an established leadership role in Arctic maritime protection negotiations. This included passing the 1970 *Arctic Waters Pollution Prevention Act*,⁹ a landmark piece of domestic legislation which established the idea of stewardship as a cornerstone for Canada's role in the Arctic. This act inspired Article 234 of the *United Nations Convention on the Law of the Sea* which makes an exception for interference in shipping in ice-covered regions for environmental protection purposes. More recently,¹⁰ Canada took a leadership role in the development of the *Polar Code*. The *Polar Code* came into effect in 1 January 2017 and "covers the full range of design, construction, equipment, operational, training, search and rescue and environmental protection matters relevant to ships operating in the inhospitable waters surrounding the two poles".¹¹

The role of commercial players in the dispute

Companies have shown that they can impact regional maritime disputes. In the Beaufort Sea, for example, there is a large 21 436 km² pie shaped maritime boundary dispute between Canada and the United States. Both sides have tried to auction off leases for oil exploration in the disputed zone, but companies generally avoid bidding, thereby stopping either state from using them to escalate the disagreement. The development of the dispute over the Northwest Passage is also likely to be impacted by commercial decisions.

⁹ Transport Canada. 2012. "Arctic Waters Pollution Prevention Act (AWPPA)." <https://www.tc.gc.ca/eng/marinesafety/debs-arctic-acts-regulations-awppa-494.htm>. Accessed 26 January 2018.; Justice Laws Website. 2017. "Arctic Waters Pollution Prevention Act (R.S.C., 1985, c. A-12)." <http://laws-lois.justice.gc.ca/eng/acts/A-12/>. Accessed 26 January 2018.

¹⁰ United Nations. 1982. "United Nations Convention on the Law of the Sea." http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Accessed 26 January 2018.

¹¹ International Maritime Organization. 2018. "Shipping in Polar Waters: Adoption of an international code of safety for ships operating in polar waters (Polar Code)." <http://www.imo.org/en/mediacentre/hottopics/polar/pages/default.aspx>. Accessed 26 January 2018.

According to the Government of the Northwest Territories:

A record number (30) of vessels transited through the Northwest Passage in 2012. In 2013, for the first time, a large bulk carrier transited the Northwest Passage. Only 17 vessels managed the full northwest passages in 2014, due to a short and cold summer.¹²

There is little dispute that the Northwest Passage technically connects two bodies of waters – the Atlantic and Pacific Oceans – but the lack of volume of traffic transiting through the waterways has helped support Canada’s argument that the Northwest Passage does not qualify as an international strait.

At the moment, most traffic in the Canadian Arctic is either by a Canadian vessel or a vessel that stops at Canadian locations as part of resource extraction efforts or community resupplying. As a result, these vessels come under Canada’s rule of law. They also tend to follow Canada’s rules of procedure for regional navigation, such as adhering to the AWPPA regulations and registering with Canada’s mandatory Northern ship monitoring system, NORDEG.¹³

Foreign naval submarines have also long been suspected of using Canada’s Arctic waters. These deployments are occasionally discussed in the context of whether submarine traffic could impact the legal status of the Northwest Passage. By and large, however, the conclusion is that submarine activity is primarily covert, and data is not reported or available for public discussion or debate. As such, military submarine activity does not count toward the volume of traffic required to establish a waterway as an international strait.¹⁴

The focus has instead been on commercial activities. Even with the possibility of a shorter shipping distance, shipping in the Arctic is a risky undertaking.

Even if relatively ice-free in late summer, the Northwest Passage and the Beaufort Sea remain difficult to navigate with their unmarked shallow areas, shifting sand-gravel bars, fog, and dangerous weather. Increasing shipping in the region would require a high preparedness for potential environmental incidents.¹⁵

¹² Environment and Natural Resources. 2015. “7.3 Trends in Shipping in the Northwest Passage and the Beaufort Sea.” <http://www.enr.gov.nt.ca/en/state-environment/73-trends-shipping-northwest-passage-and-beaufort-sea>. Accessed 26 January 2018.

¹³ Also see: Justice Laws Website. 2017. “Northern Canada Vessel Traffic Services Zone Regulations.” SOR/2010-127. <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-127/FullText.html>. Accessed 26 January 2017.

¹⁴ Pharand, Donat. 2007. “The Arctic Waters and the Northwest Passage: A Final Revisit.” *Ocean Development & International Law* 38(2007): 3-69.

¹⁵ Environment and Natural Resources. 2015. “7.3 Trends in Shipping in the Northwest Passage and the Beaufort Sea.” <http://www.enr.gov.nt.ca/en/state-environment/73-trends-shipping-northwest-passage-and-beaufort-sea>. Accessed 26 January 2018.

Long periods of regional darkness and high insurance rates for vessels navigating in Arctic waters, will also mitigate shipping development interest and encourage businesses to take precautions, like following local safety regulations and laws developed to help in regional navigation.¹⁶

Conclusion

Overall, the dispute over the legal status Northwest Passage has been ongoing for decades. There are no inherent benefits for either Canada or the United States to alter their respective positions on the dispute. As more states wade in on the legal status of the Northwest Passage, the Government of Canada needs to find more concrete ways to ensure its claims will be respected. Global warming and climate change are game changers and a major factor that will impact how this dispute evolves is how relevant commercial players approach Canadian laws and regulations going forward as economic activity in the region increases.

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¹⁶ Griffiths, Franklyn. 2003. "The Shipping News: Canada's Arctic Sovereignty Not on Thinning Ice." 58(2): 257-282.