

THE DEBATE OVER THE LEGAL STATUS OF THE NORTHWEST PASSAGE

*Explanatory Notes by Dr. Suzanne Lalonde
Full Professor, Faculty of Law, Université de Montréal
17 Octobre 2018*

1. THE OFFICIAL CANADIAN POSITION

- When Joe Clark, then Secretary of State for External affairs, stood in the House of Commons on 10 September 1985 to announce that Canada was drawing baselines' around the outer edge of the Canadian Arctic archipelago, he took pains to emphasize that "these baselines define the outer limit of Canada's **historic internal waters**."
- This was and has remained the official position of the Government of Canada: that all of the waters within the archipelago (enclosed within those lines since 1 January 1986) are Canadian internal waters on the basis of a historic title.
- Under international law, a State may validly claim a historic title over a marine space if it can show that it has, (1) for a considerable length of time, (2) effectively exercised its exclusive authority over the maritime area in question. In addition, it must show that, during the same period of time, the exercise of authority has been (3) acquiesced in by other countries, especially those directly affected by it.
- Obviously, the 3rd criterion is a very real obstacle given the United States' letter of protest* and that of the European Community (via the British High Commission)† in 1985 following the Clark announcement.

(* I was recently informed that the American letter may not have constituted a formal, official letter of protest.)

(† At the time, the member States of the European Community did not have a common foreign policy which raises doubts as to the capacity of the British Government to presume to speak on behalf of the "European Community".)

- Query whether actual State practice since 1985 (over thirty years now) might not amount to "acquiescence" in the Canadian claim, notwithstanding the letters of protest in 1985.
- Alternatively, it might be possible to argue that the Inuit acquired a historic title over the Arctic waters before the arrival of the Europeans, which they subsequently transferred to Canada.
- To succeed with this argument, Canada would have to persuade other States or an international court or tribunal: (1) that sea ice can be subject to occupancy and appropriation like land; (2) that under international law, indigenous people can acquire and transfer sovereign rights; and (3) that such rights, if they did exist, were in fact ceded to Canada.

- There is documented evidence that Canadian Inuit actually lived on the ice for months at a time and therefore the argument could be made that ice can in fact be “occupied”.
- There is also some support under international law for the 2nd proposition – that indigenous people can acquire and transfer sovereign territorial rights.
- See for example the *Western Sahara Case* where the ICJ recognized that territories inhabited by indigenous peoples having a measure of social and political organization were not *terra nullius* and thus that these human ‘collectivités’ enjoyed a limited but no less real international legal status → [1975] I.C.J. Rep. 12, 79 *et seq.*
- The 3rd element is the easiest to prove since the Nunavut Land Claims Agreement affirms the intent of the Inuit to transfer to Canada their rights under international law over the sea-ice.

2. ALTERNATIVE CANADIAN LEGAL JUSTIFICATION¹

- Canada can of course argue that the waters enclosed by the baselines are “non-historic internal waters”.
- Canada would then have to demonstrate that its baseline system in the Arctic respects the legal rules set out under Article 7 of the 1982 Law of the Sea Convention (LOSC).
- Canada became bound by the specific rules set out under Article 7 when it became a State Party to the Convention on 7 November 2003.
- As Article 8(1) provides: “... waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.”
- A recent historical study by Lajeunesse on Canadian Arctic sovereignty has shown (relying on archival material) that Canada has consistently claimed the waters of the Arctic archipelago as national / internal waters throughout the 20th century.²
- Thus I am confident that Canada could ‘escape’ the rule set out in Article 8(2): “Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters *areas which had not previously been considered as such*, a right of innocent passage as provided in this Convention shall exist in those waters.”
- Article 5 of the Convention proclaims that “the normal baseline” is the “low-water line along the coast”. In the 2001 *Qatar v Bahrain* case, the ICJ declared that “... the method of straight baselines,

¹ For a more detailed analysis of the official Canadian position and Canada’s Arctic baseline system, see Suzanne Lalonde, “Increased Traffic Through Canadian Arctic Waters: Canada’s State of Readiness” (2004) 38:1 *Revue juridique Thémis* 49; Michael Byers and Suzanne Lalonde, “Who Controls the Northwest Passage” (2009) 42:4 *Vanderbilt Journal of Transnational Law* 1133.

² Adam Lajeunesse, *Lock, Stock and Icebergs: A History of Canada’s Arctic Maritime Sovereignty* (Vancouver: UBC Press, 2016).

which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met”.³

- Article 7(1) of the LOSC provides 2 geographical situations where a coastal State may resort to straight baselines – 2 alternative threshold criteria: “(1) where the coast is deeply indented and cut into, or (2) if there is a fringe of islands along the coast in its immediate vicinity.
- Canada would of course rely on the 2nd geographical situation, arguing that the Arctic archipelago is a fringe of islands along its northern coast and in its immediate vicinity.
- Canada has never sought to justify its baselines on the basis of Part IV of the Convention which concerns “Archipelagic States”.
- Notwithstanding some authors’ scepticism, I believe Canada could justify resorting to straight baselines, that Canada does meet the threshold requirement:
 - The Canadian coast, by way of the Boothia peninsula, juts into the archipelago and therefore, the various islands are in the “immediate vicinity” of the Canadian coast;
 - Two islands, Lowther and Young (and other smaller islands), across Parry Chanel reinforce the unity of the archipelago;
 - The unity of the archipelago also derives from the interpenetration of the land formations and sea areas, and this close relationship is reinforced by the presence of ice;
 - Experts such as Prescott and Schofield (Australia) have commented that “[t]he referenceto the fringe of islands being in the immediate vicinity of the coast must be construed to mean the landward edge of the fringe...”⁴
- Canada’s Arctic baseline system also meets the ‘construction’ criteria laid out in Article 7:
 1. “The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast” → Article 7(3);
 2. “... [t]he sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters” → Article 7(3);
 3. Canada’s system of straight baselines does not “cut off the territorial sea of another State from the high seas or an EEZ” → Article 7(6).

³ *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [212].

⁴ Victor Prescott & Clive Schofield, *The Maritime Political Boundaries of the World*, 2nd (Leiden: Brill / Nijhoff, 2004) at 147.

- While some academics have criticized the length of some of Canada’s baseline segments (the segment across Amundsen Gulf is 92 nm and that across M’Clure Strait is 99 nm), it must be emphasized that

1. The Law of the Sea Convention does not specify a maximum length for Article 7 straight baselines unlike bay closing lines under Article 10 or archipelagic baselines under Article 47(2).
2. Article 7(5) specifically provides that “[w]here the method of straight baselines is applicable under paragraph 1, account may be taken, *in determining particular baselines*, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage.”

The historic use and occupancy of the sea and ice by the Inuit will be a very strong argument and will undoubtedly help justify individual Canadian segments / baselines.

3. WHY THE ISSUE OF “AN INTERNATIONAL STRAIT” WON’T GO AWAY

- Part III of the LOSC, “Straits Used for International Navigation” establishes a ‘regime of exception’.
- That is to say, that the rules on navigation contained in Part III are superimposed on whatever regime would normally pertain to a particular body of water.
- This is confirmed in the very 1st article of Part III.
- Article 34(1) clearly states: “The regime of passage through straits used for international navigation established in this Part *shall not in other respects affect the legal status of the waters forming such straits* or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.
- Thus, even if Canada was successful in persuading the international community that the waters of the Arctic archipelago are Canadian historic internal waters, there might still be an international strait cutting through those historic internal waters.
- While Part III establishes a detailed regime for navigation (ships and aircraft) through an international strait, the Convention does not provide a precise definition of what constitutes an international strait (the general category of straits submitted to the normal legal regime).
- The only legal source on this issue is thus the 1949 judgment of the International Court of Justice in the *North Corfu Channel Case* as reflected in the general language of Article 37.
- Article 37 provides: “This section [Transit Passage] applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

- Based on the *Corfu Channel* judgment and Article 37, there is a general consensus that two criteria must be satisfied for a body of water to constitute an “international strait”
 1. A geographic criterion: the body of water must connect 2 parts of the high seas or EEZ → this criterion is definitely satisfied in regards to the NWP
 2. A ‘functional’ criterion: the body of water must be “used” for international navigation → I’ve argued in many different fora that this criterion is most definitely NOT met in regards to the NWP
- It must be emphasized that when reference is made to a strait being “used” for international navigation, this refers to foreign ships sailing through and foreign aircraft flying above the strait **AS OF RIGHT** → that is to say, without contacting / involving the bordering State’s agencies or abiding by its national regulatory regime (confirmed in the *Corfu Channel* case).
- **ALL** of the international navigation through the Northwest Passage has to date involved Canadian government agencies and has been respectful of Canada’s laws and regulations, including what are often identified as the 2 ‘controversial’ crossings by American vessels.

The *Manhattan* crossing in 1969: Official diplomatic correspondence shows that while the U.S. did not ask Canada for permission for the *Manhattan* crossing in 1969, the Canadian Government was advised in advance of the crossing, formal permission was granted by the Canadian Government, Canadian personnel was on board the *Manhattan* throughout the crossing (notably Thomas Pullen), the *Manhattan* was assisted for the entirety of its voyage by the Canadian icebreaker *Sir John A. Macdonald*, and the *Manhattan* conformed to the Canadian regulatory regime.

This is most certainly NOT navigation “as of right”.

The 1985 transit by the *Polar Sea*: Rob Huebert in his Ph.D. thesis establishes, again on the basis of official diplomatic correspondence, that Canada and the United States had arrived at an understanding in the days leading up to the transit. Once again, while permission was not sought by Washington, advance notification was given and to protect its legal position, the Government of Canada officially granted permission for the transit. As in 1969, Canadian personnel was on board the *Polar Sea* for the transit through the Northwest Passage and the American vessel received assistance from the Canadian Ice Service among other federal agencies.

This is most certainly NOT an instance of navigation “as of right” by a foreign vessel through the NWP.

- All other transits of the NWP by foreign vessels (including China’s Xuelong in the summer of 2017) have occurred in strict conformity with Canadian laws and regulations and with the direct participation of Canadian authorities and agencies.

- As for transits by submarines → it would appear that most transits are covered by NORAD or NATO arrangements / agreements (and thus with the ‘consent’ of Canada as a party to those arrangements / agreements). (*This type of information is difficult to access for a civilian.)
- As for submarine transits of the NWP by States not covered by NORAD or NATO arrangements, a legal right cannot be exercised clandestinely → this would not constitute international navigation “as of right”.
- Thus, it is not Canada’s contention that an exception should be made for the Northwest Passage.
- Rather, unlike the Strait of Gibraltar, or the Strait of Malacca, or the Torres Strait, the NWP does not meet the definition of a “strait used for international navigation” as defined under international law.

4. WHAT IS ACTUALLY REALLY AT STAKE?

- If the Northwest Passage routes are internal Canadian waters, whether by virtue of a historic title or the drawing of straight baselines, then Canada exerts full and exclusive sovereign authority over those waters (they are considered as much Canadian national territory as the streets of downtown Ottawa).
- Canadian laws and regulations govern navigation in those waters and the full force of Canada’s enforcement powers can be brought to bear if ships violate the applicable Canadian rules.
- Furthermore, the airspace above the Canadian Arctic archipelago is entirely sovereign national territory.
- If the Canadian position is rejected, than Canada’s maritime zones will be calculated from each individual land formation, each individual island. The result would be a complex patchwork of Canadian territorial sea, contiguous zone and exclusive economic zone (EEZ).
- There is nowhere in the Canadian Arctic archipelago where the marine area is greater than 400 nm across. Thus, even at its broadest, the Northwest Passage would be enclosed within Canada’s exclusive economic zone.
- Thus, navigation rights would be a mixture of innocent passage in those sections of territorial sea and freedom of navigation (and overflight) in those sections of contiguous zone and EEZ.
- Canada would exercise policing authority in those sections of territorial sea and other enforcement powers, though less extensive, in those parts of the contiguous zone and EEZ.
- Certainly, all the resources would be under the sovereignty of Canada (territorial sea) or its sovereign jurisdiction (contiguous zone, EEZ).
- If the various routes that make up the NWP are recognized as an “international strait”, then Part III relating to transit passage is superimposed on the existing regime, whatever it may be.

- That is to say, a right of transit passage, as defined under Part III would exist through waters that might otherwise be recognized as either (1) Canadian internal waters (current Canadian position) or (2) a patchwork of territorial sea, contiguous zone and EEZ.
- As described in Article 38(1), in international straits, “all ships and aircraft enjoy the right of transit passage, which shall not be impeded”.
- Article 38(2) adds that transit passage means the exercise “of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait”.
- Thus, ships and aircraft must refrain from any threat or use of force or activities other than those incident to their normal modes of transit (i.e. submarines can transit submerged).
- In addition, ships, while in transit through a strait, must comply with *international* standards (not Canadian) for safety at sea and *international* rules and procedures (not Canadian) for the prevention, reduction and control of pollution of ships → Article 39(2).
- Aircraft must observe the Rules of the Air established by the International Civil Aviation Organization (ICAO).
- Article 44 declares that “States bordering straits SHALL NOT HAMPER transit passage...”
- However, as mentioned above, article 34(1) clearly establishes that the regime of transit passage through straits does not “in other respects, affect the legal status of the waters forming such a strait”.
- Thus, if the waters are recognized as internal waters or if instead, they are deemed to be a mixture of Canadian territorial sea, contiguous zone and EEZ, the regimes for those different zones guarantee that the resources remain under the sovereignty and sovereign jurisdiction of Canada.
- No ship exercising its right of transit passage could, for example, fish while transiting through the NWP → the right of transit passage is merely a right of NAVIGATION (continuous and expeditious).
- One of the worrying aspects is that international safety and environmental standards would govern navigation if the NWP were recognized as an international strait rather than Canadian rules which are more detailed, thorough and stringent.
- Another key issue is enforcement: In the event that a foreign ship, exercising its right of transit passage through the NWP (if it was recognized as an international strait) violated an international standard for the prevention of pollution, could Canadian enforcement authorities intervene? Does Article 44 (“States shall not hamper transit passage”) prohibit such an intervention?
- Article 233 would provide some source of enforcement authority for Canada in such a situation. If a foreign ship violates an international standard for the safety of navigation or the prevention of pollution and that violation causes or threatens to cause major damage to the marine environment of the strait (NWP), the State bordering the strait can “take appropriate enforcement measures”.

- Also, it should be recognized that Article 234, the “Arctic exception”, would allow Canada to adopt domestic national rules for “the prevention, reduction and control of marine pollution from vessels” and enforce those domestic rules in regards to ice-covered areas within the limits of the Canadian EEZ (200 nm) “where particular severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation...”
- While articles 233 and 234 of the LOSC would be important sources of legislative and enforcement authority for Canada if the NWP was classified as an international strait, a number of weaknesses and gaps must be highlighted:
 1. Note that Article 233 (enforcement power) concerns a violation by a foreign ship of *international* (1) safety or (2) pollution standards and that major environmental harm must occur or be threatened. To return to my earlier example, Article 233 provides no enforcement authority for Canadian agencies as against a foreign ship that fished illegally while transiting through the NWP considered an international strait. In such a case, Article 44 would command that the Canadian government initiate a court action in order to recuperate any losses. Canadian enforcement agencies could not intercept / interdict the violating ship while it exercised its right of transit passage.
 2. It is unclear how the words “for the prevention, reduction and control of marine pollution” in Article 234 will be interpreted. Canada invoked Article 234 as a legal justification for its decision to make NORDREG mandatory. At the IMO, the United States and Singapore vehemently denounced the Canadian action, claiming that Article 234 did not provide a legal basis for the Canadian measure. In their view, making NORDREG (a vessel reporting system) mandatory, was NOT a law or regulation “for the prevention, reduction and control of marine pollution from vessels”.
 3. Article 234 only covers rules to prevent “the pollution of the marine environment from vessels”. It is unclear whether this phrase will be interpreted liberally or narrowly (e.g. will noise be considered “pollution” from ships?)
 4. It is unclear how long Article 234 will apply to the waters of the NWP. As incredible as it may seem, some scientific projections are warning that the NWP may not be covered by ice “for most of the year” within the span of decades.
 5. Perhaps, most crucially, neither Article 233 nor 234 confer any authority on Canada as regard warships or State vessels that might exercise the right of transit passage through the NWP considered as a strait (sovereign immunity). In contrast, under the current Canadian position (historic internal waters), Canada enjoys full and absolute authority to allow or refuse passage to such ships.
 6. And of great importance, Articles 233 and 234 confer absolutely zero authority to regulate the transit by aircraft in the AIR corridor above the NWP designated as an international strait. This issue, though absolutely critical in terms of Canada’s defence and security, is almost completely overlooked. To designate the NWP as an international

strait is to confer freedom of navigation above those routes to the aircraft, both civilian and and military, of all States.⁵

- There can be little doubt that though a designation of the Northwest Passage as an international strait would ONLY concern the right of navigation (ship and aircraft), it would nevertheless result in a substantial loss of authority and control for Canada in waters and in an air corridor that cut right through the heart of its national territory.

5. WHAT DO SOME OF THE MAIN PROTAGONIST IN THIS SAGA SAY?

The **UNITED STATES** has been remarkably consistent in declaring that the Northwest Passage is an international strait including in these two instances:

1. 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.”
2. 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.”

- However, it must be readily acknowledged that the United States Government has never done anything ‘in’, ‘on’ or ‘under’ the water to undermine the Canadian legal position when it could quite easily do so (of course, such a move would be highly controversial and would seriously damage the Can-US relationship).
- The United States position is based on its global geostrategic interests rather than any real concern with Canadian domestic governance of the Northwest Passage.
- For example, James Kraska of the U.S. Naval War College has stressed in his writings the legitimate concern of the United States over the negative impact for the freedom of the seas principle that would result from the recognition of Canadian sovereignty over the Northwest Passage.⁶

⁵ I spent a fair few weeks looking into this neglected issue. The results of my research were published as Suzanne Lalonde, “The Right of Overflight Above International Straits” (2014) 52 *Canadian Yearbook of International Law* 1.

⁶ Tired of hearing this justification voiced by our American colleagues, a Laval colleague and I conducted a global survey of disputes or contested claims that might be impacted by the sudden recognition of Canada’s position by Washington. In the end, we had to acknowledge that the United States’ recognition of Canada’s sovereignty over the NWP might be seized upon by Russia (NSR), China (Qiongzhou Strait), Canada (Head Harbour Passage) and to a lesser extent, Japan (Shimonoseki Strait, Hoyo Strait, Bungo Channel), Italy (Piombino Strait), India and Sri Lanka (Palk Strait) and Russian and Ukraine (Kerch Strait). Suzanne Lalonde and Frédéric Lasserre, “The Northwest Passage: A Potentially Weighty Precedent?” (2012) 43:3 *Ocean Development and International Law* 1.

The **EUROPEAN** position has evolved:

1. Reference can be made to the 2008 Communication of the European Communities to the European Parliament and the Council in which Member States and the Community were exhorted to “defend the freedom of navigation and the right of innocent passage in the newly opened routes and areas.”
2. This call was repeated in paragraph 48 of the “European Parliament Resolution of 12 March 2014 on the EU Strategy of the Arctic”, which also called on “the states in the [Arctic] region to ensure that any current transport routes – and those that may emerge in the future – are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than *internationally agreed measures* aimed at increasing security or protection of the environment.”
3. 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.

GERMANY’S ambiguous 2013 Arctic Policy

1. The “Guidelines of the Germany Arctic Policy” released by the Federal Foreign Office in September 2013 announced that the German Federal Government is “*campaigning for* freedom of navigation in the Arctic Ocean (Northeast, Northwest and Transpolar Passages) in accordance with high safety and environmental standards.”
- It is unclear what “campaigning for” entails. In any case, it was a relief to discover that the 2016 European Union Policy for the Arctic had NOT been influenced by the German view.

RUSSIA as is an ally of Canada when it comes to the Northwest Passage.

- The Russian Federation’s legal claim in regards the Northeast Passage, now renamed the Northern Sea Route, is almost the perfect mirror of the Canadian legal position (including in terms of timing).
 1. The Soviet government claimed early in the 1960s that a number of the strategic straits that make up the Northern Sea Route (notably the Vil’kitskii, Dmitrii, Laptev and Sannikov Straits) belonged historically to the Soviet Union now the Russian Federation.
 2. According to Rothwell, “there is no denying that a strong view has been presented [by the Soviet and Russian Governments] that not only are certain bays properly classified as historic but also that the various seas which make up the Russian Arctic waters can also be so classified.”⁷
 3. More recently, both the 2008 “Russian Federation’s Policy for the Arctic to 2020” and the 2013 “Strategy for the Development of the Arctic Zone of the Russian Federation and National Security up to 2020” have emphasized Russia’s *sovereignty* over the Northern Sea Route and the need to protect the country’s national interests.
 4. Furthermore, by a 15 January 1985 Declaration of its Council of Ministers, the Soviet Union drew straight baselines connecting its Arctic island groups of Novaya Zemlya, Severnaya Zemlya and the New Siberian Islands to the mainland.
- If Russia were to contest the Canadian legal position, it would be torpedoing its own claim.

CHINA is a wily, strategic international player that takes refuge in deliberate ambiguity.

- China’s position on the legal status of the NWP is constrained by its own national interest.
 1. On 4 September 1958, the People’s Republic of China issued a declaration that defined its territorial sea as a zone 12 nautical miles in width. The declaration also claimed Bohai Bay (Gulf of Tonkin) and the Qiongzhou Strait, between Hainan Island and southern China, as part of Chinese internal waters.
 2. More recently, the 1992 Law on the Territorial Sea declared that the method of straight baselines would be relied on to define the Chinese territorial sea. The follow-up legislative instrument, the Declaration on the Baseline of the Territorial Sea of 15 May 1996, confirmed China’s position according to which the Qiongzhou Strait is entirely within Chinese internal waters.
 3. The United States formally protested China’s initial claim in 1958, and again in 1996 – calling into question the legality of both the baseline system and the claim to internal

⁷ Don Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996) 209.

waters status for Qiongzhou Strait – and proceeded to conduct ‘operational assertions’ in 1997.

- Abandoning its longstanding policy of deliberate vagueness, China released an official White Paper in January 2018 that sets out a perfectly ambiguous Arctic policy, at least on the NWP issue!

4. “China’s Arctic Policy” released by the State Council Information Office of the People’s Republic of China on 26 January 2018 is strewn with references to sea passages and Arctic routes and the role of China in developing these increasingly important shipping routes.

However, the most intriguing and nebulous passages can be found under 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 Arctic shipping routes comprise the Northeast Passage, Northwest Passage, and the Central Passage. As a result of global warming, the Arctic shipping routes 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.** 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.**

China hopes to work with all parties to build a “Polar Silk Road” through developing the Arctic shipping routes. It encourages its enterprises to participate in the infrastructure construction for these routes and conduct commercial trial voyages **in accordance with the law** to pave the way for their commercial and regularized operation. China attaches great importance to navigation security in the Arctic shipping routes. It has actively conducted studies on these routes and continuously strengthened hydrographic surveys with the aim to improving the navigation, security and logistical capacities in the Arctic. China abides by the International Code for Ships Operating in Polar Waters (Polar Code), and **supports the International Maritime Organization in playing an active role in formulating navigational rules for the Arctic.** China calls for stronger international cooperation on infrastructure construction and operation of the Arctic routes.

- The reassuring statement in red is completely negated by the passages highlighted in blue. The reference to “freedom of navigation” in the “Arctic shipping routes”, which appears to encompass the NWP (see definition in the first sentence), is of course in complete opposition to the official Canadian position.

- The White Paper also gives some legitimacy to the idea that a “dispute” exists as to the status of the “Arctic shipping routes”, which again includes the NWP. Finally, by supporting the role of the IMO in formulating navigational rules “for the Arctic”, the policy appears to be advocating that international rules and standards, rather than Canadian domestic rules and regulations, should govern navigation in the NWP.
- It is unclear according to what “law” (passage in green) – Canadian domestic or international – China believes commercial trial voyages ought to be conducted.
- 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 - not only with the release of the White Paper - but also in light of the strategy China adopted for the transit of its research icebreaker Xuelong (a State vessel) through the NWP in the summer of 2017.
- The Chinese Government did not ask Canada for permission for its research icebreaker to sail through the NWP in 2017. Rather, much like the provisions of the 1988 Arctic Cooperation Agreement between Canada and the United States (which covers transits by American icebreakers engaged in scientific research), China invoked articles 245 and 246 of the LOSC on “Marine scientific research”.
- According to Article 245, “Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, *authorize* and conduct marine scientific research in their territorial sea”. For its part, Article 246 provides that “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...”
- Thus, China sidestepped the thorny issue of the legal status of the NWP. It did not ask permission for its State vessel to enter Canadian internal waters (as the Canadian position would require). However, it also did not officially declare that it rejected the Canadian position and assert freedom of navigation through an international strait. Rather, it chose to ask Canada for permission to conduct marine scientific research, an obligation imposed by the LOSC regardless of the maritime zone in which such research is to be conducted (well, except for the high seas and the international Area).
- Thus, Canada’s legal position was neither strengthened nor weakened by the transit of the Xuelong through the NWP in 2017.

* **No other official Arctic Policy has promoted “freedom of navigation” through the NWP** - e.g. Japan’s “Arctic Policy” (2015) or France’s “Feuille de route nationale sur l’Arctique (2016), etc.

6. HOW WILL WE KNOW WHO’S RIGHT?

- Part XV of the LOSC provides for the compulsory settlement of any dispute between State Parties concerning the interpretation or application of the Convention. Indeed, Article 286 in section 2

stipulates that any such dispute that has not been settled according to the general provisions under section 1 of Part XV (non-binding mechanisms such as conciliation, etc.) shall be submitted, at the request of any party to the dispute to the court or tribunal having jurisdiction.

- At first blush, it therefore appears as if any of the LOSC Parties (China, Germany, etc.) could activate Part XV of the Convention and eventually submit the “dispute” over the legal status of the Northwest Passage to an international court or tribunal.
- However, Section 3 of Part XV specifically provides a right of ‘opting out’ from the Convention’s compulsory dispute settlement mechanism for certain issues.
- For the Northwest Passage, the critical provision is Article 298(1)(a)(i):

1. When signing, *ratifying* or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does NOT accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of dispute:

(a) (i) disputes ... involving historic bays or titles...

- On the UN’s website for the 1982 Law of the Sea Convention, it is possible to find the Declaration Canada made upon it’s ratification of the LOSC on 7 November 2003: “With regard to Article 298, paragraph 1 of the Convention on the Law of the Sea, Canada does not accept any of the procedures provided for in Part XV, section 2, with respect to the following disputes:
 - Disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;”
- However, other distinct dispute settlement mechanism might be activated.
- Indeed, Canada is only one of 73 States in the world that has made a general “Declaration” recognizing the compulsory jurisdiction of the International Court of Justice.
- States parties to the Statute of the International Court of Justice may “at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court” (Article 36(2) of the Statute).
- Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other State which has accepted the same obligation before the Court by filing an application instituting proceedings with the Court, and, conversely, it has undertaken to appear before the Court should proceedings be instituted against it by one or more such other States.
- Canada filed its Declaration of acceptance of the compulsory jurisdiction of the ICJ on 10 May 1994. Germany is another of the 73 States, having made such a declaration on 1 May 2008, while the United Kingdom recently filed its own Declaration on 22 February 2017.

- Thus, on the basis of their reciprocal Declarations, Germany or the United Kingdom could institute proceedings before the ICJ on the question of the legal status of the NWP and Canada would be obligated to appear and participate in such proceedings.
- And it must be emphasized that 70 other States might also exercise that option (Australia? Denmark? Finland? India? Norway? Etc.)
- Finally, Canada could simply agree, at the request of another State, to submit the question of the legal status of the NWP to the International Court of Justice or the International Law of the Sea Tribunal or an ad hoc arbitration tribunal but the odds of this happening are very, very slim.
- For as the renowned law of the sea expert and professor Bernie Oxman (Professor at U of Miami, judge ad hoc at the ICJ) once declared, “litigation is very much like surgery ... you never know!”
- Everything points to the *status quo* being maintained in the foreseeable future. Canada must therefore continue to earn the trust and confidence of the international community, showing through its actions that it claims the NWP as Canadian internal waters not so as to impose arbitrary and unjust obligations upon foreign vessels but so as to ensure the responsible governance of its fragile and culturally sensitive waters.