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FROM THE NORTHWEST PASSAGE TO THE CANADIAN INLAND WATERS: POLITICAL HISTORY OF THE CANADIAN ARCTIC WATERS*

The paper focuses on the latest developments of an old controversy over the status of the channels and straits of the Northwest Passage. The problem arises from the fact that the waters which constitute the passage are not universally recognized as Canadian though there is an international consensus on the land area of the Arctic Archipelago. In its first part my article presents a general idea of the Northwest Passage and outlines the history of establishing Canadian sovereignty in the Arctic. The next parts of the article trace the roots of the controversy between Canada and the United States. The paper also shows the recent development of the problem and concentrates on submarine traffic underneath the waters of the Arctic Archipelago. Reaffirming Canada's claim and enforcing sovereignty there is one of the most important goals of Prime Minister Stephen Harper. Finally, the last part of the paper shows how critical the controversy is becoming. Global warming has substantially changed the Arctic. It is thought that the passage is likely to be attractive as a major shipping route. Will this time Canada be prepared to stand on guard for the "True North, strong and free"?

The North is one of the most important Canadian myths. Northern geography and concern for the North are treated by Canadians as distinct features, symbols of their country and an important part of their national identity ("North"). The theme of my presentation is a change in the official name of the Canadian northern sea route through the Arctic Archipelago, which connects the Atlantic and Pacific Oceans and is the shortest way from the east to west coasts of North America. For centuries the passage has been referred to as the Northwest Passage¹ and has become part of a northern myth. However, in 2006 the Canadian Army decided to change the official name to the Canadian Inland Waters. The alteration was politically motivated and has its roots in a controversy over the legal status of the channels and straits of the Northwest Passage, which started at the end of the 1960s. At the beginning of the 21st century, the debate resurfaced once again because of the effects of global warming. The northern mythology once again is becoming visible.

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¹ The Spanish called the hypothetical route between oceans the *Strait of Anián*.

POLITICAL HISTORY OF THE CANADIAN ARCTIC

First, I am going to give a general idea of the Northwest Passage by outlining the history of the establishment of Canadian sovereignty in the Arctic. The search for the Northwest Passage started four hundred years ago. European sailors looked for a commercial sea route between the Atlantic and Pacific Oceans. The desire to establish such a route was strong but extreme temperatures were the main obstacles. In the Arctic, water was covered with ice almost all months of the year, and weak wooden ships were not prepared to face the quest. A lack of supplies was an additional difficulty. These conditions were so extreme that not until 1906 did the first ship complete the passage.

The political history of the Arctic began in 1670 when King Charles II granted a Royal Order to the Hudson's Bay Company, giving it the title to Rupert's Land (essentially Hudson's Bay, and its watershed). In 1821, after merging with the North West Company, the territory was expanded to include what is now the Northwest Territories and Nunavut south of the Arctic Islands. The Hudson's Bay Company signed over sovereignty of its lands to Canada in 1870. This sovereignty² was never questioned. Then, in 1880, the British government transferred the rest of its possessions in the Arctic to Canada, including all islands whether discovered or not. Experts say that the British had a dubious right to give Canada islands which had not yet been discovered, or which had been discovered by foreigners. Nevertheless, Canada finally agreed to take stewardship over the still unexplored Arctic Archipelago from Great Britain.³

In the meantime, in 1906 the Norwegian explorer Roald Amundsen completed a three-year voyage in the converted herring boat *Gjøra*, and became the first man to pass through the Northwest Passage. The voyages and discoveries of large arctic islands by non-British explorers were dangerous to Canadian sovereignty over the Arctic. Thus, the Canadian government sponsored periodic voyages to the eastern Arctic in order to establish a presence there in support of its claims.⁴ Of far more importance for the assertion of Canadian sovereignty in the Arctic were NWMP posts, which controlled the activities of American whalers in the Arctic, enforced Canadian laws, and made the flag visible in the region ("Arctic" 2006a). This made Canada's formal claim secure since the 1930s, sovereignty over the land part of the Arctic Archipelago has not been questioned by any country.⁵

Although the voyage of Roald Amundsen was a success, the route through the Northwest Passage was not commercially practical: it was too long (3 years) and too dangerous to excite merchants.

² When I use the term sovereignty, I mean the supreme authority within a territory.

³ During Roald Amundsen's voyage through the passage (between 1906 and 1911), Canada, in order to maintain sovereignty, sent Captain Joseph-Elzéar Bernier on numerous trips to the North. Bernier collected license fees and duties from whalers. His lasting legacy is a bronze plaque that he hammered into the frozen tundra on Melville Island on July 1, 1909, officially claiming the Archipelago for Canada (Mandel-Campbell 2005: 2).

⁴ One of the expeditions in 1909 set up a plaque on Melville Island, claiming the Arctic Archipelago for Canada, from the mainland to the North Pole.

⁵ Canada is in a dispute with Denmark over the ownership of a small island between Baffin Island and Greenland named Hans Island (Huebert).

CONTROVERSY DURING THE TRUDEAU ERA

As of the 1930s, sovereignty over the land part of the Arctic Archipelago was secure. The issue of the waters surrounding islands was far more complicated, but no one in Canada was interested in clarifying it.⁶ In the opinion of experts, the anticipated reaction of Washington to that decision discouraged politicians (McRae, 100). And luckily for Canada, until the 1960s Washington was not very interested in the freedom of navigation through the Arctic, mainly because this region was virtually un-navigable for ships other than submarines.⁷ Until the end of the 1960s, for most Canadians the Arctic remained an imaginary place far from their daily realities.⁸ This changed because of a voyage of the oil tanker *Manhattan* in 1969.

In 1969 the American ship *Manhattan* successfully sailed through the Northwest Passage. The *Manhattan* was a specially reinforced supertanker sent by Humble Oil to test the viability of the passage for the transport of oil from Alaska to the east coast of the U.S. Owners of the ship cooperated with the U.S. government and deliberately decided to neglect requests made by the Canadian government to seek its approval before traveling through the Canadian Arctic. The expedition put Canadian jurisdiction over the passage into question. Canadian public opinion began to demand the declaration of sovereignty over the waters of the Northwest Passage.⁹

The Canadian government realized the significance of the events, and feared that the *Manhattan* might represent a precursor of future commercial voyages that could seriously undermine Canada's claim to sovereignty.¹⁰ Pierre Trudeau acted in a very creative way. In April 8, 1970, the Canadian government proposed the *Arctic Waters Pollution Prevention Act* that implemented pollution control regulation in the Arc-

⁶ Some politicians, like Lester B. Pearson, defined the Canadian Arctic as mainland, islands, and the frozen sea north of the mainland up to the North Pole. Others were not so sure (Charron 2005).

⁷ It is known that American, Soviet, and probably British submarines have been regularly patrolling the Arctic waters (Granatstein, Hilmer 1991: 246).

⁸ In the words of Professor Franklyn Griffiths from the University of Toronto: "[Canadians – M.G.] are not an Arctic nation, except in a mystical sense, as part of our greatness by extension, our grandeur as a people" (Mandel-Campbell 2005: 2).

⁹ The North suddenly became increasingly important for the national identity of a large part of Canadian society. The public pressure on Trudeau was very strong. Almost every day the press printed editorials calling for action. As a result, the majority of Canadians was even convinced that their country was the owner of the North Pole (Young 1987: 118 and Kirton, Munton 1987: 86). It should be remembered that Canada issued official maps which showed that the Arctic waters were Canadian authority. The very popular sector theory from the beginning of the 20th century stated that the boundaries of Canada stretched up to the North Pole. Even Prime Minister Lester B. Pearson believed the theory. All of this built up a mythology of the Canadian Arctic (Head: Trudeau 1995: 51–52).

¹⁰ The main problem at the turn of the 1960s and 1970s was that if the voyage had succeed, the lack of Canadian approval could have lessened the Canadian claim, since one could easily accuse Canada of not exercising power in the Northwest Passage. From the legal point of view, at the end of the 1960s, Canadian territorial waters were three miles wide. It meant that Ottawa controlled only the most frequently used strait of the Northwest Passage – the Prince of Wales Strait – because it is narrower than six miles. The Trudeau government feared that, with the development of technique, vessels could use a route through the wider McClure Strait.

tic.¹¹ Canada was not yet claiming sovereignty over the region, but rather asserting limited functional jurisdiction to prevent pollution beyond 60 degrees of the northern latitude.

The *Manhattan* became the largest ship to traverse the legendary passage, but the route was expensive and impractical. Oil companies chose the Alaska Pipeline as a means of transportation of Alaskan oil. For others, the Northwest Passage was too costly to compete with the Panama Canal.

THE POLAR SEA CONTROVERSY

For the next 16 years after the *Manhattan* voyage, no American ship sailed through the Northwest Passage ("Arctic" 2006a). It again was the focus of national attention in 1985, when the U.S. icebreaker *Polar Sea* passed through the Passage without Canadian permission.¹² The U.S. Government deliberately did not ask Canadians, claiming that this was simply a cost effective way to get the ship from Greenland to Alaska and that there was no need to ask permission to travel through international waters. Once again, Canadian sovereignty over arctic waters became a matter of dispute with the U.S. The *Polar Sea* showed that the Canadian ability to control the Arctic was *de facto* very weak and Ottawa felt obliged to act to save face.¹³

Under public pressure, Prime Minister Brian Mulroney declared total sovereignty over the waters in 1986. Since then, the Canadian government has claimed that all waters of the Northwest Passage are internal waters of Canada. However, the U.S. and the European Union refuse to accept the claim and still see them as international waters.¹⁴ I am going to discuss this later.

With the declaration of sovereignty, Canada sought a compromise with the U.S. Both countries signed an agreement in 1988 to permit U.S. icebreakers access to arctic waters, but only with Canada's consent. The agreement, however, did not settle the question of sovereignty and the problem of American submarines.¹⁵

The public outcry in the 1970s and 1980s over the two voyages was short-lived. It was rather a manifestation of Canadian nationalism and anti-Americanism. Despite the plans to build the fleet of modern icebreakers and nuclear submarines, Ottawa

¹¹ The objectives were to "assert Canada's jurisdiction to regulate all shipping in zones up to 100 nautical miles off its Arctic coasts in order to guard against pollution of the region's coastal and marine resources" (Zorzetto 2006). At the same time, the *Arctic Waters Pollution Prevention Act* also extended to the territorial waters from three to twelve nautical miles. It had a critical result for the Northwest Passage straits: Barrow and Prince of Wales passed under Canadian control.

¹² Before a number of commercial voyages via the Northwest Passage had occurred, but the owners had requested permission from the Canadian government (McRae 1987).

¹³ The voyage of the *Polar Sea* was a threat to the Canadian claim to the Arctic waters, because the vessel was a military ship. The U.S. Coast Guard is treated as part of the U.S. Navy (Griffiths 1987: 248).

¹⁴ The United Kingdom, acting on behalf of the European Community, issued a diplomatic protest against the decision of Mulroney's government.

¹⁵ Usually, however, the two countries have ignored their differences, refusing to acknowledge the regular traffic of undersea nuclear submarines that use the passage.

soon lost interest in the North.¹⁶ The plans were dropped and Canada returned to its habit of ignoring the controversy and the North. There was not much to worry about since until the beginning of the 21st century only a few vessels have completed the passage.

CANADIAN SOVEREIGNTY OVER THE WATERS OF THE NORTHWEST PASSAGE

The controversy, which I intend to concentrate on, arises from the fact that there is international consensus only concerning the land area of the Arctic Archipelago. The channels and straits that constitute the Northwest Passage are not universally recognized as Canadian. The problem is even more complicated by the fact that the Passage is a difficult piece of territory to categorize, since it is neither solely land nor solely water, and legal jurisprudence for remote, ice-clogged, arctic waters is uncertain (Charron 2005).

The position of Canada

The Canadian government's official position is that the Northwest Passage is Canadian historical internal waters. This means that Canada assumes full sovereignty over the waters and asserts complete control over all activity within them. For example, foreign vessels must request permission to pass through (Huebert 2001).¹⁷

In 1986, Canada declared straight baselines – lines drawn between the outer headlands of the Arctic Archipelago. Under international law, straits and channels within properly drawn baselines constitute internal waters subject to the full force of the coastal state's laws. However, a country may still not exercise total sovereignty over those waters if they include a strait used for international navigation. Donald McRae, a law professor at the University of Ottawa, says Canada must therefore prove two things to win a sovereignty claim over its Arctic waters.

1. It must be demonstrated that the waters of the Northwest Passage are the internal waters of Canada,
2. It must be demonstrated that the waters do not constitute an international strait – it is a functional condition (McRae).

Over the years, Canadian government officials have been saying that Canada can meet both of those requirements. For the first condition Canada has cited a ruling of the International Court of Justice.¹⁸ Ottawa also points out that the waters

¹⁶ Because of the 1985 voyage of the *Polar Sea*, External Affairs Minister Joe Clark declared an increase of the budget for the development of the northern region, surveillance flights and plans for building a new icebreaker. It fell victim to cost-cutting and was never built. The same has been with plans from 1987 and 1996 to build nuclear-powered submarines capable of patrolling the Arctic waters (McRae 1987).

¹⁷ The 1988 Canadian-American agreement stated that voyages of American vessels in the Arctic region claimed by Ottawa as Canadian would not have any impact in lessening the Canadian claim (McRae 1987).

¹⁸ The ruling from 1951 stated that countries could draw a straight baseline across coastal areas dotted with many islands and declare that all the water between that line and the main-

separating most of the islands in Canada's Arctic are frozen over most of the year. The Inuit hunt and spend large amounts of time working and even living on the ice – in effect turning it into an extension of the land.¹⁹ In short, the baselines and the claim of the waters of the Northwest Passage are secured by historic usage, including the occupation of the sea-ice by the Inuit.

For the second condition – deciding whether the waters of the Northwest Passage can be considered an international strait under maritime law – Canada has stated that there have been so few transits through the Northwest Passage that it is impossible to consider it an international shipping route.²⁰ Thus, it fails the required use test.

The American and European Position

The United States and the European Union stand firm on the contention that the waterways between the northern Canadian islands are an international strait. The Americans in particular do not accept the argument that ice cover makes a difference for the international legal definition of an international strait. The United States argues that the Northwest Passage joins two international bodies of water and has been used for international shipping, and the number of transits does not matter.

The opposition of the U.S. originates from the fact that Washington has consistently defended the right of transit passage through international waters.²¹ Naval interests of the United States around the world prevent the U.S. government from conceding to Canada on the Passage. Before September 11, 2001, it was unlikely that the U.S. government would have ended the policy of protecting vital trade routes around the world.

land is internal, even if it lies outside the 12-mile limit. The ruling concerned a case involving Norway. However, some observers say Canada's geographic case is similar ("Arctic" 2007).

¹⁹ But recently (in 2001) an official from the Legal Affairs Bureau in a presentation in Whitehorse regarding Canadian sovereignty in the Arctic argued that "Canadian sovereignty over the waterways of the Canadian Arctic did not depend on the ice cover of the region, but that Canada's view, then and now, is that since the 1880 [...] the waters of the Arctic Archipelago have been Canada's internal waters by virtue of historical title. These waters have been used by Inuit, now of Canada, since time immemorial. The official also noted that Canada has not relied on the concept of 'ice as land' to support its claim of sovereignty. [...] Thus, he concluded, 'even if the ice were to melt, Canada's legal sovereignty would be unaffected'" (Huebert 2001).

²⁰ It is reported that there were about 11 foreign transits between 1904 and 1984 ("Arctic" 2007).

²¹ Some examples include the American refusal to accept Libya's claim that the Gulf of Sidra is entirely internal waters, and, in 1986, the dispatch of the cruiser *Yorkton* and destroyer *Caron* deep into the Black Sea in order to prove the point that states should not limit the access of vessels to an international strait (Charron 2005).

CONTROVERSY IN THE 21st CENTURY

There are at least two threats to Canadian sovereignty over the Northwest Passage in the 21st century. The first is posed by subsurface transits of submarines. The second is a future threat, but in my opinion much more serious – one of the effects of global warming is the melting of ice in the Arctic regions, which would open the Passage for commercial transit. Let me start with the problem of submarines.

Submarines

As I said earlier, experts are divided on whether the waters of the Northwest Passage could be regarded as constituting an international strait, through which a right of innocent or transit passage exists. There are two conditions necessary for determining whether a body of water can be regarded by law as an international strait. Academics say that of course the Northwest Passage meets the geographic condition (joining two oceans). The problem lies in determining the second, functional condition (whether international ships use a strait). As I said earlier, only two vessels have overtly transited the Northwest Passage without requesting Canada's permission. While there has been relatively little traffic through the Passage due to ice conditions, there is an unregulated transit of foreign submarines under the surface of waters of the Northwest Passage. It is reported that since 1999, Canada has detected an average of two incursions a month, by unknown submarines in its Arctic waters.²² This could be considered as weakening the Canadian claim to sovereignty over these waters.

The problem of subsurface transit of submarines reached the front pages of newspapers in Canada and sparked outrage in late 2005. Only a few weeks in advance of Canadian general elections on January 23, 2006, the U.S. submarine *Charlotte* was reported in the media to have visited the North Pole after having passed through Canadian waters, without receiving permission. Opposition parties called it a national embarrassment and warned that Canadian sovereignty was at risk. Some observers have said that the *Charlotte's* trip was a slap in the face to all Canadians ("U.S." 2005).

The North became an important theme during the 2006 election campaign. Politicians began to declare how importantly they treat Canadian sovereignty over the Arctic waters. Stephen Harper announced plans to increase Canada's military presence in the Arctic, deploy three military icebreakers there and install a remote sensing network in order to enforce Canadian sovereignty there ("Harper" 2006a). One of the symbols of the new politics was a change in the official name of the Northwest Passage. On April 9, 2006, the Canadian Army declared that the Canadian military would no longer refer to the region as the Northwest Passage, but as the Canadian Internal Waters ("Northwest").

²² *The Globe and Mail* has informed that American vessels have made at least three incursions into the Northwest Passage without informing Canada ("U.S." 2006).

However, the reality is that Canada's military presence in the Arctic could not be considered as sufficient.²³ The Rangers, 1,400 part-time volunteers, many of them Inuit, still equipped with Second World War rifles, provide most of Canada's military presence in the Arctic. Surveillance of the region is left to five Coast Guard icebreakers, which are old and have to leave the Arctic for winter. Air patrols occur only a few times a year (Mandel-Campbell 2005: 3). In sum, Canada has no idea if American submarines are passing through unless the Americans inform the Canadians.

Global warming

The second threat to Canada's sovereignty over the Arctic is posed by global warming, which is clearing the Northwest Passage of ice and making commercial travel feasible. Scientific reports state that the Arctic region is experiencing warming at a rate greater than almost any other region of the globe (Huebert). The Passage is almost free of ice during the summer months (Burkholder). Northern Aboriginal peoples confirm this observation.²⁴

Should the Passage become ice-free, however, it is quite possible the functional condition of an international strait will soon be satisfied.²⁵ It is thought that global warming is likely to open the passage for increasing periods, making it attractive as a major shipping route. The Northwest Passage substantially shortens the distance from Asia to the east coast of the United States and Europe. It is more than 7,000 kilometers shorter than the current route through the Panama Canal, and would significantly shorten the voyage for vessels that are too large to fit through the Canal and must sail around Cape Horn. Experts say the opening of the Northwest Passage could be the most significant change to ocean transportation since the opening of the Panama Canal in 1914. However, if foreign ships begin using the route, Canada may lose its claim of the Arctic waters.

HOW THE CONTROVERSY CAN BE SOLVED

The controversy between Canada and the U.S. concerning sovereignty over the waters of the Northwest Passage is based on the principles of law. Arguments on both

²³ Canadian Forces Northern Area Headquarters in Yellowknife has a staff of 150 people. There are also two smaller detachments in Whitehorse and Iqaluit. They are responsible for a territory of four million square kilometers (Sevunts).

²⁴ Insects have been reported much further north than is the norm. Changes in animal migration patterns have also been reported. Both northern Aboriginal peoples and scientists have reported significant changes in the hunting patterns of predators such as the polar bear. Inuit hunters are falling through thinning ice and dying. There is not enough snow to build igloos for shelter during hunts ("From").

²⁵ As long as ice conditions remained hazardous to commercial shipping, there was little incentive for any country, the United States included, to challenge the Canadian position. International law expert at the University of British Columbia, Michael Byers reported: "We've essentially been able to avoid problems over this in the past because the ice has been too thick and too hard to make it a commercially viable route...But, of course, the ice is melting" ("Harper" 2006b).

sides are strong and solid. Experts are of the opinion that continued reliance on strictly legal arguments is likely to result in a stalemate. A way forward must be based not on law but on some kind of political compromise. Let us look at a chance to solve the dispute that has recently emerged.

One of the first signs that the position of Washington with regard to the Passage is changing was a speech given in late October 2006 by former U.S. ambassador to Canada Paul Cellucci. He declared that the disputed waters in the North should be recognized as a sovereign Canadian territory, since it would be easier for Canada to police the area than for the United States, and the decision should be made in the context of North American security ("Americans").

Since September 11, 2001, security has become the most important problem for the United States. And there is the opportunity for Canada to overcome a 150-year-old American policy of securing freedom of navigation in the seas. During the Cold War, the U.S. was focused on maintaining open access for its navy, especially its submarines. Today, Washington is more concerned about terrorists sneaking into North America, or states using the oceans to transport "weapons of mass destruction." The U.S. would benefit more if foreign vessels had to fulfill Canada's reasonable regulations than by maintaining that the Northwest Passage is an international strait. This type of reasoning is responsible for lessening Washington's objections to the new Canadian strategy of strengthening its military presence in the Arctic.

Of course, the U.S. approval could be only tacit, if support for the Canadian claim had been used by other states to restrict U.S. naval mobility elsewhere in the world.²⁶ Also, abandoning the position of securing freedom of navigation would result in protests from the U.S. Navy.²⁷ However, when it comes to the U.S. national security interests in the Arctic, new demands of homeland security and continental defense have been more important than the traditional need for naval mobility in distant areas. Canada's quest for accepted jurisdiction in the Northwest Passage could paradoxically benefit substantially from the events of September 11 ("Arctic" 2006b).

The new U.S. tactic toward the debate with Canada has not yet received widespread support. The main problem for Canada lies in convincing the U.S. that this time Prime Minister Stephen Harper's announcement of a new arctic policy is different from promises made by Pierre Trudeau, Joe Clark, or Brian Mulroney. Their intentions to build a Canadian naval presence in the Arctic have never been fulfilled ("Arctic" 2006b).

Canada and the U.S. have a long history of compromise and working around agreements. This makes a solution to the dispute over the Northwest Passage more likely to be reached. Perhaps the controversy could be solved under the existing agreements for the joint protection of North America. And probably the best way for Canada would be to act along lines proposed by Professor Michael Byers: in exchange for the U.S. recognition of the Canadian claim, Ottawa would provide "open access for all American government vessels, facilitate shipping by reputable compa-

²⁶ The current U.S. ambassador to Canada, David Wilkins, has been quick to restate U.S. insistence that the Northwest Passage is an international strait ("Americans").

²⁷ Christopher Sands, a senior associate of the Washington-based think tank Centre for Strategic and International Studies, said in November 2006: "By suggesting that the U.S. position on a matter of international law might be changed in order to please a friendly government, the U.S. would open itself to challenges and special pleas around the world, along with charges of hypocrisy" (Berthiaume 2006: 9).

nies, and invest in the equipment necessary to police the Northwest Passage on a year-round basis" (Byers 2007).

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