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TROUBLED WATERS: CANADA'S CLAIM ON THE NORTHWEST PASSAGE AND THE IMPACT ON THE ROYAL CANADIAN NAVY

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Service Paper

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AIM

1. This service paper will analyze the United States' (US) response to the Canadian claim that the Northwest Passage (NWP) is a territorial water space. It will then propose a possible course of action for resolution in concert with the US as a method to assuage security concerns while maintaining Canadian sovereignty.

INTRODUCTION

2. Over the past several years there has been much discussion regarding US foreign policy regarding Canada's strategic policy concerning the NWP. Decisions Canada will make in the next decade will have significant ramifications for the country. It is assumed that Canada will adhere to its defence policy with regards to a secure arctic in partnership with the US as described in *Strong Secure Engaged: Canada's Defence Policy* (SSE)¹. It is also assumed that Canada will maintain its claim that the NWP is a territorial water space².

3. This service paper will begin by describing the evolving importance of the NWP and an overview of Canadian policy. US strategic intentions with regards to the NWP will be discussed through the lens of economic and homeland security and in the context of its relationships with Russia and China, as well as disadvantages. Finally, a course of

¹ Department of National Defence. *Strong, Secure, Engaged: Canada's Defence Policy*. (Ottawa: DND, 2017), 59.

² Mathieu Nolin. "Heated Conflict Over the Northwest Passage: Is Canada's Sovereignty Melting Away?" *Journal of Maritime Law and Commerce* 48, no. 3 (2017), 346.

action will be proposed which will align with US strategic intentions while allowing the RCN to support Canada's strategic policy with regards to the NWP.

DISCUSSION

The Changing Arctic and Canadian Policy

4. There is an overwhelming amount of evidence which indicates that arctic sea ice is diminishing annually³. There is, however, general disagreement on when the NWP will become navigable. Some projections state that the first ice-free periods will occur in the first third of this century while other models indicate it will occur during the second third⁴. Nonetheless, when the NWP does achieve ice-free states for limited periods during the year, the implications for commerce and international trade is significant. An ice-free route via the NWP will provide a distance savings of up to 60% as compared to more traditional routes, namely the Suez or Panama canals⁵. This equates to a far reduced transit time and significant cost savings, which provides an economic advantage for a variety of organizations, both governmental and business. The result is that this century, Canada will witness an increased amount of shipping traffic in the NWP.

5. The United Nations Conventions on the Law of the Sea (UNCLOS) provides a framework for the identification, recognition and adherence to sovereignty and integrity of territorial waters⁶, and of the exclusive economic zone (EEZ) which may extend up to

³ Scott R. Stephenson and Laurence C. Smith. "Influence of Climate Model Variability on Projected Arctic Shipping Futures." *Earth's Future* 3, no. 11 (2015), 331.

⁴ *Ibid.*, 340.

⁵ *Ibid.*, 331.

⁶ United Nations. *United Nations International Convention of the Laws of the Sea*. (Montego Bay, United States: 1982), 25.

200 nautical miles (nm) from territorial waters⁷. International regulatory organizations listed in UNCLOS are the International Maritime Organization (IMO) and the International Tribunal for the Law of the Seas (ITLOS)⁸ which are important for the resolution of international disputes⁹. Conventionally, the other regulatory body is the International Court of Justice (ICJ)¹⁰ though it is not described in UNCLOS.

6. Canada asserts that the NWP is part of its territorial waters as per UNCLOS. Its claim is based on continued jurisdictional control, the historical context of the claim, international consent and that Canada has “drawn a straight baseline connecting the outer headlands of [the] Arctic Archipelago.¹¹” Strategically this is important because recognition of the NWP as territorial waters would allow enforcement of internal laws and management of environmental concerns. Secondly, any gas and oil reserves could potentially be capitalized upon, as well as denied from competing nations. This claim, however, has not stood the test of international regulatory organizations¹². In several decades when the NWP experiences ice free and navigable periods, this may very well become a moot point as other nations challenge Canada’s claim via precedence setting freedom of navigation of warships through the NWP.

US Strategic Interests

7. Though not a signatory, UNCLOS is important to the US and is leveraging UNCLOS as a method to project its security interests. The US’ strategic interest in the

⁷ *Ibid.*, 32.

⁸ *Ibid.*, 95.

⁹ *Ibid.*, 184.

¹⁰ Mathieu Nolin. "Heated Conflict Over the Northwest Passage: Is Canada's Sovereignty Melting Away?" : 360.

¹¹ *Ibid.*, 346.

¹² *Ibid.*, 363

NWP revolves around issues of economic, defence, and to a lesser extent, environmental security¹³. In fact the US government has directly cited UNCLOS in order to assert its interests in the arctic, especially regarding its economic concerns¹⁴. Further, the US perceives the integrity of UNCLOS as strategically important with regards to its interests in other contested sea spaces¹⁵. This policy is centred on its economic interests in Alaska¹⁶, its policy concerning Russian arctic interests¹⁷ and its efforts to thwart Chinese interests in the South China Sea¹⁸. Therefore, in order for the US to advance its strategic security interests, it continues to contest Canada's claim that the NWP is a territorial water space.

8. The US is an arctic nation because of Alaska. Over the past several decades Alaska has put increasing pressure on the US due to the potential to increase economic security. The discovery of up to 20% of the world's natural gas reserves in the arctic and increasing accessibility due to climate change have convinced the US government¹⁹. More recently, the Trump Administration's renewed interest via the "America First Energy Plan" has placed renewed focus on Alaska, especially since the reserves will

¹³ Annika E. Nilsson. "The United States and the Making of an Arctic Nation." *The Polar Record* 54, no. 2 (2018): 104.

¹⁴ Philip E. Steinberg . "Steering between Scylla and Charybdis: The Northwest Passage as Territorial Sea." *Ocean Development and International Law* 45, no. 1 (2014), 95.

¹⁵ *Ibid.*

¹⁶ Annika E. Nilsson. "The United States and the Making of an Arctic Nation.",105.

¹⁷ Natasha Geber. "Russia's Arctic Policy: Objectives and Prospects." *Journal of Public and International Affairs* (2015), 30.

¹⁸ Simon, Sheldon. "US-Southeast Asia Relations: Augmented Presence." *Comparative Connections* 18, no. 2 (2016), 48.

¹⁹ Annika E. Nilsson. "The United States and the Making of an Arctic Nation.", 105.

become more economically viable²⁰. Assertion of these claims positions the US to take advantage of natural gas resources.

9. Russia is positioning itself as the premier arctic power via its claim of the projection of its northern continental shelf and its claim of the Northern Sea Route (NSR). Russia has laid claim to the continental shelf from its territorial waters to the high arctic for two reasons. First, the NSR as claimed navigates at some points within its EEZ but outside of normal territorial waters as per the UNCLOS definition of 12nm, thereby extending the territorial waters²¹. Secondly, UNCLOS allows for a jurisdictional claim to the continental shelf (and resources) so long as the shelf extends unbroken from its territorial waters²². The result is that Russia is claiming the potential of natural gas and oil reserves which extends approximately 600 nm from its northern coast²³. The consequence for Canada is that if the US officially recognizes Canada's claims and the definition in UNCLOS, it will, by default, recognize Russian NSR claims. Furthermore, the US will effectively cede to Russian and oil and gas claims, and ensuing economic security, far beyond Russia's EEZ, which the US will then not be able to access.

10. Recently, China has become interested in the arctic. Though not a member of the Arctic Council, it has been granted observer status²⁴. It has invested in scientific research in the arctic²⁵ and has developed economic relations with Iceland, a member of the Arctic

²⁰ Sakharov, A. "Shift in the United States Climate Policy and the Arctic Council Agenda." *International Organisations Research Journal* 13, no. 1 (2018), 70.

²¹ *Ibid.*, 42.

²² *Ibid.*, 32.

²³ Caitlyn Antrim. "Geography and Jurisdiction in the Maritime Arctic." *Geographical Review* 107, no. 1 (2017), 44.

²⁴ Marc Lanteigne and Su Ping. "China's Developing Arctic Policies: Myths and Misconceptions." *Journal of China and International Relations* 3, no. 1 (2015), 1.

²⁵ *Ibid.*, 18.

Council²⁶. As China has not produced its equivalent of an arctic white paper²⁷, it is difficult to deduce its strategic intentions regarding economic and domestic security. However, it is becoming increasingly clear that China is attempting to exert its influence regarding freedom of the seas as per UNCLOS as well as to assert its influence²⁸, possibly to secure secondary access to gas and oil reserves via other nations, such as Iceland. With China's continued exertion of power in the South China Sea²⁹ and the contested issues involving the Spratly Islands and the Nine Dash Line³⁰, the US' recognition of Canada's claim to the NWP would be an acknowledgement of China's claim in the South China Sea. Furthermore if the US bows to Chinese interests in the arctic beyond scientific interest and observer status, it will add further political complications to an already crowded arctic space.

11. Due to the above arguments, the US may have weakened its strategic posture in the arctic. The US cites UNCLOS as the reason it contests the NWP and contests Chinese claims in the South China Sea. Yet, the US' only regulatory route for resolution is the ICJ, which it has not done. It cannot resolve the issue via ITLOS or the IMO as it has not ratified UNCLOS and could not pursue any of its counter claims in either of the later regulatory organizations. Theoretically at least, any nation could exploit gas reserves within Alaska's 200nm limit and this exploitation would be defensible in accordance with UNCLOS. Furthermore, should Canada or Russia demand the US request diplomatic clearance to sail within claimed territorial waters, the US would not have a legal counter.

²⁶ Aki Tonami. "The Arctic Policy of China and Japan: Multi-Layered Economic and Strategic Motivations." *The Polar Journal* 4, no. 1 (2014), 122.

²⁷ Marc Lanteigne and Su Ping. "China's Developing Arctic Policies: Myths and Misconceptions.", 18.

²⁸ Ingrid Lundestad and Tunsjø Øystein. "The United States and China in the Arctic." *The Polar Record* 51, no. 4 (2015), 399

²⁹ Sheldon Simon. "US-Southeast Asia Relations: Augmented Presence.", 48.

³⁰ *Ibid.*, 52.

Therefore, by not ratifying UNCLOS, the US is limiting its ability to assert its claims via soft means. There is no question that it could enforce its claims via hard power³¹, but doing so would significantly increase the risk of kinetic conflict in the region. The US has boxed itself into a rather tenuous position, one which Canada must take advantage of before the opportunity closes.

Impact to the RCN

12. SSE states that “Principal among the challenges at home is the need to operate in the Arctic, alongside the Canadian Coast Guard, and alongside allied partners.³²” To meet this objective, Canada has committed to the construction of five to six Arctic and Offshore Patrol Ships (AOPS) as well as investment in Naval Intelligence Surveillance and Reconnaissance (ISR) capabilities³³. However, without resolution of the NWP claim, this endeavour may be moot as Canada’s ability to defend its sovereignty claim is very limited. Therefore, a complimentary approach is required; to engage in dispute resolution with the US and other key international partners via the ICJ³⁴. Partnership with the US may also lead to the termination of the ad hoc nature of agreements with the US as per the 1988 Agreement on Arctic Cooperation, and enable the US to support Canada in any disputes brought before the ICJ for resolution³⁵. If this is not pursued, when international powers exercise freedom of navigation Canada will be on very tenuous legal ground, especially if it can’t enforce its sovereignty claims.

³¹Navy Project Team. *Report to Congress. Alternative Future Fleet Platform Architecture Study*. (Washington: Navy Pentagon, 2016), 3-4.

³² Department of National Defence. *Strong, Secure, Engaged: Canada’s Defence Policy*, 35.

³³ *Ibid.*

³⁴ Mathieu Nolin. "Heated Conflict Over the Northwest Passage: Is Canada's Sovereignty Melting Away?", 360.

³⁵ *Ibid.*, 363.

13. For dispute resolution to occur, Canada needs to apply Canadian laws as well as develop a strong method of managing the NWP³⁶. This task would fall to the RCN, very likely in partnership with the Royal Canadian Air Force (RCAF), and other government departments (OGDs) such as the Canadian Coast Guard (CCG) and the Department of Fisheries and Oceans (DFO). For this solution to be viable, Canada may need to increase the speed of its investments in the arctic, beyond what was recently announced by the Minister of National Defence³⁷.

CONCLUSION

14. Canada has staked its claim of the NWP as territorial waters as per UNCLOS, which the US will not recognize, given the US' present strategic policy towards Russia and China. Within this century, when the NWP becomes navigable, this claim will be challenged. Therefore, for Canada to secure its claim, the dispute should be resolved in partnership with the US and other major stakeholders, and any disputes should be resolved via the ICJ. If Canada waits until the passage is navigable, it will be too late.

RECOMMENDATION

15. In order to avoid a prolonged dispute with the US, it is recommended that NWP patrols are conducted in partnership with the US. Framing the dispute within the US strategy of homeland and economic security and providing the US secure passage would assuage US security concerns while not officially acknowledging UNCLOS, thereby falling within the context of US strategic objectives. At the same time, any disputes

³⁶ *Ibid.*, 362.

³⁷ Alex Brockman "Northern defence upgrades part of plan to protect Canada's Arctic, Sajjan says," CBC News, 20 August 2018.

would be brought before the ICJ for resolution, avoiding the IMO or ITLOS, thereby averting resolution via UNCLOS. Once the dispute is resolved, the US' security concerns would be satisfied, Canada's commitment to a secure North American battlespace reaffirmed and Canada's arctic sovereignty protected.

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