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## WHAT DOES THE U.S. POLICY ON THE NORTHWEST PASSAGE MEAN FOR THE ROYAL CANADIAN NAVY?

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By Lieutenant-Commander Maude Ouellet-Savard

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## WHAT DOES THE U.S. POLICY ON THE NORTHWEST PASSAGE MEAN FOR THE ROYAL CANADIAN NAVY?

### AIM

1. With the rapid decline of the ice cover in the Arctic region, the legal status of the Northwest Passage (NWP, Passage) has been, and remains, a vibrant subject of debate among the Arctic states, and within the international community. More specifically, while Canada claims the NWP are “historic internal waters”<sup>1</sup>, the United States’ “response to Canada’s position has consistently been that the waters of the Passage are part of an “international strait” through which the freedom of navigation prevails.”<sup>2</sup> The purpose of this service paper is to present both the Director General Naval Force Development (DGNFD) and the Director General Naval Strategic Readiness (DGNSR)<sup>3</sup> an analysis of the American Arctic Policy as it pertains to the NWP in order to better understand the implications for the Royal Canadian Navy (RCN and propose areas for further studies so Canada is ready to face the maritime future in the Arctic.

### INTRODUCTION

2. Ever since the first complete transit of the Northwest Passage between 1903-06 by Norwegian explorer Roald Amundsen<sup>4</sup>, the prospect of using the waterway for commercial shipping has drawn the world’s attention to the Arctic. The spotlight put on the region also raised the question of Canada’s sovereignty in its Arctic waters, which has

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<sup>1</sup> Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), 110.

<sup>2</sup> Donald R. Rothwell, “The Canadian-U.S. Northwest Passage Dispute: A Reassessment,” *Cornell International Law Journal* 26, no.2, (Spring 1993); 347.

<sup>3</sup> Department of National Defence, *The Royal Canadian Navy Strategic Plan 2017-2022: Ready to Help, Ready to Lead, Ready to Fight* (Ottawa: Commander Royal Canadian Navy, 2017), 34-35.

<sup>4</sup> R.K. Headland, “Transits of the Northwest Passage to End of the 2018 Navigation Season,” last modified 1 October 2018, <https://www.spri.cam.ac.uk/resources/infosheets/northwestpassage.pdf>.

remained unresolved and a challenge through the years. Global warming has now pushed the academic and conceptual discussions about the NWP's legal status to a more concrete topic of international interest. As the waterways are growing more and more accessible, the anticipated increases in shipping and related activities in the region are raising a plethora of concerns with the countries known as the Arctic Eight<sup>5</sup>, as well as with non-Arctic nations. Canada is eager to assert its authority over the region to protect its interests, taking an active role in shaping policies and international laws with the International Maritime Organization (IMO) and the United Nations via the Law of the Sea Convention (UNCLOS)<sup>6</sup>, but has not yet reached international recognition for its claim on the NWP.

3. While Canada has changed its approach on how it defines its waters in the Arctic over time, initially using the sector theory, then the historic internal waters claim, and now applying the straight baseline,<sup>7</sup> the US has maintained its firm stance on the matter. Conflicting interpretations of the legal precedents set by rulings of the International Court of Justice, as well as of applicable conventions on the law of the sea, are used by both countries to endorse their differing positions.<sup>8</sup> In an effort to reach an agreement that will secure its sovereignty in the Arctic Archipelago waters, Canada must understand why the United States categorically rejects its territorial claim over the NWP. In order to

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<sup>5</sup> University of the Arctic, "The Circumpolar North," last accessed 13 October 2018, <https://education.uarctic.org/circumpolar-north/>. The Arctic Eight comprise Canada, Finland, Denmark (including Greenland and the Faroe Islands), Iceland, Norway, Russia, Sweden and the United States (Alaska).

<sup>6</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]

<sup>7</sup> Robert Huebert, *Canadian Arctic Sovereignty and Security in a Transforming Circumpolar World*. Foreign Policy for Canada's Tomorrow (Toronto: Canadian International Council, 2009), 17, 22.

<sup>8</sup> Elizabeth B. Elliot-Meisel, "Politics, Pride, and Precedent: The United States and Canada in the Northwest Passage," *Ocean Development and International Law* 40, no. 2 (2009): 211.

determine how the opposing schools of thought impact the RCN and its future in the Arctic, the initial part of the discussion will briefly review the main elements of the U.S. policy and the second part will detail the strategic advantages and disadvantages to the U.S. of their policy on the NWP. Finally, the implications for the RCN of the United States' position will be analyzed in order to determine how best to navigate the dispute until the political levels agree on the legal status of the Passage.

## **DISCUSSION**

4. The most recent update to the U.S. Arctic Policy has been articulated through its *National Strategy for the Arctic Region* (NSAR) under the Obama administration in 2013. Its purpose was to identify and clarify the strategic priorities to prepare the nation to handle the challenges, and embrace the opportunities, that would be present in the North.<sup>9</sup> It is framed around three main lines of effort: “to protect U.S. national and homeland security interests, promote responsible stewardship, and foster international cooperation”<sup>10</sup> and is informed by four guiding principles: “to safeguard peace and stability, make decisions using the best available information, pursue innovative arrangements, and consult and coordinate with Alaska Natives.”<sup>11</sup> The below study will focus on the objectives of the NSAR that do not concord with Canada’s interests, and not the themes common to the Statement on Canada’s Arctic Foreign Policy<sup>12</sup>.

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<sup>9</sup> White House, *National Strategy for the Arctic Region* (Washington, DC: The White House, 2013), i.

<sup>10</sup> *Ibid.*, 5.

<sup>11</sup> *Ibid.*, 10-11.

<sup>12</sup> Global Affairs Canada, *Statement on Canada’s Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada’s Northern Strategy Abroad* (Ottawa: Government of Canada, 2010).

5. The first line of effort reiterates the preservation of freedom of the seas in the Arctic Region as a key priority for the U.S. government. This is consistent with its 1983 Freedom of Navigation (FON) Program stating that “the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis [...] and] however, will not ... acquiesce in unilateral acts of other states designed to restrict the rights and freedom of the international community.”<sup>13</sup> Referring back to the recognized legislation, the right of transit passage is the only type to meet the FON Program’s description. It is defined in Part III of the LOS Convention, pertaining to straits used for international navigation. It is further amplified that “ships and aircraft must refrain from any activities other than those incident to their *normal* [emphasis added] modes of continuous and expeditious transit.”<sup>14</sup> In contrast, the right of innocent passage, which applies to navigation through a coastal state’s territorial sea, is more restricted. Passage is defined as “innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”<sup>15</sup> The right of innocent passage of foreign ships is, however, not a guarantee and may be “suspended temporarily in specified areas of territorial sea [...] if such suspension is essential for the protection of its [the State’s] security.”<sup>16</sup>

6. The strategic advantages to the U.S. of rebutting Canada’s claim and asserting that the NWP is an international strait are plentiful. If the Passage is not recognized as internal or territorial water, but as an international strait, the right of transit passage would apply, meaning “that foreign ships, including warships, would have virtually the

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<sup>13</sup> Under Secretary of Defense for Policy, *Freedom of Navigation Program – Fact Sheet* (Washington, DC: U.S. Department of State, 2015), 1.

<sup>14</sup> UNCLOS, art. 39.

<sup>15</sup> *Ibid.*, art. 19.

<sup>16</sup> *Ibid.*, art. 19.

same right of passage as they have on the high seas.”<sup>17</sup> Firstly, this enables U.S. submarines to navigate submerged and undetected, and can also encourage the commercial development of underwater transport for natural resources. Secondly, the right of unimpeded transit is extended to the above air corridor, permitting the employment of aircraft during the transit, therefore increasing awareness of the area through the use of organic assets. Moreover, congruent with the FON concept, vessels are not required to participate in a reporting system or to ask permission from the coastal state to transit international waters. The U.S. can thus enter and exit freely as long as their actions do not threaten the “sovereignty, territorial integrity or political independence”<sup>18</sup> of Canada, cutting down on voyage time and facilitating the repositioning of ships where needed in the world. Another strategic advantage relates to the establishment of regulatory frameworks. In this case it proscribes Canada as the coastal State to adopt unilateral laws and regulations over the strait, such as for the safety of navigation and the regulation of maritime traffic, the prevention, reduction and control of pollution, the conservation of the living resources of the sea, etc. as per Article 21 of the Convention, without referring back to recognized mechanisms such as the IMO, of which the U.S. is a member state<sup>19</sup>. By ensuring the NWP is considered an international strait the United States consequently maintains its influence on the rules and regulations that can be enforced in it. Similarly, the right of transit passage in international waters does not subordinate American shipping - commercial, military or otherwise - to Canadian prerogatives if such laws, which could be perceived as infringing on their interests, were

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<sup>17</sup> Standing Committee on Fisheries and Oceans, *Controlling Canada’s Arctic Waters: Role of the Canadian Coast Guard* (Ottawa: Senate, December 2009), 17.

<sup>18</sup> UNCLOS, art. 39.

<sup>19</sup> International Maritime Organization, “Member States,” last accessed 12 October 2018, [www.imo.org/en/About/Membership/Pages/MemberStates.aspx](http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx).



enacted by Canada. Instead, U.S. ships and aircraft would only be bound for example, in accordance with the LOS Convention, to comply with recognized IMO regulations, procedures and practices for safety at sea and for the prevention, reduction and control of pollution from ships.<sup>20</sup> Finally, these rights under the umbrella of transit passage cannot be suspended by a coastal state<sup>21</sup>, such as Canada in the Northwest Passage, and offers a sense of control and security to the United States.

7. Other than the more obvious and direct benefits described above, the main concern expressed by the U.S. is that recognizing the NWP as anything other than an international strait could have negative ramifications on freedom of navigation all over the globe. Commander Kraska from the U.S. Naval War College argues that “a special deal between the United States and Canada provides a precedent for other nations to develop bilateral treaties for controlling traffic, such as Iran and Oman with respect to the Strait of Hormuz.”<sup>22</sup> Likewise, China would be reassured in the assertion of its claim around the artificial islands and reefs being built in the South China Sea. Key chokepoints in terms of U.S. foreign policy and commerce, such as the Straits of Bab el-Mandeb and Malacca, despite being dissimilar to the NWP in geography and oceanography, could become increasingly more challenging to navigate, resulting in unstable economies, conflicting national security interests and heightened tensions around the world. From this perspective, the U.S. is destined to maintain its stance on the

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<sup>20</sup> UNCLOS, art. 39.

<sup>21</sup> UNCLOS, art. 44.

<sup>22</sup> James Kraska, “International Security and International Law in the Northwest Passage,” *Vanderbilt Journal of Transnational Law* 42 (2009): 1128.

status of the NWP in order to uphold the credibility of its FON Program and operations worldwide.

8. The NSAR's third line of operation pursues the objective of acceding to the Law of the Sea Convention.<sup>23</sup> Notwithstanding having taken part in its negotiation and having signed the 1982 Convention, the United States still has not ratified the treaty. Instead it relies on a directive issued by former President Reagan in 1983 that endorses UNCLOS as a reflection of customary law of the sea to which the U.S. abide in maritime related matters and operations.<sup>24</sup> Significant strategic disadvantages for the United States stem from this abstention. The first one relates to the inherent illegitimacy of all FON operations where the U.S. challenges other nations' territorial or sovereignty claims based on definitions of the LOS Convention that it has not itself endorsed. As such, the U.S. does not have the same foothold or credibility as other participants when trying to impose its will or convictions on contentious UNCLOS matters, such as with China in the dispute with the Philippines, nor does it have the leverage to do so as it speaks as a single nation and it does not have the weight of the treaty to support it. Another disadvantage for the United States is of not having a voice at the UNCLOS negotiation table in order to promote its national interests. By not being a recognized participant to the Convention and its various bodies, the U.S. has to rely on partners and sponsors to address its concerns. Finally, the most detrimental consequence of not having acceded to the Convention for the U.S., in terms of domestic interest, is of not being able to partake in a

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<sup>23</sup> White House, *National Strategy for the Arctic Region*, 9.

<sup>24</sup> Roncvert Ganan Almond, "U.S. Ratification of the Law of the Sea Convention: Measuring the *raison d'état* in the Trump era," *The Diplomat*, 24 May 2017, last accessed 12 October 2018, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>.

stable framework governing access to ocean and sea bed resources. More specifically, the United States cannot establish its outer limits beyond the 200 nautical miles Exclusive Economic Zone (EEZ) recognized by customary and conventional law as it is considered the high seas and the “common heritage of mankind.”<sup>25</sup> The UNCLOS, however, subject to specific conditions, does allow countries to claim a continental shelf that extends beyond the EEZ, thus securing jurisdiction for the non-living resources of the encompassed deep sea bed.

9. On a different note, a notable drawback on the United States’ of its Arctic Policy with regards to the status of the NWP is the tensions that have slowly built between the Canada and the U.S. every time their respective stance has been reaffirmed. The once “special relationship”<sup>26</sup> has grown less acquiescent and Canada has become more rigid when asserting its will and sovereignty, which in turn risk reaching bi-or-multilateral agreements more laborious.

10. When comparing the Canadian Arctic foreign policy to the NASR’s objectives, it becomes evidently apparent that both nations have comparable interests in the Region. The protection of the environment, the involvement of northern communities, international cooperation and collaboration, and safety of navigation, just to name a few, are themes common to both and reflect the time-tested bond shared between the two countries. Without being the end all be all solution to the issue, the ratification of the LOS Convention by the U.S. would be a positive sign to the international maritime

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<sup>25</sup> UNCLOS, art 125.

<sup>26</sup> Elizabeth Elliot-Meisel, “Politics, Pride and Precedents ...,” 221.

community, and to Canada, of the United States' earnestness towards a collective and balanced management of the Arctic.

11. The following implications for the RCN can be extracted from the analysis of the U.S. Policy:

a. Under its FON Program, the U.S. conducts an important number of operations yearly to challenge countries on what they perceive to be excessive maritime claims, including more than 36 in fiscal year 2017.<sup>27</sup> Canada's waters have not been challenged since the passage of the ice breaker *Polar Sea* in the NWP in 1985<sup>28</sup>. If the U.S. decides to actively emphasize its stance on the Passage by conducting a freedom of navigation operation, the RCN will have to take action to demonstrate Canada's resolve and preserve the credibility of its claim.

b. The RCN has for generations enjoyed a bi-lateral partnership with the U.S. Navy (USN) where it has benefitted from, and relied on, the use of American training infrastructure, for instance weapons ranges, from the services of its maintenance facilities, such as deperming stations, and from its operational capabilities, such as replenishment at sea. If the dispute over the NWP continues to linger and adversely affect the collaborative relationship with the United States, the RCN risks finding itself depending on a less willing and generous partner. The loss of reciprocal agreements and USN support, as well as an inability to leverage those assets would severely affect operational readiness and responsiveness,

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<sup>27</sup> U.S. Department of State, *Annual Freedom of Navigation Report – Fiscal Year 2017* (Washington, DC: U.S. Department of State, 2017), 3-5.

<sup>28</sup> Robert Huebert, *Canadian Arctic Sovereignty and Security ...*, 17.

especially in a relatively unfamiliar operating environment such as the Arctic. It would also erode interoperability in the longer term.

c. The formal recognition of the Northwest Passage as an international strait would not only allow U.S. shipping to proceed through the Arctic Archipelago, but would open the route to vessels from all over the world, including submarines, without Canada having the authority to regulate their access. The proximity to North America from a third frontier will enhance the national security vulnerability of both Canada and the U.S. that will demand a greater presence of the RCN. Moreover, the increased traffic will also pose an environmental threat to the Polar Region and will require stringent regulations that the RCN may be called upon to enforce, in support to the Canadian Coast Guard.

## **CONCLUSION**

12. While Canada and the United States are generally in tune in terms of their Arctic policies, the elements they do not agree on could have significant impacts on the governance of the northern waters, and the navy's involvement in the area. The RCN shall be ready to respond in support of the country's territorial claim until it is resolved by the political spheres, and then to enforce the recognized status. This requires a review of the collective training provided to ships' crews so they are empowered to counter freedom of navigation operations or support other government departments in their policing tasks when needed. The RCN also requires a reassessment of the infrastructure requirements and of the equipment to be procured to ensure it can convincingly assert and sustain a credible presence in the Arctic as self-reliant blue-water navy. Likewise, the

findings could result in necessitating the revision of the RCN's organization and establishment, redistributing resources where the most value will be gained. This endeavour will require the involvement of both DGNFD and DGNSR's teams to make those determinations and build the plan to achieve a maritime *True North strong and free*.

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