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INTRODUCTION

Arctic sovereignty has become once again a matter of political importance. The changing climate of Arctic regions, concerns about defence capability, interest in mineral exploitation, and greater awareness of the needs of Canada's indigenous peoples, have all combined to direct political attention to the north. Scholars such as Rob Huebert, Franklyn Griffiths, Michael Byers and Suzanne Lalonde, as well as indigenous leaders, have made important contributions to heightening awareness of the threats to Canada's north and have helped focus a debate about what should be done if Canada is to take its northern obligations and responsibilities seriously. Politicians have responded and the issue of "Arctic sovereignty" was prominent in the last election. Since then Prime Minister Harper has visited the North and confirmed his commitment to protecting Canada's Arctic sovereignty.

The term "Arctic sovereignty" is a touchstone in Canadian political debate. It conjures up images of Canada losing its national heritage in the north, of the United States asserting rights over what is rightfully Canadian, of the sacrifices made by Canada's indigenous people in the far north in order to secure what Canada claims as its own. A Canadian government that stood silent in the face of a claim that Arctic sovereignty was in peril would be renouncing Canada's history and the aspirations of its forbears. "Arctic sovereignty" strikes a chord that resonates powerfully.

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The word "sovereignty" however, can mean different things to different people. It has political, legal, economic and social dimensions. The sovereignty of a state is often seen to be synonymous with independence. A sovereign state is an independent state, one that is not subject to the authority of any other state. Independence, while easily stated, has different connotations in a globalized world. While as a matter of law all states are sovereign and independent, the degree of actual independence might vary whether one is looking at the matter from a political or economic perspective. So, too, one's appreciation of the "threat" to Arctic sovereignty might vary according to the particular meaning one places on the term sovereignty.

What, then, is really at stake in the sovereignty debate? What is it that Canada stands to lose as a matter of law if it does not stand up for its Arctic sovereignty? And what does standing up for Arctic sovereignty mean? To understand the issues it is necessary to go back and trace the history of the Arctic sovereignty debate and then see where things stand today.

SOVEREIGNTY OVER WHAT?

Canada's Arctic consists of land, water and ice, sometimes permanently frozen, increasingly not. In 1907 Senator Poirier advocated that Canada's Arctic claim should extend from the mainland of Canada up to the North Pole, bounded by sector lines - the 141st meridian of west longitude to the west and the 60th meridian of west longitude to the east - which would form an apex at the North Pole. This is what is known as the sector claim in the Arctic. Although Poirier may well have been concerned only with the land within that sector, the sector claim has often been seen as a claim to sovereignty over land and waters. Certainly any discussion of Canada's Arctic sovereignty relates to the islands and waters lying north of the Canadian mainland, what is often referred to as the Canadian Arctic archipelago.

At the time of Senator Poirier's speech there was uncertainty about sovereignty over islands in the Arctic, but by the end of

the 1930's any dispute over the islands within the Poirier sector, had abated. Indeed, to the extent that the High Arctic relocations of Inuit peoples were based on a desire to support Canada's sovereignty in the Arctic, by then it was no longer relevant as far as sovereignty over the land was concerned. With the exception of Hans Island, a small island in the Kennedy Channel between Greenland and Ellesmere Island whose sovereignty is disputed between Denmark and Canada, there is no challenge to Canada's sovereignty over the islands of the Arctic. This means that the Arctic islands - the whole of the Arctic archipelago - are no different than any other part of Canada. The idea that Canada could lose its sovereignty over Cape Breton or Vancouver Island is simply nonsensical; equally so with the islands of the Canadian Arctic.

Of course, a country can abandon its sovereignty over land territory. If Canada were to ignore the Arctic islands and cease to exercise effective control over them, it might have difficulty defeating a claim to sovereignty by another country that came and occupied those islands and exercised effective control over them for a long period of time without Canadian protest. But, again, that would be true of any other part of Canada's land territory. This unlikely scenario apart, claims about a need to increase Canada's presence in the Arctic, although frequently expressed in terms of protecting Canada's sovereignty are, as far as the land is concerned, essentially claims about good governance.

A responsible government provides proper policing, surveillance, search and rescue and other services throughout its territory and the claims about the failure to protect Canada's sovereignty over the lands of the Arctic are often claims about the failure of governments over time to act as governments should in respect of remote areas. In particular, they areclaims about the failure to respond adequately to the needs of indigenous peoples. The Report of the Royal Commission on Aboriginal People[1] chronicled this deficit clearly. There is an important value at stake here, even if it is expressed somewhat misleadingly in terms of Arctic sovereignty.

SOVEREIGNTY AND ARCTIC WATERS

Although the issue of sovereignty over the land is quite clear, the situation in respect of the waters is more complicated. Although that complication is a relatively narrow one it requires an understanding of the legal regimes that apply to waters off the coast of a state and, in particular, how these regimes are relevant in the particular context of Arctic waters. The basic framework for the oceans is set out in the 1982 Convention on the Law of the Sea,[2] to which Canada is a party, although the treaty provisions of that Convention are also intertwined with principles of customary international law, a matter that is particularly important when dealing with the United States, which has yet to become party to the 1982 Convention.

The legal regimes for the oceans can best be understood starting from the coast of the state and heading seawards. For a distance of 12 miles from the coast, usually from the low-water mark, lies the *territorial sea* of a state. Over the waters of the territorial sea, a state has full sovereignty in respect of both the water column and the seabed. That is to say the territorial waters of a state are just like its land territory. But, there is an important qualification. There is a right of innocent passage through the territorial sea. Any waters that lie inland of the territorial sea (bays, inlets, harbours etc) are known as *internal waters* and are subject to the full sovereignty of the coastal state with no associated right of innocent passage through them.

There is a further potential qualification to the regime of the territorial sea. If the waters of the territorial sea form an "*international strait*", then there is a right of passage for international shipping through that strait. The legal definition of an international strait has both a geographical component and a functional component. The geographical component is that it must be an area of water that joins two areas of high seas. A well-known example is the Malacca Strait joining the Indian Ocean with the South China Sea. The functional component is that the strait must be "used for international navigation".

The nature of the right of passage for shipping through the

territorial sea and through international straits is a key question, one that lies at the heart of the sovereignty debate. The right of passage through the territorial sea has its limits. A vessel exercising that right of passage must not act in a way that is prejudicial to the "peace, good order or security of the coastal state" - that is the sense in which this passage is known as "innocent" passage - and submarines must navigate on the surface. The coastal state may adopt laws and regulations relating to innocent passage in the territorial sea, including for the "prevention, reduction and control of marine pollution". However, the coastal state could not take away the right of passage completely, something that it could do in the case of waters that are internal.

In respect of straits used for international navigation, the right of the coastal state to regulate shipping exercising the right of passage is more constrained. The word "innocent" has been removed from the designation of this kind of passage. It is known as "transit passage", which according to the 1982 Convention "cannot be impeded". In the case of transit passage, submarines may exercise such passage in their submerged mode. The power of the coastal state to regulate such passage is equally circumscribed. In respect of the prevention, reduction and control of pollution, the coastal state can give effect only to "international standards" regarding the discharge of oil or other noxious substances. The reference to "international standards" is to standards set by the agreement of states, often in treaties sponsored by the International Maritime Organization (IMO).[3] In short, the coastal state is limited in applying its own standards to shipping in an international strait. Its authority is more limited over vessels than it would have if the waters were territorial sea and substantially less than if the waters are internal waters of the state.

Beyond the territorial sea is the 200 nautical mile exclusive economic zone (EEZ), where a state has exclusive rights of management and exploitation over the resources both of the water column and of the seabed or continental shelf. This applies

to fisheries and to hydrocarbons and to any other living or mineral resources. A state also has some rights to control marine pollution from vessels within its EEZ although, again,only in accordance with "international standards". Beyond 200 miles, the water column is high seas, and is not subject to the jurisdiction of the coastal state, although a state will have rights over the resources of the continental shelf if it extends physically beyond 200 miles.

The above represents the legal regimes applicable to the oceans as they exist today. These regimes have evolved over time and are not now as they were at the time of Senator Poirier's sector claim. In the years that followed the Poirier claim, some attempt was made to apply it to the waters as well as the land. As such the claim was intended to treat the waters of the Canadian arctic within the sector up to the North Pole as internal waters of Canada, subject to full Canadian sovereignty as if they were land.

There has always been considerable ambiguity about a Canadian sector claim. There are statements by Canadian officials supporting it as a claim over land and waters, and there are statements saying that it applies only to land. In any event, the legal basis for a sector claim has always been dubious and although Canada has never formally abandoned the claim, it seems unlikely that a claim to sovereignty over the waters all the way to the North Pole on the basis of the sector claim alone could be supported. Nevertheless, the sector idea might well be used to support a claim made on some other basis.

Canada's "Arctic sovereignty" claim today is more narrowly focused. It is concerned with the waters of the Arctic archipelago, which encompass the various routes of the Northwest Passage. Before turning to this, however, it is important to note that there are some other unresolved issues in the Arctic that fall outside the sovereignty claim. Canada and the United States still have to delimit their maritime boundary in the Beaufort Sea, and the outer limit of Canada's continental shelf in the Arctic has yet to be determined. The question of the outer limits

of the continental shelves is a matter that concerns all of the Arctic states and there is the potential for overlapping continental shelf claims. Ultimately this may require agreement amongst them. However, as pointed out earlier, the "sovereign rights" that states have over the continental shelf are a much more limited form of jurisdiction than is embodied in Canada's sovereignty claim in respect of the waters of the Arctic archipelago.

CANADA'S ARCTIC ARCHIPELAGO AND THE NORTHWEST PASSAGE

One basis for a sovereignty claim over the waters between the islands of the Canadian archipelago is that they are the internal waters of Canada on the basis of historic title. Such a claim involves treating Canada's rights to sovereignty over the lands, established through historic, effective occupation and control, as rights to sovereignty over the waters as well. Claims to treat waters as internal by reason of historic title are not unknown around the world. The basis for Canada's now uncontested claim that the waters of Hudson's Bay are internal waters rests in part on such a claim. And some support for an historic claim to the waters of the Arctic archipelago rests on the practice of the Inuit who for centuries occupied the land and ice, making no distinction between the frozen land and the frozen sea.

A potential difficulty with the historic title claim is a lack of consistency in the way the Canadian government has over the years promoted and advocated the claim. This has led some to doubt whether such a claim would be upheld if it ever came before a court of law. However, the claim is probably stronger today than it was in the middle of the last century.

The objective among supporters of the sector and the historic title claims was to ensure that the waters of the Canadian Arctic archipelago would be subject to full Canadian sovereignty. This would mean that the waters of the Northwest Passage would be subject to Canadian jurisdiction and control. Ships navigating through the Passage would be able to do so only if permitted by Canadian law and they could navigate only in

accordance with Canadian law.

Control over the Northwest Passage lies at the heart of the Canadian Arctic sovereignty issue.

In 1963 Ivan Head wrote, "It is highly unlikely that uninterrupted surface passage from the Labrador Sea to either the Arctic Ocean or the Beaufort Sea, or *vice versa*, will ever be a reality. Future demands for the right of innocent passage through the archipelago are speculative to a degree." Transits of the Passage had been few, and they had generally been Canadian.

Some 6 years later the illusion was shattered when the voyage of the *SS Manhattan* awakened Canada to the possibility that there would be commercial shipping through the Northwest Passage. In fact, the Manhattan voyages demonstrated that commercial shipping was not feasible at that time, but it opened eyes to the enormous potential for environmental damage if oil tankers were eventually to transit Arctic waters, and it reawakened interest in the debate over sovereignty over the waters of the Arctic.

Although in 1970 Canada's claims to jurisdiction over the waters off its coast were not as extensive as they are today, at the very least any transit of the Northwest Passage involved passage through the territorial sea of Canada. But, of course, if those waters were territorial sea, there would be a right of innocent passage through them. And while it may have been possible at that time for the coastal state to establish laws to protect against marine pollution in the territorial sea, the extent of that authority was unclear.

There was a further problem. Linking as it does the North Atlantic and the North Pacific oceans, a sea route through the Northwest Passage might be regarded in law as an international strait through which there would also be a right of passage that would be more onerous for the coastal state than the right of innocent passage in the territorial sea. The events surrounding the Manhattan voyage took place at a particularly inopportune time. The negotiations for what was ultimately to become the 1982 Convention on the Law of the Sea were getting underway

and major shipping states and states with large navies were talking of rights of transit through international straits that would be greater than "innocent passage". A right of "transit passage" was beginning to emerge.

In the wake of the *Manhattan* incident the Canadian government under Prime Minister Trudeau decided on a different strategy. Instead of asserting an all-purpose sovereignty claim, it enacted the Arctic Waters Pollution Prevention Act[4] under which jurisdiction out to 100 miles from the coast for pollution prevention purposes was asserted. Essentially, Canada was claiming the authority to control shipping in the Northwest Passage, indeed throughout the waters of the Arctic archipelago and beyond, according to its own standards, including the right if necessary to prohibit shipping in those waters. This novel unilateral assertion of jurisdiction was protested by the United States and by some European countries, but the opposition was not as widespread or as vociferous as might have been anticipated. States seemed to understand the problem Canada was seeking to deal with and there was some sympathy for it.

There followed a substantial campaign by Canada in a variety of multilateral fora to gain international acceptance of its right to regulate the unique Arctic marine environment. Ultimately that campaign met with success. The 1982 Convention on the Law of the Sea contains a provision known as the "arctic exception", Article 234, which permits coastal states to regulate to prevent, reduce or control marine pollution in ice-covered areas within its exclusive economic zone - that is within 200 nautical miles of its coast. The inclusion of Article 234 in the Convention was widely seen and understood by states to be a vindication of Canada's Arctic Waters Pollution Prevention Act. Indeed while the Act extended only to 100 nautical miles and still does, Article 234 permitted the exercise of jurisdiction out to 200 nautical miles.

There is, however, an important limitation in respect of Article 234. It does not apply to warships or to other government

ships. This meant that the environmental strategy adopted following the voyage of the *SS Manhattan* resulting in the Arctic exception went only part way towards ensuring that Canada would be able to regulate to preserve the Arctic environment to deal with the consequences of navigation through the Northwest Passage.

The fact that Canada's authority was only partial was brought home in 1985 with the voyage of the US icebreaker *Polar Sea* into the waters of the Northwest Passage without Canada's prior consent. This put the issue of sovereignty back in the limelight. The United States appeared to assume that it could transit Canadian waters without Canada's consent, seemingly a clear challenge to Canada's claim to sovereignty over the waters of the Canadian Arctic archipelago.

By now there were few options left for Canada to preserve its legal position in respect of the Northwest Passage. What had to be done was to clarify its position on sovereignty over the waters. If the waters of the Arctic archipelago were internal waters of Canada, then Canada had full rights to regulate shipping in those waters, including warships and other government vessels of foreign states, and if necessary to exclude them from those waters.

The measure adopted by Canada to confirm sovereignty over the waters of the Canadian Arctic archipelago was known as the drawing of "straight baselines". Normally a state draws the baseline for the measurement of its 12-mile territorial sea along the low-water mark. However, where the coastline is heavily indented and where there exist islands off the coast that complicate the following of the low water mark, it is accepted that states can draw "straight baselines" from the outer edge of the coasts or the fringing islands, enclosing the waters behind the baselines as internal waters.

This approach had been endorsed by the International Court of Justice in a case between the United Kingdom and Norway (*Anglo-Norwegian Fisheries Case*, 1951)[5] concerning the way in which Norway had drawn baselines from headland to

headland or to fringing islands on the west coast of Norway, the area known as the Norwegian "skjaergaard". The approach has since been followed by many states including Canada on both its east and west coasts, and it had been endorsed in Article 7 of the 1982 Convention on the Law of the Sea.

Thus, on 10 September 1985, Secretary of State Joe Clark announced that the government was confirming Canada's sovereignty over the waters of the Arctic archipelago by enclosing the archipelago with straight baselines. In a stirring speech to the House of Commons, Minister Clark stated, "Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward facing coasts of the Arctic islands. These Islands are joined and not divided by the waters between them."

Canada's actions resulted in protests by the United States and by the European Community. However, the Reagan administration in the United States seemed less interested in pressing its legal position and more interested in finding a way to cooperate with Canada. Thus, in 1988 the Arctic Cooperation Agreement[6] was entered into between Canada and the United States under which the United States pledged that, "all navigation by US icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada." Both parties, however, reserved their legal positions on the law of the sea, implicitly protecting their respective positions on the legal status of the waters of the Northwest Passage.

With the promulgation of straight baselines around the Arctic archipelago Canada has essentially done all it can do legally to cement its claim that the waters of the archipelago are the internal waters of Canada. As internal waters, the waters of the Northwest Passage are completely under Canadian sovereignty. They could never become an international strait. Thus whether vessels are permitted through the Northwest Passage and under what conditions would be decided in accordance with Canadian law.

Not all states accept that these are the internal waters of Canada, but no state has decided to take Canada to court over the matter. In fact, there is nothing stopping them from unilaterally doing so. In 1970, when Canada adopted the Arctic Waters Pollution Prevention Act, the government modified its acceptance of the compulsory jurisdiction of the International Court of Justice so that no state could challenge the international validity of the legislation without Canada's consent. In 1985, when straight baselines were drawn for the Arctic archipelago, Canada again modified its acceptance of the jurisdiction of the International Court, this time opening itself to challenge by other states without first seeking Canada's consent.

Thus if the United Kingdom wanted to challenge Canada's position on the Northwest Passage, it could bring a case against Canada tomorrow in the International Court of Justice and Canada would be forced to defend that case. The United States, however, could not bring such a claim since it no longer accepts the compulsory jurisdiction of the Court. The United States withdrew its acceptance of the compulsory jurisdiction of the Court following a case brought against the United States by Nicaragua in 1984 arising out of the United States support for the "Contras" in Nicaragua. As a result, the United States can only bring a case against another state in the ICJ with that state's consent.

CHALLENGES TO CANADA'S SOVEREIGNTY CLAIM

What, in legal terms, does a challenge to Canada's Arctic sovereignty mean? Canada's sovereignty over the land is unchallengeable so, with the exception of Hans Island, land is not in issue. Two things could be challenged. First, Canada's claim that the waters of the Canadian Arctic archipelago are the internal waters of Canada could be challenged. Second, a claim could be made that the waters of the Northwest Passage have the status of an "international strait" with a consequent right for international shipping to pass through those waters. I will look at the likelihood of success of each of those potential

claims, and at the consequences if Canada were to lose to either one or both of those claims. I shall also consider what Canada can do to strengthen its position.

Internal Waters

Predicting the outcome of litigation is a hazardous business in international law, particularly when one is dealing with an area that is in a sense unique with little in terms of prior authority to assist in the prediction. The combination of the sheer size of the area involved, the fact that it is comprised of land and frozen sea, the fact that Inuit have for centuries used the land and water is if they were interchangeable, all go to make examples of the use of straight baselines elsewhere in the world useful but not entirely on point.

At the same time, these differences are elements of strength in the Canadian position. The fact that the areas concerned are far larger than other areas where straight baselines are normally drawn is counterbalanced by the uniqueness of the interrelationship of sea, land and ice, and patterns of usage by indigenous peoples add to the particularity of the area. All of these factors go to support Canada's claim to use the straight baseline method to define and enclose the area. And straight baselines are more than an assertion that the waters of the Arctic archipelago are internal waters. They are also an important step in consolidating the claim that these are Canadian internal waters by virtue of historic title.

Since Canada was not a party to the 1982 Convention on the Law of the Sea when it drew straight baselines, the status of the waters enclosed by the baselines has to be measured at the time of the drawing of the baselines, not at the later date when Canada became a party to the Convention. Thus, Canada is not affected by Articles 8 and 35 of the 1982 Law of the Sea Convention. According to these Articles if the drawing of straight baselines encloses, as internal, waters through which previously a right of passage existed, then that right of passage remains even after the drawing of straight baselines. There was no such

customary international law rule binding on Canada when it drew the baselines and so the waters enclosed by straight baselines are not affected.

Canada, then, has a strong legal argument to support the claim that the waters of the Arctic archipelago are the internal waters of Canada and thus subject to full Canadian sovereignty. If the matter were challenged before an international tribunal, Canada would have a good chance of winning. If it did, Canada's claim to permit or not to permit shipping through the Northwest Passage and to set standards for such shipping would be unassailable.

International Strait

The second possible challenge to Canada's arctic sovereignty is the claim that the waters of the Northwest Passage constitute an international strait. This is a critical issue, because the right of transit passage through international straits under the 1982 Convention on the Law of the Sea limits substantially the ability of the coastal state to control shipping exercising the right of passage.

It is difficult to deny that the Northwest Passage meets the geographic test for an international strait - it joins the waters of the Labrador Sea with the waters of the Beaufort Sea, or more broadly, it is a link between the Atlantic and Pacific Oceans. However, the key question is whether it meets the functional test. Are the waters of the Northwest Passage waters that are "used for international navigation"? The usage test is derived from the decision of the International Court of Justice in the 1949 *Corfu Channel Case*.[7] There, the Court concluded that the Corfu Channel was an international strait. It was "used for international navigation" and in one recorded year there had been almost 3000 ships using the Channel.

If the *Corfu Channel Case* sets the standard of the volume of shipping required to meet the test of whether the waters are "used for international navigation" then the Northwest Passage clearly does not constitute an international strait. There have

been approximately 100 surface transits of the Northwest Passage over the past 100 years, the vast majority by Canadian vessels. International navigation has been extremely limited. Moreover, with one or two exceptions all of the international transits have been with Canadian assent and in many cases with Canadian ice-breaking support.

There is one potentially important qualification to this. While the surface transits are known, much less is known about transit by submarines. It is assumed that they occur but it is not clear whether they occur under Canadian authority and with the consent of the Government of Canada or whether they are transits of which Canada knows little. If, in fact, they have been frequent and without Canadian knowledge or consent, then it might be possible to show that the Northwest Passage has been "used for international navigation" and that in practice submarines have been exercising a right of transit passage. One assumption is that most submarine transits would have been by US vessels and that they are in some way authorized under defence arrangements between Canada and the United States. But, again, there is no solid information about this and there are sufficient conflicting statements by former members of the Canadian military to indicate that this is an area of potential difficulty for the future.

A further argument about the term "used for international navigation" is that it could mean "capable of being used for international navigation". This appears to be the position adhered to by the United States. However, no support for this interpretation can be found in the *Corfu Channel Case*, and it seems to be contradicted by the express wording of the 1982 Convention itself. In defining an international strait, Article 37 of the Convention refers to "straits which are used for international navigation". The plain meaning of that phrase is that the reference is to straits that are actually used for international navigation, not waters that could potentially be used for international navigation.

Thus, should any state decide at the present time to

challenge Canada's claim that the waters of the Northwest Passage are the internal waters of Canada or seek to assert that the Northwest Passage constitutes an international strait, they would be met with arguments that are legally sound and that would have a good chance of success. Nevertheless, this is to some extent uncharted territory and there remains a possibility that Canada could lose on either of those claims, or that the situation could change and that Canada's legal position would be less secure in the future.

What could cause such a change? As far as the internal waters claim is concerned nothing short of express abandonment of that claim by Canada can affect it. Either the waters of the Canadian Arctic archipelago are the internal waters of Canada or they are not. But the claim that the waters of the Northwest Passage constitute an international strait could be strengthened if the strait came to be used for international navigation. If the passage of foreign ships through the Northwest Passage increased, the argument that the waters are not "used for international navigation" would diminish and over time the claim that the test for an international strait was not met by the Northwest Passage would be difficult to maintain, particularly if passage were occurring without Canada's consent.

The difficult question is what kind of increase in international shipping would be necessary to turn the Northwest Passage into an international strait? Opinions are divided on this. On the one extreme, there is little support for the view that a single unauthorized transit of the Northwest Passage could transform the waters into an international strait. At the other extreme, it seems unlikely that the volume of shipping that existed in the Corfu Channel would be necessary, and indeed significantly less might be sufficient in the particular context of the remote and inhospitable arctic waters.

Certainly, if over a period of years there were international shipping through the Northwest Passage without any attempt by Canada to regulate that shipping, the waters could become an international strait. And the greater the volume of shipping,

the greater the likelihood that this would occur. The challenge for Canada is to ensure that all transits of the Northwest Passage are with its knowledge and consent.

THE CONSEQUENCES OF LOSING A "SOVEREIGNTY" CHALLENGE

What would be the consequences for Canada if it were to lose a challenge to its claim that the waters are the internal waters of Canada through which no right of passage exists? If the waters of the Arctic archipelago are not the internal waters of Canada, then a significant part of them would be territorial sea. This would still retain for Canada substantial control over vessels going through those waters and, in so far as vessels proceeding through those waters en route to a Canadian port are concerned, Canada's ability to regulate ships coming into its ports is unconstrained. Ports are within the internal waters of a state.

But, as far as vessels simply in transit through the territorial sea are concerned, as we have seen, there is a right of innocent passage through the territorial sea. Although the coastal state retains wide legislative and enforcement powers in respect of such passage, there are limits to those powers. For example, the coastal state cannot set design, construction, manning or equipment standards for shipping unless those standards conform to "generally accepted international rules and standards".

Regardless of whether the waters of the Arctic archipelago are territorial sea or EEZ, Canada would still retain the wide-ranging powers that it has under Article 234 of the 1982 Law of the Sea Convention to deal with ice-covered areas. As we have seen, those powers, implemented domestically through the Arctic Waters Pollution Prevention Act, would allow Canada to regulate shipping in substantially the same way as it would if the waters were the internal waters of Canada. The main limitation with Article 234 is that the authority it grants to coastal states does not extend to the regulation of warships or other government vessels. Thus, while commercial shipping

through the waters of the Arctic archipelago could be regulated under that provision, other arrangements would have to be made with respect to government vessels.

In short, while a determination that the waters of the Canadian Arctic archipelago were not the internal waters of Canada would no doubt be perceived as a major loss to Canadian sovereignty, in practical terms the situation would be much as it is today. Canada would regulate commercial shipping through the Arctic Waters Pollution Prevention Act, and rely on its bilateral arrangement with the United States, the 1988 Arctic Cooperation Agreement, to cover US icebreakers - effectively covering all US government surface vessels that are likely to enter Arctic waters. The situation with respect to submarines would remain as obscure as it is today.

What if Canada were to lose a challenge to its position that the waters of the Northwest Passage do not constitute an international strait? This could, of course, only arise if the waters had already been determined not to be the internal waters of Canada. As mentioned earlier, the regime of transit passage gives ships passing through international straits greater rights than they would have in exercising innocent passage through the territorial sea. But again, as far as commercial vessels are concerned, the powers that Canada has in respect of ice-covered areas under Article 234 of the 1982 Convention on the Law of the Sea would still be applicable. That is to say, the rules relating to transit passage are still subject to the authority of the coastal state to regulate in respect of ice-covered areas.

So, in this respect again, although it would be widely perceived as a significant sovereignty loss, the fact that the Northwest Passage constituted an international strait would have little impact on Canada's legal authority to regulate commercial shipping. And, once again, the situation with respect to warships and government vessels would depend on bilateral arrangements with other governments. The Arctic Cooperation Agreement would be significant here as well.

Having said this, there are two aspects that would still remain problematic. The first is the continued applicability of Article 234. That provision applies to "ice-covered areas" and it refers to them as areas,

> where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

If the ice recedes so that the Northwest Passage is no longer covered with ice for most of the year, can Article 234 still be applied? Certainly the susceptibility to major harm and irreversible ecological damage is unlikely to change, but would the other precondition for the application of Article 234 - that the area be ice-covered for most of the year - be lost? While this may not occur for some time, it indicates the precariousness of relying simply on Article 234 as a justification for Canadian authority to regulate shipping in the Arctic.

The second concern relates to submarine passage. If submarines are in fact passing through the Northwest Passage outside of the defence arrangements that Canada has with the United States or not otherwise known to or authorized by Canada, this remains a potential problem for Canada's claim that the waters of the Northwest Passage are not "used for international navigation" and hence not an international strait.

IMPLICATIONS FOR CANADIAN POLICY

Ever since the voyage of the *SS Manhattan*, the spectre of commercial shipping in the Northwest Passage has been the backdrop of all discussions about Arctic waters. In 1970 and again in 1985, it was believed that technology would make shipping through ice-covered waters feasible and economically viable. So far, that has not occurred. Today the focus of attention is different. It is that climate change will remove the impediment to shipping that ice has traditionally provided,

and as a result commercial shipping will be feasible and economically viable.

One can debate whether the effect of climate change will be to open shipping in the Arctic Ocean before it becomes feasible in the waters of the Northwest Passage. One can argue whether commercial shipping in Arctic waters will occur in 10, 40 or 80 years time. But, today, for responsible policy-makers there is no option. Commercial shipping in either or both the Northwest Passage and the Arctic Ocean is something that has to be planned for. What then are the policy implications?

There are three major directions for Canadian policy in respect of Arctic waters. First, Canada has to uphold its position that the waters of the Northwest Passage are the internal waters of Canada. This means that Canada should be prepared to defend any legal challenge that is brought against Canada's position. That does not mean that Canada should provoke litigation or seek to encourage some form of submission of the issue to an international tribunal. The outcome of litigation is always uncertain and thus there is no point in seeking it out.

It also means that any opportunity to negotiate acceptance of Canada's position with those countries that oppose it, in particular the United States, should be taken. However, that option should be pursued only if there is a reasonable chance of success. Canada's position is strengthened when no challenge is made to it. Creating circumstances that allow or encourage other countries to challenge Canada's claim to treat the waters of the Northwest Passage as the internal waters of Canada does not assist in securing acquiescence to that position over the long term.

Second, Canada has to act domestically with respect to the Arctic so that it is taking seriously, and is seen to be taking seriously, the claim that the waters of the Arctic archipelago are the internal waters of Canada. This means knowing what is happening with shipping in the Northwest Passage, whether surface or submerged traffic. It means ensuring that all passage is with the consent of Canada. And it means being able to take

measures of enforcement when vessels do not comply with Canadian law. Some have argued that this means greater icebreaker capability; some have argued that this means detection systems to know when submarines are in transit in the area; and some have argued that this means more generally a greater surveillance, policing and military presence in the area.

Once again, a parallel with other areas in Canada is useful. The idea that vessels could travel the Inside Passage from Vancouver to Prince Rupert, either on the surface or submerged, without Canadian knowledge or consent and without complying with Canadian law simply would not be tolerated. Equally, it is unthinkable that Canada would not have the capability to detect such activity or the capacity to take enforcement action against any violations of its laws. The same should be true for the Northwest Passage.

Third, Canada has to act internationally, within IMO or elsewhere, to ensure that international standards achieve the same objectives as domestic standards, that internationally accepted standards and regulations conform to what Canada regards as desirable for the regulation of arctic waters. Such an approach is a precautionary measure. If circumstances change both legally and climatically so that the Northwest Passage has to be regulated in accordance with international standards, those standards should be the same as those Canada would apply in any event.

CONCLUSION

The claim that Canada's Arctic sovereignty is under threat is a broad claim. And as a symbolic statement that Canadian governments should pay more attention to a vital part of Canada, it has an important role to play in Canadian political debate. But the "threat" if it can be called that, is much narrower in scope than the term Arctic sovereignty would imply. It is not about a threat to sovereignty over land or to Canada's rights over the waters of the Arctic archipelago more generally, or to

Canada's rights to the marine and mineral resources of the waters or the seabed. All of these are intact and not challenged, nor are they challengeable.

The fundamental question is whether shipping through the Northwest Passage is to be regulated by Canada in accordance with standards that Canada itself determines, or whether Canada is limited in what it can do by having to comply with generally accepted international standards. This is simply another way of putting the question, are the waters of the Northwest Passage the internal waters of Canada or do they constitute an international strait? In fact, some would contend that it is incorrect to characterize the question as a sovereignty issue at all. There are many international straits around the world subject to the rules of transit passage, but the adjacent coastal states do not consider that the existence of the strait has somehow impaired their sovereignty.

Nevertheless, the issue in respect of transit through the Northwest Passage has been framed in Canada in sovereignty terms, and it is unlikely that the terminology will be abandoned. And there is no doubt that many Canadians would feel that their sovereignty had been diminished if shipping through the Northwest Passage could not be regulated according to standards set by Canada, regardless of what international lawyers might say about the meaning of sovereignty.

What of the future?

One scenario is that in the foreseeable future there will be no definitive legal resolution of the question whether passage through the Arctic archipelago is to be governed by Canadian or international standards. Thus, the issue of "Arctic sovereignty" will remain for a good many years to come, with the interest of governments waxing and waning as in the past.

But, there is an equally plausible alternative scenario according to which there will be increased shipping in the Arctic and that Canada will be faced with vessels seeking to transit the Northwest Passage without complying with Canadian

standards and regulations. Canada will therefore be compelled to arrest any such vessel provoking a legal challenge by the vessel's flag state. In short, Canada's claim to treat the waters of the Northwest Passage as the internal waters of Canada would be directly in question. In this way, the issue of "Arctic sovereignty" could be finally resolved.

In the past, governments have been able to bank on the first scenario as the likely outcome. Inaction has been a viable policy. Today, while governments may hope that this will continue, it is the second scenario on which they must plan.

ENDNOTES

1. *Report of the Royal Commission on Aboriginal Peoples*, (5 vols), Canadian Communication Group Publishing, 1996. http://www.ainc-inac.gc.ca/ch/rcap/index_e.html

2. United Nations Convention on the Law of the Sea, 1982 UN Doc. A/CONF.62/122(1982) http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

3. The International Maritime Organization (IMO) is a specialized agency of the United Nations with responsibility for developing agreed standards among states for the safety of shipping and the prevention of marine pollution. http:// www.imo.org/

4. Arctic Waters pollution Prevention Act, R.S.C 1985, c. A-12, http://lois.justice.gc.ca/en/A-12/index.html

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