

## Canadian Defence Policy Review Roundtable Yellowknife, 24 May 2016

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Climate change and its devastating impact in the Arctic have created a number of challenges for Canada. These include defending its sovereignty and sovereign rights in the Arctic Ocean basin, justifying its claim to an extended continental shelf underneath the Arctic Ocean, settling its longstanding dispute with the United States regarding the maritime and continental shelf boundary in the Beaufort Sea, and resolving the issue of ownership of tiny Hans Island.

In the first three cases (Arctic Ocean basin, extended continental shelf [ECS], Beaufort Sea), an established international legal framework is in place and will govern the resolution of these important questions. Indeed, at the Ilulissat Summit in May 2008, each of the five coastal States bordering the Arctic Ocean reiterated their commitment to the legal framework defined by the UN Law of the Sea Convention [LOSC] and to the peaceful settlement of any disputes. While the current regime leaves some difficult questions unanswered – for instance, the resolution of overlapping ECS claims or the true nature of the Commissions' recommendations regarding individual claims - the Ilulissat Declaration makes clear that Canada will be an equal party in any future negotiations and settlement.

As regards Hans Island, Canada's only outstanding territorial dispute in the Arctic, the Joint Statement adopted by Canada and Denmark in September 2005 has proven extremely successful in managing the dispute.<sup>1</sup> As in so many cases, dialogue and collaborative efforts have proven to be the most effective weapons in the defence of Canada's interests.

The principal threat to Canada's sovereignty in the Arctic stems from opposition to its claim over the Northwest Passage. Successive Canadian governments have declared that all of the waters within Canada's Arctic archipelago are Canadian historic internal waters over which Canada exercises full sovereignty. This assertion of sovereignty necessarily includes the right to govern and control access to the various routes that make up the Northwest Passage. Washington, on the other hand, has consistently maintained that the Northwest Passage is an international strait through which the ships *and aircraft* of all nations enjoy a right of transit passage.<sup>2</sup> Canadian Arctic governance measures have also in the past been the object of protests by other States<sup>3</sup> and recent European

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<sup>1</sup> In the Joint Statement, Canada and Denmark decided that, without prejudice to their respective legal claims, they would inform each other of activities related to Hans Island. Furthermore, all contact by either side with Hans Island would be carried out in a low key and restrained manner.

<sup>2</sup> See The White House, Section III "Policy", sub-section B "National Security and Homeland Security Interests in the Arctic" at paragraph 5, January 9, 2009: "The Northwest Passage is a strait used for international navigation, and the Northern Sea Route include straits used for international navigation; the regime of transit passage applies to passage through those straits." See also President Obama's "National Strategy for the Arctic Region" of May 2013: "Accession to the Convention would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments *for freedom of navigation and overflight through the Northwest Passage* and the Northern Sea Route."

<sup>3</sup> For example, in 1978, a Canadian official acknowledged that a "drawer full of protests" had been received following the adoption of Canada's 1970 *Arctic Waters Pollution Prevention Act*. See Ted L. McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the Continental Shelf," *Journal of Maritime Law and Commerce* 14 (1983): 215.

Union policy documents have emphasized freedom of navigation in the newly-opened Arctic routes.<sup>4</sup> Germany's "Guidelines of the Germany Arctic Policy" released by the Federal Foreign Office in September 2013 announced that the German Federal Government is "campaigning for freedom of navigation in the Arctic Ocean (Northeast, *Northwest* and *Transpolar Passages*) in accordance with high safety and environmental standards".<sup>5</sup>

Canada's legal position in regards to the status of the Northwest Passage is vulnerable. This vulnerability is not so much legal as factual.

If, as Canada asserts, the waters of the Northwest Passage are an integral part of its national territory, then Canada must maintain a visible presence in those waters. Over the last half century, this presence has largely taken the form of Canadian Coast Guard vessels, escorting and assisting ships through the Passage and serving the needs of the various Arctic communities. In our view, the CCG remains the appropriate agency, both in terms of expertise and capabilities, to ensure an effective Canadian presence over the Arctic waters.

However, Canada must not only be visibly present in the Northwest Passage; it must also exert effective control over those waters. It is in this respect that the Canadian armed forces must play a vital role. Unauthorized transits by foreign ships, whether on the surface or under the water, would gravely undermine Canada's legal claim. Such a public violation of Canada's sovereignty would call into question Canada's ability to effectively govern those waters (a vital aspect of Canada's historic waters claim) and it would also constitute a weighty precedent with regards to the functional criterion and the definition of the Northwest Passage as an international strait.

The Canadian Armed Forces must be equipped with the best possible surveillance and detection equipment, not only to track surface but also underwater transits. For in order to protect its legal position, the Canadian government would have to react vis-à-vis any ship or submarine which had entered the archipelago unannounced. The amount of time available for diplomatic negotiations between Canada and the flag State of the offending vessel would be severely limited. In the absence of a political solution to the crisis, Canada would have, in our opinion, no choice but to interdict the contravening ship.

It must also be acknowledged that there is a risk (though slight) that the Northwest Passage may at some point in the future be recognized as an international strait. In 1994, Canada filed with the UN Secretariat a "Declaration of acceptance of the compulsory jurisdiction of the International Court of Justice" which recognizes the Court's authority to adjudicate any legal dispute between Canada and another State having made a similar declaration save with respect to four specific categories of disputes *that do not include the Northwest Passage*. Consequently, Canada could one day find itself before the world Court having to defend its assertion of sovereignty over the Passage.

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<sup>4</sup> Reference can be made to the 2008 Communication of the European Communities to the European Parliament and the Council, "The European Union and the Arctic Region" in which Member States and the Community were exhorted to "defend the freedom of navigation and the right of innocent passage in the newly opened routes and areas". This call was repeated in paragraph 48 of the recent "European Parliament Resolution of 12 March 2014 on the EU Strategy of the Arctic", which also calls on "the states in the [Arctic] region to ensure that any current transport routes – and those that may emerge in the future – are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than *internationally agreed measures* aimed at increasing security or protection of the environment

<sup>5</sup> Auswärtiges Amt, "Guidelines of the Germany Arctic Policy – Assume Responsibility, Seize Opportunities," September 2013.

Any judicial determination that the Northwest Passage was an international strait would trigger the right of transit passage for the *ships and aircraft* of all nations through the waters and air corridor above the Passage, and this right could be neither impeded nor suspended.<sup>6</sup> Such a guaranteed right of access and transit for foreign ships and aircraft, both civilian *and military*, across the 900 miles length of the Northwest Passage would inevitably raise a number of important national security concerns for Canada.

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<sup>6</sup> See Part III of the LOSC, particularly articles 38, 42(2) and 44.