The Polar Code and its influence on the legal status of the Northwest Passage and implications of its potential use

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Aims and objectives

• To identify who has jurisdictional authority over the Northwest Passage (the Passage)
  ➢ Maritime safety
  ➢ Environmental protection
• Increasing maritime activities resulted from melting sea ice
Outline of presentation

• Overview of the Northwest Passage
• The Arctic melt
• Sovereignty and sovereign right/s
• The legal regime of straits used for international navigation
• The legal status of the Passage
• Summary and conclusion
Overview of the Northwest Passage

• It is a series of linked straits passages-seven routes (Rothwell 1996)
• It connects the N. Atlantic Ocean (east) to the N. Pacific Ocean (west)
• It passes through the Canadian Arctic Archipielago
• All routes are not navigable: Thick ice and shallowness
Controversy over the Passage’s legal regime

• Canada claims the Passage as its historic internal waters
  ➢ Art. 234 of UNCLOS
• International community (led by the U.S.) asserts the Passage as an international strait
  ➢ Governing by international law/the Polar Code
• Sovereignty v. international law
Events influenced the Passage’s legal regime

• 1907-Canadian Senate’s advice to possess Arctic territory-lands and islands

• 1969- the U.S. Manhattan crossing the Passage resulted in Canada:
  - The 1970 AWPPA
  - Modification of Canadian relationship with the ICJ
  - The extension of maritime boundary from 3 to 12 n.miles

• 1985-the U.S. Polar Sea crossing the Passage resulted in Canada:
  - Drawing straight baselines around its Arctic waters

• 1988- Agreement: status of the Passage, para. 3
The importance of the Passage

• Strategic/political: Cold War; Canadian new Arctic strategy; and terrorist threats
• Economy: shortcut for connecting markets; and Arctic resources
• Environment: Fragile and sensitive
The Arctic melt

- Climate change/global warming transforming world/Arctic
- Arctic sea ice recedes-not completely
- Greater human access to region
- Transportation-shipping
Shipping challenges derived from environment

- Harsh weather conditions
- Low air and water temperatures
- Existence and variability of sea ice
- Presence of ice on deck
- Safety concerns-communication systems
- Pollution accidents: oils spills; clean up operations
Sovereignty and sovereign right

- Territorial sovereignty: right to apply jurisdiction
  - Act of discovery as a traditional notion
  - Territorial integrity: involves state’s boundaries
  - Extension of sovereignty seaward up to 12 n. miles (coastal jurisdiction)
  - UNCLOS (1982): dividing coastal jurisdiction into maritime zones

- Exclusive sovereign right: a limited jurisdiction over some maritime zones—EEZ
Coastal jurisdiction/maritime zones

- Maritime zones are measured based on baseline
- Normal baseline (Art. 5): low water line
- Straight baseline: a line of the shortest distance between two points in special circumstances

» Arts. 7, 10 and 76(7)
Figure 1. Coastal state jurisdiction over maritime zones (Ocean Futures 2006).

Landward side of baseline

• Internal waters: full sovereignty; no innocent passage without permission (Art. 8)

➢ Historic waters: no definition-treated as internal waters (the 1951 Fisheries case)

➢ Archipelagic waters: enclosing the archipelago based on straight baseline (Art. 50)- Canada 1985
Seaward side of baseline

- Territorial sea: extension of sovereignty - 12 n. miles (Arts. 2-3); right of innocent passage (Art. 17)
- EEZ: exceeding up to 200 n. miles (Arts. 55-57)
- The continental shelf (or continental margin): seabed up to 200 n. miles or 350 n. miles (Art. 76)
  - Sovereign right: due regard to rights of other states
- High seas: freedom of navigation for all states (Art. 86)
Figure 1. Coastal state jurisdiction over maritime zones (Ocean Futures 2006).

UNCLOS and the legal regime of straits used for international navigation

- International strait (Martin 2010)
- Transit passage: applies to straits used for international navigation (Art. 37)
  - Connecting one part of high seas or EEZ to another part of high seas or EEZ—the Passage
  - Freedom of navigation; no hamper of transit passage (Art. 44)
- Innocent passage: applies to straits forming part of territorial sea (Art. 45)
  - Respecting right of non-suspendible innocent passage (even regarding Art. 234)
The Polar Code and the legal regime of straits used for international navigation

- Binding international Code for growing shipping following 2002 and 2009 Guidelines
- Maritime safety and environmental protection
- Covering full range of navigational matters in the Polar waters-straits
- Dealing with design, construction, search and rescue, training and environmental protection
- Adaptation process: by means of amendments to SOLAS in 2014 and MARPOL in 2015
- Entering into force on 1 January 2017
The legal status of the Northwest Passage

• Suitable law?
• The 1949 Corfu Channel case criteria for qualification of a strait as international:
  ➢ Geographical situation connecting the high seas
  ➢ Strait used for international navigation purposes
Geographical situation of the Northwest Passage

- Respecting right of innocent passage in archipelago enclosed by straight baseline
- Historic waters and historic titles to territory tests: intention; unchallenged authority
- Northwest Passage—very long route, not a strait?
- Freedom of high seas and innocent passage
- Strait as natural waterway v. artificial one
- Environmental protection via the Polar Code
- Enclosing straits as historic waters has minor effects on int. shipping-special arrangement
Strait used for international navigation purposes

• How many voyages may constitute sufficient precedent to make the Passage an int. strait?
• The degree and the nature of navigation through the Northwest Passage:
  ➢ Geographical perimeter:
    o Thick ice affects degree and type of navigation
    o Freedom of navigation
  ➢ The future of sea ice: increasing shipping traffic at least in the summer
Summary and conclusion

- Climate change—receding sea ice
- Opening navigation for at least a few months
- Resurfacing the dispute between Canada and international community led by the U.S.
- Arguments that the Passage is an international strait are more prevalent— the Polar Code
- Special arrangement: between Canada and the international community
- Right of non-suspendible innocent passage—customary international law
Thank you

Any questions?