

Stirring up the Hornets' Nest: China and the Sea Routes of the Arctic

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Abstract: *The Arctic has been covered by a vast and nearly continuous icecap for long centuries and it was almost impossible to navigate through the territory and that is why it was neglected for long. However, increasing climate change and global warming has already let the world know about the real values of the icy territory and states began to submit their claims and to protect their presumed rights in the Arctic even by military means if necessary. China has no Arctic territory but its presence in the Arctic as one of the largest shipping nations of the world is the articulation of a global problem of international law to be faced: the sovereignty and the existing, often questioned legal situation of Arctic States, mainly that of Canada and Russia because of the Arctic sea routes. The article aims to examine this legal situation.*

Keywords: *Arctic, China, sea route, strait, Northwest Passage, Northern Sea Route*

Introduction

The 2007 planting of a titanium Russian flag on the North Pole seabed generated significant global attention to the Arctic, as the importance of the region in connection with climatic changes, natural resources, sovereignty claims, and new shipping routes is undoubted.

The Arctic has been covered by a vast and nearly continuous icecap for long centuries. It was almost impossible to ship through the territory not to mention other kinds of exploitation work. That is the reason why it was neglected for long. However, increasing climate change and global warming has already let the world know about the real values of the icy territory and States began to submit their claims and to protect their presumed rights in the Arctic even by military means if it is necessary.

China has no Arctic territory, but it does have a voracious appetite for oil and natural gas, and as it is also among the largest shipping nations, eager for shorter routes and greater efficiencies to avoid piracy problems occurring in the southern sea routes. The State has several Arctic research projects and plans for investigations in hydrocarbon explorations in the north.

The presence of China in the Arctic is the articulation of a global problem of international law to be faced: the sovereignty and the existing, often questioned legal situation of Arctic States, mainly that of Canada and Russia because of the Arctic sea routes.

This work aims to highlight and examine the role of China's appearance and plans for the Arctic region from the point of view of usage of sea routes and the disturbance of this action in the legal status of sea routes (Northwest Passage and Northeast Passage/Northern Sea route) in the Arctic.

1 China and the Arctic

China has no Arctic territory, but it does have a voracious appetite for oil and natural gas. It is also among the largest shipping nations, eager for shorter routes and greater efficiencies. To be sure, China displays a real interest in the Arctic, as attested by its applying for observer status at the Arctic Council in 2008 and by its developing research programs in the area. (Lasserre 2010: 3)

Concerning the sovereignty debate over the Arctic beyond maritime zones China asserted that the questioned territory of the Arctic belongs to all peoples and is part of the *common heritage of mankind*. (Jakobson 2010: 10)

As for oil and gas, China supports the right of the Arctic Ocean coastal States to assert exclusive jurisdiction over the continental shelf beyond 200 nautical miles, if the shape and geology of the seabed make it a "natural prolongation" of the shelf closer inshore. China has a strong reciprocal interest in the rules set out in the U.N. Convention on the Law of the Sea (UNCLOS) because they constitute the basis for its own extensive claims in the South and East China Seas. (Shackelford 2008: 103) While there is some dispute about the future of global oil prices, there is no question that the Chinese economy will be forced to compete to find new sources of oil and gas. This issue will only grow in importance. Of the world's total consumption of 84 million

barrels per day (MMBD), America consumes the most at 21 MMBD, and China is now second at 6.4 MMBD. It is anticipated that the Chinese demand could double by 2020. Further, it is believed that over the next 25 years, China's dependency upon imported oil will double to 80 % of its total consumption. (Killaby 2005–2006: 39)

China, an indispensable actor in the global economy, also knows that it can access Arctic hydrocarbons through foreign investments, joint ventures and international markets. China already has the largest non-nuclear powered icebreaker of the world, the *Snow Dragon*, but — until now, it has been used solely for scientific research — and with good reason. (Spears 2009: 10–11)

One of the major Arctic interests of China concerns the shipping routes being opened by the melting sea-ice. Different routes will be used depending on origins and destinations: liquefied natural gas from the Barents Sea will be sent to Shanghai through the Russian Northern Sea Route; luxury German cars will go straight “over the top,” and Chinese goods headed for the eastern US will use the Northwest Passage. (Jakobson 2010: 5–9)

But even when the ice disappears, these routes will remain remote, poorly charted and often stormy. These risks provide the key to constraining China in the North. If coastal States provide world-class charts, navigation aids, ports of refuge, weather and ice-forecasting, search-and-rescue and policing aimed at pirates, terrorists and smugglers, Chinese shipping companies will voluntarily comply with reasonable laws concerning ship safety, navigation lanes, insurance coverage and the provision of crew lists and cargo manifests. In other words, if Arctic States provide incentives for China to work with rather than against us, there is every reason to expect that Beijing will recognize their considerable power as coastal States including in currently contested waters. The same aim moves the shipping power of South Korea. South Korea believes that being an observer of the Arctic Council will help it to be able to enter into discussion among the Arctic nations over preservation and development of the area and this will probably also help their government brainstorm policies on development of marine transportation. (Se-Jeong 2008; ‘Polar research in Korea and Sweden — areas of common interest’ 2010)

2 Conflicts Amplified by A Chinese presence

Owing to the reduction of ice new shipping routes open, (Warming Opens Northwest Passage 2007) fishing facilities widen out and the exploitation and transportation of resources hidden in the continental shelf will probably increase in the foreseeable future. (Theologitis 2008: 113)

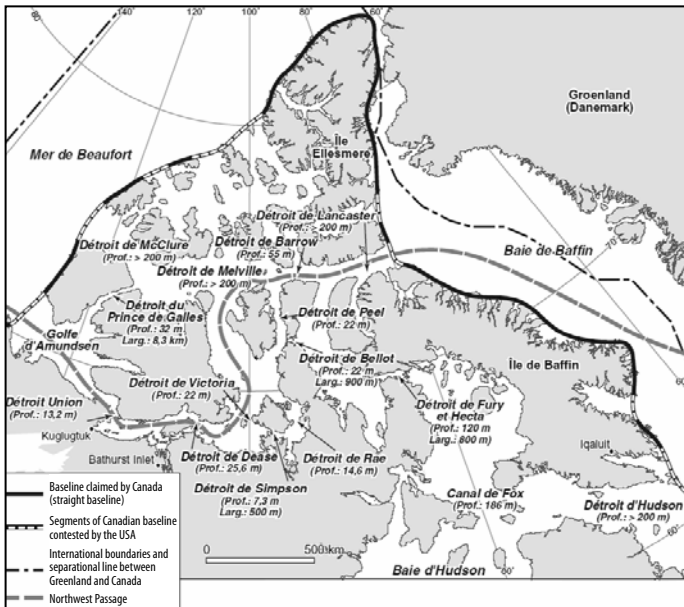
Two major sea routes exist in the Arctic: the *Northwest Passage* along Canadian territories connecting the Atlantic and Pacific Ocean and the *Northeast Passage* (or in

conformity with its Russian name: Northern Sea Route) from the Atlantic Ocean to the Pacific Ocean along the Russian Arctic coasts. The possibility of navigation shortens drastically the distance between continents, which means time, and cost reduction of transportation of an exploited oil and gas in the region. (Christensen 2009)

2.1 Canada and the Northwest Passage

The Canadian government claims that the waters of the Northwest Passage, particularly those in the Canadian Arctic Archipelago, are internal to Canada, giving Canada the right to ban transit through these waters. Contrarily, most maritime powers like the USA or the EU consider the passage to be an international strait where foreign vessels have the right of transit. (Struck 2006; Howson 1987–88: 338–375)

Figure 1: Northwest Passage and Strait baselines



Source: Lasserre (2004: 409)

Key: Baie Baffin = Baffin Bay; Baie d'Hudson = Hudson Bay; Canal de Fox = Fox Channel; Danemark = Denmark; Détroit de Barrow = Barrow Strait; Détroit de Bellot = Bellot Strait; Détroit de Lancaster = Lancaster Strait; Détroit de McClure = M'Clure Strait; Détroit de Melville = Melville Strait; Détroit de Peel = Peel Strait; Détroit de Prince de Galles = Prince of Wales Strait; Détroit de Victoria = Victoria Strait; Golf d'Amundsen = Amundsen Gulf; Groenland = Greenland; Île de Baffin = Baffin Island; Île Ellesmere = Ellesmere Island; Mer de Beaufort = Beaufort Sea; Détroit de Fury et Hecla = Fury and Hecla Strait; Détroit de Rae = Rae Strait; Détroit d'Hudson = Hudson Strait; Détroit de Dease = Dease Strait; Détroit de Simpson = Simpson Strait; Détroit Union = Union Strait; Prof. = dept; Larg. = width

Canada's claim relies upon two legal bases: first, the waters that make up the Northwest Passage are Canada's internal waters by virtue of historical title. Second, the waters are internal as they are on the landward side of straight baselines. (Teeples 2010: 57–59; Briggs 1990: 437–452; Donat 1989: 653; Kraska 2009: 1126)

Concerning historical title, it has not been declared as such in any treaty or by any legislation only government officers made statements that Canadian sovereignty over waters — and only in the '70 —, including the Northwest Passage, is based on historic title and no right of passage is therefore recognized. In order to prove historic title Canada needs to make evident its possession of Arctic waters for a sufficiently long period of time and with the acquiescence of this possession by foreign states, particularly those who are primarily affected by the claim. (*Fisheries case* 1951: 116)

The main argument to strengthen Canada's sovereignty is the ongoing use and occupation of the covering ice by its Inuit people "*from time immemorial*." (Kindred 2006: 461) Statements like that are also based on legislator acts which refer to islands and waters around it as well. (Pharand 1971: 7; Pharand 1983–1984: 759; O'Connell 1982: 428)

As historical title concerning Canadian claims to the Arctic is rather controversial, and have not been accepted by international community, (Franckx 1993: 103; Lalonde 2009: 77–78) in addition to it, following the controversial transit of the US Coast Guard icebreaker *Polar Sea* in 1985, the State claims that the waters of the Northwest Passage are internal as the waters are on the landward side of straight baselines. (Canada: Statement concerning Arctic Sovereignty 1985: 1723–1730; Pharand 1986: 298; Pharand 2007: 12) Like the historical title argument, this argument is not specific to the Passage itself, but has been articulated in connection to the challenges of Canadian sovereignty. Under Article 8 of UNCLOS, when straight baselines are drawn around waters that were not previously considered internal, a right of innocent passage remains as it does elsewhere on the territorial seas. So the main question remains if Canadian waters are qualified internal waters because of historic title or because of straight baselines surrounding them. On this point, some argue that what governs the issue is the law applicable at the time when the baselines were drawn, i.e., 1985. When Canada adopted its position of drawing straight baselines in 1985, it was not bound by UNCLOS; it was acting under customary international law. The distinction between treaty law and customary law is significant. The principle of preservation of a right of innocent passage expressed under Article 8 of UNCLOS is regarded as a new treaty-law rule, which did not exist under customary international law. This principle means that foreign states could not claim that a right to innocent passage continues to exist on waters enclosed through the straight baseline method. Under this argumentation foreign States cannot claim the right of passage on the sea route. (Dufresne 2008: 5)

The problem would be resolved by the solution marked by the USA insisting on the legal qualification of international strait of the Northwest Passage. The United States has consistently argued that the Northwest Passage represents an international strait: first in 1969 by voyage of the tanker *S.S. Manhattan* and in 1985 by the icebreaker *Polar Sea*. In relation to transits by both ships, the position of the United States is that States do not have to obtain Canada's permission given that the ships navigating through an international strait under the right of transit passage. (Kraska 2009: 1119)

Is the Northwest Passage an international strait?

The legal criteria of international straits are summarized only in jurisdiction, in the *Corfu channel case* of the International Court of Justice. According to the judgment the nature of the strait that it connects open seas (geographic element) and the fact that it is an important traffic route (functional element) determines the legal status of straits. (*Corfu Channel Case* 1949: 28; Brüel 1947: 42–43; Pharand 2007: 14) In the case of the Northwest Passage the geographic element exists, but there is some problem with the functional one: it is not frequent enough to be considered an international strait. In comparison, the Corfu channel case was crossed 2884 times during 21 months (Pharand 1979: 106; Fitzmaurice 1953: 28; Pharand 2007: 15) while the Northwest Passage from the first voyage of Amundsen in 1904 until 2004 was shipped through only 99 times. (Brigham and Ellis, Ben 2004: Appendix F) In conformity with the judgment and the legal literature it shall be actual use and not potential use of the strait in question so it has no importance how important shipping route the Northwest Passage might be, as long as it is not actually used for a significance marine traffic, it cannot be qualified as international strait. (McRae 2007: 15)

In 1988, the dispute between Canada and the United States was partly set aside by an agreement, which pledges that voyages of US icebreakers will be undertaken with the consent of the Government of Canada. The agreement do not otherwise alter either State's legal position vis-à-vis the Arctic waters and in 2003 *Paul Cellucci*, then the US Ambassador to Canada, confirmed that the agreement to disagree on the status of the Northwest Passage continues. (Canada and United States of America Agreement on Arctic cooperation 1988)

Concerning frequency of the traffic it will probably increase in the foreseeable future and will cause legal problems concerning international strait qualifications. Moreover, when Canada ratified the UNCLOS in 2003, it made a reservation excluding from adjudication "*disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles.*" (Pharand 2007: 5) So, in respect of peaceful settlement of disputes the case of the Northwest Passage will also be a challenge of law.

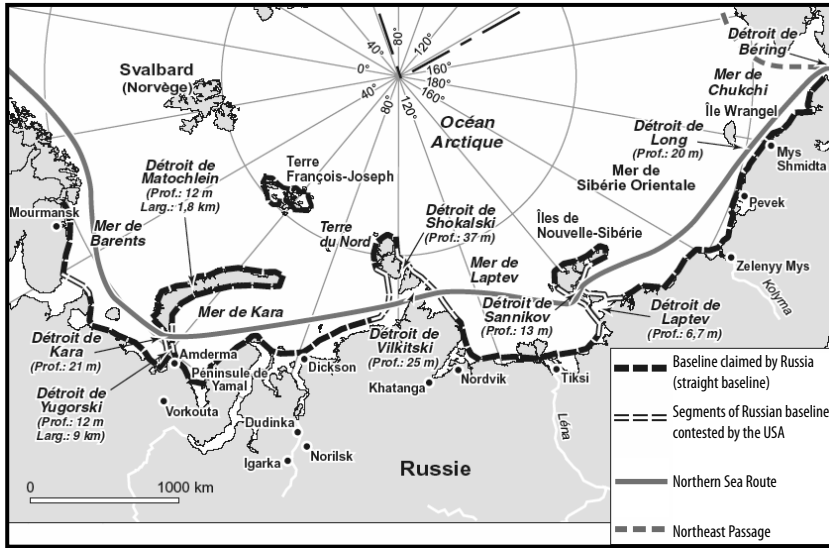
Canada counters that it has sole jurisdiction over the Northwest Passage and wants to enforce its own laws on ships in the Arctic waters. Canadian officials argue that their authority is the best way to minimize unsafe ships and accidental spills in the pristine north. (Beesley 1972–1973: 226–235) To put an emphasize on their words, on 9th April 2006 the Canadian Government declared that the Canadian military will no longer refer to the region as the Northwest Passage, but as the *Canadian Internal Waters*. (Northwest Passage gets political name change' 2006; 'Le passage de Nord-Ouest' 2008)

2.2 Russia and the Northern Sea Route

Russia has chosen a more profiting solution: the State opened the icy sea route to foreign vessels but as it is too risky to ship there without the necessary icebreaking installations and the coastal State itself is entitled to protect its marine area from a potential pollution because of an accident, Russia established a special regulation system in 1996 in order to have its profit from the route. (Franckx 2009: 327; Ragner 2008: 122) All ships intending to use the Northern Sea Route should submit a request to the Administration of the Northern Sea Route, at least four months in advance, including detailed information on the vessel, possible deviations from the 1996 Requirements, certification of insurance of liability for possible pollution damage, and approximate date and purpose of the voyage. If the response is positive, an inspection needs to take place at the expense of the owner. Ships not completely satisfying the 1996 Requirements, as well as floating structures, can be guided through the Northern Sea Route for an additional fee. (Franckx 2009: 336)

In 2007 Canada sent armed ships, which were declared to be the first element in a plan to secure the far north, (Miller 2007) but it was Russia, which declared that they had adapted training plans for units that might be called upon to fight in the Arctic. (Cook 2008)

Figure 2: Straight Baselines and the Northern Sea Route



Source: Lasserre (2004 : 410)

Key: *Détroit de Kara* = Kara Strait; *Détroit de Laptev* = Laptev Strait; *Détroit de Long* = Long Strait; *Détroit de Matochlein* = Matochlein Strait; *Détroit de Sannikov* = Sannikov Strait; *Détroit de Shokalski* = Shokalski Strait; *Détroit de Vilkitski* = Vilkitski Strait; *Détroit de Yugorski* = Yugorski Strait; *Îles de Nouvelle-Sibérie* = New Siberian Islands; *Mer de Barents* = Barents Sea; *Mer de Chukchi* = Chukchi Sea; *Mer de Kara* = Kara Sea; *Mer de Laptev* = Laptev Strait; *Mer de Sibérie Orientale* = East Siberian Sea; *Norvège* = Norway; *Océan Arctique* = Arctic Ocean
 Prof. = dept; Larg. = width

3 The future of the sea routes

According to scientific estimations concerning the standard of ice melting in the last decades, by 2050 the Arctic will need to face with significant traffic. (Macneil 2006: 204; Pariseau 2008; Dumas and Brown 2006: 5175–5189) Scientists went on to take samples from ice cores, trees and lake sediment over a five-year period to gather a clearer picture of temperatures across the region. They found the Arctic Ocean could be free of ice by 2015. (Bruckner-Menchelli 2010: 24) News of shorter routes that could cut transit routes in half between Europe and Asia were welcomed by the industry, environmental concerns increased.

Figure 3: Distance between Seaports

Departure–Destination	Panama	Northwest Passage	Northern Sea Route	Suez and Malacca
London–Yokohama	23 300	<i>14 080</i>	<u>13 841</u>	21 200
Marseille–Yokohama	24 030	<u>16 720</u>	<i>17 954</i>	<i>17 800</i>
Marseille–Shanghai	26 038	19 160	19 718	<u>16 460</u>
Marseille–Singapore	29 484	21 600	23 672	<u>12 420</u>
Rotterdam–Singapore	28 994	19 900	19 641	<u>15 950</u>
Rotterdam–Shanghai	25 588	<i>16 100</i>	<u>15 793</u>	19 550
Rotterdam–Yokohama	23 470	<i>13 950</i>	<u>13 360</u>	21 170
Hamburg–Seattle	17 110	<i>13 410</i>	<u>12 770</u>	29 780
Rotterdam–Vancouver	16 350	<i>14 330</i>	<u>13 200</u>	28 400
Rotterdam–Los Angeles	<u>14 490</u>	<i>15 120</i>	<i>15 552</i>	29 750
Lisbon–Los Angeles	<u>14 165</u>	<i>14 940</i>	<i>16 150</i>	27 225
Lisbon–Singapore	25 341	19 740	20 070	<u>13 191</u>
Lisbon–Yokohama	21 590	<u>14 240</u>	<i>15 230</i>	18 724
Gioia Tauro–Hong Kong	25 934	20 230	20 950	<u>14 093</u>
Gioia Tauro–Singapore	29 460	21 700	23 180	<u>11 430</u>
Barcelona–Hong Kong	25 044	18 950	20 090	<u>14 693</u>
New York–Shanghai	20 880	<u>17 030</u>	19 893	22 930
New York–Hong Kong	21 260	<u>18 140</u>	20 985	21 570
New York–Singapore	23 580	<i>19 540</i>	23 121	<u>19 320</u>
New Orleans–Singapore	22 410	<i>21 950</i>	25 770	<u>21 360</u>
Maracaibo–Hong Kong	<u>18 329</u>	<i>19 530</i>	23 380	22 790

Source: Lasserre (2009: 6) Bold underlined numbers: shortest sea route; numbers in italics: more than 15 % difference.

But at the moment, it is still not the actual fear of Arctic States that thousands of ships are intending to use the sea routes as ice still constitutes such a risk to navigation that can only be mitigated by the strongest icebreakers. According to the survey of Frédéric Lasserre which collected information from container companies whose answers account for 57 % of world traffic shows that mainly North Ameri-

can companies are the most interested in the use of sea routes but among the ones questioned, 4 North American companies and 2 European were already present in the Arctic. [figure 4]

Figure 4: Lasserre's industry survey on the Arctic

	Asia	North America	Europe
Interest for Arctic transit	2	6	3
Maybe/do not know yet	1	0	2
No interest	7	4	10

Source: Lasserre (2009: 16)

However these statistics do not mean that this situation will not change in the future when the intensive melting of ice will make the region more navigable. The Chinese attitude, actions and plans signify exactly this possibility.

Concerning environmental problems that the increased traffic will probably cause, the Arctic is a good place to demonstrate effective cooperation between coastal States and others or to become a battlefield of egoistic interests. Hopefully the first version will win.

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