WHY CANADA AND RUSSIA SHOULD UNITE TO SUPPORT A COMMON POSITION AGAINST THE US IN ADVANCING CERTAIN ARCTIC CLAIMS

In the article the author covers the most important questions concerning a problem of definition of the status of internal waters, and also gives exhaustive justification of the position concerning association of Canada and Russia for achieving their Arctic interests.

Keywords: The Arctic, climatic changes, demarcation, Northern Sea Route, The Northwest Passage, the UN Convention on the Law of the Sea 1982, internal waters, international passage.

Unlike the Antarctic, a continent surrounded by oceans, the Arctic is an ocean surrounded by continents. Most of the Arctic Ocean coastline belongs to the world’s two largest countries – Russia and Canada – each of which also owns territory on either side of a series of contested, and increasingly ice-free, Arctic straits.

Canada considers the Northwest Passage to be internal waters. Russia takes the same view of the Northern Sea Route. Both countries recognize that the thinning and melting of the Arctic sea ice pose environmental and security risks at the same time that they create economic opportunities in the form of increased shipping and access to natural resources. Both take the view that their domestic laws provide the best bases for protecting and developing their Northern coastlines. And both face a single, common source of opposition to their claims – namely, the US. All of this should beg the question: why have Russia and Canada not bolstered their respective positions by recognizing each other’s legal positions?

The Northwest Passage is made up of a number of different possible routes between the more than 19,000 islands of Canada’s Arctic Archipelago. The islands themselves have been incontestably Canadian since the UK transferred title over them in 1880, while the nearly impenetrable sea ice meant that the issue of ownership and control over the water was never discussed – until the acquisition of powerful icebreakers by the US and, more recently, the dramatic melting of sea ice as a consequence of climate change.

Canada takes the view that the Northwest Passage constitutes internal waters, where the full force of its domestic law applies. Internal waters are not territorial waters, and there is no right – at international law – to access them without the permission of the coastal state. Internal waters arise in bays or along fragmented coastlines through the long-term acquiescence of other countries and/or by the drawing of ‘straight baselines’ between headlands in accordance with a judgment of the International Court of Justice (ICJ) in the 1951 Anglo-Norwegian Fisheries Case.

The US insists that the Northwest Passage is an ‘international strait,’ according to criteria set out by the ICJ in the 1949 Corfu Channel Case – namely, that “its geographical situation [connects] two parts of the high seas and the fact [that it is] being used for international navigation.” Foreign vessels sailing through an international strait necessarily pass within 12 nautical miles of one or more coastal states, but instead of the regular right of ‘innocent passage’ through territorial waters, they benefit from an enhanced right of ‘transit passage.’ This entitles them to pass through the strait without coastal state permission, while also freeing them from other constraints. For instance, foreign submarines may sail submerged
through an international strait – something that they are not allowed to do in regular territorial waters.

On two occasions, the US has sent surface vessels through the Northwest Passage without seeking Canada’s consent: the SS Manhattan, an American owned-and-registered ice-strengthened super-tanker in 1969; and the USCGC (US Coast Guard Cutter) Polar Sea, a coastguard icebreaker in 1985. Most Canadian specialists argue that these two transits are insufficient to fulfill the ‘used for international navigation’ criterion. American analysts respond that the ICJ did not specify a threshold – with some of them even arguing that prospective use is itself enough.

The US position has received some support from the European Commission, which in 1985 joined the State Department in protesting against Canada’s drawing of straight baselines around its Arctic islands. However, the focus of the European objection was the unusual length of several of the baselines, rather than the adoption of the lines as such, or the internal waters claim specifically. Contrary to a widespread assumption, no country apart from the US has ever explicitly and specifically objected to Canada’s internal waters claim.

Nor has the dispute posed a problem for Canada and the US since 1988, when the two countries concluded an Arctic Cooperation Agreement. In the treaty, the US “pledges 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.” In return, Canada promises to give consent whenever it is requested. The two countries also agree that “[n]othing in this Agreement [...] nor any practice thereunder affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas [...].” In other words, the treaty is essentially an agreement to disagree.

The Arctic Cooperation Agreement was designed to manage the Northwest Passage dispute indefinitely, since shipping was restricted to heavy icebreakers by the year-round presence of thick, hard, multi-year sea ice. But climate change, which is advancing more quickly in the Arctic than anywhere else on Earth, is rapidly causing the ice to thin and recede. For four of the last five summers, the Northwest Passage has been free of ice in early September and open to non-icebreaking vessels. Eighteen ships sailed through in each of 2009 and 2010, and 22 ships in 2011.

It now seems possible that the Arctic could experience a complete, late-season melt-out of sea ice within the next five-plus years, and with this a permanent loss of the main impediment to shipping: the multi-year ice. Before long, the Northwest Passage could well resemble the Gulf of St. Lawrence or the Baltic Sea, where ice-strengthened vessels and icebreaker-escorted convoys can operate safely throughout the year.

Another fundamental change involves the US’s attitude toward security. Since 9/11, Washington has become concerned about the possibility of terrorists using the Northwest Passage to sneak into North America, or of rogue states transporting weapons of mass destruction via the continent’s longest, mostly unguarded coastline. These challenges would arguably best be addressed through a coastal state’s domestic criminal, customs and immigration laws – especially when the state in question is a close military and economic ally – rather than the much weaker powers available under international law in an international strait.

The US Navy, however, is concerned that recognizing Canada’s claim could create a precedent for other waterways, such as the Strait of Hormuz – the international legal status of which is contested. Yet the presence of sea ice and the paucity of non-consensual foreign transits make it possible to legally distinguish the Northwest Passage from all other potential or existing international straits – apart, that is, from the Russian Arctic straits that form part of the Northern Sea Route.

The Northern Sea Route stretches along the top of Russia from the Atlantic to the Pacific, and has, because of climate change, also become seasonally ice-free. Thirty-two ships traversed the waterway last summer – most of them transporting natural resources from Russian ports to Asian markets. South Korean shipyards are building dozens of ice-strengthened cargo vessels that will soon extend the shipping season beyond the summer months, while the Russian government is building new icebreakers to escort convoys of vessels.

The Russian government is intent on turning the Northern Sea Route into a commercially viable alternative to the Strait of Malacca and the Suez Canal. In September 2011, Prime Minister Putin said: “The shortest route be-
tween Europe’s largest markets and the Asia-Pacific region lies across the Arctic. This route is almost a third shorter than the traditional southern one. I want to stress the importance of the Northern Sea Route as an international transport artery that will rival traditional trade lanes in service fees, security and quality. States and private companies that choose the Arctic trade routes will undoubtedly reap economic advantages.”

There is, of course, a notable fly in the ointment: the US contests Russia’s claim that portions of the Northern Sea Route – namely, the Vil’kitskii, Shokal’skii, Dmitrii Laptev and Sannikov straits – constitute internal waters. Significantly, no other country has taken a side in the dispute, which began in 1963 when the US Coast Guard icebreaker Northwind surveyed the Laptev Sea; the next summer, the USS Burton Island did likewise in the East Siberian Sea. These voyages prompted the Soviet government to send an aide m\önumoire to the US embassy in Moscow, clearly setting out the position that the straits are internal waters. The US responded by asserting that they were in fact international straits.

Then, in the summer of 1965, the US Coast Guard icebreaker Northwind approached the Vil’kitskii Straits from the west. Strong diplomatic pressure was applied by the Soviet Union – pressure that, according to one Department of State spokesman, extended to a threat to “go all the way” if the American ship proceeded into the strait. The US government responded by ordering the Northwind to turn round. A similar incident occurred in 1967, when the US Coast Guard icebreakers Edisto and East Wind retreated after being warned off by the Soviets.

The opening of the Northern Sea Route to international shipping began more than two decades later when, in 1987, the reforming Soviet General Secretary Mikhail Gorbachev said: “Across the Arctic runs the shortest sea route from Europe to the Far East, to the Pacific. I think that, depending on how the normalization of international relations goes, we could open the Northern Sea Route to foreign ships under our icebreaker escort.”

In September 2009, with the thick, hard, multi-year ice having recently disappeared from the Russian coast, two German container ships successfully navigated the Northern Sea Route from east to west, on a voyage that began in Ulsan, South Korea, and ended in Rotterdam, Netherlands.

In November 2010, Norilsk Nickel, Russia’s largest mining company, reported that one of its vessels had completed a round trip from Murmansk to Shanghai. The 18,218-kilometre trip took 41 days, compared to the 38,785 kilometres and 84 days that it would have taken by way of the Suez Canal. In August 2011, the Vladimir Tikhonov, a 280 metre-long super-tanker carrying natural gas condensate from Murmansk to Map Ta Phut port in Thailand, became the largest vessel to complete the Northern Sea Route. It was able to do so because ice conditions now allow ships to sail northward of the New Siberia Islands – thus bypassing the shallow waters between those islands and the mainland.

Nevertheless, to be sure, attempts to support the use of the Northern Sea Route by foreign ships have never meant that the USSR or Russia believed that the waterway should be opened to unrestricted passage.

The similarities between the Northwest Passage and Northern Sea Route extend beyond the common Russian and Canadian positions that argue that their respective Arctic straits constitute internal waters. In 1982, Soviet and Canadian diplomats partnered in the negotiation of Article 234 of the UN Convention on the Law of the Sea (UNCLOS), which allows coastal states to exercise heightened regulatory powers over shipping in ice-covered areas for the prevention, reduction and control of marine pollution – including in terms of vessel design, construction and navigational practices – out to 200 nautical miles from shore. Article 234 legitimated the 1970 Canadian Arctic Waters Pollution Prevention Act, which later provided a model for the Soviet Union’s 1990 regulations on the Northern Sea Route.

In 1985, Canada and the Soviet Union both adopted straight baselines. The Canadian lines connect the outer headlands of the Canadian Arctic Archipelago. The Soviet lines connect the island groups of Novaia Zemlia, Severnaia Zemlia and the New Siberian Islands to the mainland. The ICJ upheld the legality of straight baselines along fragmented coastlines and fringing islands in the 1951 Anglo-Norwegian Fisheries Case. And, crucially, on the strength of this case, as well as customary international law and UNCLOS, maritime areas within straight baselines today constitute internal waters of the coastal state.
Also in 1985, the US sent the coastguard icebreaker Polar Sea through the Northwest Passage – prompting Evgeni Pozdnyakov, a press attaché at the Soviet Embassy in Ottawa, to publicly express support for Canada’s claim: “Whether it is the Northwest Passage or the Northeast Passage does not matter. Our position is based on provisions of international law. The waters around islands belonging to a country are the internal waters of that country.”

However, there is no evidence of any prior or subsequent statements of support by the Soviet Union or Russia for Canada’s position, nor indeed evidence of Canadian statements in the reverse – which is curious, given the similarities in legal circumstances. The most logical explanation for this curiosity is political in character: Canada and the Soviet Union were on different sides of the Cold War. The American opposition to Canada’s claim has always been based on wider strategic concerns – namely a felt need for maximum navigation rights worldwide. With Canadian and US security linked through NATO, NORAD and the Five Eyes intelligence sharing network, it would already have been difficult enough for Canada to take an independent stance on the Northwest Passage issue. Taking the Soviet Union’s side in the Northern Sea Route dispute was, in the event, simply not an option.

As for the Soviet Union’s near-complete silence on the Northwest Passage, one can postulate that the Soviet government decided not to disrupt the delicate balance that allowed Canada and the US to ‘agree to disagree’ on the issue. (Had Moscow come out publicly in favour of the Canadian position, Ottawa’s independent stance was no longer tolerable.) An alternative or additional explanation is that Moscow was not concerned that any foreign country would physically challenge its claim by overtly sailing through the Northern Sea Route. The risk of sparking a nuclear conflict would be too high, and the only US vessels capable of a surface voyage were lightly armed coastguard icebreakers that would be no match for the Northern Fleet.

Today, with the Cold War over and the sea ice melting, environmental concerns and economic opportunities dominate the policy landscape. Russia has just been admitted to the World Trade Organization, and cooperation has arguably replaced conflict as the dominant paradigm in the North.

In November 2007, Canadian Prime Minister Stephen Harper and then-Russian Prime Minister Viktor Zubkov issued a joint statement on Canada-Russia economic cooperation. In January 2010, according to WikiLeaks, Stephen Harper told NATO Secretary-General Anders Fogh Rasmussen that the alliance had no role to play in the Arctic because “there is no likelihood of Arctic states going to war.” Harper also said that “Canada has a good working relationship with Russia with respect to the Arctic, and a NATO presence could backfire by exacerbating tensions.”

As for the current Russian prime minister, in September 2010, Vladimir Putin told a conference in Moscow: “It is well known that, if you stand alone, you cannot survive in the Arctic. Nature alone, in this case, demands that people, nations and states help each other.” Putin’s comments came just a week after the Russian and Norwegian foreign ministers signed a boundary treaty for the Barents Sea, where the two countries had previously disputed 175,000 square kilometres of oil- and gas-rich seabed. Then, in May 2011, Russia, Canada, the US, Denmark, Norway, Sweden, Finland and Iceland signed a multilateral search-and-rescue treaty – the first legal instrument negotiated within the framework of the Arctic Council.

All of this has consequences for the Northern Sea Route and Northwest Passage. In February 2009, Alan Kessel, the senior lawyer in Canada’s Department of Foreign Affairs and International Trade, met with his Russian counterpart, Roman Kolodkin, in Moscow. According to a Russian summary of the meeting, “[b]oth sides noted a high degree of similarity in their position on the issue of international shipping in the Northwest Passage (Canada) and the Northern Sea Route (Russia) – the existing limitations that are being applied to those areas are necessary to preserve the fragile maritime environment and are in sync with the rights that UNCLOS concedes to coastal states in ice-covered areas. Both sides agreed to have more detailed consultations on this topic, including the issue of rights to historical waters in the context of the existing disputes over their status with the US.”

Soviet submarines never threatened Canadian sovereignty over the Northwest Passage, because the whole purpose of such vessels is to
remain covert. (Under international law, only overt actions can create new rights.) But today, with the sea ice melting and foreign shippers looking north, it is only a matter of time before other countries join the US in overtly opposing Canada’s and Russia’s claims.

In the more than two decades since the Cold War ended, Russia has lost its superpower status, been integrated into the global economy, and become an active participant in Arctic cooperation. In these changed circumstances, Moscow and Ottawa should pursue the possibility of a joint Russian-Canadian position on the legal status of the Northern Sea Route and Northwest Passage. Such issue-specific diplomatic cooperation would strengthen the leverage of both countries as they seek – singly or jointly – to negotiate some kind of long-term compromise with the US.

M. Byers

WHY CANADA AND RUSSIA SHOULD UNITE TO SUPPORT A COMMON POSITION AGAINST THE US IN ADVANCING CERTAIN ARCTIC CLAIMS

The article highlights the most important issues concerning the problems of inland waters status determination and also provides a comprehensive rationale for the position with regards to joining efforts of Canada and Russia to achieve their Arctic interests.

Keywords: Arctic, climate changes, demarcation, Northern Sea Route, Northwest passage, UN Convention on the Law of the Sea in 1982, inland waters, international strait.