

The Ice is Melting: Climate Change in the Canadian North

Contested Waters: Sovereignty, Security, Strategy

Remarks of

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Let me begin by thanking the organizers for inviting me to participate in this conference on climate change in the Canadian North and provide an American perspective on the legal issues posed by melting of the ice in the Arctic.

My specific charge is to help define and clarify the issues concerning sovereignty, territoriality and maritime passage in the Arctic Ocean that are coming into focus as large-scale navigation becomes feasible in these waters.

My first point is that consideration of these issues is timely now before large-scale navigation becomes feasible. It will take considerable time to identify and agree on the steps that will be needed to ensure the safety, security and environmental protection of the Arctic Ocean, and even more time to put them in place.

And we need to be aware that these issues are not just of concern to Canada and the United States. These issues are of concern to all five states bordering on the Arctic, the other states in the high north, and flag states whose shipping might wish to ply these waters when they become suitable for large-scale navigation.

## 1. Terminology

As a preliminary matter, it is important to be aware of the differences in “Arctic” terminology and definitions.

- Geographically, definitions of the Arctic vary:
  - Some consider the Arctic to consist of all land, submerged lands, and water north of the Arctic Circle (66° 33’ 39’’ North of the Equator).
  - The US Arctic Research statute includes a broader area, including the Bering Sea and a portion of the land area of Alaska below the Arctic Circle.
  - The Canadian Arctic Waters Pollution Prevention Act defines the Arctic as all Canadian land and waters north of 60° N (i.e., the Northwest Territories).
  - Other definitions include where permafrost begins.

- Land territory north of the Arctic Circle includes northern Alaska, northern mainland Canada abutting the Bering Sea (the Northwest Territories), the Canadian Arctic islands (which Canada calls the Canadian “arctic archipelago”), Greenland (Denmark), Svalbard/Spitzbergen (Norway), northern Norway, northern Sweden, northern Finland, and the Russian territory of Franz Josef Land, Novaya Zemlya, North Land, Anjou Islands, Wrangel Island and northern Siberia.
- Arctic submerged lands consist of the “continental shelf” and the “deep seabed.”
  - Continental shelf is the natural prolongation of the land mass, out to 200 nm automatically – and beyond where it meets the geological criteria of article 76 of the LOS Convention.
  - Deep sea bed is the sea floor beyond the continental shelf.
- Defining the Arctic Ocean is much like defining the Arctic; neither has a definitive and obvious extent. As with the Arctic, the United States has an interest in not subscribing to one particular definition of the Arctic Ocean for all purposes. Rather each definition serves its own purpose.
  - There is a definition adopted by the International Hydrographic Organization (IHO) in 1953; it defines the Arctic Ocean by a series of segments that includes all the waters, whether or not frozen, seaward of the northern limits of the U.S., Canada, Denmark (Greenland), Norway, and Russia. This definition includes several “seas,” such as the Beaufort, Chukchi, Norwegian, Barents, Laptev, and Greenland Seas, as well as Baffin Bay.
  - As a member of the IHO, the U.S. agrees with this definition in the context of providing uniformity to mariners for navigational purposes (the primary purpose of this organization).

I make this point in part to recall that the entrance to the Arctic Ocean from the Pacific Ocean is through the Bering Strait. I suggest that consideration of issues concerning shipping in the Arctic Ocean need to begin to focus on that chokepoint rather than further north.

## 2. Maritime Zones

Next, let me briefly explain the different maritime zones in the Arctic Ocean: these are territorial seas, exclusive economic zones (EEZ), continental shelves, the deep seabed beyond the limits of national jurisdiction (i.e., the Area) and high seas. These are the same zones found in other ocean areas, such as the Pacific and Atlantic.

- Each of the five States bordering the Arctic Ocean has claimed an EEZ in the waters beyond and adjacent to its territorial sea, in which it enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and in the same area, jurisdiction with regard to protection and preservation of the marine environment.
- The maximum breadth of the EEZ is 200 nm measured from baselines determined in accordance with the LOS Convention.
- Each of these five States has a continental shelf over which it has exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources.
- The continental shelf may extend more than 200 nm from properly established baselines if the geologic criteria set out in article 76 are met.
- For Parties to the LOS Convention (which includes the other four countries), the Convention sets forth a procedure for establishment of the outer limits of the shelf beyond 200 nm. If the coastal State establishes its outer limits on the basis of recommendations of the Convention's Commission on the Limits of the Continental Shelf (Commission), the limits are considered "final and binding."
- Russia and Norway have made submissions to the Commission but it has not yet made its recommendations on the outer limit of their extended shelves. As is known, Russia is collecting additional data to substantiate its submission.

- Denmark, Canada, and the U.S. are in the process of collecting the necessary scientific data to support their submissions/establishment. (The U.S. may not make a submission unless it is a party to the LOS Convention.)
  - In that connection I would note that later this year Canadian and U.S. scientists will be collecting bathymetric and multi-channel seismic data of the sea floor in the northern and eastern portions of the Arctic where our shelves join. This will involve both a U.S. and a Canadian icebreaker each doing what the other can't.
  - I understand Canada and Denmark did similar joint work last summer.
- The “Area” consists of the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (i.e., beyond the outer limits of the continental shelf). Under the LOS Convention, deep seabed mining in the Area is administered by the International Seabed Authority.
- The water column more than 200 nm from land in the Arctic Ocean, whether or not frozen, is “high seas” where:
  - high seas freedoms apply, and
  - no State may validly purport to subject any part of the high seas to its sovereignty.

### 3. Maritime boundaries

In this area, not all the maritime boundaries have been agreed.

- There are several maritime boundary situations in the Arctic Ocean, i.e., places where adjacent/opposite States have overlapping maritime claims:
  - US-Russia
  - US-Canada
  - Canada-Denmark
  - Denmark-Norway
  - Norway-Russia
- The U.S.-Russia maritime boundary – running from the Bering Sea north to the Arctic – has been negotiated. The 1990 U.S.-USSR (now Russia) treaty is being applied provisionally pending ratification by the Russian

Duma. The Senate gave its advice and consent in 1992. The treaty provides that the maritime boundary extends north along the 168° 58' 37" meridian through the Bering Strait and Chukchi Sea into the Arctic Ocean "as far as is permitted under international law."

- The Russian submission to the CLCS respects this boundary. Russia does not claim extended continental shelf on the US (east) side of this line.
- The U.S. and Canada disagree on the location of the maritime boundary in the Beaufort Sea and northward. Canada considers that the maritime boundary follows the 141<sup>st</sup> meridian, which forms the land boundary between Alaska and the Northwest Territories. The United States rejects that the 1825 Anglo-Russian and 1867 Russo-American treaty establishing the land boundary also established the maritime boundary and considers that the boundary should be based on the "equidistance" methodology.
- Nevertheless, as described above Canadian and U.S. scientists will be cooperating this summer in gathering seismic and bathymetric data related to establishment of the outer limits of their continental shelves in the Arctic.
- I would also note that a month ago the U.S. Minerals Management Service held a very successful lease sale of off-shore blocks for oil and gas exploration in the Chukchi Sea. These blocks were well off shore some 60-200 miles, thereby avoiding issues with protected species near-shore.

#### 4. Northwest Passage

Then there's the Northwest Passage.

- The Northwest Passage connects Baffin Bay/Davis Strait in the Atlantic with the Beaufort Sea in the Arctic Ocean, through the waters of Canadian Arctic archipelago.

- The commercial potential of the passage lies in the reduction, both in distance and time, of the transit between Asia and Europe or the eastern Atlantic.
- The United States recognizes Canadian sovereignty over its Arctic islands.
- The U.S. – and many other countries -- consider the Northwest Passage is a “strait used for international navigation,” in which vessels and aircraft are entitled under the law of the sea to the non-suspendable right of transit passage, in the normal mode, without the permission of, or prior notice to, the State bordering the strait. Canada’s right to enforce environmental requirements on transiting vessels in the strait is circumscribed by article 233 of the LOS Convention.
- Canada claims the waters are internal and that, therefore, Canadian consent is necessary for passage. Canada also asserts the right to impose on transiting vessels environmental regulations of its choosing.
  - Article 234 (on ice-covered areas) of the Law of the Sea Convention was adopted following enactment of Canada’s Arctic Waters Pollution Prevention Act.
  - One might question whether article 234 will provide international legitimacy for that Act if or when the Canada’s arctic waters are no longer covered with ice “for most of the year” and no longer “create obstructions or exceptional hazards to navigation”.
- The U.S. rejects the Canadian claim – it does not meet the criteria for historic title, and article 35(a), which prevents drawing of straight baselines from altering the previous navigational rights, applies to the Canadian Arctic.
- In January 1988, Canada and the United States reached a pragmatic agreement applicable to a limited class of U.S. vessels, i.e., icebreakers (all of which belong to the U.S. Coast Guard).
- The Agreement, which was expressly without prejudice to either country’s position on the status of the Northwest Passage, provides for

U.S. icebreakers to conduct marine scientific research during the transit and, as such, for the U.S. to seek Canada's consent prior to such passage.

- Subsequent transits by U.S. Coast Guard icebreakers of the Northwest Passage have all taken place in accordance with this Agreement.
- The Agreement does not cover transit of other types of ships.
- The U.S. Navy conducts submerged transits throughout the Northwest Passage and the Arctic region. The Arctic is a particularly advantageous pathway for shifting submarines between the Atlantic and Pacific fleets. Such transits are quicker, more covert, more fuel efficient, more cost effective, and provide greater force protection in comparison to alternative transits through the Panama Canal.
  - In addition to these transits, U.S. naval forces conduct transits, training and operations in the Arctic region. U.S. force presence in other parts of the Arctic supports U.S. combatant commanders and strategic deterrence. The U.S. submarine force, in particular, is prepared to operate in and project maritime power from the Arctic.
  - The U.S. Navy also maintains a training presence in the Arctic in order to evaluate tactics, platforms, weapons systems and associated equipment. For example, the submarine force operates temporary ice camps every two years. The most recent camp was in Spring 2007 with the next camp planned for Spring 2009. The U.K.'s Royal Navy shares the use of these camps and conducts cooperative training with U.S. Navy submarines.
  - Since the early 1970s, the U.S. submarine force has collected Arctic data in support of the scientific community. These activities are conducted on a 'not to interfere' basis with military missions and requirements.
- However, rather than debating legal differences, we think it is much more useful to focus on the extensive, long-term common interests in security, environmental protection and safety of navigation shared between the U.S. and Canada in the Arctic.

## 5. Sources of law

- In our view, there are many sources of international law that are applicable to the Arctic Ocean, and, more importantly, available to enhance the security, environmental protection and safety of navigation of the Arctic Ocean. As a result, we do not believe it is necessary to develop a new regime of laws for the Arctic, as some have suggested.
- The sources include, e.g.:
  - the law of the sea, as reflected in the Law of the Sea Convention, which allows the coastal States to claim territorial seas, EEZs, shelf out to 200 nm, shelf beyond 200 nm if it meets the Article 76 criteria, passage rights for foreign flag vessels, high seas freedoms, the consent regime for marine scientific research;
  - various IMO agreements on safety of navigation and prevention of marine pollution, which clearly apply to the Arctic Ocean, apply there (e.g., SOLAS, MARPOL and its annexes on vessel source pollution, the London Convention/Protocol on ocean dumping); and
  - various air-related agreements that indirectly protect the Arctic, such as the Montreal Protocol on the ozone layer, the Framework Convention on Climate Change, the POPs Convention (to which the U.S. is not yet a party).
- There is also so-called “soft law” applicable to the Arctic Ocean, including the IMO guidelines and the Arctic Council guidelines.
- IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters (2002), IMO’s Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities (2006), the IMO’s Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas (2007) and the Arctic Council Guidelines on Arctic offshore oil/gas activities (1997/2002).
- The U.S. participated actively in the development of, and supports, the IMO Guidelines:
  - The Guidelines for Ships Operating in Arctic Ice-Covered Waters was originally a Canadian initiative.

- They address construction, equipment, ship operation, and environmental protection and damage control.
  - They are non-binding.
  - They are presently being reviewed by the IMO for application in Antarctic waters.
- The U.S. also supports the Arctic Council Guidelines on off-shore oil/gas activities.
    - They recommend voluntary standards, technical and environmental best practices, and regulatory controls for Arctic offshore oil and gas operators.
    - The Guidelines were designed to be consistent with U.S. offshore regulations; Interior/MMS posts the Guidelines on its webpage, apparently applies them, and recommends their use to new operators in the Arctic.
    - Greenland apparently requires that they be read by potential permit holders; Russia has said they suggest that leaseholders read them.
    - In December, an Arctic Council working group (PAME) began another round of updates to the Guidelines.
    - Another Arctic Council working group (the Arctic Monitoring and Assessment Program (AMAP)) recently released an Assessment of Oil and Gas Activities in the Arctic. The Council is still considering the working group's policy recommendations.
- Various institutions address the Arctic Ocean as well, whether as part of a global approach or specifically:
    - The Arctic Council is the only diplomatic forum focused on the Arctic. It is an intergovernmental forum of the eight countries with land territory about the Arctic Circle – Canada, Denmark (Greenland, Faroe Islands), Finland, Iceland, Norway, Russian, Sweden, and the U.S. Six indigenous organizations serve as “permanent participants” in the Council and participate along side the governments in the operation of the Council.
    - There are six observer states (France, Germany, Netherlands, Poland, Spain, UK) and a number of non-governmental observers. China and Italy are seeking permanent observer status, and the EC is seeking ad hoc observer status.

- The Council's focus is environmental protection and sustainable development. With U.S. support, the Council's working groups have taken on increased responsibilities for studies and projects in recent years.
- The Council is not an international organization (IO); there are various proposals to either make it an IO or to give it certain attributes of an IO, such as mandatory assessments or a permanent secretariat.
- There are also various subsidiary bodies of the Council addressing Arctic scientific, environmental and social issues:
  - The Arctic Monitoring and Assessment Program (AMAP) published the Arctic Climate Impact Assessment, a 2006 Assessment of Acidification and Arctic Haze, and a study of Persistent Toxic Substances, Food Security and Indigenous People in the Russian North. AMAP also released the Assessment of Oil and Gas Activities in the Arctic in January 2008, as just mentioned.
  - The working group on Conservation of Arctic Flora and Fauna (CAFF) launched an on-going Circumpolar Biodiversity Monitoring Program in 2006 and a ten-year Arctic Biodiversity Assessment. Publications include, for example, Arctic Flora and Fauna: Status and Conservation; Arctic Flora and Fauna: Recommendation for Conservation; Protected Areas of the Arctic: Conserving a Full Range of Values; and Vital Arctic Graphics.
  - The working group on Protection of the Arctic Marine Environment (PAME) published the Arctic Offshore Oil and Gas Guidelines previously noted, and has recently begun an update of these guidelines to be completed during the Danish chairmanship of the Arctic Council (2009 – 2011). In 2004, it published Guidelines for Transfer of Refined Oil and Oil Products in Arctic Waters.
  - The Sustainable Development Working Group published the Survey of Living Conditions in the Arctic (2006); the Arctic Human Development Report (2004); Analysis of Arctic Children and Youth Health Indicators (2005); and International Circumpolar Surveillance: Prevention and Control of Infectious Diseases (2006).

- The U.S. experience with the Council has been positive overall, although we continue to resist calls to make it more like an international organization.
- The United States believes that the Council should remain a high-level forum devoted to issues within its current mandate. The United States does not support a transformation of the Council into a formal international organization, including one with assessed contributions. The United States is nevertheless open to updating the structure of the Council, including consolidation of or operational changes to its subsidiary bodies, to the extent such changes can clearly improve the Council's work and are consistent with the general mandate of the Council. Policy recommendations developed within the ambit of the Council's scientific reviews must be subject to policy review by governments.

## 6. Tools

Then, what specific tools are available to enhance the security, environmental protection and safety of navigation in the Arctic Ocean and its approaches? There are a number of international instruments available to do so. They relate to search and rescue, routing and reporting measures, vessel traffic services, ship identification, ISPS Code and MARPOL special areas.

### Search and Rescue

- The Arctic nations are all party to the IMO's International Convention on Maritime Search and Rescue (1979). The SOLAS Convention requires each party to provide search and rescue services for the rescue of persons in distress at sea around its coasts.
- The Arctic nations are also party to the Convention on International Civil Aviation (ICAO), Annex 12 to which addresses SAR.
- Both SAR Conventions require parties to establish SAR Regions (SRRs) and call on parties to cooperate in the establishment and provision of SAR services.

- The United States has a number of bilateral SAR agreements and MOUs with other countries.
  - A maritime SAR agreement with Russia (1988)
  - An aeronautical and maritime SAR agreement with Canada and the UK (1999)
  - Is developing a multilateral SAR MOU for the North Atlantic SAR region.
- In the Alaska region, the U.S. Coast Guard has recently announced plans to operate SAR aircraft from forward operating bases in Nome and Barrow starting this summer.

#### Routeing and Reporting Measures, Vessel Traffic Services

- The U.S., Canada and Russia are party to the IMO's International Convention for the Safety of Life at Sea (1974, as amended).
- Chapter V of the annexed regulations provides for the establishment of ships' routeing measures and ship reporting systems, which can be made mandatory if the IMO approves them (Regulations V/10 and 11).
- SOLAS regulation V/12 provides for the establishment by parties of vessel traffic services where the volume of traffic or the degree of risk justified such services.
- I am confident that these states will be giving due consideration to need for any of the measures or services and make appropriate submissions to the IMO in due course.

#### AIS and LRIT

- SOLAS already requires all ships over 500 gross tons on international voyages to be equipped with automatic identification systems (AIS).
- Later this year, the IMO's system for long range identification and tracking (LRIT) of ships should become operational.

- These systems, along with others in development, will enable coastal States to identify and track commercial ships heading for and in the Arctic Ocean.

### ISPS Code

- Following 9-11, the IMO adopted special measures to enhance maritime security, as amendments to SOLAS (chapter XI-2) and the International Ship and Port Facility Security (ISPS) Code.
- These are applicable to commercial ships that could be expected to traverse the Arctic Ocean, and will be applicable to ports on the rim.

### Review of the “Polar Code”

- Consideration might be given to reviewing the IMO’s Guidelines for Ships Operating in Arctic Ice-Covered Waters with a view to seeing if they need to be updated or strengthened.

### MARPOL Special Areas

- Annex I to MARPOL 73/78 contains regulations for the prevention of pollution by oil.
  - The Annex provides for the establishment of special sea areas where for recognized technical reasons in relations to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil is required. (regulation I/1.11)
- In respect of the Antarctic area, any discharge into the sea of oil or oily mixtures from any ship is prohibited (regulation I/15.4)
  - A similar prohibition might be found to be appropriate for the Arctic Ocean as well.

## Other possible steps

- Other steps that might be considered include:
  - entering into oil and other hazardous material pollution response agreements under the 1990 IMO International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPRC) and its 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (HNS Protocol);
  - consideration of ballast water rules under the 2004 IMO International Convention for the Control and Management of Ships' Ballast Water and Sediments; and
  - review of air emission standards under MARPOL Annex VI.

## Conclusion

I hope this has been helpful to define and clarify the issues concerning sovereignty, territoriality and maritime passage in the Arctic Ocean. I've gone into some considerable detail because, as I said at the top, consideration of these issues is timely now before large-scale navigation becomes feasible.

Let me close by repeating myself: these issues are not just of concern to Canada and the United States. These issues are of concern to all five states bordering on the Arctic, to the other states in the high north, and to flag states whose shipping might wish to ply these waters when they become suitable for large-scale navigation.

I hope I have contributed in some small way to meeting those concerns.

Thank you very much.