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Steering between Scylla and Charybdis: The Northwest Passage as Territorial Sea

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Abstract

Heightened attention is being paid to the Northwest Passage, the waters that flow among the islands of northern Canada and that, in the next decades, may be amenable to commercial navigation. Most debates regarding the Passage's legal status focus on Canada's contention that it is its internal waters and the United States' contention that it is an international strait. This article proposes that a designation of the Passage as Canada's territorial sea would be as legally robust as the internal waters or international strait designations while satisfying both Canada's and the United States' political objectives.

Keywords: Canada, Internal Waters, Northwest Passage, United States

I. Introduction

In *The Odyssey*, the goddess Circe cautioned Odysseus that there was no safe route through the dangerous strait that he was preparing to traverse. To one side lay Scylla, a monster who was known to grab sailors, six at a time, from each passing ship. To the other side lay Charybdis, a treacherous whirlpool. Circe advised Odysseus that, since there was no way of avoiding both hazards, he would do best to sail quickly by Scylla, so that his loss would be limited to six sailors. Any attempt to fight Scylla would just lead to the loss of more men, while steering toward Charybdis would doom the entire ship.

Echoing Circe's warning to Odysseus, would-be legal navigators of the Northwest Passage are typically warned of two dangers: the Scylla of the transit passage regime that the United Nations Convention on the Law of the Sea (UNCLOS) applies to international straits and the Charybdis of enclosure as Canada's historic internal waters. Canadian authors generally warn that the transit passage regime is legally inappropriate for the Northwest Passage and that its application could bring about an era of unregulated shipping through waters that are environmentally sensitive, culturally significant, and militarily vulnerable (e.g. Byers, 2009; Byers and Lalonde, 2009; Huebert, 2003; Pharand, 2007). Conversely, U.S.-based scholars caution that the internal waters designation could set an unwanted precedent for enclosing key navigational straits around the world (e.g. Kraska, 2007; 2009). While an abstract ideal might be to steer a course that avoids both dangers, the policy options for the Northwest Passage, as for Odysseus, are typically portrayed as limited to one of these two extremes.

In fact, several commentators on the Northwest Passage dispute have noted that it is unlikely that either acceptance of Canada's internal waters claim or acceptance of the United States' assertion that the waters constitute an international strait would lead to catastrophic

consequences on the scale of those faced by Odysseus in his choice between Scylla and Charybdis. Legal scholars note that enclosure of the Passage within Canada's internal waters likely would not lead to a significant restriction of navigational access in northern Canada, let alone the rest of the world. In fact, it might encourage Canada to invest in transport infrastructure, which would increase use. Conversely, the international straits designation would not necessarily leave the waters without any regulatory framework (Lalonde and Lasserre, 2013; McDorman, 2009; McRae, 2007). Nonetheless the perception that such potentials exist amplifies the debate and thereby diminishes the prospects for a mutually acceptable solution.

This article suggests a way to break this stalemate that has received surprisingly little attention in the legal literature: classifying the Northwest Passage (and, more broadly, the waters that separate Canada's northern islands) neither as Canada's internal waters nor as an international strait but instead designating them as being part of Canada's territorial sea. This third path – a middle route through the Northwest Passage that steers between the Scylla and Charybdis of the internal waters and international strait designations – is legally justifiable, compatible with the policy needs of each country, and potentially achievable politically.

II. Classifying Water: Internal, International, and Territorial

Since August 2007, when, for a brief period, the waters of the Northwest Passage first became navigable by ship without the assistance of icebreaking vessels, the scholarly and popular media have been abuzz with questions concerning the geopolitical and legal challenges that would arise were these waters to form a commercially viable long-distance transit route, realizing a dream that has long driven European imaginations of North America. The prospective emergence of a navigable maritime corridor among the Canadian islands, connecting the Atlantic with the Arctic and ultimately the Pacific Ocean has resonated, in particular, with Canadians, for whom the

Northwest Passage plays an important role in stories of the nation's foundation (Grace, 2001) and who recognize that the Northwest Passage could be a source of both economic opportunity and environmental risk (Evans, 2012).

Coincidentally, just three weeks before the Passage was declared to be navigable, a Russian-led team planted that country's flag on the seabed at the North Pole. Although the intended message of the flag-planting and its connection with Russia's ongoing efforts at mapping its continental shelf remain debated to this day, it seems clear that the event had nothing to do with navigational rights, either in the Northwest Passage or anywhere else in the Arctic (Steinberg, 2010). Nonetheless the coincidence of the two events facilitated public concern about a "scramble" for increasingly valuable Arctic resources, including the resource of transportation (e.g. Fairhall, 2010; Howard, 2010; Romaniuk, 2012; Sale and Potapov, 2009; Zellen, 2009) and this served to reaffirm the contextualization of the Northwest Passage legal status issue within politically contentious debates concerning the future of State sovereignty in the Arctic (Gerhardt *et al.*, 2010).

Tensions in the region increased further in May 2008, when representatives of the five Arctic Ocean coastal states (Canada, Denmark/Greenland, Norway, Russia, and the United States) met in Ilulissat, Greenland. Although the Ilulissat meeting was intended to demonstrate that no "scramble for the Arctic" was occurring and that the region was being governed through the application of established mechanisms of State territoriality (on land) and the U.N. Convention on the Law of the Sea (on water), the meeting inadvertently gave the impression that the "Arctic Five" were seizing the region (including, potentially, its waters) and closing it off to any form of collective governance. Whether actors beyond the Arctic Five actually perceived the Ilulissat meeting as an exclusionary power grab or whether they merely seized upon this

narrative as a pretext, the aftermath of the meeting saw others with an interest in the region reaffirming their intent to play a role in determining its future, whether through public proclamations (e.g. the Inuit Circumpolar Council's Declarations on Sovereignty and Resource Development), issue-oriented campaigns (e.g. Greenpeace's "I ♥ Arctic" project), or attempts to gain higher status representation at international meetings (e.g. the efforts of non-Arctic states to gain permanent observer status within the Arctic Council) (Steinberg *et al.*, 2014).

Although most narratives of impending conflict in the Arctic have centered on access to outer continental shelf seabed minerals and, to a lesser extent, fisheries, debates about the region's governance impact shipping as well. Long-distance shipping States express concern that political turbulence in the region could lead to their losing control over navigational freedoms, and coastal States, conversely, fear that this same turbulence could interfere with their ability to regulate transit through coastal waters. These concerns have been most prevalent in the waters of the Northwest Passage, with the key protagonists being Canada and the United States.¹

A. Internal Waters

Canada has long held that the waters that flow between its northern islands (i.e. the waters that constitute the various routes of the Northwest Passage) are its internal waters. In the early 20th century, some in Canada asserted that the country's territorial borders should take the form of a wedge-shaped sector that would extend to the North Pole from the easternmost and westernmost points on the northern coast of the Canadian mainland (Dufresne, 2007; Pharand, 1988). This territorial claim, which effectively was based on geographic coordinates without regard to whether the points within those coordinates were land (which normally can be claimed as sovereign territory) or water (which normally cannot), was always questionable under international law. Nonetheless, the sectoral claim was reiterated by Lester Pearson (then

Ambassador to the United States) in 1946 when he stated, “[The Canadian Arctic] includes not only Canada’s northern mainland but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries, extended to the North Pole” (quoted in Pharand, 1988, 54). The sentiment, extending Canada’s Arctic territorial rights over water as well as land, and up to the North Pole, was further implied by then Foreign Minister Peter MacKay in his reactions to the 2007 Russian flag planting, when he responded, “We established a long time ago that these were Canadian waters and this is Canadian property” and “The question of sovereignty in the Arctic is not a question. It’s clear. It’s our country, it’s our property, it’s our water.... The Arctic is Canadian” (quoted in Steinberg, 2010, 83). Indeed, sectoral boundary lines still appear on maps in the Canadian government’s *National Atlas of Canada* (Natural Resources Canada, 2004; 2006; see also Steinberg *et al.*, 2014). As Eric Franckx concludes,

[The sector] theory seems to exert a mystical attraction as a fall-back position whenever the Canadian sovereignty claim over its northern waters [has] to be buttressed.... It is obvious that for Canada the notion of [the] sector theory still has not totally fallen into oblivion. (Franckx, 1993, 90; see also Pharand, 1988; Rothwell, 1996)

Notwithstanding the persistence of semi-official appeals to the sectoral principle, most official assertions of Canadian sovereignty over Arctic waters, especially since the Second World War, have been in line with the more moderated principles detailed in Article 4 of the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone (United Nations, 1958) and, more recently, Article 7 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (United Nations, 1982). These articles allow States, in some circumstances, to draw straight baselines across indented coastlines such that all water landward of these baselines is defined as internal waters. In 1985, Canada declared baselines around its

entire Arctic archipelago, with the declaration being effective January 1, 1986 (Government of Canada, 1985b).

UNCLOS provides a number of criteria for determining when straight baselines are justified:

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured....

The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters...

The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone. (United Nations, 1982, Articles 7(1), 7(3), 7(6))

In their detailed defenses of Canada's straight baselines, both Donat Pharand (2007) and Michael Byers and Suzanne Lalonde (2009) find that these geographic criteria are met unproblematically in the waters amidst Canada's Arctic islands, notwithstanding the indeterminate nature of such terms as "deeply indented and cut into," "appropriate points," "any appreciable extent," and "sufficiently closely linked." Many outside of Canada, however, have disputed this opinion. Shortly after the straight baseline declaration went into effect, the United States issued a protest, just as it had done with respect to a host of other straight-baseline declarations around the world (including earlier declarations made by Canada in its non-Arctic waters). This was followed by a protest from the European Community.² U.S. Navy Commander James Kraska is particularly strident on this point, declaring that Canada's Arctic baselines "[violate] virtually every rule governing lawfully drawn baselines" (Kraska, 2007, 271).

In addition to these geographic criteria, UNCLOS also identifies some historic use and functional integration criteria, most notably in Article 7(5), which states that although functional integration is neither necessary nor sufficient for the drawing of straight baselines it can be used to support a claim based on geographic criteria:

Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage. (United Nations, 1982, Article 7(5))

In his discussion of the use criteria, Pharand focuses less on Article 7(5) and more on other points in UNCLOS, most notably Article 10, where historic use criteria are referenced in the context of the role of straight baselines in marking off bays as internal waters. Pharand finds that this use criteria, particularly as it has been implemented through case law, is likely not met in the case of Canada's Arctic waters, in large part because of the history of other States failing to recognize this claim. Byers and Lalonde, in contrast, feel that Pharand abandons the historic use argument too quickly. They assert that Inuit used the waters of the Passage intensively and thus the waters had been incorporated into their sovereign territory. When Inuit sovereignty was transferred to Canada, Byers and Lalonde argue, the waters were transferred along with the land.

Since evidence of historic use and economic integration is not necessary for drawing straight baselines, it would seem that these criteria are irrelevant. However,

where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters. (United Nations, 1982, Article 8(2))

In other words, if straight baselines formalize the status of what had previously been considered to be internal waters, then the coastal State is granted all the rights that it would normally have in internal waters. This is the situation that Canada claims applies in its northern waters. If,

however, the internal waters designated by a straight baseline are waters that historically had not been “considered” as such, then – even if those baselines are recognized as legitimate due to geographical criteria – the coastal State’s rights within the newly enclosed waters are to be the same as if those waters were territorial sea (the portion of ocean-space within 12nm of the coastline or baseline) and the coastal State would be required to permit innocent passage by another country’s vessel.

This distinction is significant because, although the innocent passage regime grants considerable powers to coastal States, these powers still are less than those granted to States over their internal waters. Therefore, both Byers and Lalonde and Pharand go to great lengths to demonstrate that the waters within the Canadian straight baselines are historic internal waters and thus are subject to the full exercise of State authority. However, they go about this in different ways. As indicated above, Byers and Lalonde integrate historic use into the core of their argument for baselines through their appeal to the ways in which Inuit have assimilated (often frozen) water into their livelihoods. In making this case, they echo an assertion frequently made by Canadian officials concerning the unique territorial properties of Arctic ice. For instance, in his 1985 speech announcing straight baselines in the Canadian Arctic, Secretary of State for External Affairs Joe Clark told Parliament:

Canada’s sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward facing coasts of the Arctic islands. These islands are joined, and not divided, by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada’s Inuit people have used and occupied the ice as they have used and occupied the land. (Clark, 1987, 270)

In 2008, this justification was reiterated by an official at Canada’s Department of Foreign Affairs and International Trade:

We’re dealing with virtually the world’s only large archipelago, certainly the world’s only large archipelago, which has ice-covered areas throughout its surface. The

question is what is the status of that ice vis-à-vis the land around it...At some point we may end up before an international court [and] we will bring evidence that shows the people of the Canadian North – Canadian citizens – in the winter time have treated the ice exactly the same as the land, and we'll make a very strong argument for that. (quoted in Gerhardt *et al.*, 2010, 994)

As Kraska notes, this argument is legally suspect. For purposes of defining territory, UNCLOS makes no distinction between liquid and frozen water:

Some governments have taken the view that the ice itself can be occupied, converting frozen water into a sort of “ice territory” with attendant rights. This is a purely theoretical invention that has no basis in either customary international law or the Law of the Sea Convention. There is no authority or provision in the Convention to assimilate ice-covered water as “territory” and thereby claim a baseline at the point where the ice meets liquid water. Moreover, there is an impracticality to such an approach, since the location and shape of the ice is constantly changing. (Kraska, 2007, 270)

Kraska here echoes Christopher Joyner, who over twenty years earlier wrote:

High seas remain free and open for use by any State, irrespective of whether the surface is liquid or solid. Ice-covered high seas are susceptible neither to sovereign claim nor national appropriation by a coastal State. The fact that the Arctic Ocean is substantially covered with ice cannot ipso facto divorce it from the normal legal status of being high seas. The frozen surface of the sea does not convert the legal status of seawater merely because it has become temporarily solid and partially capable of physical occupation. (Joyner, 1991, 224; see also Moore, 2010)

Since Pharand excludes historic use from his justification for straight baselines he avoids making any assertions about the territorial status of ice (although he does note, *inter alia*, that “the quasi-permanency of the ice over the enclosed waters bolsters the physical unity of land and sea” (Pharand, 2007, 19)). However, he still is faced with the problem of asserting that the waters enclosed by straight baselines are historic Canadian internal waters. He makes this case by arguing that when Canada established straight baselines in 1986 it was neither a party to the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone (which had a similar clause asserting that innocent passage must be allowed through non-historic internal waters

(United Nations, 1958, Article 5(2)) nor was this Convention accepted as customary law. Therefore, when UNCLOS entered into force in 1996, the waters within the straight baselines had been “considered” internal for eleven years, and when Canada acceded to UNCLOS in 2003 they had been so for nineteen years. Apparently, that is “historic” enough for Pharand. However his argument seems particularly weak given that, as we have seen, the 1985 straight baselines declaration was itself contested and this would seem to diminish Canada’s claim that the designated internal waters “had...previously been considered as such” (United Nations, 1982, Article 8(2); see also, United Nations, 1962).

In addition Kraska points to a practical problem with Pharand’s argument:

Some suggest that straight baselines made by a nation before 1982 [when UNCLOS was finalized, or before 1996 when it went into force, or before when a country acceded to the convention – author] have special status and should be considered permissible. This approach is unconvincing; otherwise, the entire range of excessive maritime claims predating the 1982 Convention similarly would be permissible—creating a global crazy quilt of conflicting maritime claims and defeating the purpose of the Convention as “one gigantic package deal.” (Kraska, 2007, 271)

In summary, serious questions can be raised about the Canadian position that the waters of the Northwest Passage are Canada’s internal waters, and in particular that they are historic internal waters.

B. International Strait

According to Satya Nandan, one of the key architects of UNCLOS, “The regime for passage through straits used for international navigation was the most contentious issue before the [UNCLOS] Conference” (Nandan, 2009, 57). For straits that were at least 24nm in width across their entire length, there was no issue; a State’s territorial sea extends to 12nm from a coastline, so any strait that is never less than 24 nm wide will have a high-seas corridor running through its middle, and in this high-seas corridor all vessels would necessarily be allowed passage without

the risk of interference from coastal States. The situation is different, however, for straits that have at least one segment that is located entirely within a coastal State's territorial sea or non-historic internal waters. In these cases, under the innocent passage regime that normally would apply in such waters, the coastal State would have the right to prevent passage by any vessel that it deemed not innocent and to temporarily suspend innocent passage rights.

States involved in long-distance navigation and the projection of naval power around the world (most notably, the United States) expressed a need for a special regime for international straits that would further limit the ability of coastal States to impede transit. Thus was born the "transit passage" regime, spelled out in Articles 37 through 44 of UNCLOS, which restricts coastal State regulatory rights to four specifically enumerated areas: ensuring safe navigation; controlling pollution; regulating fishing; and preventing smuggling (United Nations, 1982, Article 42(1)). Even in these areas, coastal States' regulations are to be limited to those that facilitate the non-discriminatory enforcement of international standards and coastal States are banned from imposing any regulations that would "have the practical effect of denying, hampering or impairing the right of transit passage" (United Nations, 1982, Article 42(2)). In addition, unlike under the innocent passage regime that prevails in portions of the territorial sea (or non-historic internal waters) that are not part of an international strait, coastal states that abut international straits have no right to prevent transit passage by warships (or airplanes) that are not posing an active threat and they have no right to demand that submarines make their presence known and travel at the surface.

Some questions remain regarding whether the international strait transit passage regime trumps Article 234 of UNCLOS, which permits States that abut waters that are ice-covered for most of the year to enact special environmental protections out to the limits of their 200nm

exclusive economic zones and which Canada has implemented through the Arctic Waters Pollution Prevention Act (AWPPA) (Government of Canada, 1985a). Although UNCLOS does not state explicitly that Article 234 rights do not apply to international straits, potentially any restriction beyond the four very specific ones enumerated in Article 42 could be seen as “[having] the practical effect of denying, hampering or impairing the right of transit passage” and therefore not be permissible. Byers and Lalonde (2009) hold that the applicability of Article 234 to international straits is “unclear” and they therefore caution that designation of the Passage as an international strait could leave Canada without adequate ability to protect its adjacent waters. Pharand, although also acknowledging that there is some ambiguity, ultimately adopts the opposite interpretation. For him, the absence of any clause that explicitly excludes Article 234 from international straits (in contrast with some of the other articles which are explicitly declared inapplicable to international straits) reveals that “the special jurisdiction conferred on Canada by the ice-covered areas provision would not be limited by an internationalization of the Passage” (Pharand, 2007, 48). Donald McRae goes even further than Pharand, stating unequivocally:

The powers that Canada has in respect of ice-covered areas under Article 234 of the 1982 Convention on the Law of the Sea would still be applicable [if the Northwest Passage were defined as an international strait]. That is to say, the rules relating to transit passage are still subject to the authority of the coastal state to regulate in respect of ice-covered areas. (McRae, 2007, 19)

Statements made by the United States in its opposition to NORDREG, Canada’s mandatory registration scheme for ships entering the waters covered by the AWPPA, suggest that the U.S. position is that Article 234 protections may be applied to international straits by adjacent coastal states, but only if they are adopted under the auspices of the International Maritime Organization

so as to ensure that they serve to enable, and not hinder, transit passage (Embassy of the United States of America in Canada, 2010).

Notwithstanding these debates regarding what regulations may be applied in international straits, the bigger debate, for now at least, is over what constitutes an international strait. As Kraska (2007) explains, during the UNCLOS negotiations Canada proposed an explicit definition that referred to historic as well as potential use, but this was rejected. Instead, the closest thing to a definition occurs in Article 37, which notes that the transit passage regime applies to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone” (United Nations, 1982, Article 37).

Pharand, and other Canadian scholars who have followed Pharand’s lead, argue that the phrase “which are used” in Article 37 refers to present, not potential, use and that furthermore there is an accepted definition of an international strait in customary international law, derived from the International Court of Justice’s decision in the 1949 *Corfu Channel Case*, between the United Kingdom and Albania. In the *Corfu Channel* decision, the International Court established a two-part test that involves both geographic and functional criteria. Pharand acknowledges that the Passage meets the geographic criteria for an international strait but, through a detailed reconstruction of every voyage that had occurred to date through the Passage (as of 2007), he argues that the Northwest Passage has not seen functional use as an international strait. Therefore, he concludes, it should not, at present, be subject to the transit passage regime that is applied to international straits (Pharand, 2007).

Kraska’s response is to simply ignore the *Corfu Channel Case* and the two-pronged test that Pharand claims has been accepted into customary international law. Indeed, after reaffirming

that the Northwest Passage meets the geographic criteria that appear in Article 37, Kraska bluntly asserts, “The test is geographical, not functional” and at this point he concludes his discussion of the matter (Kraska, 2007, 274). Kraska’s rejection of the Canadian position is rather unconvincing, however, because 1) ignoring the *Corfu Channel Case* is hardly a systematic rebuttal, 2) it is inconsistent with the enthusiasm that Kraska and others associated with the U.S. government generally have for customary international law when discussing maritime issues (an outgrowth of the United States’ failure to ratify UNCLOS), and 3) in contrast to Canada’s straight baselines assertion, in which the U.S. protest was joined by a protest from the European Community, the United States is alone in publicly asserting that the Northwest Passage is an international strait and in claiming that the only test for determining this is geographical.³

C. Territorial Sea

As the above discussion suggests, there are significant weaknesses to both the Canadian and U.S. positions. There is good reason to contest Canada’s claims that the waters are internal, and, especially, historic internal waters, and there is good reason to contest the United States’ claim that these waters meet the legal standards for an international strait. This then leads to the question: What if the Passage is neither an international strait nor Canada’s historic internal waters?

[INSERT Figure 1]

Under the “normal” division of the ocean, areas that are between 12 and 200 nm from the coast (or baseline) are part of the exclusive economic zone (EEZ). For purposes of navigation,

however, the EEZ designation is irrelevant since high seas navigational freedoms apply there (although some limited interdiction rights do apply in the contiguous zone, between 12 and 24 nm). Water that is less than 12 nm from the coast is classified as a nation's territorial sea, in which UNCLOS' innocent passage regime applies. In fact, however, so long as there is some point in a semi-enclosed body of water that is less than 24 nm wide, this distinction between waters that are within 12 nm of the coast and those that are beyond 12nm is largely immaterial. In such cases – and the Northwest Passage would be one such case if it were neither Canada's internal waters nor an international strait – coastal States can exercise control over portions that are less than 24 nm as “choke points,” effectively giving the entire water body the character of territorial sea. In other words, as Figure 1 illustrates, if both Canada's internal waters claim and the United States' international strait assertion were found to be invalid, or, for that matter, if Canada's internal waters claim based on straight baselines was found to be valid but to not reflect the historic use of the waters, the Passage would become effectively a component of Canada's territorial sea.

Others have identified options between the extremes of international strait and internal waters, the Scylla and Charybdis referred to at the beginning of this article. Franklyn Griffiths (1987a), for instance, identifies five potential futures for the Passage's legal status, including two that derive from its designation as neither an international strait nor Canada's internal waters (Griffiths, 1987a). Likewise, Ted McDorman (2009, 244) briefly considers what he calls the “none of the above” option. However, probably the most detailed discussion of this option is undertaken by Donald McRae (2007). As McRae notes, from the Canadian perspective the actual rights that would accrue to Canada in the Passage if it were designated as territorial sea would not be that different than if it were designated as internal waters. A similar sentiment is

expressed by Suzanne Lalonde and Frédéric Lasserre, who deemphasize the differences between “a coastal state’s sovereign control over its internal waters and the many rights and prerogatives recognized to it over the innocent passage of foreign ships in its territorial sea” while positing that there is a “marked contrast [between these packages of coastal state rights and] the regime of transit passage that applies within international straits” (Lalonde and Lasserre, 2013, 34). This suggests that it may be pragmatically advisable for Canada to accept recognition of a territorial sea designation in return for the United States abandoning the much less palatable international strait position.

Furthermore, specific conditions in the Northwest Passage could enhance Canada’s stewardship rights over these territorial waters. As McRae notes, Canada could effectively apply internal waters-level regulations to any ship traveling to a Canadian port through the establishment of domestic port standards, since ports are always considered internal waters. This point has taken on increased saliency since 2009 when the Arctic Council’s *Arctic Marine Shipping Assessment* found that, for the foreseeable future, the vast majority of shipping in the Northwest Passage will be port-based destination traffic, as opposed to through transit (Arctic Council, 2009). Commercial ships traveling through the territorial waters of the Northwest Passage could be further regulated through the special rights granted to Canada through Article 234 of UNCLOS. Additionally, at some point in the relatively near future, regulations for ships of all nations operating in polar waters likely will be enhanced through a multilaterally negotiated (within the International Maritime Organization) Polar Code.

Even for McRae, however, the territorial sea option is clearly a second-choice alternative, and one that should be pursued only if the internal waters claim gets invalidated by a judicial authority. In contrast, the suggestion here is that the territorial sea option may be politically

optimal for both Canada and the United States and that pursuing it could bring about long-term stability for users of the Passage and, more broadly, for United States-Canada relations.

III. Canadian and U.S. Political Objectives

As several scholars have noted, the governments of Canada and the United States approach the Arctic, and, more specifically, the Northwest Passage, from different starting points, with different levels of interest, and with different concerns and policy objectives (Bergh, 2012; Elliott-Meisel, 2009). While these distinctive perspectives of Canada and the United States make dialogue difficult, they also make compromise possible.

A. Canadian Objectives

In Canada, the North has an iconic role as the hearth of the nation. Although few southern Canadians have actually ventured to the Canadian Arctic, the North is mythologized as defining the essence of Canadian identity (Grace, 2001). Furthermore, because the North is understood to be a region of islands, waterways, peninsulas, and coastlines, it is perceived by Canadians as giving their country a fundamentally archipelagic character (whether or not the country meets UNCLOS' definition of an archipelagic nation) (Vannini *et al.*, 2009). Thus, popular affirmations of sovereignty and Canadian identity frequently explicitly link expressions of nationhood with statements and actions that affirm the territorial integrity of Canada's Arctic waters. This can be seen in the aforementioned statements by Ambassador Pearson and Minister Clark (both of whom subsequently went on to become prime ministers) as well as those by Foreign Minister MacKay. Boosted by a longstanding concern among Canadian leaders to reaffirm that sovereignty extends to the nation's northern reaches (Grant, 2010), Canadians maintain a construction of the North that is proudly maritime, as is evidenced in the extensive

public relations campaigns that surround annual Arctic naval exercises and in Prime Minister Harper's penchant for publicity photos in which he places a foot in Arctic waters (Dodds, 2012).

In this context, Canadian policies toward the Arctic are created in a vortex of myths about Canada's past, ideals about its future, and specific, concrete policy goals for the present. For Canada, the Northwest Passage is, as Franklyn Griffiths has stated, "where vision and illusion meet" (Griffiths, 1987b). Thus, there is little point in debating, for instance, whether the Arctic Waters Pollution Prevention Act was an attempt by the Canadian government to utilize environmental protection concerns as a means for affirming Canadian territorial security ambitions or whether the government was asserting territorial authority in order to attain pollution-prevention goals. In fact, the two objectives support each other as they work together to maintain the integrity of the "True North Strong and Free,"⁴ a pristine and unsullied universe of land, water, ice, and indigenous peoples that grounds southern Canadians' identity in a totem of perceived northern exoticism, inaccessibility, and harshness (Grace, 2001).

The North is therefore constructed by Canada as a vulnerable, yet essential space to be defended (Dittmer *et al.*, 2011; Dodds, 2010). Canadians debate whether this defense can best be achieved through investments in soft power (e.g. the development and integration of northern communities and peoples) or hard power (e.g. increasing military capabilities), but few Canadian politicians would question that an enhanced presence in the North is a key means toward the goal of affirming Canada's integrity as a sovereign nation, distinct from the culturally, economically, and militarily dominant United States that lies adjacent to its population centers. As McDorman writes, "It is a reality of Canada's domestic politics that the sitting government must be seen to be protecting Canadian sovereignty and standing-up to the United States, regardless of the

existence of a US provocation” (McDorman, 2010, 242), and this extends to the Northwest Passage as one seemingly threatened component of Canada’s sacred Arctic patrimony.

B. U.S. Objectives

Although the United States Arctic Region Policy states, “The United States is an Arctic nation, with varied and compelling interests in that region” (Bush, 2009, para. II.A), in fact little attention is paid nationally to Arctic affairs, and even less is paid to Arctic security issues. As Kraska wryly remarks, “As a nation, the United States views the Arctic with relatively minimal interest compared to every other Arctic nation ... The United States is not focused on the Arctic, and, for the most part, other countries prefer it to be that way” (Kraska, 2012, 244).

In fact, Kraska may be overstating his case here, perhaps due to his particular focus on security issues. The United States is increasingly focused on the Arctic, but not as a fundamental locus of security or sovereignty. It is telling, for instance, that in hearings held in 2012 by the U.S. Senate Foreign Relations Committee concerning accession to UNCLOS, fourteen of the sixteen speakers who spoke in favor of accession specifically pointed to the growing importance of the Arctic maritime region as one of the reasons why the United States should join the convention (United States Senate Foreign Relations Committee, 2012).⁵ However, it is equally telling that when these military, diplomatic, and industry officials made the link between UNCLOS accession and U.S. interests in the Arctic it was almost always with reference to how UNCLOS accession would permit the United States to claim resource extraction rights on Arctic portions of the outer continental shelf. Only two of the speakers referred to navigational opportunities and related security challenges in the Arctic, and only one of these, former Deputy Secretary of State John Negroponte, specifically mentioned the Northwest Passage.⁶

Given the lack of U.S. interest in the Arctic as a security concern and the peripheral location of the Arctic in U.S. identity, both of which sharply contrast with the Canadian situation, the main concern of the United States regarding the Northwest Passage is as a source of precedent for other parts of the world. As historian Elizabeth Elliot-Meisel has noted, “The Passage is an issue of precedent and principle, not one of national security” for the United States, with the primary concern being that recognition of the Passage as Canada’s internal waters could set a dangerous precedent for other international straits in which transit passage is guaranteed under UNCLOS (Elliot-Meisel, 1999, 419). Secondly, recognition of Canada’s internal waters claim could be seen as an affirmation of the legitimacy of Canada’s Arctic straight baselines, and this too is something that the United States seeks to avoid because of the precedent-setting impact that it could have on the U.S.’ overriding interest in navigational freedom.

Since 2001, a number of Canadian scholars, joined by former U.S. Ambassador to Canada Paul Cellucci, have argued that if the United States is concerned about homeland security then its interests would be better met through Canadian control of the Northwest Passage, so that Canadian forces could interdict potential terrorist threats that might seek to use the Passage as an entry point into North America (Byers, 2009; Byers and Lalonde, 2009; Griffiths, 2003). This argument, however, appears to have achieved little traction in Washington. Although the 2009 U.S. Arctic Region Policy includes its discussion of the Northwest Passage within the section on “National Security and Homeland Security Interests in the Arctic,” the connection between the Northwest Passage and homeland security is made not by pointing to a direct threat to the homeland from a poorly policed Northwest Passage but rather by pointing to the precedent-setting function that the Northwest Passage could have in other straits that are important for U.S. security:

Freedom of the seas is a top national priority. The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits. Preserving the rights and duties relating to navigation and overflight in the Arctic region supports our ability to exercise these rights throughout the world, including through strategic straits. (Bush, 2009, para. III.B.5; see also Kraska, 2007)

Certainly the Arctic Region Policy's integration of the discussion of the Northwest Passage with that of the Northern Sea Route, where there certainly is no threat of cross-border incursions, indicates that the United States' primary concern is with transit passage in general, not any dangers arising from the Passage's proximity. Thus, to the extent that the United States sees the Northwest Passage as a security concern, it is in relation to the overall security of U.S. interests as a maritime nation and naval power, not through any direct threat to the homeland.

In 2003, Rob Huebert wrote, "The past actions by the United States clearly demonstrate that Americans feel stronger about the principle of freedom of navigation through international straits over any security benefits achieved through a Canadianized Northwest Passage" (Huebert, 2003, 306). The explicit disavowal of Cellucci's argument by his successor (Struck, 2006), the failure of military and Coast Guard leaders to identify the Northwest Passage as a potential security threat when testifying about U.S. Arctic interests at the 2012 Senate Foreign Relations Committee hearings, and the folding of Northwest Passage homeland security concerns within freedom of navigation priorities in the Arctic Policy Strategy all suggest that this remains the case.

C. A Third Option: Agreeing to Disagree

While the United States and Canada have vastly different perspectives on the Northwest Passage, their priorities are not directly opposed to one another. It is not as if, for instance, the United States seeks transit through the Passage and Canada seeks to close it off. In fact, the United States has no strong interest (for now, at least) in making commercial transits through the

passage and Canada has no particular desire to ban transit. At a practical level, both nations agree that the Passage can and should be used for well-regulated shipping. The problem is that Canada approaches this problem within the political context of protecting the sovereignty of Canadian territory while the dominant context for the United States is that of guaranteeing worldwide navigational freedoms. Thus, the two countries tend to talk past each other when addressing the Northwest Passage. This situation makes dialogue difficult, but not as difficult as would be the case were their policy goals in direct opposition to one another. Elliot-Meisel (2009), in particular, stresses that, given that the two countries' priorities are not directly in opposition to one another, and given the generally warm relations that otherwise prevail, some form of compromise should be possible.

One tactic for achieving agreement would be for Canada to convince the United States to adopt its priorities because they are in the United States' best interests. Byers and Lalonde (2009) pursue this line of reasoning, but the failure of officials in the United States (other than the recently deceased Paul Cellucci) to adopt the homeland security perspective suggests that this tactic will not be successful. Conversely, it seems highly unlikely that the United States would be able to convince Canada – a country without a significant merchant marine or blue-water navy – that its primary interest lies in preserving transit passage through the world's international straits.

A more promising path to consensus has been proposed by a number of Canadian scholars who suggest that the two countries can break the current stalemate by focusing on practical arrangements for ensuring safe use of the waters (Griffiths, 2009; Lackenbauer, 2012; McDorman, 2010).⁷ They argue that the two countries' practical interests in the Northwest Passage are not far apart, and that this will become apparent to individuals on both sides once they disassociate management issues from larger concerns regarding precedent and principle.

These scholars therefore suggest that both countries stand to gain from avoiding direct negotiations, as a formal, high-level bargaining environment inevitably would force each country to defend its principles. Instead, the argument goes, the two countries should maintain the status quo whereby they “agree to disagree” on major principles while working through the technical details required for orderly and safe use of the Passage. As McDorman writes,

The way forward regarding the Northwest Passage is to concentrate on the vessels potentially engaged in use of the Passage and other Arctic Ocean waters, ensuring safer and cleaner navigation, rather than focusing on the coastal State’s rights to control access to the Passage. (McDorman, 2010, 249)

Proponents of this strategy note that historically the two countries have gone to great lengths to avoid outright confrontation in Arctic waters. For instance, while the transit of the U.S. tanker *SS Manhattan* through the Northwest Passage in 1969 was generally perceived in Canada as an intentional challenge to Canada’s claims, in fact Canada had not at the time formally established baselines around the archipelago or passed the AWPPA, and the planned route was specifically designed to keep the ship in waters that were more than 6nm from land (which, at the time, was the limit to Canada’s territorial sea). Likewise, the Canadian government’s actions (and military expenditures) in the North have fallen short of the populist rhetoric that politicians have articulated in order to placate (or inflame) their populace (Byers and Lalonde, 2009; Elliot-Meisel, 2009; Griffiths, 2009; Lackenbauer, 2012; McDorman, 2010).

For a model of how this “agreement to disagree” might proceed, supporters point to the 1988 Canada-United States Agreement on Arctic Cooperation (the Icebreaker Agreement), which was enacted following the transit of another U.S. ship through the Northwest Passage, the *USCGC Polar Sea* (Governments of Canada and the United States, 1988). Under this agreement, the United States agrees to ask permission before a Coast Guard icebreaker enters the Northwest

Passage and Canada agrees to grant that permission, all with the understanding that neither side is making any concessions regarding its position on the legal status of the waters. Griffiths, in particular, has proposed that this agreement could be expanded to cover a broader range of vessels (Griffiths, 2003) and that it thereby could serve as a model for “a set of cooperative arrangements that deepen and widen the Canada-US agreement to disagree on the Northwest Passage” (Griffiths, 2009, 109).

While the “agree to disagree” approach is appealing for its potential to resolve difference without direct confrontation, it has been criticized by Byers and Lalonde (2009) and, somewhat less directly, by Elliot-Meisel (2009) for a number of reasons. First, the principle of “agreeing to disagree” assumes a small number of actors who have a degree of trust and mutually supportive interest that enables them to accept tacit understandings. Such a system may function in a bilateral environment between two States that have extensive interaction and generally friendly relations, but it is much less likely to function in a multilateral arena. As the 2013 admission of six new non-Arctic states as permanent observers on the Arctic Council illustrates, the Arctic increasingly is an arena in which a wide range of actors, including many from outside the region, have interests. At present, outsiders’ interests are primarily in mineral extraction opportunities and, secondarily, the Northern Sea Route, and few countries besides Canada and the United States have expressed an interest in using the waters of the Northwest Passage. However, as northern Canada attracts foreign direct investment from outside the region (e.g. the 70 percent stake that Luxemburg-based ArcelorMittal holds in Nunavut’s Mary River iron ore mine) this is sure to change, and it will change even more dramatically should the Passage become a commercially viable trans-continental shipping corridor.

Thus, Byers and Lalonde, although acknowledging that the Icebreaker Agreement “created a status quo that might have solved the entire problem indefinitely,” note that this is no longer the case due to “the sudden, unanticipated effects of climate change two decades later” (Byers and Lalonde, 2009, 1161). Elsewhere, Lalonde reflects on how these changes have made bilateral approaches to governing the Passage obsolete, noting that change in the region “has completely changed the nature of the [Northwest Passage] problem. This is no longer simply a bilateral issue, if it ever was” (Lalonde, 2008, 10, quoted in Elliot-Meisel, 2009, n. 101).

As part of their argument encouraging Canadians to support the “agree to disagree” approach, both Griffiths and McDorman note that the United States has acknowledged the validity of UNCLOS Article 234 and Canada’s Arctic Waters Pollution Prevention Act, including as they apply to the Northwest Passage, and they contend that this will provide a foundation for the two nations adopting practical management policies that will reaffirm Canada’s effective control of the Passage. Griffiths points to the United States’ support for Article 234 in the UNCLOS negotiations as a “triumph” for Canada, as it effectively “made consensual” the AWPPA in spite of its unilateral origins (Griffiths, 2009, 112). McDorman similarly celebrates the fact that “the United States acknowledges that US commercial vessels are ‘subject to’ the standards and requirements of the Arctic Waters Pollution Prevention Act [and that] the United States has made no distinction regarding application of the Arctic Waters legislation to the Northwest Passage as opposed to other Canadian waters” (McDorman, 2010, 245-246).

Griffiths and McDorman may however be premature in the celebration of a (pro-Canadian) consensus. While the United States has indeed acknowledged the legitimacy of both Article 234 and the AWPPA, contestation remains over the details. For instance, while

McDorman cites a 1992 U.S. Department of State policy document that states, “The United States considers U.S. vessels subject to [the AWPPA],” he neglects to note that this sentence is preceded by two that express reservations regarding how Canada is applying the legislation:

The United States continues to object to the application of the [AWPPA] in so far as it purports to apply to sovereign immune vessels. The United States believes that internationally agreed standards should be developed to replace many of the unilateral provisions. (United States Department of State, 1992, 73, n. 114)

Since that time, the United States has continued to accept in principle the application of Article 234 and the AWPPA to the waters of the Northwest Passage, but it continues to conflict with Canada on their precise interpretations. This can be seen most recently in the United States’ reaction when Canada announced that, as of July 2010, ships entering waters covered by the AWPPA would be required to register under Transport Canada’s NORDREGs scheme. In a diplomatic note of protest, the U.S. Embassy in Canada asserted that “it continues to be concerned that the NORDREGs are inconsistent with important law of the sea principles related to navigational rights and freedoms” and that “the United States does not believe that requiring permission to transit these areas meets the condition set forth in Article 234 of having due regard to navigation” (Embassy of the United States of America in Canada, 2010). In short, while the United States and Canada may agree in principle on the legality of Article 234 and its application to Canada’s waters via the AWPPA, significant differences of interpretation remain. Given this underlying tension, it is not at all clear that an “agreement to disagree” would be strong enough to withstand new tensions that could arise from increased use of the passage.

A related issue concerns the applicability of Article 234 – and, it follows, the legality of the AWPPA – if the waters of the Northwest Passage were to stop being characterized by “the presence of ice cover...[for] most of the year.” In fact, there has always been some flexibility in defining “the presence of ice cover...[for] most of the year.” Canada’s Ice Service uses a

threshold of 10 percent ice-cover for at least six months, but in the past there has been consideration of adjusting this threshold upward or downward, depending on political objectives (Steinberg *et al.*, 2014). Notwithstanding this flexibility, at some point the level of ice cover could become so low that any application of Article 234 would become difficult to justify (Byers and Lalonde, 2009; McRae 2007).

In fact, in its ongoing attempt to question what it sees as excessive interpretations of Article 234 by Canada, the United States has begun to raise the question that Article 234 may no longer be applicable to all of Canada's Arctic waters due to the lack of persistent ice cover. In response to a request for public comments after Canada proposed mandatory participation in NORDREGs, Eric Benjaminson, the U.S. Embassy's Minister-Counselor for Economic, Energy, and Environment Affairs, raised the following challenge:

The United States is interested to know the scientific evidence that was considered in the development of these proposed regulations. Article 234 is likewise limited to "ice-covered areas," namely those areas covered by ice for "most of the year." Recognizing that the Notice states that "ice levels have recently been observed to be at an all-time low," the United States is likewise interested to know what information has been used to determine how this condition has been met through the entire area covered by the NORDREG zone. (Benjaminson, 2010)

When the NORDREGs rule was adopted and Benjaminson's letter was revised into a formal diplomatic note of protest (Embassy of the United States of America in Canada, 2010) this paragraph was excised from the revision. Presumably, the United States decided that it was not prepared to launch what could be read as a direct challenge to the AWPPA. Nonetheless, the combination of ongoing diplomatic tensions and diminishing ice cover suggests that for the foreseeable future substantial differences will remain between Canada and the United States even over practical issues in the management of the Northwest Passage, let alone the more thorny

issues of principle and precedent. This suggests that an “agreement to disagree” may not have the resilience necessary for accommodating unforeseen challenges.

A final reason why differences surrounding management of the Northwest Passage would not be settled under an “agreement to disagree” is that, just as the applicability of Article 234 and the AWPPA are likely to be contested as Arctic ice melts, Canada’s argument that the Passage is not an international strait will lose validity with each successful transit. This eventuality was noted by Pharand already in the 1980s, before increased use of the Passage due to climate change was seen as imminent (Pharand, 1988). However, it is more immediately pressing now, especially in the eyes of Canadians who fear “losing” the Passage to creeping internationalization brought about by its increased use as a transit channel (e.g. Huebert, 2003).

Each of these points – the emergence of the Northwest Passage as a multilateral problem, questions and tensions concerning the applicability and extent of Article 234 and AWPPA protections, and the declining power of Canada’s argument that the Passage is not an international strait – suggest that tacit acknowledgment between the United States and Canada to “agree to disagree” will not bring about the era of conflict-free, consensual management that its supporters predict. Tensions would arise as ice melts and uses of the Passage become more intense, and this likely would endanger both Canada’s claim that it is not an international strait and the United States’ interest in regional stability and the rule of law. A more affirmative middle route between Scylla and Charybdis is therefore required.

IV. Territorial Sea

McDorman (2010) considers four middle routes that have been proposed for resolving the Northwest Passage stalemate: internationalizing the Passage with the engagement of the International Maritime Organization, following the model of the Straits of Malacca; creating a

joint U.S.-Canadian authority, following the model of the St. Lawrence Seaway; expanding the Icebreaker Agreement to cover vessels other than U.S. Coast Guard icebreakers; and nationalizing the Passage with the United States recognizing the homeland security benefits to be gained through Canadian control. McDorman concludes, however, that none of these options is viable, given “the ferocity of Canada’s ‘politics of sovereignty’ and the US attachment to navigational freedom and fear of precedent” (McDorman, 2010, 247). He speculates that the first three options would be politically unacceptable to Canada while the fourth option would be politically unacceptable to the United States.

Little attention, however, has been given to another option: classifying the Northwest Passage as a component of Canada’s territorial sea. For the United States, the benefit of such a strategy would be clear. If the United States’ primary objective in the Northwest Passage is to avoid setting a precedent that might reduce transit passage rights in other international straits, then it would seem that the second-best solution, almost as good as affirming the Passage’s status as an international strait with no special provisions for Canadian authority, would be to assert that the Passage is not an international strait. By affirming the Passage’s exceptionalism, to the point that it is taken out of the international strait category all together, the United States will have effectively insulated whatever regime is adopted in the Northwest Passage from having any impact on other straits around the world. Although writing about the impact of designating the Passage as Canada’s internal waters, not as territorial sea, Byers and Lalonde’s commentary is instructive:

Although the [United States’] fear that recognizing Canada’s claim would create a dangerous precedent is understandable, it is misplaced. The Canadian position does not seek to create an exception to the international straits regime. Rather, the position is that the Northwest Passage is not and has never been an international strait. (Byers and Lalonde, 2009, 1204)

Given that the United States' main concern regarding the Passage is the precedent that it would set for other straits, rather than a fear that Canada will not permit U.S. ships to transit Arctic waters, there is no need for the United States to be concerned about the extra rights that Canada would have in these waters should the regime shift from transit passage to innocent passage.⁸

Furthermore, designation of the Passage as Canada's territorial sea would bring a number of benefits to the United States. Although the United States' primary concern has been with preserving the integrity of the transit passage regime for international straits, it also is concerned with limiting straight baseline claims around the world. Canada's renunciation of its straight baselines, which could occur if Canada were to reclassify the waters as territorial sea, would serve to buttress the United States' opposition to straight baselines elsewhere.⁹ Secondly, although the homeland security argument certainly has not emerged as a major concern among U.S. policy makers, to the extent that it is a concern at all the designation of the Passage as Canada's territorial sea would provide more protection than would be the case were the Passage an international strait. And, relatedly, the recognition of the Passage as Canada's territorial sea could encourage Canada to invest in navigational infrastructure, something from which all countries engaged in long-distance trade – including the United States – would benefit.

For Canada, the designation of the Passage as territorial sea at first appears more problematic. After all, if Canada's goal is to proclaim possession of the North and reaffirm its sovereignty in the most definitive, least qualified way, then, at least in a symbolic sense, acceptance of a territorial sea designation would be a concession from the present historic internal waters claim. In reality, however, a diverse range of Canadian and U.S. scholars representing a wide variety of perspectives -- including Griffiths (2009), Kraska (2009), Lalonde and Lasserre (2013), McDorman (2009), and McRae (2007) -- have noted that the rights that

would accrue to Canada if the Passage were designated as territorial sea would not be very much different than would be the case if it were designated as historic internal waters. This would be all the more so if Canada unequivocally were to be granted extensive Article 234 rights in its Arctic waters. And since much of the United States' resistance here has been because Canada's efforts to exercise Article 234 rights in the Passage have been bundled with its assertions of sovereignty,¹⁰ it is likely that, in the context of a mutual recognition that the Passage is Canada's territorial sea, the United States' resistance to what it sees as "excessive" applications of Article 234 would disappear.

To be certain, both States would be giving up some rights in these waters were they to compromise on a territorial sea designation. The United States would lose the right that it currently claims to sail submerged submarines through the Passage, since there is no restriction against this in the international strait transit passage regime while "in the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag" (United Nations, 1982, Article 20). As both Byers and Lalonde (2009) and McRae (2007) note, however, submerged U.S. ships are almost certainly already traversing the Passage, notwithstanding Canada's internal waters claim. Whether or not Canada receives advance notice of each transit, both sides apparently have chosen not to publicize these transits so as not to inflame the situation. If the Passage were recognized as territorial sea, it would be much easier for the United States to notify Canada and for Canada to then exempt the United States from the surface-transit requirement without either side making an implicit challenge to the Passage's status. The end result would likely be no significant reduction in U.S. mobility while permitting a notification protocol that would affirm Canada's territorial control over the waters.

Just as the United States would – on paper, at least – be surrendering the right that it currently claims to sail submerged submarines through the Passage, Canada would be giving up the right to apply environmental regulations to vessels with sovereign immunity, since Article 236 of UNCLOS explicitly protects such vessels from environmental regulations, whether these regulations are instituted as part of the general management of the territorial sea or under the special Article 234 provisions for ice-covered waters. However, with the broader issues of sovereignty and precedent taken off the table through a positive agreement to classify the Passage as Canada’s territorial sea, it then might be possible to follow Griffiths’ call for expanding the Icebreaker Agreement to other government-sponsored vessels as well as to add clauses regulating these ships’ environmental impact.

Notwithstanding these arguments, one could still maintain that this settlement would be politically unacceptable to Canada. Even if it is the case that the substantive reduction in Canada’s control over adjacent waters would pale in comparison to the benefits that would accrue to both States from a settlement based on a territorial sea designation, one might hold that the proposal would be a difficult sell to a Canadian public that puts a priority on “defending its sovereignty” in the North. However, while the territorial sea solution could be interpreted by Canadians as a retreat from the more robust historic internal waters claim, it equally could be seen as a victory. After all, if the two countries were to agree on a territorial sea designation, that would involve the United States recognizing that the waters that flow around Canada’s northern islands are irreducible extensions of Canada’s territory, something that Canadian nationalists have long sought. It seems likely that the Canadian public would focus less on the relatively technical distinction between internal waters and territorial sea than on the fact that the United States will have recognized the waters amidst the islands of the Canadian North as being under

Canadian sovereign control. Indeed, in the long run, consensual recognition of the Passage as Canada's territorial sea would constitute a much more substantial affirmation of Canadian sovereignty in the North than could ever result from Canada's unilateral and contested assertions of straight baselines and internal waters.

V. Conclusion

Arguably, every water body is both an obstacle and a facilitator of connection. For Odysseus, the strait of Scylla and Charybdis was most certainly a barrier; indeed, it was one that could be crossed only at considerable expense in human lives. But it was also a passage that enabled Odysseus and his ship to get to the other side and meet new challenges.

The Northwest Passage has long played a similar role for the nations of North America. For centuries, the search for it led to trade, investment, and migration. But it also spawned conflict between outsiders seeking routes through the passage and local inhabitants who were integrating its waters into their livelihoods, as well as among competing groups of outsiders. Most recently, the Northwest Passage has emerged again as a site of division and discord, as Canada and the United States duel over whether the Passage should be classified as internal waters or an international strait.

In the Northwest Passage, however, unlike in the passage navigated by Odysseus, there is an opportunity for navigating down a middle path that minimizes risk. The consensual designation of the Passage as Canada's territorial sea would be consistent with UNCLOS while meeting the policy objectives of both countries. The potential for designating the Northwest Passage as Canada's territorial sea therefore merits our attention, before the Passage becomes a commercial transit corridor and, potentially, a site of intensified conflict.

References

- Arctic Council. 2009. *Arctic Marine Shipping Assessment*. Tromsø: Arctic Council. Available at <www.arctic.gov/publications/AMSA_2009_Report_2nd_print.pdf>.
- Benjaminson, Eric. 2010. "Letter from Eric Benjaminson (Minister-Counselor for Economic, Energy, and Environment Affairs, Embassy of the United States of America in Canada) to Robert Turner (Manager for Navigation Safety and Radiocommunications, Transport Canada)," March 19, 2010. Available at <www.state.gov/documents/organization/179286.pdf>.
- Bush, George W. 2009. *National Security Presidential Directive and Homeland Security Presidential Directive: Arctic Region Policy* (NSPD-66 / HSPD-25). Washington: The White House. Available at <www.fas.org/irp/offdocs/nspd/nspd-66.htm>.
- Byers, Michael. 2009. *Who Owns the Arctic? Understanding Sovereignty Disputes in the North*. Vancouver: Douglas & McIntyre.
- Byers, Michael, and Suzanne Lalonde. 2009. "Who Controls the Northwest Passage?" *Vanderbilt Journal of Transnational Law* 42: 1133-1210.
- Clark, Joe. 1985. "Statement on Sovereignty, 10 September 1985." Reprinted pp. 269-273 in Franklyn Griffiths (ed.), *Politics of the Northwest Passage*. Kingston/Montréal: McGill-Queen's University Press.
- Dittmer, Jason, Sami Moisiö, Alan Ingram, and Klaus Dodds. 2011. "Have You Heard the One about the Disappearing Ice? Recasting Arctic Geopolitics." *Political Geography* 30, no. 4: 202-214.
- Dodds, Klaus, 2010. "We Are a Northern Country: Stephen Harper and the Canadian Arctic." *Polar Record* 47: 371-374.
- Dodds, Klaus. 2012. "Graduated and Paternal Sovereignty: Stephen Harper, Operation Nanook 10, and the Canadian Arctic." *Environment and Planning D: Society & Space* 30, no. 6: 989-1010.
- Dufresne, Robert. 2007. "Canada's Legal Claims over Arctic Territories and Waters" (PRB 07-39E). Ottawa: Parliamentary Information and Research Service, Library of Parliament. Available at <www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0739-e.htm>.

- Elliot-Meisel, Elizabeth. 1999. "Still Unresolved after Fifty Years: The Northwest Passage in Canadian-American Relations, 1946-1998." *American Review of Canadian Studies* 29: 407-430.
- Elliot-Meisel, Elizabeth. 2009. "Politics, Pride, and Precedent: The United States and Canada in the Northwest Passage." *Ocean Development and International Law* 40: 204-232.
- Embassy of the United States of America in Canada. 2010. "Diplomatic Note No. 625," August 18, 2010. Ottawa: Embassy of the United States of America in Canada. Available at <www.state.gov/documents/organization/179287.pdf>.
- Evans, Pete. 2012 13 September. "Arctic Thaw Heats up Northwest Passage Dreams." *CBC News*. Available at <www.cbc.ca/news/business/story/2012/09/11/f-franklin-northwest-passage-arctic.html>.
- Fairhall, David. 2010. *Cold Front: Conflict Ahead in Arctic Waters*. London: I.B. Tauris.
- Franckx, Erik. 1993. *Maritime Claims in the Arctic: Canadian and Russian Perspectives*. Dordrecht: Martinus Nijhof.
- Gerhardt, Hannes, Philip E. Steinberg, Jeremy Tasch, Sandra J. Fabiano, and Rob Shields. 2010. "Contested Sovereignty in a Changing Arctic." *Annals of the Association of American Geographers* 100, no. 5: 992-1002.
- Government of Canada. 1985a. *Arctic Waters Pollution Prevention Act of 1970, Revised Statutes, c. A-12*. Ottawa: Government of Canada. Available at <laws.justice.gc.ca/en/ShowFullDoc/ca/A-12///en>.
- Government of Canada. 1985b. *Territorial Sea Geographical Coordinates (Area 7), Order SOR/85/872*. Ottawa: Government of Canada. Available at <laws-lois.justice.gc.ca/eng/regulations/SOR-85-872/page-1.html>.
- Governments of Canada and the United States. 1988. *Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation*. Available at <www.treaty-accord.gc.ca/text-texte.aspx?id=101701>.
- Grace, Sherrill E. 2001. *Canada and the Idea of North*. Kingston/Montréal: McGill-Queen's University Press.
- Grant, Shelagh D. 2009. *Polar Imperative: A History of Arctic Sovereignty in North America*. Vancouver: Douglas & McIntyre.

- Griffiths, Franklyn. 1987a. "Beyond the Arctic Sublime." Pp. 241-268 in Franklyn Griffiths (ed.), *Politics of the Northwest Passage*. Kingston/Montréal: McGill-Queen's University Press.
- Griffiths, Franklyn. 1987b. "Where Vision and Illusion meet." Pp. 3-21 in Franklyn Griffiths (ed.), *Politics of the Northwest Passage*. Kingston/Montréal: McGill-Queen's University Press.
- Griffiths, Franklyn. 2003. "The Shipping News: Canada's Arctic is Not on Thinning Ice." *International Journal* 58: 257-282.
- Griffiths, Franklyn. 2009. "Canadian Arctic Sovereignty: Time to Take Yes for an Answer on the Northwest Passage." Pp. 107-136 in Frances Abele, Thomas J. Courchene, F. Leslie Seidle, and France St-Hilaire (eds.), *Northern Exposure: Peoples, Powers and Prospects in Canada's North*. Montréal: Institute for Research on Public Policy.
- Howard, Roger. 2010. *Arctic Gold Rush: The New Race for Tomorrow's Natural Resources*. London: Continuum.
- Huebert, Rob. 2003. "The Shipping News II: How Canada's Arctic Sovereignty is on Thinning Ice." *International Journal* 58: 295-308.
- Joyner, Christopher C. 1991. "Ice-Covered Regions in International Law." *Natural Resource Journal* 31: 214-242.
- Kraska, James. 2007. "The Law of the Sea Convention and the Northwest Passage." *International Journal of Marine and Coastal Law* 22: 257-281.
- Kraska, James, 2009. "International Security and International Law in the Northwest Passage." *Vanderbilt Journal of Transnational Law* 42: 1109-1132.
- Kraska, James. 2012. "The New Arctic Geography and U.S. Strategy." Pp. 244-266 in James Kraska (ed.), *Arctic Security in an Age of Climate Change*. Cambridge: Cambridge University Press.
- Lackenbauer, P. Whitney. 2012. "Polar Race or Polar Saga? Canada and the Circumpolar World." Pp. 218-243 in James Kraska (ed.), *Arctic Security in an Age of Climate Change*. Cambridge: Cambridge University Press.
- Lalonde, Suzanne and Frédéric Lasserre. 2013. "The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?" *Ocean Development and International Law* 44: 28-72.

- McDorman, Ted L. 2009. *Salt Water Neighbors: International Ocean Relations between the United States and Canada*. Oxford: Oxford University Press.
- McDorman, Ted L. 2010. "The Northwest Passage: International Law, Politics and Cooperation." Pp. 227-250 in Myron H. Nordquist, John N. Moore, & Tomas H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea*. Leiden: Martinus Nijhof.
- McRae, Donald. 2007. "Arctic Sovereignty? What Is at Stake?" (*Behind the Headlines* 64, no. 1). Toronto: Canadian Institute for International Affairs / Waterloo, ON: Centre for International Governance Innovation.
- Moore, John N. 2010. "The UNCLOS Negotiations on Ice-Covered Areas." Pp. 17-26 in Myron H. Nordquist, John N. Moore, & Tomas H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea*. Leiden: Martinus Nijhof.
- Nandan, Satya. N. 2009. "An Introduction to the Regime of Passage through Straits Used for International Navigation and through Archipelagic Waters." Pp. 57-64 in Myron H. Nordquist, Tommy T.B. Koh, and John N. Moore (eds.), *Freedom of Seas, Passage Rights, and the 1982 Law of the Sea Convention*. Leiden: Martinus Nijhof.
- Natural Resources Canada. 2004. "Northern Circumpolar Region." In *The Atlas of Canada*. Ottawa: Natural Resources Canada. Available at atlas.nrca.gc.ca/site/english/maps/reference/international/north_circumpolar.
- Natural Resources Canada. 2006. "Territories." In *The Atlas of Canada*. Ottawa: Natural Resources Canada. Available at atlas.nrca.gc.ca/site/english/maps/reference/provinceterritories/northern_territories.
- Pharand, Donat. 1988. *Canada's Arctic Waters in International Law*. Cambridge: Cambridge University Press.
- Pharand, Donat. 2007. "The Arctic Waters and the Northwest Passage: A Final Revisit." *Ocean Development and International Law* 38: 3-69.
- Romaniuk, Scott N. 2012. *Global Arctic: Sovereignty and the Future of the North*. Highclere, UK: Berkshire.
- Rothwell, Donald R. 1996. *The Polar Regions and the Development of International Law*. Cambridge: Cambridge University Press.
- Sale, Richard and Eugene Potapov. 2009. *Scramble for the Arctic: Ownership, Exploitation, and Conflict in the Far North*. London: Francis Lincoln.

- Shields, Rob. 1991. *Places on the Margin: Alternative Geographies of Modernity*. London: Routledge.
- Steinberg, Philip E. 2010. "You Are (Not) Here: On the Ambiguity of Flag Planting and Finger Pointing in the Arctic." *Political Geography* 29, no. 2: 81-84.
- Steinberg, Philip E., Jeremy Tasch, and Hannes Gerhardt, with Adam Keul and Elizabeth Nyman. 2014. *Contesting the Arctic: Politics and Imaginaries in the Circumpolar North*. London: I.B. Tauris.
- Struck, Doug. 2006 6 November. "Dispute over NW Passage Revived." *The Washington Post*. Available at <www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110500286.html>.
- United Nations. 1958. *United Nations Convention on the Territorial Sea and the Contiguous Zone*. Geneva: United Nations. Available at <untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf>.
- United Nations. 1962. *Juridical Regime of Historic Waters, Including Historic Bays (Doc A/CN.4/143)*. New York: United Nations. Available at <untreaty.un.org/ilc/documentation/english/a_cn4_143.pdf>.
- United Nations. 1982. *United Nations Convention on the Law of the Sea (Doc A/Conf.162/122)*. New York: United Nations. Available at <www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>.
- United States Department of State. 1992. "United States Responses to Excessive Maritime Claims" (*Limits in the Seas*, no. 112). Washington, DC: United States Department of State.
- United States Senate Foreign Relations Committee. 2012. *Hearings on the Law of the Sea Convention (Treaty-Doc. 103-39)*. Available at <www.foreign.senate.gov/treaties/103-39>.
- Vannini, Phillip, Godfrey Baldachino, Lorraine Guay, Stephen A. Royle, and Philip E. Steinberg. 2009. "Reterritorializing Canada: Arctic Ice's Liquid Modernity and the Imagining of a Canadian Archipelago." *Island Studies Journal* 4 no. 2: 121-138.
- Zellen, Barry. 2009. *Arctic Doom, Arctic Boom: The Geopolitics of Climate Change in the Arctic*. Westport, CT: Greenwood.

¹ The other major (or potentially major) sea route through Arctic coastal waters is the Northern Sea Route, off the northern coast of Russia and connecting the Pacific with the Baltic Sea. While there are some common issues of concern in the two sets of northern shipping lanes, there are enough differences – geographic, political, and legal – to merit separate consideration. This article focuses exclusively on the Northwest Passage.

² Both letters are reprinted in Byers and Lalonde (2009, 1162).

³ There is some dispute about this final point. McDorman (2009, 236) and Byers and Lalonde (2009, 1193-1194) both state that the United States is alone in asserting that the only criterion is geographic, while Kraska (2007, 259) holds that the European Union has taken this position as well. However, the *Washington Post* article that Kraska references when making this point (Struck, 2006) does not mention the European Union, and Kraska offers no other evidence to support his statement.

⁴ This is a line from Canada's national anthem, and is frequently used by students of Canadian culture to ground their discussion of the North's role in Canadian identity (e.g. Shields, 1991).

⁵ The only two speakers who did not mention the Arctic were Admiral Samuel Locklear from the U.S. Navy, who spoke from his perspective in the U.S. Pacific Command, and Lowell McAdam from the telecommunications firm Verizon, who spoke on how UNCLOS accession would facilitate protection of submarine cables, a topic that is not relevant to the Arctic since there are no cables there.

⁶ In listing a series of benefits that UNCLOS ratification would bring to the United States in the Arctic, Negroponte mentioned that accession would give the United States standing “to challenge Canada's assertion that the Northwest Passage falls within its internal waters.” The

other speaker who alluded to security concerns in the Arctic was Air Force General Charles Jacoby, Commander of the Northern Command. Although General Jacoby did not refer specifically to the Northwest Passage he did remark, “As a combatant commander with mission responsibilities for homeland defense and civil support in the maritime approaches to the homeland with an increasingly accessible Arctic Ocean, I fully support our nation’s accession to the Convention.”

⁷ Elliot-Meisel (2009) makes similar arguments although, unlike Griffiths, Lackenbauer, and McDorman, she supports direct negotiations between Canada and the United States.

⁸ The one exception here potentially could be for military ships, discussed below.

⁹ Alternately, Canada could achieve territorial sea designation by maintaining its straight baseline claim but acknowledging that the waters enclosed by these baselines are not historically internal water. Although this alternate strategy would deprive the United States of a victory in its campaign against straight baselines, it might be more palatable to Canadians since it would leave unchanged the map showing the extent of Canadian territory.

¹⁰ For instance, the U.S. Embassy’s note of protest to Canada over its requirement of mandatory NORDREG registration concludes with a paragraph that suggests that the U.S. opposition is not simply about the meaning of Article 234 but how, in Canada, it is being conflated with, and used as a instrument to promote, a broader campaign to internalize Arctic waters: “The United States noted with concern the references to ‘sovereignty’ in the statements accompanying the regulations. The United States wishes to note that the NORDREGs do not, and cannot as a matter of law, increase the ‘sovereignty’ of Canada over any territory or marine area” (Embassy of the United States of America in Canada, 2010).
