

Disputed Sovereignty:  
A Bilateral Solution to the Northwest Passage

by

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## **Dedication**

This thesis is lovingly dedicated to the memory of my mother, Maxine L. Moslow and in eternal appreciation and gratitude for the constant support and encouragement of my father, Dr. Thomas F. Moslow. Without them this endeavour would not have been possible.

## Table of Contents

<b>Abstract</b> .....	vi
<b>Acknowledgments</b> .....	vii
<b>Chapter One: Introduction</b> .....	1
1.1 Political Relevance of the Northwest Passage .....	2
1.2 The Legal Dispute .....	5
<b>Chapter Two: The Benefits of A Bilateral Approach</b> ...	20
2.1 Evolution of US Interest in the Passage.....	21
2.2 Freedom of the Seas .....	29
<b>Chapter Three: Avenues of Dispute Resolution</b> .....	46
3.1 The Unilateral Approach .....	46
3.2 A Multilateral Approach.....	50
3.3 Informal Bilateral Regimes vs. Formal Treaties.....	53
<b>Chapter Four: Theoretical Perspectives</b> .....	60
4.1 Realism and Regime Theory.....	61
4.2 Liberal Regime Theory .....	66
4.3 Post-Positivist Approaches .....	69
4.4 Summary .....	73
<b>Chapter Five: Conclusion</b> .....	75
5.1 Negotiations .....	75
5.2. Future Research .....	82
5.3. Discussion.....	84
<b>Bibliography</b> .....	86

## **Abstract**

This study examines how the legal dispute between Canada and the United States, on the status of the Northwest Passage could be resolved through diplomatic means. It asserts that Canada is unable to unilaterally defend its claim to the Passage because it is unwilling to allocate the financial and military resources necessary for such a large undertaking. Joint military enforcement and policy cooperation with the United States outlined in an informal regime in which both countries continue to agree to disagree on the legal status of the Passage, will provide a more cost effective and politically pragmatic alternative to the current dispute. The creation of such an informal bilateral regime should include future efforts for joint environmental protection of the region and the mutual collaboration between military and civilian personal as well as, government agencies in monitoring naval passage through the Strait.

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# Chapter One

## Introduction

It has been called the “Arctic Grail” (Berton, 2001). From Martin Frobisher in 1576 to John Franklin in 1845, generations of explorers battled the harsh Arctic climate in a vain search for the fabled Northwest Passage, a navigable route around the northern edge of the Americas. Today, myth is becoming reality: the passage is opening up, with geopolitical implications that policy makers simply cannot ignore. This chapter reviews the security and environmental risks that will result from future international shipping in the Passage. It outlines the differing positions of Canada and the United States with regards to the legal status of the Strait asserting that Canada is unable to unilaterally defend its claim to the Northwest Passage because it is unwilling to allocate the financial and military resources necessary for such a large undertaking.

Previous Canadian governments have attempted to ensure sovereign control over the Passage through the use of symbolic rhetoric that panders to the patriotic sentiments of voters rather than by developing concrete solutions. The Harper government has continued the trend of providing limited financial and military resources to protect Canada’s claim to the Passage. Since Canada is unable to defend the Passage unilaterally, joint military enforcement with the United States provides a more effective and politically pragmatic alternative to the current dispute.



## **1.1 Political Relevance of the Northwest Passage**

Climate change is at the centre of the growing political relevance of the Northwest Passage. The warming climate has reduced the extent and thickness of sea ice in the Arctic, making international shipping in the Passage possible in the foreseeable future. At the moment, the Passage is navigable for about four months of the year, but only with considerable assistance by icebreakers; a warmer Arctic climate should extend the navigation season and make future voyages less treacherous. The summer months will become increasingly ice-free but communication will remain difficult until additional global positioning satellites are placed in orbit to accommodate the high latitudes.

There are varying estimates of the rate at which Arctic ice is melting but a 2004 study by the Arctic Council and the International Arctic Science Committee assessed that sea ice in the summer had declined by 15-20 percent over the past thirty years (*Arctic Climate Impact Assessment*, 2004: 6). The Canadian Government's International Policy Statement in 2005 predicted that: "In addition to growing economic activity in the Arctic region, the effects of climate change are expected to leave the Northwest Passage ice-free as early as 2025" (Shevnina & Soloveva, 2008: 458-461). During August and September of 2007, the Northwest Passage was found to be more navigable than at any time since routine monitoring by the Canadian Ice Service began in 1972 (Stroeve, Julienne & al. 2008: 15). Already the Passage is subject to numerous crossings despite the harsh conditions. According to the Canadian Coast Guard, eighty-six ships entered Canada's Arctic waters last year, including research vessels from Denmark, Germany and Russia. There were eleven transits of the Northwest Passage, five of them by cruise ships, while the other six were by research or military vessels (CCG 2009: 17).

The development of a more navigable strait will provide new economic opportunities not only to the Arctic coastal states but to industrial powers further afield. The European Union, China, Russia and South Korea are particularly concerned about energy security and consequently are attracted by prospective new lines of communication and trade in the Arctic. A navigable Passage would offer a route between Asia and the East Coast of the United States that is 7,000 kilometres shorter than the current route through the Panama Canal, thus saving valuable time, fuel and costly transit fees (Rogner, 2007: 682). It could also accommodate super-tankers and container ships that are too large for the Canal.

A more manageable strait could provide an unrestricted entry point into North America for drugs, guns and illegal immigrants. Commercial shipping is likely to increase as the Arctic's natural resource industry matures and as mining companies slowly progress from exploration to production. South African giant De Beers has recently joined the sixty or so companies pursuing diamonds in the Arctic (Rogner, 2007: 678). Although diamonds, gold, and base metals have been the focus of exploration to date, previously inaccessible uranium resources are also beginning to attract attention as the demand for nuclear fuel increases. Fresh water will also become an increasingly valuable commodity in the future as the world's population grows, water pollution increases, and desertification threatens an ever greater number of countries.

Control over the Northwest Passage is an issue of great importance to both Arctic and non-Arctic States; however the legal dispute centers primarily on Canada and the United States. Both countries take the Passage to be open for international navigation. The issue of sovereignty in the Passage concerns only the regulatory regime governing

international shipping. Canada asserts that the waterways that comprise this strait are internal waters; therefore this would mean that the Canadian government has the right to control who can enter these waters and under what conditions (Huebert, 2009b: 40). The American and the European Union position is that these waters are part of an international strait, in which Canada does not have final, authoritative decision-making power. “The United States and the European Union claim that the international community, through the International Maritime Organization (IMO), makes the final decisions” (Huebert, 2009b:46). Stripped of all rhetoric and emotion that normally surrounds this issue, sovereignty concerns controlling the actions of others within the jurisdictional boundaries claimed by the respective state. From this perspective, Canada’s challenge lies in the maritime nature of its boundaries of the area in dispute. The following chapter will demonstrate that Canada’s sovereign claim to the Strait is severely challenged by its weak legal position vis-à-vis the United States and that both countries’ security interests in the Passage could best be served by bypassing their legal dispute and then proceeding to cooperate on joint defence and enforcement of the Strait.

## 1.2 The Legal Dispute

Following the discovery of a very large oil field in northern Alaska in 1968, the Americans considered the possibility of shipping oil to southern American markets via the Northwest Passage (Dosman, 1976: 38). The Americans argued that the Passage was an international strait and therefore they did not need Canadian permission to go through it. The Canadian position was that the waters were internal and therefore under Canadian control thus requiring Canadian permission. In the name of good relations with the United States, the Canadian government granted “permission” to the 1969 American *Manhattan* voyage even though it was not sought and provided icebreaker assistance. As a result of the voyage, the Trudeau government passed the *Arctic Waters Pollution Prevention Act* (AWPPA) and embarked upon an international campaign to gain acceptance for its position regarding the legal status of the Northwest Passage (McRae, 1987: 59-61).

The AWPPA imposed anti-pollution and marine safety standards for Canadian waters up to 100 nautical miles offshore. The preamble to the AWPPA justified the assertion of jurisdiction by citing Canada’s responsibilities for the welfare of Inuit and other arctic inhabitants, as well as the preservation of the ecological balance. When the AWPPA was implemented, the Canadian government feared that this legislation would be unable to withstand a challenge in the International Court of Justice (ICJ). As at that time, the creation of a 100-mile wide pollution protection zone was an innovation in international law. The Canadian government made a reservation to the court’s statute, asserting that Canada would not accept any ruling on:

[D]isputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the preservation or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.

(Quoted in Huebert, 1995: 352).

The United States and the European Economic Community, denounced the AWPPA as contrary to international law (McDorman, 2009: 153). Between 1973 and 1982, two events occurred at UNCLOS III that enhanced the legality of the Act. The first was, the successful negotiation of Article 234, the ice-covered areas article of the UNCLOS which states that:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

(UNCLOS, Article 234).

The second event that produced broader legal support and international legitimacy for the AWPPA was the creation of Exclusive Economic Zones (EEZ), a body of water, reaching up to 200 nautical miles from a state's cost, over which it has exclusive control of any maritime exploration or mineral extraction in that area. The jurisdiction Article 234 provide to enact anti-pollution measures applying in ice-covered areas within Canada's exclusive economic zone (200 nautical miles offshore) validated the AWPP Act's original 100-mile application. These two events minimized the possibility of an ICJ

ruling against Canada and lead the Canadian government to lift its restriction on the AWPP Act in 1985 (Huebert, 1995: 353).

Besides the enactment of the AWPPA, little effort was made to improve the Canadian government's ability to exert a physical presence in the north because the immediate threat from the Americans ended when they decided to build a pipeline running north to south across Alaska instead of shipping it by tanker. The dispute over the legal status of the waters of Canada's Arctic Archipelago resumed in August 1985, with the westerly crossing of the Northwest Passage by the U.S. Coast Guard icebreaker *Polar Sea*. Having been notified of the projected transit, Canada informed the United States that it considered the waters of the Archipelago, including those of the Passage, as historic internal waters and that prior request for transit was necessary. The United States refused to make such a request, still contending that the Passage was an international strait. In the end, the two countries agreed that the crossing would take place without prejudice to their respective legal positions.

In the wake of the *Polar Sea* controversy, the United States evinced a willingness to engage in bilateral discussions over the status of the Arctic waters. After more than two years of negotiations and thanks in large part to personal interventions by Prime Minister Brian Mulroney and President Ronald Reagan, Canada and the United States signed a four-clause "Arctic Cooperation Agreement" on January 11, 1988. In the Agreement, the United States pledged "that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada" (McRae, 1995: 5-9). Canadian consent is seemingly linked to marine scientific research conducted by American icebreakers, and Article Four spells

out that “[n]othing in this Agreement . . . nor any practice there under affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas . . . .”(Quoted in McDorman, 2009: 151).

Following the *Polar Sea* crisis the Mulroney government promised a wide range of actions to address Canada’s weaknesses in the Arctic region. In 1985 six initiatives were announced by Secretary of State for External Affairs Joe Clark, though of these, only the ones that did not require substantial new funds were ever implemented. A promise to build a Polar-8-class icebreaker was abandoned within a couple of years of its announcement, as was a plan to purchase ten to twelve nuclear-powered submarines. Ultimately the government implemented only those promises that did not involve spending money (Kirkey, 1995: 12). The *Polar Sea* incident also prompted Canada to modify its legal position on the Northwest Passage and draw straight baselines connecting the outer headlands of the archipelago. To justify this action, the Canadian government pointed to the International Court of Justice’s (ICJ) ruling on the Fisheries Case (United Kingdom v. Norway) of 1951 (ICJ Rep, 1951: 116), “which recognized straight baselines as a legally accepted means for determining the extent of coastal state control along fragmented coastlines” (McDorman, 2008: 293). This ruling was particularly important for Canada because: (1) it recognized the concept of historic title to coastal waters; and (2) it accepted the method of measurement of territorial seas that Canada prefers—the use of straight baselines. This method of calculation was reinforced seven years later at the first United Nations Conference on the Law of the Sea (McRae, 1987:99).

Rather than following the outline of a country's land mass, as was the more traditional method, the straight baseline method allowed a country with offshore islands and/or very jagged coastlines to calculate its territorial seas from straight lines drawn from a point on the coast to the islands or from island to island (McRae, 1987: 99). One then connects the dots and the water behind the lines is designated internal water, whereas waters away from the line and toward open water are considered territorial seas. The old method of measurement (which is still used and favoured by the United States) simply calculated the territorial seas from a baseline not exceeding twelve nautical miles from shore (at the low-water line) that traced the outline of the coast. Therefore the baseline would exactly match the seacoast, but is twelve miles out in the sea. The area encompassing a country's internal waters can be increased by adopting the straight baseline method of calculation, thus increasing the amount of water deemed internal and under the full authority and sovereignty of the coastal state.

The Canadian government continues to assert that it is fully within its right to pass laws to interdict traffic in the Strait at its discretion and in accordance with its straight base lines. This has been contested by the American government which argues a strait may retain its international character despite having become part of the internal waters by operation of the rules of straight baselines. In defence of this assertion they point to Article 5(2) of the *1958 Territorial Sea Convention* which reflected the view that straits should be treated as territorial seas and that this should apply *a priori* to straits affected by straight baselines. As well, Article 35(a) of the UN Law of the Sea Convention provides:



“Nothing in this Part affects a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the methods set forth in Article 7 (Straight Baselines) has the effect of enclosing as internal waters areas which had not previously been considered as such”.

(United Nations Convention on the Law of the Sea, 1982)

Had Canada made formal claims to enclose the Passage within straight baselines before 1958 and not waited until 1986, then its position may have been strengthened. Of course, laws can be interpreted differently, so Canada’s position remains that straight baselines drawn around the perimeter of the Arctic Archipelago constitute the outer limits of its internal waters.

Despite the ICJ ruling and UNCLOS approval, Canada’s Arctic baselines have not received widespread support from the international community rather they are a source of frequent and obstinate diplomatic protests from the United States and the European Union. With the legality of the straight baselines unresolved, the status of the Passage remains uncertain.

As an alternative approach, the Canadian government has argued that the Northwest Passage is an internal waterway under the principle of historic usage. The government points to the fact that most of the archipelago had been mapped by British explorers prior to the transfer of title and to date, few non-consensual transits of the Strait have occurred. (By non-consensual voyages I mean transits through the Northwest Passage by foreign vessels that have not received prior authorization from the relevant Canadian authorities). For Canada, the risk that unauthorized transits could weaken its

claim makes it imperative that no such transits occur; this is especially the case for subsurface voyages through the Strait.

Submarine transits are of central importance to understanding the traditional U.S. position on the Northwest Passage. This is due to the Arctic Ocean's strategic location between the United States and Russia and the legal consequences for submarine traffic if the Passage was deemed to be anything other than an international strait. Under UNCLOS, submarines may pass through an international strait without surfacing or otherwise alerting the adjacent coastal state or states, something not permitted in internal or (regular) territorial waters (Burke, 1977: 193).

Nuclear-powered submarines do not require oxygen for propulsion and are therefore not dependent on the straits and channels being free of ice. It is widely known, though infrequently officially acknowledged, that submarines from several countries regularly traverse the Northwest Passage (Byers & Lalonde, 2006: 56). Publicly, Canada has chosen to ignore the issue; it has never possessed a submarine that could travel under the ice, nor has Canada made any effort to deploy a surface-based anti-submarine operation in the area (Fowlow, 2007: 15).

Arguably, it works in Canada's favour that the submarines do not announce their presence. For if these subsurface transits were acknowledged by their respective governments and had occurred without Canadian authorisation, they could present a real threat to Canada's legal claim over the Strait. At the same time, it seems likely that Canada—a North Atlantic Treaty Organization (NATO) ally of Britain, France, and the United States—has known about at least some of the submarine voyages and simply kept quiet.

On June 3, 1995, then-Defence Minister David Collenette told a parliamentary committee:

“I believe we have a novel diplomatic arrangement with the United States under which they inform us of activities of their nuclear submarines under the ice, which enables us to at least say they are doing it with our acquiescence.”

Mr. Collenette repeated this position in the House of Commons on November 6, 1995, before retracting it in a letter to Jay Hill, an opposition MP, on January 26, 1996. In the letter, the minister wrote:

There is no formal agreement covering the passage of any nation's submarines through Canadian Arctic waters. However, as a country that operates submarines, Canada does receive information on submarine activities from our Allies. This information is exchanged for operational and safety reasons with the emphasis on minimizing interference and the possibility of collisions between submerged submarines.

(Fenge, 2006: 12).

Such a combination of knowledge and acquiescence could prove fatal to Canada's legal position were evidence of it made public, since this would establish actual non-consensual usage of the Northwest Passage by international shipping(Pharand,2007:18). However, it is just as likely that any U.S. (and probably NATO) submarine traffic takes place on a pre-negotiated basis similar to that set out in the 1988 Arctic Cooperation Agreement (Kirkey, 1995: 5-9).

If the governments sending submarines through the Passage have already agreed with Canada that the voyages are without prejudice to the dispute, Canada's legal position will not be affected (Huebert & McRay, 2001: 89–91). It is even conceivable that permission has regularly been sought and received—in which case the voyages, if publicly acknowledged, would actually strengthen Canada's legal position. However, the

issue of submarine voyages remains off the table, legally speaking, as long as the countries involved continue to treat such activity as officially secret—as it appears they all intend to do.

As a further legal defence of its claim over the Northwest Passage, Canada has asserted that the Inuit — who are Canadian citizens — had travelled and lived on the ice for millennia, “acquired historic title over the Arctic waters well before the arrival of the Europeans, which they subsequently transferred to Canada” (Pharand, 1988: 224). In pursuing this line of argument, Canada would have to prove that sea ice can be subject to occupancy and appropriation in a similar fashion to land. Under international law, indigenous people can acquire and transfer sovereign rights, as was the case in the *Western Sahara* ruling where the International Court of Justice recognized that territories inhabited by indigenous peoples having a measure of social and political organization were not terra nullius and thus conferred a limited but no less real international legal status on these local authorities. That such rights, if they did exist, were in fact ceded to Canada, could be argued under the 1993 *Nunavut Land Claims Agreement* (NLCA) which affirms that “Canada’s sovereignty over the waters of the Arctic archipelago is supported by Inuit use and occupancy” (Byers & Lalonde. 2006: 23-25).

Through the agreement the Inuit ceded to the Crown their Aboriginal title, rights, claims and interests to lands and waters within Canada and received in return a wide range of rights applicable throughout the Nunavut Settlement Area (Fenge, 2008: 85). Implementation of this agreement is an ongoing expression of a negotiated partnership between the Government of Canada and the Inuit of Nunavut and could be an important component of a strategy to assert Canada’s sovereignty over the Northwest Passage.

Despite the potential asset this agreement could add to Canada's sovereign claim, the federal government has yet to engage the Inuit effectively in arctic sovereignty assertion and has failed to implement fully the Nunavut Land Claims Agreement, forsaking a potential trump card in this complex international game.

Climate change itself also poses a threat to Canada's internal water's claim. In its 1949 *Strait of Corfu* judgment, the ICJ defined an "international strait" as a body of water that joins two international bodies of water and is used by international shipping interests. The Northwest Passage does join two international bodies of water, but ice conditions have often prevented its use as a shipping lane. A dramatic increase in the volume of ships transiting the Strait would create a legal challenge to Canadian jurisdiction and sovereignty over the Northwest Passage, raising the question of whether the Passage is or might become an international strait and putting at risk Canada's claim that the Strait constitutes internal domestic waters. If Canada does nothing to increase its efforts to establish sovereignty over the Passage and climate change does make it more accessible, Canada will be hard pressed to win a challenge in the International Court of Justice.

An ice-free Passage in the future poses a serious challenge to Canada's legal claim, which as outlined in Chapter Four, can be addressed by bypassing the legal disagreement in favour of establishing an informal Canada/U.S. defence regime in the Strait. In addition to its legal difficulties with proving that the Northwest Passage constitutes internal waters, the Canadian government also faces the challenge of maintaining and financing the enforcement of its claim. For Canada, the risk that any more unauthorized transits could weaken its claim makes it imperative that no such

transits occur. Yet as the next section will demonstrate Canada is poorly equipped to prevent this from happening.

#### **1.4 Enforcement Challenges**

Canada's military capacity in the Northwest Passage is severely limited and dramatically underfunded. Despite having the world's longest coastline, much of it ice-covered most of the time, Canada has never possessed an icebreaker capable of operating in the arctic year-round. The Canadian Coast Guard's small fleet of icebreakers, used to re-supply northern communities in summer, is incapable of operating through the arctic winter and has been subsequently redeployed to the Gulf of the St. Lawrence each autumn. Canada's military presence in the arctic is limited mostly to the Canadian Rangers, 1465 part-time volunteers—many of them Inuit—who live in 59 hamlets stretching from Baffin Island to the Alaskan frontier (Fenge, 2008: 85). The Rangers know the land and ice and provide a useful search and rescue capacity, but their abilities are dwarfed by the expanse in which they are working.

Currently, Canada does not have a single helicopter based in the arctic or any dedicated search and rescue personnel located there. This is in sharp contrast to the well developed American military airbases in Alaska. Canada also suffers from limited naval ability, possessing only three icebreakers with sufficient hull strength to effectively traverse the Passage under current ice conditions. Ships carrying illicit cargoes could be drawn to the Northwest Passage by the relative absence of a military or police presence. Canada alone is unable to prevent unauthorized entry and transit of the archipelago either by foreign nuclear submarines throughout the year at present, or by conventional

submarines and warships in the course of a lengthening and ultimately a wholly ice-free summer. Currently in the arctic, there are no Canadian surface or sub-surface ocean radar or sonar systems (similar to those on the eastern and western seabords) to monitor submarine or ship traffic at the entrances to the Passage. Were a major environmental disaster, such as an oil spill or a large passenger airplane crash, to occur the Canadian Forces' ability to respond would be very limited and would have to be coordinated from bases located in southern Canada (Griffiths, 2008: 4-6). Moreover, given the size of the territory, the increasing level of shipping activity and the thousands of over-flights annually by national and international passenger airplanes (Griffiths, 2008: 5), Canada's attempts to defend the area unilaterally and monitor the Passage have been woefully unsuccessful.

The traditional Canadian approach to dealing with arctic security issues can be characterized as reactive and ad-hoc. Canadian governments have found it far easier to let the arctic take care of itself and only apply tools of national power when forced to do so by the outside world, only doing so for a short duration and at a minimum of intensity. Rob Huebert (2008: 7) has noted that "the responsibility to protect the North has been viewed by Canadian governments as too demanding, and they have on average, preferred to pretend there were no problems and hope for the best."

The ongoing Canada/U.S. dispute over the status of the Northwest Passage has been a source of media attention for many decades. Canadians generally consider themselves more oriented toward the Arctic than their American neighbors, although ever since the purchase of Alaska, the United States also has been an Arctic nation. Beginning with the voyages of the *Manhattan* and the *Polar Sea*, the Canadian media has

continuously stirred up the idea among the public that Canadian sovereignty over the Passage and the Arctic is being stolen or lost to their American neighbours. The wide spread reporting by Canadian media sources, including newspapers, television and radio, have framed the dispute as a challenge to Canadian identity and sovereignty (Griffiths, 1987: 43).

Historically both the *Manhattan* and *Polar Sea* voyages were the source of a noticeable increase in anti-American sentiment and a simultaneous demand by the Canadian public for concrete action by the government to protect Canadian sovereignty over the Strait. Research by Fabrice Blocteur, (1998) which compared newspaper coverage between the *Globe and Mail*, the *Toronto Star*, *Le Devoir*, and *La Presse* for a four-month period in 1985 found that English-based media decisions to prime the Northwest Passage dispute as an issue of importance to Canadians has often resulted in emotional editorials filled with patriotism and anti-American rhetoric. This tended to not be the case with French-speaking media sources which had less of a focus on national defence and typically provided a more balanced or even indifferent perspective (Rioux, 2005: 30).

Research on how Canadian defence policy and the Northwest Passage dispute are covered in mainstream media found that this dichotomous trend has continued in a relatively consistent manner up to the present day (Soderlund, Lee & Gecelovsky, 2002: 78). On average English speaking media were found to promote strong nationalistic attachment to the Arctic, often coupled with a protectionist instinct and an aversion to international and especially US power and influence in the region (Soderlund, Lee & Gecelovsky, 2002: 78-83). Whether this emotional framing of the dispute, primarily seen



in English media sources, has influenced the opinions of the general public is a difficult question to answer and one that goes far beyond the scope of this study. However it is reasonable to conclude that any future developments on the Northwest Passage will be the topic of much heated debate and frequent coverage in Canada's mainstream media.

Despite strong media pressure and a stable economy, Canada's commitment to the Passage has typically consisted of political rhetoric rather than concrete action. Given its stable economic status Canada is more than capable of providing the necessary funds and manpower to further develop its military and civilian presence in the Passage but it has historically chosen not to allocate the necessary resources to do so. In 1985 Prime Minister Brian Mulroney promised to build a *Polar Class 8* icebreaker and to buy twelve nuclear-powered submarines that could travel under the ice. His government also planned to deploy a subsurface surveillance system across the Passage from Cornwallis Island to Somerset Island were abandoned as too expensive when the media moved on to other issues (Huebert, 2008: 6).

Despite having the world's longest coastline, much of it ice-covered for the majority of the year, Canada still lacks the necessary naval vessels to properly defend its maritime borders. This intermittent commitment was once again evident in July of 2007 when Prime Minister Harper promised that "six to eight ice-strengthened arctic Offshore Patrol Ships" would be built for the Canadian navy; his government has recently retracted this statement citing the economic recession as a need for austerity. The Canadian government has also recently renamed the Northwest Passage, the "Canadian Northwest Passage" in an act of symbolic nationalism, which represents another attempt to assert Canada's claim on the cheap (Boswell, Canwest News Service, 2009).

Currently, by all estimations, Canada's defence and security posture in the North is minimal. Despite the fact that, "sovereignty talk lends itself to a rhetoric of alarm and exaggeration aiming to 'energize' others" (Griffiths, 2003: 276), Canada has historically not made securing a presence in the Strait a priority. This is because: (1) Canada has always known it can rely on the U.S. to provide military might should it be required; and (2) establishing a significant presence in the North is extremely expensive. As a result and unless Canada dramatically ramps up its financial contributions to Passage defence, the United States will continue to be a major contributor to Canada's (and North America's) security.

This chapter has demonstrated that maintaining at least some control over the Northwest Passage is in Canada's best interests both in terms of nationalist sentiment, economic stability and domestic security. Yet Canada's sovereign claim is severely challenged by its limited enforcement capacity, weak legal position and historical lack of action on arctic maritime security. Given these flaws, the Canadian government is not capable of unilaterally defending its sovereign claim to the Northwest Passage, especially given its current and historically limited level of financial and military commitment. Agreeing to disagree on the legal status of the Passage would allow both countries to collaborate on joint defence and enforcement measures in the Strait. However, this approach raises the very serious issue of how to convince our American neighbours that a bilateral solution would be in their best interest. This daunting task is addressed in the forthcoming chapter.

## **Chapter Two:**

### **“The Benefits of a Bilateral Approach”**

For the Americans, bilateral cooperation would have the benefit of maintaining free navigation through the Passage while simultaneously decreasing the financial and manpower costs associated with defending the Strait unilaterally. This chapter will examine the U.S. legal argument that the Northwest Passage constitutes an international strait and will demonstrate that the two countries should side-step their legal dispute in favour of creating an informal regime for the joint defence of the Strait and enhanced North American security. This is especially the case in regards to recent Russian excursions into the arctic and the potential of future threats posed by unrestricted maritime traffic in an ice-free Passage. This chapter will conclude by reviewing the long history of mutually beneficial bilateral cooperation between the two countries, which sets a precedent for a bilateral transit agreement for the Northwest Passage.

## **2.1 Evolution of US interest in the Passage**

The United States security interests in the Northwest Passage emerged during the Cold War over concerns of possible under water transits by Soviet submarines (Huebert, 1995: 301). The ice-covered waterway offered the subs an alternate route between the Arctic and Atlantic Oceans and if Canada and the United States had been able to agree that the Northwest Passage was Canadian internal waters, they would have had a strong legal basis for excluding the Soviets. Yet while it was a given that Canada would always allow American vessels access, the U.S. Navy was concerned about securing maximum freedom of navigation worldwide (Huebert, 1995: 345-346). It worried that recognizing Canada's claim might create a precedent for coastal state control over other contested waterways. In every other respect during the Cold War, the two NATO allies worked closely together to counter the Soviets. They built and operated the Distant Early Warning (DEW) Line, a string of fifty-eight radar stations stretching from Alaska to Greenland across the Canadian North to counter the threat posed by Soviet bombers (and, later, intercontinental ballistic missiles). It is also well known, though not publicly admitted, that the two countries cooperated in the deployment of underwater surveillance devices at various choke points in the Canadian Arctic Archipelago to detect Soviet submarines in the area (Byers & Lalonde, 2006: 56).

The submarine threat still exists today and concerns over possible Russian incursions into the Passage are a source of anxiety for those focused on maintaining North American security. The opening up of the Northwest Passage has been accompanied by rising tensions between Russia and the four other Arctic Ocean littoral states, Denmark, Norway, Canada and the United States, as climate change alters the

region's geostrategic dynamics. While there are unresolved disputes among the four NATO members, the fault lines between the NATO states on the one hand and Russia on the other appear to be deepening, and the sense of common space is under pressure. Never much for subtlety or nuance, Moscow has begun training troops that could be engaged in Arctic combat missions and has increased the operational radius of its northern submarine fleet. In August 2007 a submarine planted a Russian flag under the North Pole, more than 4,000 metres deep, on a stretch of seabed that Russia claims as its own (Boswell, 2008, A2). The stunt was regarded by many as ridiculous, an irrelevant military gesture that was no substitute for a legal claim. Less amusing was Russia's manoeuvre in 2008 that sent nuclear-powered ice-breakers into Arctic waters stirring up fears that it planned to go ahead with resource exploration outside any international treaty (Blomfield, 2007: A4).

To make matters worse, Russian long-range bombers have again started flying sorties in the Arctic after nearly two decades of post-Cold War peace. The Canadian government of Prime Minister Stephen Harper, adopting a more assertive foreign-policy stance than its Liberal predecessor, has reacted vociferously to high-visibility Russian demonstrations of air and naval power. Canadian alarm came to a head in February 2009 when Canadian fighter jets intercepted a Russian bomber near Canada's Arctic airspace only three days before U.S. President Barack Obama made an official visit to Ottawa. Harper makes no secret of the fact that his government's military developments in the North are a response to Russian moves. On February 16<sup>th</sup> 2009, he declared that:

"We will defend our airspace; we also have obligations of continental defence with the United States. We will fulfil those obligations to defend our continental airspace, and we will defend our sovereignty and we will respond every time the Russians make any kind of intrusion on the sovereignty in Canada's Arctic".

(Canwest News Service, 2009).

In short, conditions in and above the Arctic warrant a consistent policy approach based on Canada's national interests and require a review of how Canada and the United States, may work together to improve security in the Arctic region. In order to enhance North American security, the United States and Canada should collaborate to jointly defend the Northwest Passage. Canada and the United States have a long history of mutually beneficial collaboration for the defence of North America (see section 2.4). Most recently the two countries are perusing a policy of joint cooperation in the Arctic as part of Operation Nanook. The Operation will run from August 19 to 26 and is being conducted under the command of Joint Task Force North (JTFN), which is responsible for the conduct of all routine and contingency operations in Canada's North (Young, 2010: 17). As part of the Arctic Reserve Company Group, members of the southern-Ontario Army Reserve units will conduct training exercises with Canadian Rangers in Resolute Bay and Pond Inlet (Young, 2010: 16).

The Canadian Navy and Air Force will also be involved in military exercises alongside American and Danish forces. Three naval ships, a dive team, helicopters and transport and patrol aircraft round out this visible demonstration of Canada's military capabilities. Within the larger operation, several exercises are planned, which are designed to test the ability of multiple government departments, including the Canadian

Forces, to work together to respond to humanitarian and environmental emergencies like oil spills, evacuations and other situations (Young, 2010: 18).

The Canadian Forces are conducting these Arctic exercises with their military and government colleagues from Denmark and the United States. For a short but symbolic period of time Canada and its allies are putting aside their well-managed disputes over tiny Hans Island, the oil-rich Beaufort Sea and the Northwest Passage and working with the U.S. Navy, the U.S. Coast Guard and the Royal Danish Navy to enhance their ability to operate together in the Arctic.

This most recent example of joint collaboration between three nations with disputed claim to the Arctic region provides a solid foundation on which to build future cooperative efforts. In the case of the Northwest Passage, if the Strait was subject to joint Canadian/American enforcement capacity the two nations could constrain the movement of Russian submarines and military or commercial vehicles transiting the Strait. This would not only enhance North American security but also protect any claims Canada or the United States may have to the mineral resources underneath the subsoil of the Passage. Together, under a bilateral regime a united Canada/ U.S. coastguard would act as an effective deterrent to any Russian incursions into the Passage while guaranteeing an American right of transit for both military/commercial vehicles. American naval mobility would be thus maintained, while resolving security concerns over the Strait. As section 2.4 below will demonstrate, agreeing to disagree on the legal status of the Passage would allow both countries to save face on the domestic front while collaborating on concrete issues (Borgerson, 2008: 11).

The challenge posed by the management of the new sea lanes of communication would provide opportunities for Canada/U.S. collaboration and increase efficiency in dealing with search and rescue operations, crisis management and environmental concerns. The North American Aerospace Defence Command (NORAD) could serve as a model for joint U.S.-Canadian enforcement of the Passage. In fact, “maritime surveillance” was added to NORAD’s list of responsibilities in 2006 (Gilmore, 2008). Just as NORAD defends Canadian and U.S. airspace, a joint or allied naval arrangement could provide security in the Northwest Passage and other parts of the Arctic. Whichever path Russia chooses in the Arctic, Canada and the United States would be best served by working together.

As outlined in section 2.4, recent U.S. initiatives such as the U.S. Navy’s Arctic Road Map and former U.S. President Bush’s Directive for the Arctic demonstrate that American concerns over the Northwest Passage have taken on a new dimension in the 21<sup>st</sup> century. The terrorist attacks of 9/11 drastically changed the manner in which North Americans view security and drove home the existence of new threats, replacing the perceived danger posed by the former Soviet Union. The events of 9/11 significantly changed the international defence and security environment and highlighted the need for enhanced cooperation between nations to protect their citizens and their economies. This need is critical for Canada and the United States, whose 9000 kilometre common border separates two culturally like-minded nations, whose economies are intertwined more closely than any other two nations in the world, and whose history of mutual support as friendly neighbours and allies is long and distinguished.



While debate remains as to the nature of the new threats and the best means of countering them, the attacks made it clear that new, dangerous and unexpected security challenges do exist. They also drove home the fact that in order for North Americans to remain adequately protected, all its borders must be made secure. If southern borders are made more secure and the northern ones are not, it stands to reason that the latter exposes a vulnerability. Terrorists could be willing to exploit any shortcomings; for example, “it is unsettling to know that there is still no security screening of passengers boarding aircraft in many of the Canadian northern airports outside the territorial capitals” (Huebert, 2005: 16).

Consideration has to be given to the security of crucial installations and supply points that might now be vulnerable to attack by conventional or unconventional weapons. Current proposals for the production of Arctic oil and gas and their transportation by pipeline or tanker routes might have to be re-examined in light of the threat of terrorism. Even if the remoteness of the Northwest Passage seems to make it an unlikely target for terrorists, security concerns will certainly have to be factored in to any major undertaking in the Arctic or elsewhere that could be perceived by terrorists as an important component of the North American economy.

Given Canada’s limited surveillance capability in the Arctic, it is impossible to know if dangerous activities may be occurring in the North. Thus, if all other entry points to North America are patrolled, the Northwest Passage could become a possible entry point. This possibility will create security challenges for both Canada and the United States even if the risk from terrorist activity in the north is low. On a more positive note, compared with other localities, the Northwest Passage could be more easily secured than

almost anywhere else in North America if provided with effective enforcement capacity, strengthening the case for closer U.S.–Canadian cooperation in the protection of a newly vital waterway (Blunden, 2009: 127).

If all vessels are subject to search for pollution control verification purposes, would-be terrorists, smugglers, and criminals might consider an alternate route (Griffiths, 2003: 270). Considering that there are multiple, viable entry points to the Passage for large vessels, and given Canada's limited resources and manpower, U.S. assistance is a must. The United States would further benefit from the use of a bilateral agreement given its currently limited financial capacity due to the economic recession and growing financial debt due to its wars in both Iraq and Afghanistan. Joint defence of the Northwest Passage would also facilitate efforts to prevent the illegal entry of people and goods into North America.

Cooperating on the joint defence and management of the Northwest Passage would provide several benefits for both Canada and the United States but it would be devoid of any international legitimacy. Legally if the Northwest Passage was deemed to be an international strait, a coastal state would not have the right to stop vessels that it considered a security risk unless it could demonstrate that the vessel in question was breaking international rules and laws. The problem for the North is that, given the widely unpopulated regions that exist, if a vessel was attempting to smuggle any illicit product into Canada or the U.S., it would only have to appear to be following international rules. A joint Canada/U.S. coastguard would not have the legal right to conduct mandatory inspections or to deny passage if it did not have solid evidence against the vessel (Huebert, 2009a: 27). In the future, countries that may not be friendly to the United States

or Canada would also have the right of navigation without being required to ask the Canadian or U.S. governments for permission to transit. If the Passage were recognized legally by the international community to constitute internal waters, the full force of the coastal state's immigration, customs, and criminal laws apply and foreign vessels, crews, passengers and cargo can be closely scrutinized. Cargo manifests and crew and passenger lists could be required in advance, as can visas, in the same manner as on land (UNCLOS, 1982:76). In contrast, the right of transit passage has almost absolute precedence in an international strait.

While a joint Canada/U.S. defence force could not legally subject transiting vessels through the Strait to the restrictions on movement through domestic internal waters, militarily, if properly implemented, there would be little to stop them. This contrast between legitimacy and the use of force in international regimes is discussed in greater detail in subchapter 2.4. "Ultimately, both nations [must] assess at what point sovereignty is compromised in return for security, when diplomatic sensitivity must be subordinated to military necessity and which operation and command arrangements facilitate cooperation even at the expense of control" (Meisel,2009: 206). The next subchapter endeavours to address these issues by examining the U.S. legal position towards the Northwest Passage.

## 2.2 Freedom of the Seas

There are two legal precedents that lend support to the U.S. case that the Northwest Passage is an international strait. The first is based on geography, and the second is based on functional use. The Geographic Criterion asserts that an international strait, “joins two expanses of high seas or exclusive economic zones and is used for international navigation, and is open with relatively few restrictions to ships from any country” (Donat, 1988: 223). If it can be demonstrated that the Passage represents a waterway, then the geographical condition is met. A waterway “must join one area of high seas to another” (Honderich, 1987: 47). Because all seven channels of the Passage link Davis Strait (a high sea) to the Beaufort Strait (a high sea), the first condition is met even if two of the channels are considered too shallow for commercial cargo vessels (Honderich, 1987: 41).

The Functional Criterion is based on the ICJ *Corfu Channel Case* (United Kingdom versus Albania), in which relatively small members of international maritime traffic constituted sufficient usage for the Corfu Channel to be considered an international strait. While there has been relatively little traffic through the Northwest Passage, due to ice conditions, should the Passage become ice-free, it is quite possible the “use” condition with increased maritime traffic could be satisfied (Meisel, 1999: 156). For the second condition, legal scholars turned to the ICJ *Corfu Channel Case* (United Kingdom v Albania), in which a relatively small amount of international maritime traffic constituted sufficient usage for the Corfu Channel to be considered a strait (Honderich, 1987: 48). Nonetheless, Donat Pharand (1984: 102), Canada’s legal expert on the Law of the Sea, does not believe this condition has been met to date. Should the Passage become

ice-free, however, it is quite possible the “use” condition will be satisfied. Therefore, having already realized the waterway condition and with the strong likelihood of meeting the usage criteria in the future, the U.S. position must be taken seriously.

There is another legal argument that both the United States and Canada have sidestepped, which is the essentiality of commerce as a decisive criterion (Jia, 1998: 34-36). Although related to the “usage” criterion, maritime commerce has imputed decisive weight in attributing international status to a Passage or strait. Right now, this criterion has not been met for the Northwest Passage and neither country wishes to focus attention on it because it weakens both cases depending on the timeframes considered. It weakens Canada’s case because, in the future, an ice-free Passage will likely see an increase in maritime commerce. It weakens the U.S. case in today’s terms because commercial traffic (military submarines do not count) is still too low. Interestingly, Russia has invited foreign shippers to take advantage of the Northeast Passage and to use Russian services (icebreaking, navigational aid, etc.) charging various rates. By offering these services, the Russian claim that the Northeast Passage falls within national waters has been strengthened (Charron, 2005: 142). Canada should keep this in mind. In both cases (the Northwest and Northeast Passages), however, the U.S. still maintains they are international straits (Roach and Smith, 1996: 340). Fundamentally, Canada and the United States disagree on principles of law, but since the law is only a tool and not a means to itself, there is room for compromise and a way forward.

There have never been any official insistences where vessels transiting the Passage have specifically not sought and received the Canadian government’s permission to do so. The *Manhattan* transit in 1969 and the *Polar Sea* in 1985 were both permitted

by the Canadian government and even had Canadian officials aboard the ships (Huebert, 1995: 352). All other transits have occurred with the explicit agreement of the Canadian authorities, this is important on a legal front because Canadian consent implies permission is necessary and that such transits cannot proceed as a matter of right as they would if the Northwest Passage had the status of an international strait; thus, when the United States maintains that the Northwest Passage is a strait used for international navigation, it is referring to a point of principle and not an existing reality.

What motivates the Americans to oppose the Canadians on this issue? America's chief concern is to ensure that they are not perceived as weakening their support of the principle of free passage through international straits and thereby limiting their strategic naval mobility. Thus their position has always been more about precedent and less about the Northwest Passage. The driving force behind the Americans' concern in these other straits is both strategic and economic, the Americans are determined to ensure that countries such as Iran do not acquire the right to limit or to restrict their navy's travel through such waters (Borgerson, 2008: 14).

The second objective of the United States is to ensure that commercial traffic continues to have the right of unfettered global passage. American officials have expressed concerns that a country such as Iran may stop oil tankers from entering or exiting the Strait of Hormuz to load off the coast of Saudi Arabia and Kuwait (Borgerson, 2008: 12). Given the Northwest Passage's strategic location between the United States and Russia Washington is very concerned about the legal consequences for maritime, especially submarine, traffic if the Passage is deemed domestic waters. In an international strait, the coastal state retains title to the waters, but foreign vessels have a right of transit

passage through them. Under the Law of the Sea, submarines may pass through an international strait without surfacing or otherwise alerting the adjacent coastal state or states, something not permitted in internal territorial waters. In the case of the Northwest Passage being declared an international strait, U.S. Navy submarines could continue to ply the waters of the Passage undetected, and there is little militarily or diplomatically, that the Canadians can do, even if they are aware of the transits.

However, if the Northwest Passage is deemed to be internal waters maritime vessels would be required to obtain Canadian permission to traverse the Strait and submarines would be obligated to surface during transit. American access to the waterway is not really an issue, since Canada would never deny entry to one of its allies or a reputable shipping company. This concept was most clearly expressed in 1969, then-Prime Minister Pierre Trudeau, who declared that:

“To close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty . . . would be as senseless as placing barriers across the entrances of Halifax and Vancouver harbours”

(Trudeau, House of Commons Debates, Oct. 24<sup>th</sup> 1969: 367).

America then, is concerned about the security of the Passage rather than any physical obstruction of maritime transit by Canadian vehicles. As asserted in Chapter One, Washington has had little reason to believe that Ottawa will invest in the equipment and personnel needed to enforce the law in such an inhospitable region. From an American perspective, a unilaterally owned Canadian Northwest Passage combined with a lack of investment and weak enforcement capacity might be worse than a waterway open to all. In an international strait, Washington could at least exert a military presence,

by having naval ships and submarines conduct frequent transits even though they would be legally restricted from interdicting other vessels in the Strait.

American policymakers are concerned that, if the United States recognizes Canadian sovereignty over the Passage, it would create an inconvenient precedent, encouraging coastal states bordering other important international straits around the world (e.g. Torres Strait, the Straits of Malacca) to flex their muscles and adopt arbitrary rules which could severely harm American strategic mobility in the world's oceans (Charron, 2005: 836) and (Borgerson, 2008: 14-16).

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. From this perspective, the Northwest Passage can be distinguished from other international straits because of the historic presence of thick, multi-year ice and the scarcity of non-consensual voyages in the Passage. Washington's concern that recognizing Canadian sovereignty would serve as an unwanted precedent is unfounded as such concerns focus primarily on the Strait of Hormuz, the Malacca Straits and various straits in the Philippines. "All of these situations can be distinguished from the Northwest Passage because of the lack of special ice conditions in those straits and the fact that they have long been considered international waterways because of customary usage" (Charron, 2005: 373). The sheer volume of maritime traffic in these other waterways guarantees their subjection to the right of transit passage, regardless of what transpires in Canada's North.

As for some of the world's other important straits, like the Strait of Malacca or the Torres Strait, "their statuses as international straits have been officially recognized in



bilateral and multilateral treaties” (Charron, 2005: 374). What is more, the status of most of the other waterways that the United States has sought to maintain as international straits have now been resolved—largely because of the United Nations Convention on the Law of the Sea (UNCLOS). A situation which should further reduce any concerns the US government might have about Canada’s claim over the Northwest Passage constituting a problematic precedent for its strategic mobility.

Article 234 of UNCLOS allows coastal states to enact laws against maritime pollution out to 200 nautical miles when almost year-round ice creates exceptional navigational hazards. It is unclear whether this provision applies in international straits, for UNCLOS negotiators did not expressly deal with the issue. Arguably, this uncertainty, when combined with the environmental imperative behind the rule, creates a presumption that ice-covered waterways such as the Northwest Passage are *not* international straits, since an international strait in ice-covered waters that was not subject to strict environmental regulation by the coastal state would undermine the purpose of both Article 234 and any parallel customary rule. Since UNCLOS was negotiated over a period of eight years, “it seems unlikely that the failure to deal expressly with the application of Article 234 to international straits was an oversight” (Byers & Lalonde, 2006: 56). Don McRae goes so far as to argue that the failure of the UNCLOS negotiators to deal expressly with the application of Article 234 to international straits suggests that they did not consider the Northwest Passage to fall within this category:

“There was no express provision for excluding the Northwest Passage from UNCLOS and thus neither the United States nor Canada was required to take a position on the matter. However, the intention of the compromise is readily apparent. The ice-

covered areas provision is not included in the sections of part XII of the Convention that are subject to the international straits regime. Since the ice-covered areas provision clearly applies to the Northwest Passage, and since the ice-covered areas provision is not subject to the international straits regime, *ergo* the international straits regime is not applicable to the Northwest Passage” (McRae, 1994: 7).

Readers will quickly note that as persuasive as the above arguments may be, they rest on two serious flaws, one that the United States has not yet ratified UNCLOS and as such cannot be held legally accountable to its various precepts and two, the presumption that the Northwest Passage will always be ice-covered. Though the United States Senate has yet to ratify the UNCLOS agreement; there is reason to believe that it will be passed in the near future so that acknowledging Canadian sovereignty over the Northwest Passage would not create an inconvenient precedent for American strategic mobility.

The United States is likely to ratify UNCLOS in the near future as American adherence to and participation in the Convention would protect U.S. interests during considerations of the *Commission on the Limits of the Continental Shelf* and enable the United States to be part of the legal arbitration over the arctic continental shelf in 2015. With the deadline for the submission of geological data rapidly approaching and with the United States and Canada already cooperating in joint mapping efforts of the seabed it would certainly be in America’s best interests to ratify the agreement soon in order to ensure its claim to mineral rich arctic waters.

The treaty also ensures the U.S. Navy and commercial ships’ right to travel freely through foreign countries’ territorial waters. The U.S. military has recently been a strong advocate of UNCLOS ratification, asserting that a legal framework on maritime mobility

would go a long way to enhancing its intelligence and military operations at sea (Rice: 2009: 6). Currently the United States relies on customary law that can change as a state's practises change often placing severe limitations on US naval action. Washington has tried to work around these disputes but without being a signatory to a firm legal framework, neutral and effective arbitration has been difficult to obtain. Admiral Thad Allen, Commandant of the US Coast Guard; Commander James Kraska, oceans policy adviser to the Joint Chiefs of Staff; and Mead Treadwell, Chair of the U.S. Arctic Research Commission are three notable military officials that have been long time advocates of both US ratification of UNCLOS and the establishment of greater Canada-U.S. military collaboration in the Northwest Passage (Griffiths: 2009: 16). Ratification is also supported by uncommon bedfellows; energy interests and leading environmental organisations have both advocated for the treaty on the grounds that it will impose higher environmental standards and a clearer legal maritime framework on the United States (Ridenour, 2006: 4).

Recent documentation issued by the former Bush Administration and continued by President Obama also lends weight to the idea that ratification of UNCLOS will occur in the immediate future. In January of 2009, during the final days of his administration, President George W. Bush issued combined National Security and Homeland Security Directives on United States policy in the Arctic region (Washington Post, Jan. 15<sup>th</sup> 2009: A2). The new directive results from the first comprehensive reassessment of U.S. Arctic policy in many years and seems likely to provide a framework for action by the Obama administration. The ten-page directive, addressed to ten cabinet departments and the Environmental Protection Agency, aims to update U.S. policy to reflect climate change in

the Arctic and other developments. It calls for a more vigorous U.S. military and navigational presence in the Arctic and reaffirms the long-standing U.S. view that the Northwest Passage is an international strait subject to the regime of transit passage. Yet the directive opposes negotiation of a comprehensive multilateral treaty on the Arctic comparable to the Antarctic Treaty but strongly reaffirms executive branch support for UNCLOS as, *inter alia*, the "most effective way to achieve international recognition and legal certainty for our extended continental shelf" (Rice, 2009: 6).

The document affirms the U.S. preference to address many questions relating to the Arctic with other circumpolar states through the mechanism of the Arctic Council, although it opposes transforming the Council into an international organization. Freedom of the seas was mentioned as a top national priority and the Northwest Passage was defined as a strait used for international navigation. The American Senate is also strongly encouraged by the U.S. Departments of States and Defense to quickly ratify UNCLOS in order to "serve the national security interests of the United States and secure U.S. sovereign rights over extensive marine areas." The Homeland Security Directive also noted that as the Northwest Passage becomes increasingly ice-free, "the United States and other governments should consider, as appropriate, new international arrangements or enhancements to existing arrangements" (Rice, 2009: 7-8).

Support for UNCLOS ratification within the United States reaches to the highest levels of government with President Obama's recent statement on the treaty. He said that the

"Oceans are a global resource and a global responsibility for which the U.S. can and should take a more active role. I will work actively to ensure that the U.S. ratifies the

Law of the Sea Convention – an agreement by more than 150 countries that will protect our economic and security interests while providing an important international collaboration to protect the oceans and its resources”

(Quoted in Fleming, 2008: 6).

The U.S. Navy’s recent publication of its “Arctic Road Map” also supports American acceptance of UNCLOS and advocates developing strong cooperative partnerships with interagency and international Arctic stakeholders in order to actively contribute to safety, security, and stability in the region (U.S. Navy, 2009: 12). One of the U.S. Navy’s main goals in a warming Arctic is international diplomacy yet amid rising military competition; the document also reflects preparation for potential discord. The plan includes an assessment of Arctic stakeholders and their motivations, to “determine the most dangerous and the most likely threats” and “provide opportunities for cooperative solutions” (U.S. Navy, 2009: 13-14). That data will be used in strategic analysis, by applying game theory “to consider the interdependencies between actors and actions.” The United States also wants to strengthen key international military and business partnerships, to improve “operations, training and common investments” (U.S. Navy, 2009: 15). The Arctic Road Map demonstrates not only that interest groups within the United States are advocating for UNCLOS ratification but also that they are open to the potential for future cooperative efforts with other Arctic States (U.S. Navy, 2009: 17). The U.S. Navy recognizes in this report the importance of proper military enforcement in the Arctic and the value of burden sharing with neighbouring states and possibly enhancing North American security through joint defence and monitoring of the Northwest Passage.

As noted above, the Canadian government has argued that the Northwest Passage can be distinguished from other international straits because of the historic presence of thick, multi-year ice and the scarcity of non-consensual voyages in the Passage (Charron, 2005: 373). The fact that Canada's legal arguments for sovereignty over the Northwest Passage rest on the permanent presence of sea ice in the Strait present a real problem for its applicability in a world that is increasingly subject to the forces of global warming.

When the ice melts, Canada's legal argument will crumble as an ice-free Northwest Passage could not be argued to constitute unique domestic waters under article 234 of UNCLOS. For this reason an informal regime approach, in which both Canada and the United States agree to disagree on the legal status of the Passage will allow both countries to ensure North American security interests without losing face on the domestic front and in the case of the U.S. setting an inconvenient legal precedent for straits and channels elsewhere.

The creation of a bilateral regime to enhance North American security has reached a new level of urgency due to the escalating militarization of the Arctic and the threats posed by Russian incursions in the area. The most pressing risk is that the heightened strategic importance of the region will set off a vicious spiral of suspicion, nationalist rhetoric and re-militarisation. The next subchapter looks at how a long history of cooperation between our two countries lays a solid foundation on which to build an informal bilateral regime for the Northwest Passage.

#### **2.4. History of Cooperation**

There is a long history of mutually beneficial cooperation between Canada and the United States over disputed waterways that provide a precedent for the creation of a joint Northwest Passage agreement. Canada and the United States have cooperated on shipping through other waters under national jurisdiction, including the St. Lawrence Seaway, the Great Lakes, the Dixon Entrance (the waterway between BC and Alaska) and the Juan de Fuca region between Vancouver Island and Washington State. Once the site of furious battles for sovereign control, the Great Lakes, demilitarized in 1817, are perhaps the most fitting example of an effective bilateral agreement over disputed waterways. This agreement was further enhanced by signing the 1909 *Boundary Waters Treaty* which guaranteed that any navigable waters in the Great Lakes would be “free and open” to both signatories (Lalonde, 2004: 8).

Canada and the United States are also close partners in the shared defence of North America, whether at the level of border security, the North Atlantic Treaty Organization (NATO) or the North American Defence Command (NORAD), with the scope of the latter organization having recently been expanded to encompass maritime surveillance, including over the Northwest Passage. At present, U.S. and Canadian defence cooperation exists in such institutions and organizations as NORAD, the Permanent Joint Board on Defence (PJBD), and the Canada-U.S. Military Cooperation Committee (MCC) (Meisel, 2009: 223). The two countries frequently conduct joint maritime exercises such as the Canadian Coast Guard resupplying the United States’ Thule Air Base in Greenland, “in exchange for [USCGC] icebreaking services in the Western Arctic,” sharing information on icebergs (as the Canadians patrol north of 50° N

and the Americans south of 50° N), and other icebreaking support as needed or requested (Huebert, 2008: 6).

Historically Canada and the United States have faced similar challenges to those posed by the development of an informal bilateral regime over the Northwest Passage. Fears of ceding Canadian sovereignty to the United States if the two countries were to cooperate and American concerns over an unequal commitment to North American defence were two sources of trepidation for Canadian and U.S. governments during the Cold War. Despite concerns about its sovereignty, Canada has tended to embrace joint continental defence efforts with the United States. At the forefront of these efforts is the Canadian military, which has been remarkably successful in convincing their political masters of the necessity of bi-national cooperation in the defence of North America. Reflecting on the importance assigned to the North American Aerospace Defence Command (NORAD), John W. Holmes noted the following:

NORAD, which seems a step in the continentalization of North American defence, can be regarded from another angle as a means of preserving a Canadian role and an appropriate degree of sovereignty in a situation in which, if there were no rules, the Americans would simply take over the defence of the continent.

(Holmes: 1982: 291).

Typically characterized as a “defence against help” strategy,( Barry & Bratt, 2008: 21) the reality described by Holmes characterizes the Canadian approach to continental defence for the better part of the 20th century. To be precise, since before the Second World War, Canada has continually chosen to forego a vulnerable pure sovereignty in favour of a truncated, but better secured, sovereignty by cooperating with



the United States. In truth, of all the trends in the Canada–US defence relationship, this sovereignty dilemma is an ever-present, but surmountable, concern. The challenge for Canada during the Cold War was that while it accepted that the USSR was a threat to Western security, it was concerned over the increase in American activity in its own backyard. Yet as with unilateral defence of the Northwest Passage, Canada could not provide the necessary resources to defend the continent from external threats.

Currently Canada’s defence and security posture in the North is minimal. Despite the fact that, “sovereignty talk lends itself to a rhetoric of alarm and exaggeration aiming to ‘energize’ others” (Griffiths, 2003: 276), Canada has historically not made securing a presence in the Northwest Passage a priority, though recently this has begun to change with the Harper government’s new “Northern Strategy.” Canada’s limited commitment to Northern defence has been bolstered by (1) its ability to rely on the U.S. to provide military might should it be required; and (2) concerns over the cost of establishing a significant presence in the Arctic. As a result and unless Canada dramatically ramps up its financial contributions to defending the Strait, the United States will continue to be a major contributor to Canada’s (and North America’s) Arctic security. As Canadian diplomat John Holmes has argued, Canadian “soil is protected not by American generosity but by American self-interest, which is more dependable” (1982: 295).

The financial and manpower commitment provided by Canada to the defence of the Northwest Passage, will likely be substantially less than the amount allocated by the United States. However unequal defence expenditures between the two countries have an enduring historical precedent. During the Cold War, although Canada was a member of NATO, it consistently allowed its military spending and capacities to degrade despite

objections from its European members and especially the United States. American officials berated Canadian governments during this period for their declining contributions to the alliance well simultaneously making up the difference when Canada fell short on its commitments. Vocal U.S. criticism actually made the situation worse as incumbent Canadian governments could capitalize on the domestic political benefits of alliance membership on the cheap and gain politically by being seen to resist U.S. pressure (Sands, 2008: 107). While Canada has made substantial contributions to NATO outside of North America, most recently in Afghanistan, it has had a limited historical commitment to defending its own continent. Most notably because being protected under the U.S. military umbrella, large Canadian expenditures for national defence have reasonably been deemed an unnecessary expenditure.

The construction of the Distant Early Warning (DEW) line, a group of radar sites that spanned the western tip of Alaska across all of northern Canada to Greenland, during the Cold War was also primarily financed by the United States. America paid for and built most of the DEW line but did not pass over control of the components located in Canada's national territory to the Canadian government until 1979 (Bow & Lennox, 2008: 119). While Canada's commitment was unequal in financial scope relative to the United States it still played an essential and important role in establishing and maintaining the Line, Canadian icebreakers deliver annual supplies of equipment and personnel to the DEW line from 1957 to 1979.

It seems probable that this unequal commitment to North American defence is likely to continue in the future and apply equally to the Northwest Passage as it did to the establishment of the DEW line. This is not to say that the creation of an informal regime

will not require a substantially increased financial and manpower commitment by Canada but it is likely be substantially less than the amount provided by their American counterparts.

The U.S. has agreed to consult with Canada in the development of standards and operational procedures to facilitate commercial navigation in the Arctic” (United States Department of State 1992: 73); and to cooperate with Canada’s environmental regulations governing both the Northwest Passage, effectively deferring to Canada’s Arctic Waters Pollution Prevention Act (AWPPA). At a time when both nations face an economic recession, tight budgets, and worldwide commitments to fight international terrorism, there is much to be said for cooperation, shared assets, costs, and responsibilities, and collaboration between Canada and the United States in the name of continental security. Given the long history of cooperation and the strong basis of interoperability between the Canadian and United States Navies security collaboration over the Northwest Passage is a very feasible and necessary solution to the current dispute. The Canadian Navy and Coast Guard have excellent operational relations with their US counterparts, which should aid future efforts at cooperation in the Strait. Facilitating this interaction is an increase in Canadian capability, which is slowly underway with the construction of Arctic Offshore Patrol Vessels and at least one new icebreaker.

This chapter has demonstrated that the creation of an informal regime for the Northwest Passage is in the best interests of both Canada and the United States. For the Americans cooperation with Canada decreases the financial and manpower costs associated with defending the Passage unilaterally. For Canada cooperation would

provide an effective enforcement capacity for managing and responding to unauthorised transit of the Strait. There exists between the two countries a long history of mutually beneficial bilateral cooperation (i.e. NORAD, St. Lawrence Seaway, etc.) which sets a precedent for a bilateral transit agreement. The end of the Cold War and the rise of global terrorism provide a real opportunity for the Canadian government to push for a regime based bilateral solution by emphasising to the American's that joint military and civilian cooperation would enhance North American security, which has become increasingly important due to the progressive militarization of the Arctic and the threats posed by Russian incursions into the area.

The success or failure of Canada's performance in the Arctic is inseparable from the conduct of its relationship with the United States. The consequences of climate change in the Passage clearly require serious attention and increased cooperation between North America's two Arctic countries. An informal regime, in which Canada and the United States agree to disagree on the legal status of the Passage well cooperating on more concrete issues, would provide a realistic and effective means to address the dispute between our two countries. Given the limited enforcement capacity and historical lack of action on Arctic maritime security by the Canadian government and the security problems caused by an international straight such an agreement would not only be mutually beneficial but also essential if North American Security is to be maintained in the Northwest Passage. With the ice disappearing quickly, agreeing to disagree is a viable policy for both Canada and the United States. The benefits and challenges of adopting an informal regime over the Northwest Passage, as opposed to a formal regime or multilateral approach are further addressed in the following chapter.

## **Chapter Three:**

### **“Avenues of Dispute Resolution”**

Possible resolutions to the long standing legal dispute between Canada and the United States over the Northwest Passage can be divided into four broad categories, complete Canadian sovereignty, an informal regime, a formal agreement and a multilateral approach.

#### **3.1 The Unilateral Approach**

Rob Huebert advocates taking a unilateral approach to ensuring Canadian sovereignty over the Passage. Ottawa and Washington, he argues, could sidestep their legal dispute, disagreeing on the law but co-operating on the practicalities of North American defence and economic development. This argument rests on two premises: 1) that the United States will not retaliate if the Canadian government takes unilateral action in the Passage and 2) that Canada will, in the near future, substantially increase its enforcement capacity in the Strait (Huebert, 2009b: 45-62).

Huebert cites the limited American reaction to the Canadian government's promises to build a resupply port in Nanisivik and its recent decision to make NORDREG mandatory (Huebert, 2009b: 46). The author also lists reasons for why the United States is unlikely to retaliate against greater Canadian military action in the Northwest Passage, he notes that the administrations of President Obama and George W. Bush. have not questioned, condemned, or supported any of the above Canadian initiatives nor mounted a campaign to undermine Canadian efforts. Rather the United

States is remarkably silent on the entire issue, which suggests to Huebert, that Canada has the latitude to be much more assertive in the Passage, than it has been to date.

Huebert's defence of a Canada only or unilateral based approach to the sovereignty dispute is backed by Franklyn Griffiths, who suggests that the United States' willingness to acquiesce to a *de facto* increase in Canadian control—a consequence of greater concern for Homeland Security and continental defence offsetting the historical need for naval mobility in distant regions—might be undermined by an attempt to open formal bilateral negotiations, since this would be to “pick a fight with the U.S. Navy” (Griffiths, 2004: 5). He posits that in an informal agreement, third parties are unlikely to challenge Canada over the enforcement of Canadian environmental and other laws regarding the transit of foreign commercial vessels in the Archipelago. As the third party that took Canada to the World Court would offer a challenge not only to Canada, but also the United States. This intrusive adjudication would threaten to breach the North American security perimeter (Griffiths, 2004: 4-6).

This is an optimistic view for a number of reasons. First, the U.S. government often changes positions on national security issues, as demonstrated in Chapter Two's analysis U.S. support for ratification of UNCLOS, (despite concerns that ratification may set an unwanted precedent for straits and channels elsewhere on the globe). Second, Huebert has underestimated the degree to which the international community will respond to unilateral Canadian assertions of sovereignty in the Passage. For example he cites that there have been very few objections to Canada making NORDREG mandatory (Huebert, 2009b: 46). However the Baltic and Maritime Council, whose members control

two-thirds of global shipping tonnage, have recently claimed that Canada's new laws for regulating shipping through the Passage violate international law (Weber, 2010: A11).

As of July 1<sup>st</sup> Canada requires all ships wishing to enter the Northwest Passage to register with the Canadian Coast Guard and obtain approval from Canada before transiting the Strait. Canada also announced it would double the extension of the AWPPA to water up to 370 kilometres from the coast (Weber, 2010: A11). The Baltic and International Maritime Council have argued that "this could be seen as interfering with the right to innocent passage" (Weber, 2010: A11). UNCLOS regulations stipulate that any reporting system, such as NORDREG, be cleared through the International Maritime Organization, something Canada has not done, before it is implemented. The Law of the Sea also says that vessel traffic can only be monitored and controlled within territorial waters, which extend only 22 kilometres from the coast. The Council represents shipping interest from all over the world including Japan, China, America and the European Union, all of whom regard the Passage as an international Strait and whose respective business groups will lobby against any future Canadian actions to assert its sovereign claim.

The only country that may support Canada's sovereignty over the Passage and the mandatory implementation of NORDREG is Russia because it asserts sovereignty over the North Eastern Passage. However unlike with the Canadian case, Russia's claim has been generally accepted by the international community which has been compliant with Russian statutory regulations and guidelines which include both fees and supervision through the route. Russia has an interest in establishing complete legal control through

the Arctic waters which is identical to Canada's interest in establishing sovereignty over the Northwest Passage in the Arctic (Macneill, 2007: 363).

On the domestic front, making NORDREG registration mandatory has proved a very popular move for the current Harper government but it is unlikely to be effective because Canada still lacks the ability to actually prevent unauthorized transits in the Strait. This leads us to the third flaw in Huebert's arguments which neglects the fact that while the Canadian government may have the latitude to be more assertive in the Passage, it lacks the will to do so, which severally undermines its claims to sovereignty over the Strait. There is no reason given Canada's past actions that if its sovereignty over the Passage were recognized by the international community that it would dramatically increase its funding or capacity to control transit through the Strait. With a limited supply of maritime vessels and flybys over the Arctic, Canada lacks the surveillance capacity to know if a ship is entering the Passage without its consent (Huebert, 2009b: 36).

Given Canada's long history of failed commitments to defend the Passage, it is not surprising that the United States has never bothered to respond to Canadian actions. These rhetorical performances have trained the U.S. government to view 'belligerent' Canadian promises as nationalistic window dressing aimed at a domestic audience. While the Harper government has continued to talk an aggressive line on Arctic issues, the current economic recession makes a substantial financial and military commitment decidedly unlikely in the near future. The Conservative government's failure to build six to eight Arctic Coastal Patrol Vehicles and nine large icebreakers, as promised during the 2005/06 election campaign (Bow and Lennox, 2009: 126) bears a striking resemblance to the Mulroney government's promises to build a *Polar-8-class* icebreaker and purchase 10



to 12 nuclear-powered submarines in the wake of the *Polar Sea* crisis. Ultimately the Mulroney government, like the current Harper government, chose to implement only those promises that did not involve spending money (Kirkey, 1995: 12). Asserting Canadian sovereignty on the cheap appears to be a hard tradition to break.

Huebert, an expert in Arctic sovereignty, has spent the majority of his academic career advocating for greater awareness of Arctic issues and greater funding for Canada's Northern defence capacity. Despite this, his pleas have gone unanswered and given the current economic recession and a long history of broken federal promises to increase funding, his pleas are likely to continue to fall on deaf ears in the future, reinforcing for Canada the importance of a cost sharing arrangement with the United States. Huebert is correct to assert that the United States is unlikely to retaliate against unilateral efforts to defend Canadian sovereignty over the Passage, not because they are uninterested in its status, but because Canada is unable to defend it alone.

A unilateral claim by Canada is further undermined by its current and historically limited level of financial and military commitment to defending the Passage from external infringement. Given these flaws Canada is not capable of unilaterally defending its sovereign claim to the Northwest Passage.

### **3.2 A Multilateral Approach**

David Johnston (2002) and Oran Young (1989) argue for a multilateral solution to the dispute, via the Arctic Council, an intergovernmental forum, established in 1996, which discusses issues and concerns related to the environment, sustainable development, as well as social and economic problems. The Council currently promotes cooperation among Arctic governments on a number of key issues, such as trans-boundary pollution, over-fishing and oil and gas development. Although member states - which include Canada, Denmark (representing Greenland and the Faroe Islands), Finland, Iceland, Norway, Sweden, Russia, and the United States - make the final decisions, the Council provides a forum for interstate communication and collaboration. It also serves as a medium in which indigenous people living in the North have a say in the decision-making process, something which they might not be able to exercise as effectively in more formal treaty negotiations (Young, 1989: 72-81).

Johnston asserts that Canada, as a founding member of the Arctic Council and a historical leader in establishing multilateral forums on Arctic issues, should work in conjunction with the Council and the International Maritime Organization (IMO) to establish common standards for shipping in the Northwest Passage (Johnston, 2002: 10). Young concurs, contending that the powers of the Council could be expanded to include issues of strategic and economic importance to member states. On the surface this proposal appears reasonable as multilateralism has long been a cornerstone of Canada's foreign policy, stretching back to its post-war involvement in the formation of the UN, NATO, and a multiracial Commonwealth. A multilateral approach has also frequently

been a way of countering or balancing the power of Canada's continental neighbour, the United States (Keating, 2002: 11) .

However, as an interstate mechanism for effective cooperation, the Council's potential seems modest under present circumstances. It has a modest bifurcated purpose: promoting environmental protection and sustainable development in the circumpolar North (Huebert, 1995: 345). This limited dual mandate ensures that the Council will function as a debating chamber and cannot serve as an effective forum for creating and implementing commonly accepted regional policies. Since its establishment, the Arctic Council has been limited by a small budget, and most meetings have been attended by relatively low-level representatives of the eight participating governments (Johnston, 2005:10). Moreover, the Arctic Council operates on the basis of unanimous consensus, and thus makes only announcements in its name which are acceptable to each state, assuring that no state will be outvoted or embarrassed (Johnston, 2005: 12). These restrictions make the Arctic Council an inappropriate forum for tackling contentious interstate, legal arguments as it has neither the mandate nor jurisdiction to do so.

The greatest flaw with this type of multilateral approach, as applied to the Northwest Passage dispute, is that it has no concrete support from member states on the Arctic Council or in the broader international community. As noted in Chapter Two (2.2), the United States recently vetoed a proposed expansion to the Arctic Council's mandate to include issues of hard politics such as security and transit management in the Passage and the Arctic more broadly. Since it originally joined the Council the United States has consistently blocked efforts by Canada and other circumpolar states to create new forms of Arctic governance and it only agreed to join the Arctic Council when the proposed

powers of that body were substantially reduced (Huebert, 2009b: 8). The Nordic states, Russia and Canada, have also rejected proposals for an overarching multilateral treaty for both the Arctic and Northwest Passage and, so far, the Arctic Council itself has shown no appetite or ability to create such treaties. The limited incentive for change and small mandate make the Arctic Council an inappropriate and an ineffective forum for resolving the Northwest Passage dispute.

### **3.3 Informal Bilateral Regimes vs. Formal Treaties**

Protectionist sentiments apply to both Canada and the United States when it comes to the Passage, yet unlike the issue oriented and pragmatic view of the United States, focused on continued continental security, Canada's position is tied to issues of national pride and identity. Therefore, suggestions and actions that endanger the Canadian government's authority over the disputed territory spark defensive domestic responses. As stated by the Rt. Honourable Joe Clark in his statement on sovereignty to the House of Commons in September 1985:

“The Northwest Passage is not only a part of Canada, it is part of Canadian greatness. The policy of the Canadian government is to preserve Canadian greatness undiminished. Canada's sovereignty in the Passage and 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. The policy of the Government is to maintain the natural unity of the Canadian Arctic archipelago and to preserve Canada's sovereignty over land, sea and ice undiminished and undivided”.

(Statement on Sovereignty, 1985: 270-271)

Despite frequent reiterations of this message, Canada's interest to the Arctic waxed and waned, attention was brusquely turned to the Arctic during the Cold War and

when foreign vessels traversed the Passage—especially if permission was not sought. Yet between events, Canada adopted a laissez-faire attitude in the hope that, by not addressing the issue, its exclusive claim to the Passage would remain unchallenged, to some extent this has proven prescient. So, what is the way forward given the legal impasse and the emotional attachment Canadians have to their North?

Andrea Charron (2005) suggests putting “sovereignty to one side” literally, one side steps the issue of total legal control (i.e., the U.S. and Canada should continue to agree to disagree) in order to concentrate on more practical issues, thus sidestepping the more emotional debates which often obfuscate issues such as protection of the environment, security, research and protection of resources, and shipping issues. There is a historic precedent for this type of foreign policy approach most recently in the 1998 Canada/U.S. Arctic Cooperation Agreement. In the Agreement, the United States pledged “that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada” (McRae, 1995: 5-9). Article four of the agreement spells out that “[n]othing in this Agreement . . . nor any practice thereunder affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas “(Quoted in McDorman, 2009:151). Paragraph three of the 1988 Agreement states:

In recognition of the close and friendly relations between their two countries, the uniqueness of ice-covered maritime areas, the opportunity to increase their knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts: — The Government of the United States and the Government of Canada undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose; — The Government of Canada and the Government of the United States agree to take advantage of their icebreaker

navigation to develop and share research information, in accordance with generally accepted principles of international law, in order to advance their understanding of the marine environment of the area; —The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.

(*Canada U.S. Agreement on Arctic Cooperation*, 1988: Ph. 3).

In the case of an informal regime for the Northwest Passage, ‘agreeing to disagree’ would allow both countries to sidestep the messy legal dispute and emotional attachment Canadians have to their North, while still defending North American security. Charron asserts that emotional Canadian rhetoric will diminish when future and current Canadian governments are faced with Canada’s limited military capacity in the Arctic, encouraging government leaders in all parties to peruse a more practical and cooperative solution to the dispute over the Strait (Charron, 2005: 139).

Charron contends that Canada’s sovereign claims to the Passage do not need to be formally accepted by the U.S. before any substantive progress can be made on an effective Arctic security regime. After all, the primary utility of informal regimes is their ability to serve as *de facto* solutions to intractable political-sovereignty problems, such as those posed by the Canada/U.S. dispute over the Strait. Unlike treaties, informal regimes can be made quickly while encompassing more subjects than a conventional treaty drawn around a small number of issues at hand. An informal regime also avoids the cumbersome process of Senate ratification that is required for the United States to implement more formal treaties. Conversely, informal agreements are difficult to enforce and maintain as there are no compulsory mechanisms to ensure compliance among the adherents to the agreement except the mutual benefits derived from continued cooperation and perhaps a fear of retaliation for cheating.

In an informal regime military force alone is deemed to be sufficient to ensure Canada/U.S. control over the Passage, but at what cost? Agreeing to disagree on the legal status of the Northwest Passage would allow both Canada and the United States to bypass the legal disagreements and focus on joint defence but such an informal agreement would have no ability to legitimately or lawfully enforce restrictions on ships in the Strait. This lack of legitimacy might be a serious detriment to both countries on the international stage and the domestic front. While the United States might be willing to agree to disagree on the status of the Passage, other countries, like China and Russia, may be unlikely to do the same, especially without a legal framework and some type of international consensus on the issue that compels them to do so.

However this is where security interests top legal concerns as the primary consideration of states operating in the international system. The international community may object to joint Canada/U.S. defence of the Passage but, as long as it is properly enforced, they will be unable to transit the Strait without proper authorization. As discussed in Chapter Two, if the Passage was subject to Canadian control with a joint American enforcement capacity, a Canada/ U.S. coastguard would act as an effective deterrent to any Russian or other non-allied incursions into the Passage while guarantying an American right of transit for both military and commercial vehicles, thereby maintaining American naval mobility while resolving security concerns over the Strait. An informal regime agreement between Canada and the United States will be able to deal with the challenges that climate change, energy development, and increased shipping will bring to the Northwest Passage and the Arctic more broadly. Once a joint Canadian/U.S. defence regime is in place in the Passage states will slowly begin to comply with the

regimes regulations developing a pattern of state behaviour around which actors interests will converge and international legitimacy over time may eventually emerge.

Air Defence Identification Zones (ADIZs) are an example of informal security regime that, like the proposed bilateral Northwest Passage defence regime, has little legal legitimacy but effectively influence state behaviour in the international system. An ADIZ is an “area of airspace, defend by a specific nation and extending upwards from the surface, usually along a national boundary, within which the ready identification, location and control of all aircraft is required by the respective state, in the interests of national security” (Boleslaw, 2005: 18).

ADIZ’s which were established during the Cold War in 1950 by the United States and Canada in 1951, are of dubious validity in international law. It is fundamental and firmly established in international law that national airspace including airspace above national waters and territorial seas are subject to the exclusive control of the subjacent state. However airspace that is above and beyond nations’ territorial waters and above territory not subject to a particular state’s sovereignty (ie. Antarctica) is free for use by all states.

In North America, the United States and Canada are surrounded by an ADIZ, which is jointly administered by the civilian air traffic control authorities and the militaries of both nations, under the auspices of NORAD. The joint US/Canadian ADIZ, which is almost exclusively over water, serves as a national defence boundary for aerial incursions. Any aircraft that wishes to fly in or through the boundary must file either a Defence Visual Flight Rules (DVFR) flight plan or an Instrument Flight Rules (IFR) flight plan before crossing the ADIZ. The aircraft must have an operational radar



transponder and maintain two-way radio contact while approaching and crossing the North American ADIZ. Any aircraft flying in these zones without authorization may be identified as a threat and treated as an enemy aircraft, potentially leading to interception by fighter aircraft (Boleslaw, 2005: 18-22). Numerous other nations including Australia, Japan, and Iceland have established self-declared ADIZs extending hundreds of miles over maritime areas beyond their territorial waters, without an explicit basis in international law (Boleslaw, 2005: 22).

In peacetime, Canadian submarines operate under the current NATO Water-space Management regime, in which submarines from allied countries are routed to their operating areas using a submarine notice (SUBNOTE) which provides a 'moving haven' (MH) of defined dimensions (including depth) in which the submarine must remain. The actual patrol or operating area is defined by a Notice of Intention (NOI), or a Submarine Patrol Area (SPA) providing the geographic coordinates, depth and time period in which the submarine will be operating. The concept was adopted by NATO in the early days of the Cold War and is used during peacetime by national, NATO and regional submarine operating authorities (SUBOPAUTHs) to ensure the safety of submarine operations in the world's oceans (Webster, 2007: 14).

The ability for a submarine-operating state to temporarily declare a Notice of Intention (NOI) for submarine operations on the high seas provides that state with de facto control in that area unless other states are willing to risk the safety of their submarines by not notifying the state that established the NOI of their operations. Like the Air Defence Identification Zones (ADIZs), NOIs, are based on an informal security regime that has little legal legitimacy but effectively influence state behaviour in the

international system. NOI's border on violating the principle of innocent passage as outlined in UNCLOSS because it attempts whether indirectly or directly to restrict freedom of movement beneath and sometimes above the high seas (UNCLOS, article 87).

The use of the current NATO and allied water space management regimes will not only allow Canada to operate submarines safely in the Canadian Arctic, but will assist Canada in gaining an understanding of other submarine movements and other underwater activity in these waters. Although the Water-space Management system is not meant to prevent other states' submarines from operating in the Canadian Arctic under the control of Canada (with the exception of internal waters and territorial seas), it will ensure that when a Canadian submarine NOI is established, other allied states which want to take their submarines through the NOI need to communicate their submarines' movements with the Canadian SUBOPAETH to ensure the safety of both states' submarines (Webster, 2007: 14-16). From a strategic perspective the judicious establishment of submarine NOIs in chokepoints and other areas limited by depth and geography in the Northwest Passage would make it difficult for other states' submarines to covertly go under or around operating area of Canadian submarines without being detected.

The next chapter looks at what International Relations (IR) theory can contribute to our analysis of four possible solutions – a unilateral, multilateral, informal regime and a formal bilateral agreement—to the Northwest Passage dispute. The four approaches are analysed from three theoretical perspectives within regime theory, to determine the explanatory capacity of each model as applied to the various solutions.

## **Chapter Four:**

### **“Theoretical Perspectives”**

In order to better understand the four solutions outlined above, from a theoretical perspective, the findings and insights of authoritative analysts need to be examined. On a macro level, foreign policy is understood to be, the general objectives that guide the activities and relationships of one state in its interactions with other states (Bow & Lennox, 2008:56).

This chapter will first, analyse the theoretical contributions that have been made to the understanding of how foreign policy is developed by a specific state. Secondly, it will briefly review realist, neo-liberal and post-positivist approaches to regime theory literature, analyzing each for their strengths and weaknesses and their explanatory capacity as applied to the case study of the Northwest Passage dispute. In summarizing the main schools of thought on IR it is impossible to provide a universally accepted set of definitions of the various schools, nor is it possible or desirable, for the purpose of this study, to incorporate a review of all of these divisions. Therefore in the context of this analysis, only the main approaches of regime theory will be assessed for their contributions to justify the development of one or more of four possible approaches to the sovereignty dispute.

## 4.1 Realism and Regime Theory

Stephen Krasner defines an international regime as:

“Sets of implicit or explicit principles, norms, rules and decision making procedures around which actors’ expectations converge in a given area of international relations.”  
(Quoted in: Haas, 1989:402).

Krasner’s definition is intentionally broad and covers human interactions ranging from formal organizations such as the Organization of Petroleum Exporting Countries (OPEC) and the World Trade Organization (WTO), to informal and non-state based groups like the Red Cross or Amnesty International. Regime theory suggests that regime formation may be the unplanned result of the cumulative actions of many individuals. In turn, this means that it is not only necessary to examine the intent of the individual actors but to also examine the net effect of their actions on the making of foreign policy. International regimes are institutional arrangements governing practises of interest to members of the international community. These practises encompass activities taking place outside the jurisdictional boundaries of sovereign states or cutting across the jurisdictional boundaries of states, efforts to form mutually beneficial regimes sometimes provide an effective method of resolving otherwise intractable disputes. Within IR there are three main approaches to regime theory, the liberal interest-based approach, the realist critique, and the post-positivist critique (Young, 1987: 132).

Realist scholars such as Joseph Grieco contend that the creation, maintenance and decline of international regimes are a reflection of the strategic balance of power among states (Grieco, 1998: 492). Realism centers on three principal premises: the major unit of

analysis is the state, the controlling factor is power and the international system exists as a state of anarchy. The international system needs a coercive force to control itself and state action is based on the politics of survival. Anarchy is derived from the formal autonomy of sovereign states and defines the essence of interstate behaviour (Grieco, 1998: 494). In interactions between states there is no international legislature that makes laws to regulate relations between them and no supreme executive stands ready to inhibit the actions of a single state when those actions oppose the common will. This absence of a central governing body is the central reason why realists describe the international system as anarchical.

This presupposition led Kenneth Waltz, to describe the nature of neorealist IR as a "self-help" system, "with many sovereign states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire, so that conflict, sometimes leading to war, is bound to occur" (Waltz, 1959: 142). Neorealists, like Waltz, see the anarchic structure of the international system, as a historically enduring force that shapes the behaviour and construction of states, the existence of structural anarchy means that nation-states must be constantly aware of the motives and capabilities of their neighbours. Power is measured in relative terms. That is, states need not be the most powerful, merely more powerful than their potential enemies. Orderly international relations emerge from the uneasy standoff of a balance-of-power where equally powerful states avoid conflict out of uncertainty and fear of the outcome (Bull, 1966: 38).

This means that the opportunities for cooperation among states are limited and constrained by the dominating logic of security competition. Relative gains and concerns

about cheating greatly limit the incentives for interstate collaboration. This emphasis on self-help does not preclude states from forming alliances but they are only temporary and today's alliance partner must be regarded as tomorrow's potential foe (Waltz, 1959: 138). Realists also recognize that states sometime operate through institutions, but these organizations are not independent actors and reflect the calculations and self-interest of states. Institutions are essentially arenas for acting out state-relationships and mirror the distribution of power in the international system. The creation of NATO for neo-realist scholars was a manifestation of the bipolar distribution of power in Europe during the Cold War and it was that balance of power not NATO itself, which provided the key to maintaining stability on the continent.

Within regime theory, realists and liberals differ over the nature of international cooperation and whether or not international institutions can be deemed independent actors in IR. Neo-liberals believe cooperation comes about through a convergence of state interests and that international institutions help create that synthesis of interests, while realists assert that cooperation simply reflects the distribution of power in the international system. Powerful states create regimes to serve their security and economic interests but these regimes have no independent power or autonomy.

John Mearsheimer has argued that while it may be possible to create regimes for relatively unimportant or soft power issues, dominant states will ensure their vital interests are not affected by these regimes. He cites the veto powers of dominant states on the United Nations Security Council as an example of how powerful states oppose policies they feel undermine their international authority. He also asserts that in the early post- WW2 period, the World Bank, General Agreement on Tariffs and Trade (GATT)

and the International Monetary Fund (IMF) were just instruments of American power and not independent actors in the international system (Mearsheimer,1994/5: 33).

The recognition of the Northwest Passage is a vital national interest for the United States, China and the European Union. U.S. concerns over setting an international precedent on the Law of the Sea and subsequently limiting its strategic naval mobility makes maintaining its legal stance on the Passage an important issue of national security. For Canada joint military cooperation and financial contribution from the U.S. would allow it to properly defend its Northern regions well keeping face on the domestic front.

What main conclusion may be drawn about the realist contribution to understanding foreign policy creation? Realists argue that a state's major concern is the pursuit of power to achieve security in an anarchic international system. As applied to our case study on the Northwest Passage, a formal bilateral agreement and a unilateral approach could be justified by this theoretical framework. Seeking to maximise their relative gains and to enhance their own security a realist interpretation of future Canada/U.S. action towards the Passage would see both countries endeavour to assert their own claims independently. This approach would be encouraged by an anarchic international system that causes national leaders to fear cooperation and could have the potential to lead to future conflict. Given the structural imbalance economic and military power structure between Canada and the United States and a long history of mutually beneficial cooperation (see section 2.4) direct military confrontation is very unlikely to occur in the future. A realist perspective would be best able to explain a U.S. decision to pursue its own unilateral claim to the Northwest Passage regardless of Canadian or international objections.

A Unilateral approach would be the most desired action for states in the case of the Northwest Passage from a realist perspective. However given the mutual benefits of cooperation over the Passage and the security threats posed by uncontrolled access into the Strait (see section 2.2), a formal agreement could be feasibly constructed and justified -- as a secondary if less desirable approach--- from a realist perspective, given the relative gains of both countries. An informal regime based on norms and common values would not be considered a reasonable solution from a realist perspective, as they believe these factors to be irrelevant in terms of international statecraft. A multilateral approach would also be disregarded; at least in terms of using the Arctic Council, as this institution would not reflect accurately the distribution of power in the current international system, -- providing insufficient power to the United States – nor would it deal with issues of hard politics, such as economic or strategic concerns. From a realist perspective, fears of cheating also increase the larger the number of states involved in any international agreement.

In summary, a realist interpretation of the Northwest Passage dispute has a limited explanatory power for the four possible solutions outlined in Chapter Three, in addition its core precepts have also been the subject of growing disagreement among post-realist approaches. Post Realisms major assumption is the belief that although power is a major variable in explaining how the international system works, it alone cannot account for the operation of the international system. Post realists also contend that it is possible to establish order within the international system through means other than a balance of power. Two types of post-realist approaches will be briefly discussed liberal regime theory and post-positivist critiques of regime theory.



## 4.2 Liberal Regime Theory

While realism predicts that conflict should be the norm in IR, liberal regime theory contends that the international system is more flexible, functional and cooperative than realist scholars admit. Nation states are concerned first and foremost with relative gains rather than absolute gains and there are consequences for violating international agreements that make it difficult for states to break away from a regime despite the absence of any overarching authority in the international system. Liberal regime theorists assert that globalization has resulted in a decline in the importance of states and has fostered a greater impetus for cooperation -- when paired with issue linkages and fear of future retaliation against transgressions - through the use of issue linkages and economic interdependence (Young, 1978: 227). The populations of most advanced societies now desire economic growth rather than territorial expansion, as the globalization of the international economy has constrained the independence and sovereignty of states so that international regimes are now playing a growing role in managing global economic relations (Keohane & Nye. 1977: 268). Taken together these changes in the international system are creating a world in which peace and cooperation are more likely to occur than realists assert.

From a liberal regime perspective, the functioning of international regimes can be traced back to the actions of individual actors within a state, thus state action is not regarded as a “black box” instead, state policies are seen as a result of the preferences of particular units or individuals within a specific state. In contrast to neo-realism, liberal regime theory stresses that international cooperation is possible without hegemonic power structures when cooperation lies in the interest of all states involved. Furthermore,

it argues that international regimes affect the behaviour of states facilitating cooperation by enhancing communication, enforcement and transparency between actors in the international system. In his book, *After Hegemony*, (1984) Robert Keohane stresses the fact that lasting international cooperation is only possible when it is facilitated by international regimes. Regimes may also alter underlying power structures, by reinforcing the power of rich dominant states as dependency theory contends, or by dissipating the resources and sovereignty of the hegemon (Keohane, 1984: 265). Regimes can have other effects, outside of the neo-realist framework, such as altering bureaucratic practises and rules, altering ideas about legitimacy and values and by changing the balance of political power within domestic policies.

Liberal interest-based approaches to regime theory state that cooperation in anarchy is possible without a hegemon because there exists between states a convergence of expectations. Regimes are said to establish standards of behaviour for cooperating which along with issue linkages and fear of future retaliation for cheating encourages states to abide by the tenets of an international regime. Liberals believe that realists neglect the degree to which countries share interests and are concerned with the possibility of future retaliation by a state they cheated on in the past (Axelrod, 1984: 16). International regimes are said to increase the probability of cooperation among states by monitoring the behaviour of member states, reducing transaction costs and reporting on state compliance (Axelrod, 1984: 145).

In the case of the Northwest Passage, liberal regime theorists point to the power of geopolitical realignment in the post Soviet era which has largely contributed to the growth of international regimes in the Arctic region. Since the end of the era of U.S–

Soviet mutual deterrence, the Arctic has been transformed from a military arena in which diplomacy was almost totally paralyzed by strategic sensitivities between the two superpowers to a political region with more or less normal potentiality for cooperative arrangements. During the Soviet era scientific cooperation between American, Russian, and other Arctic scientists was possible but only in areas deemed to be of no strategic significance. Joint efforts typically took the form of data exchange rather than genuine collaboration. Now, however, the uniqueness of the Arctic environment has attracted a host of multilateral programs across a wide spectrum of scientific sectors. Of these, the best known is the Arctic Environmental Protection Strategy (AEPS) but many other international projects have been initiated, and it is now conceivable that the Arctic will soon become the scene of polar research of a quality and magnitude matching the distinguished scientific program in the Antarctic (Johnston, 2002: 6).

A formal regime or institutional approach would be able to explain a Canada/U.S. decision to develop a formal bilateral agreement governing transit in the Northwest Passage, without the assistance of a neutral institution such as the International Maritime Organization (IMO). Liberal regime theory would explain this as a convergence of norms of expected behaviour between two states, which mutually benefit from interstate collaboration. Though fears of cheating and reengaging on the agreement would most likely, be higher without the added benefits of working through a neutral institution to facilitate communication and ensure compliance with the agreement.

Canada's decision to pursue a multilateral approach to the dispute by developing the Arctic Council into an international body to monitor and enforce regulations on transit through the Passage could be justified theoretically as a tool to allow Canada to

apply pressure on the United States to abide by the regime's decisions, effectively constricting U.S. objections through the use of peer pressure, acceptable norms of behaviour and international law. Canada's decision to "agree to disagree" on the status of the Northwest Passage can be seen as the development of an informal regime based on mutual norms of expected state behaviour and trust rather than a solid legal framework.

Liberal regime theory can also explain the potential for unilateral action by either Canada or the United States, as the dominance of the security dilemma mentality and a failure of communication between states in the international arena. Such an explanation would be very effective given the tit-for-tat strategy that states employ in the absence of an effective international institution to facilitate interstate cooperation. While other schools may have numerous and longstanding critiques of the liberal regime approach, it has effectively provided an explanation of state behaviour for all four of our potential solutions.

### **4.3 Post-Positivist Approaches**

Post-Positivist theories present an attack on what once passed for established knowledge and the theoretical foundations of traditional or mainstream theories. The key difference between post-positivist and positivist (liberal, behavioralist and realist schools) is that while positivist theories such as neo-realism offer causal explanations, as to why and how power is exercised, post-positivist theories focus instead on constitutive questions, for instance what is meant by "power," how is it experienced and reproduced. This is not to deny that there are numerous and important differences between post-positivist scholars but they each challenge the hidden presuppositions, comments and

metaphors which in the era of scientific rationalism have shaped the dominant images of “reality” the “self” and the nature of modern society. Post-positivists assert the state-centric interpretations of the international system, which form the foundation of positivist approaches, are just *one representation* of the world that tends to be self-perpetuating.

Mainstream IR theorists are all essentially positivists, because all agree that -- while analysts look at the world in ways that are partly subjective -- some basic features of the world can be shown more or less 'objectively' to be a fact. Positivists broadly hold that it is possible to know the world through experience and observation, the truth can therefore be obtained through systematic empirical observation and a commitment to a unified view of the methodologies of the natural sciences to explain the social world. Positivist scholars broadly defined, include realists, behavioralist, rational choice scholars and liberal institutionalists, among others. Positivists assert that “facts” are value neutral, and that the researcher can be both impartial and can avoid any imputation of him/herself into his/her research that might affect the outcomes of that research. Positivism expects to find regularities in the social world such that theories and laws are in play, just as is the case in the natural world and places a heavy reliance on validation and falsification as the sign of true social inquiry (Smith et al., 1996: 16).

Post-positivist scholars such as feminists, post-structuralists, post-modernists and some critical theorists argue that mainstream IR theories are products of authority and power not science or objective reality. The main thesis of this group is that societal phenomena are socially constructed, and only exist in the minds of actors and observers. Objective universal truth is impossible to achieve as criteria for judging the truth are

relative to time, place and culture. As Robert Cox asserts “all theory is for someone and for some purpose.”(1981: 128.)

Feminist scholar L.H.M. Ling asserts that within positivist theories there is a circularity of thought and action, the longevity of realism, it is asserted, is due to its belief in and commitment to the world it envisions. “Since realists believe that the world is nasty, brutish, lonely, poor, and short they behave accordingly, thereby ensuring that the world is indeed so, which in turn affirms their belief that the world is nasty, brutish, lonely, poor and short”(Ling, 2005: 144). The important unifying theme of post-positivist scholars is the assertion that theory cannot be value neutral and that facts cannot be separated from value. Instead of a state based analysis, post-positivist focus on the interactions between the state and society and their subsequent role in shaping the international system.

Collectively, post-positivist approaches critique liberal and realist theories of IR on the grounds that they use flawed assumptions such as states are always rational actors, the interests of states remain static over time and that different interpretations of interests and power among states and actors is not possible. For post-positivists it is not only interests or power that matters in shaping the behaviour of states and international actors but their perceptions of the international system.

While the post-positivist approaches have raised many criticisms of realist and liberal theories of IR, their critiques are of limited value as they fail to provide a unified alternative approach to positivist analysis. Post-positivist scholars do suggest that a more historical, value conscious approach should be taken into consideration. However there is little agreement as to what should replace the positivist approach.

Given its limited focus on explaining state behaviour, the post-positivist approach is somewhat difficult to apply directly to both regime theory and our case study of the Northwest Passage dispute. From a post-positivist perspective the potential for Canada U.S. cooperation on the strategic importance of the Passage is limited, given what post-positivist scholars would interpret as the typical realist lens of American and Canadian policy makers. While cooperation might be possible on smaller issues such as environmental protection or search and rescue efforts, the United States is unlikely to place much faith in an informal regime or a multilateral agreement. Given the traditional realist slant of its chief policy makers, fears of reengaging on agreements remain too high to justify conceding sovereignty for a dubious security agreement reliant on the cooperative efforts of many states or the influence of norms in an informal regime.

In looking at epistemic communities as a source of foreign policy development, post-positivist approaches would focus on the importance of national identity in shaping interstate relations. For example, Canadians conceive of the Northwest Passage as an integral component of Canadian identity, as part and parcel of the Canadian soul, indeed as one of those special characteristics which distinguish them from their American neighbours. Thus when it comes to the Northwest Passage and the Arctic region more broadly, Canadians worry first and foremost about perceived violations of these physiologically potent jurisdictions and boundaries, responses tend to be nationalistic, sentimental and protective. On the other hand when the American public thinks of the Northwest Passage – if they do at all---they focus on its strategic importance and economic potential. In this sense the American public and policy makers think of the Passage in terms of its geostrategic importance in the language of *realpolitik*.

Therefore, when Canadians and Americans think about the Passage they actually reflect on many of the same things, however, very real distinctions reveal themselves when one examines *how* each nation views these identical facts. Both possess analogous interests in and concern about the Passage but owing to certain innate historical and cultural differences they rank them differently. What is perceived as a pivotal issue by one is assigned a somewhat lower degree of significance by the other and vice versa. When a particular matter has been low on the priority lists of both nations' cooperation has occurred. The difficulty has been when the issues on the top of each nation's priority list are diametrically opposed to each other, resulting in a lack of substantial cooperation on serious issues such as sovereignty and security. From this perspective, a post-positivist interpretation viewing the conflict as an outgrowth of two hostile national perceptions of the Strait would be best able to explain the development of a unilateral and often confrontational foreign policy for both Canada and the United States.

#### **4.4 Summary**

This chapter's primary concern has been the identification of the key variables in the making of Canada/U.S. foreign policy. Both realism and the various forms of post-realism accept the state as a key actor. While realists contend that states are the only important players on the global stage, post-realists accept only that the state is merely *premier inter pares* in the international system. Post-positivist scholars have recently challenged these assumptions but their focus on the role of society in the international system has not produced a viable alternative unit of analysis.



Of the various approaches reviewed here, liberal regime theory is the most promising for explaining how Canada and the United States would develop a solution to the Northwest Passage dispute. A formal regime or institutional approach is capable of explaining a Canada/U.S. decision to develop the Arctic Council into an international body to monitor and enforce regulations on transit through the Passage. A liberal regime approach can also effectively explain a formal bilateral agreement in which Canada/U.S. allocated some of their state sovereignty to a neutral international organization to manage the Passage on their behalf, such as the International Maritime Organization (IMO). The decision to develop an informal regime, based on the mutual consent to cooperate on concrete issues while “agreeing to disagree” on the legal status of the Passage, could be accounted for by a reliance on mutual but informal norms of common behaviour. Liberal regime theory can also clarify the potential for unilateral action by either Canada or the United States, as the dominance of the security dilemma mentality and a failure at communication among state leaders. A multilateral approach could be justified in that choosing to work with in a multistate institution would allow Canada to apply pressure on the United States to abide by the regimes decisions regarding the Northwest Passage. The next chapter looks at how an informal regime on the status of the Passage could be negotiated in practise between Canada and the United States.

## **Chapter Five:**

### **“Conclusion”**

#### **5.1 Negotiations**

The suggestions of the Bi-National Planning Group (BPG) could serve as a model for the development of an informal bilateral regime for controlling transit through the Northwest Passage. Developed in 2002, in response to 9/11, the BPG was designed to discuss means of improving the safety and security of citizens of both Canada and the United States (Baker, 2005: 92). Specifically the BPG was tasked with developing detailed bi-national maritime, land, and civil support contingency plans and decision-making arrangements in the event that threats, attacks, incidents, or emergency circumstances required bi-national military or civil/military responses to maintain the security of both nations.

The BPG found that, from a national perspective, both Canada and the United States have articulated the need for enhanced security cooperation in their national strategy documents, as well as in the Security and Prosperity Partnership signed by Canada, the United States and Mexico in 2005 (Baker, 2005: 93). However, it felt that an overarching vision for continental defence and security organizations was missing. Hence, the BPG encouraged the development of a ‘Comprehensive Defence and Security Agreement,’ with a continental approach to CANUS defence and security, while simultaneously maintaining an open invitation to participation by other countries. The BPG report advocated the development of a combined vision statement by the governments of Canada and the United States, to provide direction and authority for

enhanced coordination and cooperation among our foreign policy, defence and security organizations.

The BGP recommended the development of a nation-to-nation information sharing agreement, shifting defence and security partners from a ‘need-to-know’ to a ‘need-to-share’ paradigm. An informal regime regarding the Northwest Passage should include this recommendation with supporting plans, processes and procedures to further facilitate this information sharing. A bilateral regime could also provide guidance, direction, and authority to NORAD, Canada Command, US Northern Command, and select security organizations for the development of plans, the conduct of seamless bi-national information sharing, the development of communications architectures, the conduct of joint, combined, inter-agency training and exercises, and the development of coordination mechanisms – including agreements brokered among the military stakeholders and the homeland security and foreign policy communities. Improved communication and collaboration among Canadian and U.S. forces will help eliminate operational gaps, shortfalls, and duplications amongst NORAD, Canada Command and US Northern Command.

In establishing a bilateral agreement on the status of the Northwest Passage, Canada and the United States should collaborate in developing equivalent rules, standards, and cooperative enforcement mechanisms for notification and interdiction zones in the Strait. This recommendation would see both countries adopt a mandatory Arctic shipping registration scheme that would protect, among other things, the western approaches of the Passage, thus keeping suspect vessels at bay and alerting Canada about foreign ships headed its way (Lalonde & Byers, 2006: 1207). Canada’s recent

enforcement of NORDREG could serve as a reliable model for a bilateral registration scheme. Allowing both countries to establish shared maritime surveillance in their northern waters, while collaborating on the establishment of shipping lanes, traffic management schemes, and oil spill response plans for the waters of both Alaska and Canada. There is a historic precedent for this “as cooperative oil spill response plans already exists for the Great Lakes, Atlantic and Pacific Coasts, Dixon Entrance and Beaufort Sea”(Lalonde & Byers, 2006: 1207-1209).

Joint enforcement of the Northwest Passage will require significant strengthening of both countries’ policing, search-and-rescue and icebreaking capabilities along the Strait. As such both Canada and the United States would benefit from acquiring new icebreakers to replace their ageing coast guard vessels. Byers and Lalonde have suggested that this could be done through cost-sharing opportunities, following the models of a U.S.–Canada icebreaker agreement on the Great Lakes and a similar agreement on the resupply of Thule Air Base in Greenland” (Lalonde & Byers, 2006: 1207-1209)

Economic development and environmental stewardship should also be included as important components of any bilateral framework. To this end, Canada could take the lead in establishing an analogous public-private Arctic seaway management corporation with a mandate to provide for the safe and secure transit of vessels in North American Arctic waters while protecting the area's sensitive environment. Shipping tolls levied by this bilateral management regime could pay for desperately needed charts (much of the existing survey information about the Passage dates to nineteenth-century British exploration), as well as for search-and-rescue capabilities, traffic-management

operations, vessel tracking, and similar services that would guard life and property. Such a jointly managed Arctic seaway system could establish facilities for the disposal of solid and liquid waste, identify harbours of refuge for ships in danger, and enforce a more rigorous code for ship design in order to ensure that vessels traveling through the Northwest Passage have thicker hulls, more powerful engines, and special navigation equipment. The captains and crews of these vessels would also “be required to have additional training and, if the conditions warrant, to take aboard an agency-approved ice pilot to help them navigate safely” (Griffiths, 2007: 12).

Cooperation would benefit both countries by combating potential environmental crisis in the Passage. Oil spills in an ice-free Northwest Passage with transiting oil tankers could pose a serious environmental risk. The recent oil spill in the Gulf of Mexico has brought to light the importance of proper regulations for industry and coordinated cleanup efforts. Having all transiting ships abide by the guidelines set out in the AWPPA would enhance environmental protection of both the Passage and the broader Arctic region. A bilateral regime should focus on improving Canada/U.S. response efforts to dealing with oil spill cleanup in ice-covered waters, protection of Arctic ice and “snow against black soot through the joint imposition of commercial vessel smokestack emission controls; joint marine environmental monitoring and study of marine ecosystems which are especially susceptible to damage by climate change” (Griffiths, 2007: 12).

Coordinated search and rescue efforts between Canada and the United States ought to be a top priority in any bilateral regime. Joint management of the Northwest Passage would have the benefit of enhanced response time in the event of a cruise fire or

a submarine grounding or fire in the Arctic Archipelago. American submarines both today and during the Cold War frequently transit the Passage, to say nothing of Russian or Chinese transits. If one of these submarines should encounter difficulties, it will be very difficult for Canadian agencies to undertake a rescue effort on their own. As such both national governments should begin developing an effective and all encompassing Northwest Passage security strategy. This could include a coherent and coordinated policy, leading to the development and deployment of surveillance and enforcement capabilities, the continuation of joint military exercises with NORAD and North American Aerospace Defence Command (NORAD), forces, with a special focus on the Arctic region, would help contribute to greater interoperability and enhanced both countries' enforcement and monitoring capacity in the Passage.

In order to comprehensively address the wide range of issues that would need to be dealt with under this bilateral regime several government departments will have to work in a coordinated and mutually supportive manner. Collaboration between Foreign Affairs Canada, the Department of National Defence and the United States Departments of State and Defence would be an essential first step. The Permanent Joint Board on Defence (PJBD) and the Canada-United States Military Cooperation Committee (MCC) should also be included in any implementation of a bilateral defence initiative.

On the Canadian side this type of direction focused collaboration will require the personal involvement of the Prime Minister to raise discussions over the Northwest Passage from the bureaucratic to the highest political level. Addressing the challenge of climate change, the Prime Minister should invite President Obama to join in the creation of a bi-national Canada-US panel to chart a way for cooperative defence, monitoring and

environmental protection of the Strait. The development of a bilateral regime must be handled in a manner that elevates the issues to the highest political level and, in so doing, raises public interest. Active and visible leadership from the Prime Minister is essential, especially given the top down focus of the current Conservative government. The success or failure of our performance in the Northwest Passage is inseparable from the conduct of our relationship with the United States, which is the preserve of the Prime Minister. The Prime Minister should endeavour to strengthen public awareness of the need and opportunity to enhance Canada/U.S. cooperation as a means of stabilizing the agreement to disagree on the Northwest Passage and enhancing North American security.

The Prime Minister's Office (PMO) could be assigned responsibility for policy development, sequencing of initiatives and coordination of federal departments. The Department of Foreign Affairs and International Trade (DFAIT) should be given the authority, responsibility and competencies to assist the Prime Minister in negotiating such a regime in coordination with Canada's embassy and U.S. counterparts in Washington. The PM should also assign a senior official in the PMO (PMO-A) and requisite staff with prime responsibility for policy planning and the machinery-of-government dimensions of a bilateral regime. The development of any future informal regime would also benefit from consultation with relevant domestic groups and the development of a Standing Committee on the Northwest Passage in the House of Commons. A demonstrated Canadian commitment to policing the Northwest Passage—in the form of actual equipment, infrastructure and personnel—is a necessary part of any diplomatic effort to sidestep the legal dispute between Canada and the United States.

Many of the suggestions outlined above for the development of an informal bilateral regime for the Northwest Passage have already been discussed as possible foreign policy options for Canada and the United States in simulated negotiations among government officials. Michael Byers and Suzanne Lalonde conducted a model negotiation on the Northwest Passage in Ottawa, from February 18<sup>th</sup> to the 19<sup>th</sup> 2008. They were joined by former U.S. ambassador Paul Cellucci, notable American and Canadian experts in international law and Arctic politics and two teams of governmental experts from the Canadian Department of Foreign Affairs and International Trade and the U.S. State Department.

The objective of the negotiations was to discuss issues, identify possible solutions, and make joint recommendations—aimed at both governments—concerning navigation in Northern waters, including but not limited to the Northwest Passage. The session began by agreeing on the reasons for the urgent need for government-to-government talks. Both countries expressed concern that future northern shipping will bring heightened security risks, ranging from drug smuggling and illegal immigration to nuclear trafficking (Lalonde & Byers, 2006: 1207). It was agreed that the long history of U.S.–Canada cooperation in the Arctic indicates the potential for bilateral agreement. So too does the history of cooperation on shipping through other waters under national jurisdiction, including the St. Lawrence Seaway and the Great Lakes (Lalonde & Byers, 2006: 1208).

These model negotiations developed several policy recommendations for future Canada/U.S. collaboration over the Northwest Passage and the Arctic more broadly. The Canadian government's recent decision to make NORDREG mandatory was one of



several policy recommendations that have been implemented after the conclusion of this consultation (Lalonde & Byers, 2006: 1208-1209). Most importantly the negotiations conducted by Lalonde and Byers demonstrate the potential for future constructive engagement between Canadians and Americans on the Northwest Passage. Having established some of the concrete measures that should be taken to establish any future informal bilateral regime on the status of the Passage; the next section will look at some of the questions for future research that this study has developed.

## **5.2 Future Research**

The primary focus of this study has been the relationship between Canada and the United States, excluding other important international actors such as Russia, China and the European Union who all have substantial interests in the Northwest Passage. This exclusion was deliberately undertaken for a variety of reasons. First, the combined military power of a bilateral defence regime between Canada and the United States would be capable of forcing other states into compliance with its respective regulations. Second, given the long history of mutually beneficial cooperation between Canada and the United States and the fact that the legal dispute over the Northwest Passage is primarily between these two nations, excluding the considerations of other international actors from this study appeared a reasonable course of action. However there is ample room for future research endeavours analysing the interests and potential policy decisions of various European and central Asian states towards the Northwest Passage in the near future.

This study has concluded that a bilateral agreement with the United States in conjunction with NORAD could best protect North American security and bypass, the legal dispute over the Northwest Passage. Yet the issue of expanding the NORAD security agreement or improving security ties with the United States should be looked at in greater depth than time constraints allowed for this particular study. Similarly, understanding the impending dynamic between NATO and Russia in the Arctic region may provide additional insight to this problem from a Canadian perspective. If a bilateral agreement over the Passage is reached between Canada and the United States, should foreign merchant vessels be capable of independent navigation, as Canada has long required, or should a joint U.S./Canada force provide icebreaker services for them?

Should an independent Canada/U.S. firm monitor transit in the Passage and charge transit fees, and what might this do to the competitiveness of the Passage relative to the Panama Canal or an ice-free Eastern Passage? What might the Inuit say about transiting ships that generate no local revenue and yet produce black soot and adverse effects on marine mammals? What would the Inuit position be towards the development of a bilateral agreement on the Northwest Passage? Beyond matters such as these, what might Canada contribute to the construction of a region-wide regime for safe and efficient marine transportation in the broader Arctic region? These are just some of the sources of future research in Arctic Sovereignty issues, for which this study may serve as a starting point.

### 5.3 Discussion

This study has argued that the Northwest Passage dispute between Canada and the United States clearly requires serious attention and increased cooperation between North America's two Arctic countries. The effects of climate change and their associated consequences of increased access to natural resources and maritime routes mean that an ice-free Passage is becoming a reality. An analysis of Canada's military capabilities and historical lack of long-term financial commitment to enforcing the Strait, has established that Canada does not have the required capabilities to guarantee its sovereignty over the Passage unilaterally.

Protecting Canada's interests in the Passage—and the interests of other responsible states and reputable shipping companies—requires an informal regime with the United States. Both countries need to invest in infrastructure and enforcement capabilities to safeguard their collective sovereignty over the Passage and to simultaneously enhance North American security. A bilateral agreement should include enhancing Canada and America's current military capabilities, expanding NORAD's role in maritime security in the Arctic and developing parallel rules on maritime transit routes.

The current geostrategic environment in the Arctic has heightened the potential for military conflict in the region, making joint a Canada/U.S. force in the Passage essential in enhancing North American security. The interests of Canada and the United States coincided but are not identical. The U.S. is primarily concerned about setting an international precedent in international maritime law and protecting their security interests in the North. Canadian concerns centre around how to establish achieve

effective enforcement of the Passage without conceding Canada's sovereign claim and losing face on the domestic front. Dispute their different interests, Canada and the United States are best served by working together. A bilateral solution presents the best alternative to resolve the legal argument between the two countries.

Given the limited enforcement capacity and historical lack of action on arctic maritime security by the Canadian government and the security problems caused by an international strait such an agreement would not only be mutually beneficial but also essential if maritime security is to be maintained in the Northwest Passage. With the ice disappearing quickly, agreeing to disagree is a viable policy for both Canada and the United States. Both countries must be prepared to deal with the challenges and potential costs of establishing an informal enforcement and monitoring regime. It may well be a long difficult and expensive process but it is one that must be undertaken with the utmost determination and perseverance. To do so later, or to do so now in some half measure, will ensure that North American security in the Passage will remain merely a theory and never a reality.

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