

Northern imperatives

How may the continued US non-ratification of the UNCLOS be explained and to what extent may the Northwest Passage dispute be understood in conjunction?

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"It's every man's dream to find a short route to his heart's desire. If the major dreams long enough, he'll find it"

¹ - Robert Young in the character of Langdon Towne in the 1940 film *Northwest Passage*.

Image 1:



Image 2:



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Needless to say, but still; any and all discrepancies and shortcomings are solely my responsibility.

Abbreviations

CLCS	Commission on the Limits of the Continental Shelf
EEZ	Exclusive Economic Zone
EU	European Union
GOP	<i>Grand Old Party</i> (the Republican Party)
ICJ	International Court of Justice
IMO	International Maritime Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
NIEO	New International Economic Order
SFRC	Senate Foreign Relations Committee
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America

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1. Introduction

The Northwest Passage is a still partly ice-covered sea route² through the Canadian Arctic Archipelago linking the Atlantic and Pacific oceans together.

The Passage has been somewhat of an obsession for many an explorer and merchant marine throughout history. First described in the 15th century by European colonial powers, a hypothetical trade route to the north and west of the Americas has been a much sought after scenario. However, it wasn't until 1906 that the route was actually conquered by sea³ when Norwegian Roald Amundsen led his converted fishing vessel *Gjøa* through the Passage in just about three years. Since then the journey has been made by many others as well.

What make the Passage take on greater political importance *today* are the projections about *tomorrow*. That is, that the expected outcome of global warming will be a receding ice cap which in turn will open up the Passage for a whole host of activities. A navigable Northwest Passage would drastically decrease time estimates and fuel costs for ships that are now making the trek from ocean to ocean through the Panama or Suez canals⁴. It would also open up vast areas for petroleum and mineral exploration. In short, there are huge potential effects to be expected; particularly economic and trade related, but also environmental and security related ones. And the *big melt* has already begun.

No wonder then that the Passage has slowly but surely moved from mostly being a famed legend in exploration milieus to becoming a seemingly hotter and hotter potato in high politics. The main driving force behind this heat has undoubtedly been and continues to be a long-standing dispute between the United States of America (US) and Canada over the legal status of the Passage.

² Although it is common to use the singular form, there are in fact several navigational possibilities along the way. Based on the known voyages through the Passage there seems to be (at least) seven major routes, although not all are equally navigable (Pharand 2007:29)

³ Others, like sir John Franklin and sir Robert McClure, had traversed the route before, but with varying degree of luck. Franklin perished in the attempt and McClure relied on dog-sled for significant parts of the journey.

⁴ The distance between the major oceans would be reduced by about 2000 nautical miles, which equates to about one week of transit in shipping.

In the background lies the United Nations Convention on the Laws of the Sea (UNCLOS) – the comprehensive legal framework which currently has some 160 parties⁵. It deals with all aspects of ocean governance and usage, among other things providing for general rules and guidelines, defining individual states' rights and responsibilities and establishing a system for evaluating sovereignty claims and adjudicating in such matters. It was nine years in the making and represented a massive undertaking – by some deemed the second-most impressive international accord ever, only surpassed by the creation of the United Nations. Although being one of its prime instigators and having served as its main facilitator during the negotiations, the US has yet to ratify the treaty, as one of very, very few states. It has signed, but not ratified. It is not a matter of the US having to alter its policies profoundly when/if acceding to the UNCLOS. It has voluntarily complied with the tone and spirit of the convention since the early 1980s. **What has held the Americans from ratifying is the forceful opposition from a small group of Republican senators who are espousing a rather stable feature in parts of the US populous; profound skepticism toward pooling sovereignty with others for some common purpose and the perceived way in which such multilateral ventures diminish American autonomy, particularly when those ventures are sweeping and serve to challenge core principles. This opposition persists, even though ratification is favored by almost everybody else in the political sphere across the party fault line and even though the objections of President Reagan – a hero to many of these fringe senators – in the 1980s had the direct effect of leading to a package of US-friendly concessions in the negotiation product commonly called the '94 Agreement.**

I wish to explore these two topics in conjunction; US non-ratification of the UNCLOS and its dispute with Canada over the legal status of the Northwest Passage.

They are two separate issues, but they sometimes join and become parts of one and the same. This represents a challenge and a caveat. But it also represents a possibility for eliciting interesting contextual knowledge.

Specifically, I pose the following questions:

⁵ 159 countries and the European Union as of May 2010 (United Nations 2010a)

1: Given that the issue is not a partisan one and that the US secured important concessions in the '94 Agreement, why has it nevertheless not yet ratified the UNCLOS?

2: What role can the Northwest Passage dispute be said to have played?

3: Going forward, what are the prospects of change?

I intend to confirm that vis-à-vis the pro's and con's of an accession to the UNCLOS, not only would a fair and reasonable look at the evidence seem to favor US interests at present – it would also seem to provide the Americans with a set of rules and procedures to peacefully claim its current and future interests in the increasingly contagious High North. And, unlike some of the fiercest UNCLOS critics, I do not see an accession to the UNCLOS as reeking havoc to the American superpower status. The US may thus continue to *reward its allies, to punish its enemies and to lecture all* even post ratification, should it so please. Fine. But what then of the seemingly strong counter force? I will show that although the nature of the opposing forces may be framed in all kinds of ways – environmental, procedural or unilateralist being but three examples – the essence and foundation of those forces are best identified by delving into the formative effects of the American sense of self and its ideological underpinnings.

The Northwest Passage dispute is a part of the puzzle that is the High North and thus it plays at the very least a general role. More specifically, I intend to thoroughly detail how it is that although Canada is forceful in asserting its *nordicité*, the US has a very good hand and, crucially, one which would likely become even better if it was to accede to the UNCLOS and gain access to the mandatory settlement mechanisms which would end the decades-long dispute.

At face value it might seem that the relevance of this thesis is potentially short-lived. The US Senate *could* indeed ratify the UNCLOS before the November elections⁶ and thus render certain parts passé. However, I would not bet my life savings on that happening. And regardless; some of the features that are illuminated are of *general*

⁶ In which approx. a third of the Senate seats are in play.

interest for the student of US politics. The road forward will to a large extent depend on how the Obama administration prioritizes and organizes its treaty portfolio. There will always be issues crowding the plate, whether it would be financial crisis, health reform or oil spills. But it is in essence down to choice – choosing to spend the [considerable] political capital necessary to quell the detractors and see through an accession.

1.1 The climatology

I will steer almost totally clear of discussing the climatology of the Passage, except for occasional usage in anecdotal form. This means that I am presupposing an ice-free Passage at some point in the future and not letting the inherently uncertain timeframe interfere significantly with the analysis⁷. Those interested in the ice condition imagery and updated climate models of the area can visit the National Snow and Ice Data Center⁸ or see the Arctic Climate Impact Assessment⁹.

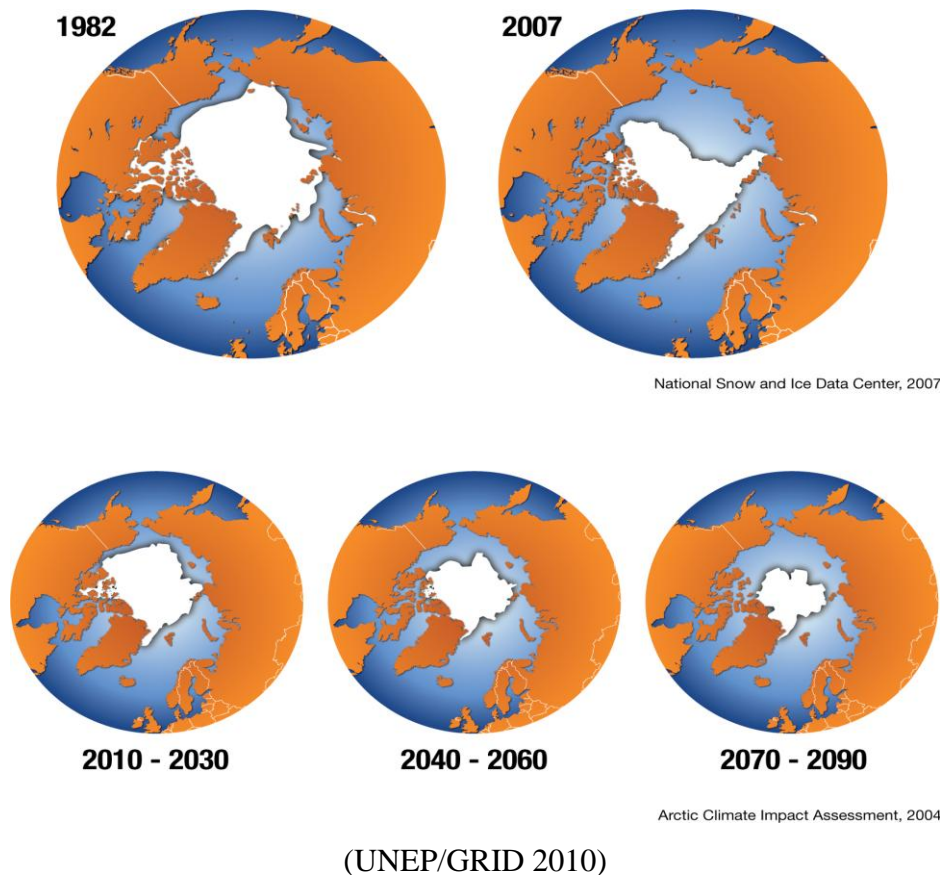
The process of how the Arctic ice vanishes so quickly is simple enough; heat-reflecting ice melts and turns into heat-absorbing water which in turn accelerates the entire process. What one gets is in other words a constantly multiplied trend towards less and less ice, *ceteris paribus*, and an ice cap melting from below instead of from above. A negative spiral or feedback loop, if you will. *Polar amplification* is the technical term. It is the reason why the Arctic is warming faster than any other region on Earth.

⁷ Short-term predictions vary greatly, but longer term predictions are unison in depicting an ice-free Passage by the middle or end of this century. At the recent Copenhagen climate change summit, computer modeling suggested the Arctic Ocean may be *nearly* ice-free by the summer of 2014.

⁸ <http://nsidc.org/arcticseaicenews/>

⁹ <http://www.amap.no/acia/>

Figure 1: Ice-melt projections (minimum extent)



1.2 The methodology

There has been a slight piece of paranoia that has followed the process from the very get-go right up until completion. “What if the US Senate ratifies the UNCLOS next week?” “Luckily” that has not happened.

That paranoia does however illustrate a more important methodological challenge; the difficulty of aiming and shooting at a moving target. Because that is essentially what the subject matter amounts to – a moving target. I have been forced to think up possible alternate plans, but there is no denying the fact that a ratification in, say, February would have hurt the thesis and the process at large seeing as though I began as early as in September of last year.

This thesis rests primarily on the use of secondary sources. There exists a multitude of literature covering the legal specificities of the UNCLOS and quite a lot

on the dispute settlement mechanisms it contains. Much of this has however been rather useless for my purposes, which I quickly discovered. The little that has been written on the US/UNCLOS-relationship is often pitted in ideological terms and/or is of the rather outdated sort. That means that much of the basis is a smorgasbord of scholarly articles, conference papers, official reports and journalistic exposés.

I had initially planned to complement the secondary data sources with explorative open-ended interviews with key individuals in the field. However, I scrapped this plan once I realized that the main challenge did not lie in collecting the data as much as it did in the structuring and de-ideologization of it – and this I felt had to begin and end with me, myself and I. It has thus been more of a cognitive (sic) process than I had expected. Instead, I ended up consulting key experts on select parts of the thesis in the draft review process. That means that Professor Erik Røsæg, dr. Alexander Proelss and Svein Melby, to name three examples, have commented on sections 4.2, 4.2 and 4.7, respectively, and spurred small changes.

My own line of reasoning takes on counterfactual tendencies at times. Or to be fair, *counterfactual* is a slightly misleading term, seeing as though what I am referring to is often not a causal event that *has* occurred, but rather an expected though inevitably uncertain *future* causal event. *Qualified hypothetical speculation* is perhaps more fitting. Nevertheless, these thought experiments might not go down too well with everybody, and certainly make for poorer reliability in that it makes it more difficult a study to replicate. Although it cannot alleviate the latter concern, I have made sure to pay attention to the internal semantic logic and stringency of the arguments. Correct use of citation also plays a part in that context, but attention to citations and references is generally a given in the social sciences.

Although I have a multitude of sources, I do not rely on many different *types* of sources. I have not conducted formal interviews, I have not been in the field and stepped onto the polar ice myself, and I have not dabbled with quantitative measures. One could therefore question whether or not data triangulation has occurred. Strengthening the validity and reliability of the thesis is something which is always desirable, but in as far as the measure of it is how well one measures the same phenomenon from different angles I would say that I nonetheless conform to the criterion set by Yin (2003:99) and others.

In what is essentially a case-study design¹⁰, my aim is to dive into the deep end and thoroughly examine the subject matter in order to unearth the causal patterns and context which will enable me to answer the “why” and “what”’s in the introduction. While choosing a case study approach serves me well in doing just that, it hurts the external validity. After all, a case study approach *goes deep* and cannot *go wide* at the same time. This means that the lessons drawn about, say, US reluctance to tying itself to international accords will most likely not be, and perhaps *cannot be*, extrapolated to other cases and said to be representative in general. This type of problem is something which “*forever haunts case study research*” (Gerring 2007:43). It has not, I must admit, haunted *me* though. My goal has not so much been to pave the way for extrapolation as it has been to attempt to answer the ponderings represented in the research questions. The gut-feeling and vantage point was always the prospect of there being something *special* about the American relationship to the laws of the sea. To then expect great out-of-case relevance would thus be an odd notion.

1.3 The general plan of the thesis

The introductory first chapter has sought to set the tone and familiarize the reader ever so slightly with the topics that will be explored and, of course, introduce the specific research questions. Chapter two lays out the theoretical construct that will inform the rest of the thesis. The three main tracks that are launched are loosely based on the perceived relevance of the three I’s; interests, ideas and identities - whilst the theory of complex interdependence is employed more as a schematic background which will inform the *world view* chosen.

Chapter three is a historical background chapter which seeks to paint a comprehensive picture of the regulation of the oceans, first in general and then with particular emphasis on how the Americans has related to it. It has purposely been presented in a chronological order so as to lead up to the issues dealt with in this thesis.

Chapter four is the main analytical bulk and where subjective interpretation and reasoning to a larger extent will be injected. It deals with the make-up of the

¹⁰ John Gerring’s (2007:37) minimal definition claims a case study approach to be “*an intensive study of a single unit or a small number of units (the cases)*”.

UNCLOS; the Northwest Passage dispute in more detail; the legal arguments employed by the two parties in the dispute; the US-Canadian relations; the arguments of the American UNCLOS opponents, how they are to be interpreted and the weight they carry; the importance of the Reagan era in that context; the hold-up in the Senate, and finally, some tentative thoughts on what Obama might do during his tenure. The fifth and sixth chapters seek to take a step back, pull the threads together and offer some concluding remarks.

I will be reverting back and forth between focus on the Northwest Passage dispute and the UNCLOS. This influences the rhythm a bit. However, it is done for a reason and I hope the reader will have no major problems in keeping track of the argument.

2. Theoretical basis

It is impossible to view global politics, and much less to analyze it, without employing some preconceived assumptions. It is the inherent process by which one makes sense of a complex world. Often this is an implicit process. When laying out the theoretical construct for this thesis, my aim is to make it explicit, or rather, as explicit as I can.

To reiterate; the aim of the thesis is to detail how come the US has yet to ratify the UNCLOS despite considerable push factors, account for the role of the Northwest Passage dispute, and offer some tentative thoughts on the road which lies ahead.

To do so I have chosen a two-pronged approach.

First, I introduce three main explanatory tracks that evolve around the three I's; interests, ideas and identities. Each of these bears with them a potential to help frame and structure the arguments. One is positivist in nature, whereas the other two are more of the constructivist sort.

Second, I identify one particular theory, that of complex interdependence, which I would pose has a place in shedding light on the themes explored in this thesis. First among the reasons for this is the mere fact that ocean policy was singled out by the theory's authors as one of the issue areas which seemed to be functioning in a way

most similar to the conditions of complex interdependence. Applying the theory thus ought to make sense. If the explanatory tools it provides seem inadequate when applied to my subject matter, then something is awry. If the fit is good however, they will bring structure and context to the thesis.

2.1 Material interests

*“Greater access to the Arctic Ocean potentially threatens United States’ national interests in the region. Access to the United States’ natural resources, specifically oil and natural gas, and to its territory and critical infrastructure must be protected” – Lt.col. T.R.McCarthy jr., US Marine Corps
(McCarthy jr. 2009)*

The first main track is that household concept within realist circles; *material interests*. It certainly plays a part in other theoretical milieus as well¹¹, but it is mainly from realist thinkers one gets its most typical interpretations (Mingst 2008:chapter 3). Material (national) interests are at the basic levels understood as the protection of territory and sovereignty. In practice, though, it is construed in much wider ways. In realist traditions it is equal to, or defined in terms of, the pursuit of power. The means by which this is done can vary greatly, but the acquisition of wealth, economic growth and military might are certainly among the most important determinants of power. That is not to say that power is hard power alone. Softer forms of power obviously have roles to play. There exists a complex relationship between the two of which I won't go into detail here, apart from saying that the creator of the term *soft power* has himself on numerous occasions detailed how allusive and fuzzy the list of material (national) interests becomes when hard and soft power are combined¹². Depending on one's theoretical inclinations, barrels of oil, number of troops or superiority of technology can be matters of US national interest just as well as human rights concerns, adherence to democracy or generous aid schemes can.

¹¹ A liberal thinker would most likely list a whole lot of material (national) interests, a radical would probably tie it to the interests of the ruling class and a strict constructivist would perhaps view the notion of a national interests as equivalent to whatever typified the people.

¹² See Joseph S. Nye jr. in, say, <http://www.theatlantic.com/issues/91jul/nye.htm> or in *Soft Power: The Means to Success in World Politics* from 2004.

The dividing line seems to be the propensity to which one is willing to inject morality into the mix. Realists are generally unwilling to do so. They tend to want to view national interests as equivalent to strategic interests, thus disregarding things like human rights concerns, adherence to democracy and aid schemes as noble but (in the power game) inconsequential interests. Insofar as states are utility-maximizing rational actors, then, the core expectancy is that state preferences will be determined by evaluating which material interests are considered to be at stake in the issue at hand. This is how foreign policy *sometimes* can appear quite separate from ideology.

2.2 Ideology

.. ideas have meaning for social actors. What people mean by their actions depends on what ideas inform their thinking. These include what they think valuable or worth striving for – “ideology”, in brief (Hollis & Smith 1991:70)

Ideology is obviously an important main track in and of itself, and one that should be included. An ideology is generally described as a set of ideals, principles, symbols, doctrines and myths that prescribes how society should be built up and work. Michael H. Hunt (2009:xi) has in the highly regarded “Ideology and U.S. Foreign Policy” offered another rather wide definition and calls it *an interrelated set of convictions or assumptions that reduces the complexities of a particular slice of reality to easily comprehensible terms and suggests appropriate ways of dealing with that reality*. These ideologies manifest themselves in the parties and the placement within the party structure. The party system in the US is well-known, comprising of two large dominating parties, each of which contain lots of different ideological streams but still exudes and embraces *mainly* one particular set of ideals each.

Like Hunt, I would most certainly expect ideology to play a role in US foreign policy, but unlike him I would not want to specify¹³ it any more than necessary. Instead, I want to keep it at the partisan level and focus on the role the ideational forces has on

¹³ Hunt essentially launches a new ideology which he claims has been underlying all the twists and turns of 20th century US foreign policy. It, according to him, comprises of three core elements; a zeal to promote liberty abroad, a hierarchical racial (and cultural) view of the world, and America`s ironic, hostile and distrusting view of revolutions and upheavals abroad.

state behavior. One core, and very basic, expectancy is that there will be significant changes as one administration replaces another.

2.3 Identity

“Foreign policy is the face a nation wears to the world. The minimal motive is the same for all states – the protection of national integrity and interest. But the manner in which a state practices foreign policy is greatly affected by national peculiarities. The United States is not exempt from these unimpeachable generalities” (Schlesinger 1983:1)

The third main track is, like the second, influenced by constructivist theories. I have called it *identity*¹⁴, but could just as well have dubbed it *character*. It refers to the collective sense of self, which is generally shared by the people of a nation¹⁵. It gets its constructivist tilt in the sense that following this track would mean accepting that key structures in international relations are not material, but instead inter-subjective¹⁶ and socially contingent (Mingst 2008:94-95). I am, in other words, referring to an *American identity* - something which is somehow innate to inhabitants of the US, irrespective of partisan color, physical color, age or any other variable.

Have social circumstances and historical processes paved the way for US-specific cultural norms and values which might go a significant way in explaining policy positions? It takes little knowledge of the US to be able to offer an affirmative nod to that question. After all, the nation was founded by people eager to create for themselves new identities and said people were careful to construct its Constitution as not to hinder the development of an American identity in time¹⁷.

I am thus posing that it exists and that it might matter. If it indeed does, identity is the element of the three which would speak for stability in a position over time¹⁸ - merely because it is an element unaffected by the party adherence variable. It should be

¹⁴ See the writings of Alexander Wendt.

¹⁵ One can obviously break it down into even smaller parts, but as one moves from the national level downwards it becomes steadily harder to generalize.

¹⁶ See the writings of Friedrich Kratochwil.

¹⁷ The development of an American identity was not only something which was made room for – it was a strongly *sought after* part of the constitutive process of the then fragile young republic.

¹⁸ More my interpretation than anything else. Constructivism, as such, is weak in its predictive (and prescriptive) qualities.

noted, though, that it is not necessarily something etched in stone. There could be, and most often will be, other factors contributing to such stability.

2.4 Complex interdependence

International relations theorists Robert O. Keohane and Joseph S. Nye jr. are not only famed academics in the field of political science. They have also pioneered the specific conceptual framework which will form the second and additional theoretical basis of this thesis.

The idea of complex interdependence¹⁹ was brought forth in the influential *Power and Interdependence* (1977) and generally refers to the reciprocal structure of international politics.

Keohane and Nye contend to have witnessed an increased propensity of complex transnational relations²⁰, dubbed *interdependencies*²¹, and consequently conclude that the world is changing. Or rather; that the traditional and modernist perspectives provided in classical international theory are insufficient and ill-equipped in explaining the rise of such relations and the politics they produce - and thus the world must be changing. Their goal is to offer a new and more adaptive perspective which allows for diversity to play a larger role – a *pluralist* or rationalist alternative, if you will. Although Keohane and Nye`s vantage point quite obviously are the realist assumptions so heeded in the bipolar postwar period, one ought not pit the notion of complex interdependence *against* realism or see it as a contender. Some certainly do²², but I would rather see it as a valuable supplement or contrasting viewpoint which has its place in filling in the gaps when realism seems unable to fully suit empirical realities.

Although downplaying the importance of (classic) power, complex interdependence does not refute it at all. Therefore, the theory may be firmly placed within the scope

¹⁹ Just like conceiving of the concept of complex interdependence in many ways was a reaction to neorealism, Keohane and Nye`s conceptual framework is itself often pitted as being a core strand of neoliberalism. I am purposely avoiding this discussion and have chosen to deal with complex interdependence more as it stands.

²⁰ If the number of relations amounts to *enough* to call it change is a matter of perception. One could certainly argue for and against. What strengthens Keohane and Nye`s argument is that the trend must be said to have continued (if not drastically picked up in pace) since 1977.

²¹ Relations of *mutual* dependence. The notion of reciprocity (though not necessarily symmetric) in effects is important and serves to distinguish interdependence from interconnectedness.

²² Including the authors themselves (Keohane & Nye 1977:20)

of classical Morgenthauian realism inasmuch as it assumes a power-maximizing state. However, it diverges on several key aspects.

2.4.1 The specific characteristics

These differences are the ones on to which Keohane and Nye structure the characteristics of complex interdependence. Taken together the conditions of the theory appear and it becomes clear that it has got very different analytical ramifications than that of realism²³.

2.4.2 Multiple channels

Firstly, it refutes the realist assumption of the states as coherent units necessarily being the dominant actors in the world. Instead it sees a myriad of formal and informal channels cutting across the strict *interstate* channels envisioned by realists, potentially involving a host of different actors like non-governmental organizations, social movements, multinational corporations and international regimes. By widening the scope of connectivity, Keohane and Nye creates a better framework for explaining why for instance agencies and departments at times reach out to foreign colleagues and operate with a different agenda than that of the incumbent government (thereby relaxing the assumption that states will act coherently), or why a non-state actor could intervene twice in four years on Balkan territory at the middle and end of the 1990's (thus relaxing the assumption that states are the only units in world politics). These tendencies, *transgovernmental* and *transnational* respectively, are key facets of this first characteristic of complex interdependency.

2.4.3 Minor role of military force

Secondly, complex interdependence refutes the realist assumption of the use of [military] force as an effective instrument of policy. As Keohane and Nye puts it, the “perceived margin of safety has widened” (1977:23). States are in other words less fearful of being attacked and this changes the ease with which leaders reach for brute force as a policy tool.

²³ Justifying the explicit claim Keohane and Nye make in the afterword to the third edition; “*the concept of complex interdependence is clearly liberal rather than realist*” (Keohane & Nye 2001:275)

Inasmuch as the primary goal of states is survival, military force will obviously remain important and the policy tool will never be taken off the table completely, not even among western democracies. However, since most issues facing world leaders today are quite different and more complex than before, the age-old policy tool of *advancing at the enemy* is simply not as relevant anymore. For how does one handle issues like economic disparity or climate change by the use or threat of brute force? The answer is of course that one cannot – at least not very successfully. These issues know so few (or no) borders, involve so many policy fields and give rise to such a magnitude of plausible remedies. Against such a complex backdrop the cost and level of uncertainty of military action rises and it consequently becomes a less appropriate instrument.

2.4.4 Absence of hierarchy among issues

Thirdly, the theory refutes the realist assumption of there being a clear-cut hierarchy of issues in world politics. Under conditions of complex interdependence, military security is no longer an all-engulfing concern and although still important in some issues it will be largely irrelevant in others – like for instance the aforementioned ones. What this means in practice is that the scope of the state agenda is wider than ever. In some situations energy might be the chief issue. In others the environment, unemployment or disease control might be. The list could be made significantly longer. The multitude of state policy goals and the way in which they are subject to a steady stream of trade-offs have the potential to make the government more receptive to influence from pressure groups and domestic issues – a proposed `good`. At the same time this means the line between domestic and foreign policy becomes blurred, which in turn tends to make for incoherent and unpredictable foreign policy – a proposed `evil`.

2.4.5 Asymmetry and the notion of power

Depending on how one portrays it, complex interdependency has within itself the potential to sound overly liberalist and harmonic. It is important to bring forth nuances to this erroneous view.

Hard power and military force are not altogether redundant and, more importantly; there is still asymmetry in the dispersion of power and in the political exchanges

between states. Here Keohane and Nye pay tribute to thinkers like Rousseau who certainly would have agreed to the fact that interdependency not only increases wealth but also fosters vulnerability and insecurity (Knutsen 1997:246)

They employ the terms *sensitivity* and *vulnerability* to explain the mechanisms of the asymmetry, with the latter being the most important concept. Let me briefly account for how they are to be interpreted.

As stated above, and much like in any relation, the interaction on the international stage bears with it the potential for unevenness. Thus, under conditions of complex interdependency interactions in most issue areas will impose costs for some and offer benefits to others. If one were to substitute `costs` with `vulnerabilities`, one would be able to view relative vulnerability as a *product* of these uneven interdependencies. Keohane and Nye see vulnerability²⁴ as leading to bargaining weakness and the lack of vulnerability as leading to autonomy. Consequently, one could envision the interdependent relationship between state A and state B. The less *vulnerable* of the two will gain autonomy and influence from the interaction due to it not being as *sensitive*²⁵ to changes in the relationship as the other one is (Keohane & Nye 1977:10-15).

As employed by the authors, the notions of sensitivity and vulnerability are more than just theoretical intellectualization; they are an exemplification of the strategic thinking an actor does in ascertaining the costs of action; or rather, ascertaining the power ratio and how its relative position dictates the strategy in bargaining for maximum gain. The asymmetries on a particular issue will in other words be a good predictor for state policy behavior.

Given that these asymmetries and power differences exist, Keohane and Nye detail the processes whereby influence can be applied.

Linkage is a strategy whereby a state attempts to tie specific issues together in hedging against its relative vulnerability. Based on the aforementioned premises of a multiplicity of issues and the rather ill-suited nature of military force, it consequently means that linking is more a strategy of the weak than that of the strong. The way in which this occurs in practice is through international organization. Thus, the

²⁴ Vulnerability can be said to refer to a situation where the country in question is not able to cope in the short run, but has to carry costs even after having attempted to alter policy.

²⁵ Sensitivity, on the other hand, refers to a situation in which the country in question is influenced by externalities but manages to cope, and carries the costs inferred without altering policies to adapt.

international organizations and regimes are to an increased extent the real playing fields of international politics. They provide a framework in which the linking strategies, issue-by-issue cooperation and broader coalition building can occur, usually favoring the small over the big²⁶.

As the regimes and organization become the main venues for bargaining, *agenda control* also becomes a crucial skill. That is; the ability to formulate, set and nourish the agenda.

It is based on these processes that Keohane and Nye can express the structuring and somewhat predicative nature of power in organizational politics²⁷.

Bargaining is the concrete process by which states seek to further their interests and maximize their gains. And when I am saying bargaining here, I am referring to bargaining within the structure of regimes and organizations. Keohane has later reiterated on this point;

“One can think of these bargains as reflecting the equilibria of games, which create institutions, which then, in turn, establish or solidify equilibria so that these institutions, and particular policies, persist” (Keohane in Viotti & Kauppi 2010:167)

When evaluating how autonomy or power relates to interdependence, much pertains to the notion of *cost*. That is; what are the relative costs for an actor in a political bargain?

Which would be less costly for the US; to stand outside the UNCLOS or to partake in it fully? If one were to employ a traditional notion of power, the US is clearly able to stand outside of the UNCLOS. However, with the gradual increase in the saliency of soft power²⁸, the US is (or at least should be) evaluating it differently, deeming itself more vulnerable than before.

²⁶ For instance; as witnessed during the discussion for a *new economic world order* (NIEO) in the 70's where the smaller developing states “ganged up” and attempted to link oil prices to other issues where they historically hadn't had much leverage. This frustrated the powerful states, the United States in particular.

²⁷ In doing so they are honing in on what regime theorist Stephen D. Krasner would specify more thoroughly a few years later; that regimes/organizations play a *channeling*, if not determining, role in the way states behave.

²⁸ Another concept coined by Joseph S. Nye jr.

Complex interdependence theory assumes and presupposes that interdependence is a recognized fact. If that is the case then the theory holds that the cost of a policy is better understood in advance. Given that the actors act rationally, they will compare different policy options and their costs, and act accordingly.

Keohane and Nye are detailing an international political scene on which the use of force is a more and more costly course of action. A military strategy is often `an act of desperation` (p. 16). Naturally, one could very well say that the situation is vastly different for a superpower like the US compared to that of, say, Switzerland. But although the costs of military action for the former are low in militaristic and physical terms, they are much higher in other terms²⁹ and thus it tends to balance out.

Quite contrary to common logic, Keohane and Nye contend that it was in fact the propensity by which the *vulnerable/small* states chose military action in for instance fishery or jurisdictional disputes that represented the trend since World War II (1977:87-91).

It is quite obvious, as Keohane and Nye makes abundantly clear, that the conditions set forth by complex interdependence, although spreading, cannot be said to be universal per se, but only *really* pertains to the “advanced information-era democracies bordering the Atlantic and the Pacific”(Keohane & Nye in Held & McGrew 2003:81-82) – commonly known as *the West*. That is however sufficient enough in this respect. Strictly speaking, complex interdependence is set forth as an ideal type, much like realism itself, or liberalism or any other isms for that matter. This means that Keohane and Nye do not pose that complex interdependence reflects political reality in a perfect fashion. Instead, one must match the empirical situation at hand with the ideal type and its assumptions, and see how much explanatory power the latter bears with it in portraying reality.

Applying complex interdependence theory to the subject matter of this thesis means generally accepting that (1) the world is transforming and global politics has entered a new era, and that (2) the implication of this transition is a new understanding of the sources of power/leverage.

²⁹ (soft power, reputation, Iraq..)

Much of what is dealt with in the following implicitly relates to power relationships. Employing complex interdependence theory helps understand these. After all, if (hard) power relationships were such an all-engulfing factor, why would, say, legal argumentation and international leeway ever matter at all? I claim they matter, and even quite a lot.

3. Background chapter

3.1 From mystery to mastery and beyond

A brief historical account of the regulation of the seas

What would the world be without the ocean³⁰? It is an unconceivable question really. The ocean is paramount to *everything* and *everybody* and covers in total some 72 percent³¹ of the globe. No wonder then that man has been drawn to it since ancient times. Whether it would be out of necessity or choice he has found ever new ways to utilize its vast body of resources. The term *resources* would remain an idle bystander for quite some time still, but would take on additional and more pressing meaning around the dawn of the 20th century and spur on a push for regulating the activities of the seas. This does not however mean that the sea up until this point equated to a mere (wet) Hobbesian world of absolutely no rule of law³². As the geographical mystery of the seas died down through extensive exploring and mapping, and trade took on a more global trait, the finite scope of it all dawned on the powers at be and slowly but surely custom, consensus and tradition began to make way. To call it *law* would perhaps be to stretch the concept a bit, but

³⁰ The concept will alternately be used in the singular and plural form, as is common with both nouns *sea* and *ocean*.

³¹ (MarineBio 2010)

³² There existed a multitude of bilateral and regional arrangements at various times.

the *freedom of the seas*³³ doctrine nonetheless became a guiding principle the major European imperial powers in the 17th century could agree upon³⁴. The doctrine did essentially two things. Firstly, it secured all coastal nations full and complete jurisdiction over about three nautical miles³⁵ of their adjacent shorelines. Thus, *territorial waters* had become a household concept. Secondly, it established total freedom for all outside of this territorial perimeter – a veritable *res nullius*. This meant that with the exception of the vessels themselves, no state could lay (any kind of) claim to the seas and the notion of *international waters* had been born. Although not codified and not always fully respected, this doctrine remained the only organizational framework pertaining to the seas for several centuries³⁶.

What became clear as time passed though was the fact that the seas could very well follow a similar pathway as had been evident on land – that is to say, that without more thorough regulation the seas had the very same potential for becoming an arena for instability and conflict and disparity³⁷. Excessive fishing that threatened fish stocks, the frenzied search for oil and gas on the seabed as technology became available, the sneaking threat from pollutants of various kinds and not to mention the power postures taken up by states with regards to a wide array of things like navigational rights, territorial sea limits, economic prerogatives etc and the disputes that followed in the wake. This is a non-exhaustive list. The point is merely that new technology, power rivalry and the quest for resources came together in the early and mid 20th century and created an increasingly pressing need for a more thorough legal regime. Thus, a lengthy process to somehow conceive of a convention which would

³³ A concept dating back to Antiquity, although 17th century Dutch lawyer Hugo Grotius is usually credited with conceiving of it in his *Mare Liberum* from 1609 (Potter 1924/2002:8, 27) . See *The Freedom of the Seas: The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (2005) by James Brown Scott or <http://socserv.mcmaster.ca/econ/ugcm/3ll3/grotius/Seas.pdf> for more on Grotius` writings.

³⁴ There were of course numerous incidents of provocations and blatant disregard of the doctrine all the way up to the 20th century. This can usually be closely linked with the perpetrating part`s power status relative to others and would more than once lead to military conflict. As the perpetrators tended to change hats quite a bit, the weaker states usually upheld faith in the doctrine and thus the doctrine remained common practice for centuries.

³⁵ Renowned Dutch legal theorist Cornelius van Bynkershoek`s “cannon shot rule” was the common standard. The width of the territorial waters that could be claimed was to be the distance a cannon could fire from the water`s edge (Johnston 1998:79-80). By today`s measures that means about three nautical miles (=5556 meters).

³⁶ Making it perhaps the oldest customary international law there is.

³⁷ Initially freedom of the seas referred to freedom of navigation only. In time, though, the concept took on more freedoms – like some of the ones mentioned in Article 87 of the UNCLOS; freedom of fishing, overflight, scientific research etc (Rothwell and Bateman 2000:4)

be acceptable to all started – a process which began in between World Wars I & II and would eventually culminate in a very substantial piece of legislation in 1982, the UNCLOS.

Besides from viewing the evolution toward the UNCLOS based on the substantive and concrete precursors mentioned above, I think it would be useful to bear in mind at least two of the larger contextual historical factors and their potential influence.

First, one would of course have to tie it in with the lessons learned by recently having gone through two horrific world wars and the subsequent desire to weave nations closer together in some kind of institutional arrangement. The second, and this time around more successful, attempt at creating a Kantian community of nations (the United Nations) is perhaps the best tangible outcome of said desire. The hope was to significantly weaken or at least dilute the importance of (hard) *power* in international relations. Some, like David M. Kennedy (1987) in *The Move to Institutions*, seem to argue that this institutionalization in essence created a third and elevated pillar by which international affairs could be handled – comparable to politics and law, and in many cases preferable. His main point is that the aforementioned desire has been an integral part of what Kennedy views as a tripartite process toward an ever more complete international institutional apparatus – one which ends (thus far) with the UNCLOS. With the League of Nations came parliament, with the United Nations (UN) came administration and with the UNCLOS came adjudication. *Mythic rhythm* he dubs it (Ibid:986).

I would call it *institutional momentum* and deem it a necessary though not sufficient condition in facilitating for the UNCLOS.

Second is a factor which at first glance may be difficult to ascertain the importance of. I am referring to the Cold War. At the substantive level there are obvious enough reasons to include it. A wide array of new events, factors and technologies came together and, when viewed against the backdrop of the increasing competition and tension between East and West, seemed to demand a better regulatory regime at sea. The A- and H-bombs and their sea-based delivery systems; the creation of NATO and the escalating cat-and-mouse games on the oceans; the thirst for carbon-rich petroleum and the subsequent prospective seabed mining; geographical claims on

both sides of the spectrum that served to encroach upon the existing jurisdictional limits. Factors like these, and others, would certainly have played well to those who were already proposing a universal and more stable order.

Having put down the premise that regulation of the seas was primarily a Western initiative, it might seem a puzzle why the other side would generally favor and participate in it – given the above-mentioned tensions. I think this is to underestimate the complexity of the Cold War and the interests which were at stake.

General political theory speaks of the particularities of bipolarity and of the many possible outcomes binding measures such as the creation and adoption of the UNCLOS are certainly plausible facets. Notwithstanding all the other arguments, adherence to it *could* very well be rational for both parties (in a bipolar situation) if it serves to create greater predictability³⁸. Thus, concurring interests in such matters *can* in itself be an expression of security politics³⁹.

Leaving that be, I think one last point is important to put forth.

If one were to take a Western perspective, it seems reasonable that the presence of a clear and strong adversary would tend to lead to more⁴⁰ multilateralism – even for the United States⁴¹.

In the excellent *Special Providence*⁴² Walter Russell Mead (2002:290) touches on this point. He writes;

“The decade following the Cold War provided growing evidence that the old American reluctance to pool sovereignty with other countries for a common purpose was still strong and, with the Soviet menace out of the way, playing an increasing role in the politics of American foreign policy”.

This quote illuminates two points nicely. On the one hand it validates the Cold War as a factor in the seemingly Wilsonian-styled multilateralism mentioned earlier and on the other hand it points to the inherently bipolar (sic) or two-headed approach of the US.

Picking up on Mead’s lead, let me thus delve from the general into the specific and have a look at the US in particular and its historical relationship with laws at sea.

³⁸ A clear analogy to the (mutual) so-called confidence-building measures (CBM’s).

³⁹ Although *security* usually equated to the hard militaristic version during the Cold War.

⁴⁰ Temporary or permanently.

⁴¹ This can reversely also, at least in theory, apply to the Eastern bloc.

⁴² Full title: *Special Providence. American Foreign Policy and How it Changed the World.*

3.2 The American historic relationship with laws at sea

Ever since its conception only some 234 years ago, the US has by necessity been very preoccupied with every-and-all things maritime. At first, this related in particular to two things; defending its new-won sovereignty and preserving commercial ties to foreign markets. Historian C. Vann Woodward once wrote that *the great benefit* [of the United States] *came from nature`s gift of three vast bodies of water* – [the Atlantic, the Pacific and the Arctic] – *interposed between this country and any other power that might constitute a serious menace to its safety* (in Gaddis 2004:7). His statement⁴³ serves to illustrate the situation in the early days. On the one hand, the *vast bodies of water* sheltered the US to a certain degree and represented an advantage in matters of security, while at the same time these waters could not be left to others to police because of the crucial need to secure US access to overseas markets⁴⁴. Consequently, the US had an evident strategic interest in seeing to it that no one (other) power could dominate the seas and threaten both the existence and (at least) the inherent potential of the United States. It would come as no surprise, then, that the Americans quickly became eager advocates for the *freedom of the seas* doctrine. Since those early days much has changed. This is not the least of which true in regards to the US itself. It is bigger, more set in its ways and much more powerful. Still, the oceans remain a matter of great concern for it and the defense of the freedom of the seas doctrine⁴⁵ is something that permeates much of its policies.

As mentioned earlier; after World War II (a war in which the US came out of stronger, relatively speaking), the US took the lead in attempting to create a more comprehensive legal regime at sea. The freedom of the seas doctrine had certainly not been sufficient to deter belligerent nations in the tumultuous first part of the 20th century. The US, as most other states, observed this and so it more or less permanently departed from its isolationist heritage and took the lead in first facilitating for the creation of the UN and later for the ocean-specific treaties that were to follow.

⁴³ Although originally meant to illustrate the relationship between the concept of security and the American character – an alternately inward- and outward looking one.

⁴⁴ One needs to remember that although we are in 2010 now, some 75 percent of global trade is still carried by sea (Port of Rotterdam 2009)

⁴⁵ Or rather *freedom of navigation*, which is the correct current terminology.

However, although leaping into multilateralism on the one hand, the US at the same time took unilateral steps coming out of World War II – steps which at least partly can be blamed for the subsequent cascade of claims and expansionist moves the world witnessed with regard to the seas. The most important ones were two proclamations President Truman issued in 1945 in which he asserted (1) US jurisdiction over the continental shelf and its resources, and (2) the ability to protect fisheries by establishing conservation zones in these waters (Food and Agriculture Organization of the United Nations 1987)⁴⁶. Although neither of the proclamations suppressed the freedom of navigation concept⁴⁷ and even though the Americans initially did not follow up on the second point with regard to their own coastal waters, the *tone* and *spirit* of it all was not lost on other states which began moving to the American beat and unilaterally extended their asserted claims significantly.

The Truman proclamations thus served two slightly conflicting interests.

On the one hand they threatened the freedom of the seas doctrine, so cherished by the US, and on the other they helped, however unintentional, to usher in the very framework that would overtake its role.

By the mid-1950s the stage was set to once more convene the nations of the world for a serious attempt at what had failed in the *interbellum* period, namely crafting a codified set of maritime rules. The proclamations Truman issued and the movement of *creeping jurisdiction*⁴⁸ it ushered in had certainly served to give it a sense of urgency.

The 86-state strong first Conference of the Law of the Sea (UNCLOS I) held at Geneva in 1956 was considered a moderate success in that it created four conventions⁴⁹ which codified generally accepted freedoms at sea – all of which the US signed and acceded to⁵⁰. However, it left out highly contentious matters of

⁴⁶ These proclamations were later backed up by legislation, such as the 1953 Submerged Lands Act and particularly the Outer Continental Shelf Lands Act (Galdorisi & Vienna 1997:21)

⁴⁷ Still of vital importance to the US.

⁴⁸ (Galdorisi & Vienna 1997:22). Also see page 55 for a discussion of the associated *creeping uniqueness*.

⁴⁹ Convention on (1) the Territorial Sea and the Contiguous Zone, (2) the Continental Shelf, (3) the High Seas and (4) Fishing and Conservation of the Living Resources of the High Seas. In addition, an optional protocol of dispute settlement was included.

⁵⁰ The optional protocol of dispute settlement was however rejected.

territorial sea delimitation⁵¹ and fisheries issues. These were supposed to be addressed during UNCLOS II in 1960. Although coming incredibly close⁵², the Conference failed to produce any agreement and was thus ultimately unsuccessful.

The US upheld a consistent practice through the 50s, 60s and 70s of refusing to accept the legality of territorial sea claims which exceeded the old three mile limit. Although most, if not all, states had far exceeded this claim themselves and/or recognized others` by this point (thus constituting something close to customary law), the American position rested on a simple, strategic premise; that as long as the limits of territorial seas remained uncodified it would best serve US interests (as a superpower) to keep on refusing these claims consistently because that would enable it to oppose the claims without be seen as not abiding by the rule of law. It would, in other words, enable the US to create for itself an exemption to the customary rule – making the US claiming the status of a persistent objector⁵³. The American objections were largely ignored and by not putting force behind it the US failed to prevent international acceptance of the 12-mile limit⁵⁴ (Roach & Smith 1996:19).

When the 1980`s came around, the political climate in Washington had changed in favor of the Republican party. It was thus Ronald Reagan who sat at the helm when the nine year long negotiation process concluded in late 1982 with presenting a comprehensive agreement, UNCLOS III, for the nations to consider. Although shrouded in anti-communist and partisan rhetoric at the time, the power of hindsight speaks of a Reagan administration which might very well have signed the agreement had it not been for the objections it had towards Part XI – the deep seabed and mining provisions of the treaty. Due to those, Reagan refused to sign, but (in his Statement on Oceans Policy) instructed his government to accept and comply with the rest of the treaty.

This has at least been the consensus up until quite recently. Recent comments by some of Reagan`s closest aides and a book of memoirs from the President himself has

⁵¹ Thus failing to deal with perhaps the most critical issue. This was indeed the same hurdle the Haag initiative in the 1930s could not overcome.

⁵² A compromise proposition of a six-mile territorial sea plus six-mile fisheries zone came within but *one* vote of being adopted (Churchill & Lowe 1983:14)

⁵³ A status similar to that which Norway has secured in respect to the ban on commercial whaling the International Whaling Convention instigated in the mid 80s.

⁵⁴ A limit the US itself eventually claimed from 1988 onwards.

stirred up a ruckus lately and, more importantly, has cast doubts over what Reagan`s objections *really* amounted to. I will touch upon this point in more detail later.

For now it suffices to say that work to somehow amend the disputed provisions began ever so slowly right away, but the real change didn`t come until George H.W. Bush`s presidency. He sent negotiators to the UN table, and between 1990 and 1994 they worked to reach an agreement the US (and other non-signatories) could live with. The end result was what is commonly known as the 1994 Agreement⁵⁵. It amended the flaws Reagan had (officially) pointed to, and thus, then-president Clinton quickly signed and moved to submit the UNCLOS (with the `94 Agreement) to the Senate for its advice and consent for accession and ratification. From this point on the US has considered the UNCLOS as a codification of customary international law. A month after Clinton signed the treaty it reached the threshold of 60 ratifications and officially went into force. At the same time however, the US `94 midterm elections saw the Republican Party take back control of the Senate and the new chair of the Foreign Relations Committee (SFRC), Senator Jesse Helms, refused to hold the necessary hearings on the matter. Following Mr. Helm`s retirement in January 2001, the treaty has passed through the Committee level with ease⁵⁶, but continues to linger on in the full Senate due to fierce opposition from an adamant, albeit small, group of Republican senators.

4. Analysis

4.1 The UNCLOS

Although consisting of some 320 articles and nine annexes, the UNCLOS is still essentially a *framework* agreement. That means that there will be issues on the outskirts of it that may need tweaking to, negotiation of or

⁵⁵ Full title; “the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982”.

⁵⁶ Two public hearings were held in late 2003, and on February 25th 2004 the SFRC by a unanimous vote (19-0) recommended that the Senate give its advice and consent for accession to the UNCLOS and ratification of the 94 Agreement. On October 31 2007 the SFRC again voted (17-4) to recommend that the Senate give its advice and consent.

tinkering with. On the other hand, since it is a framework agreement a tool kit is already in place to deal with many of the challenges that lie ahead. It *assumes and anticipates* that there will be offshore drilling, that nations will want to extend their grasp on the continental shelf, that pollution and climate change will become a big problem etc. And as such, the framework is already there, complete with dispute settlement procedures and everything.

The UNCLOS is far too elaborate a document to account for in detail here. However, some of its more important features are as follows;

- It determines a 12 nautical mile limit to the territorial sea and secures other states the right of innocent passage through it.
- It secures the right of transit passage through straits used for international navigation.
- It codifies 200-nautical mile economic exclusive zones (EEZs) wherein the coastal states enjoy sovereignty regarding natural resources and certain economic activities, plus exercising jurisdiction over environmental protection and marine science research activities.
- It secures the coastal states sovereign rights to their continental shelf sea beds for exploitation within the EEZs, and even further if they can submit convincing geological evidence to the effect to the newly established body Commission on the Limits of the Continental Shelf (CLCS).
- It sets up the International Seabed Authority (ISA) to manage the future exploration and exploitation of the deep sea bed which lies beyond the additional claims made to the CLCS.
- It codifies the traditional freedoms on the high seas, but appeals to the states to cooperate in managing the resources in a sustainable way.
- It provides for detailed specifications on delimitation and classification of waters, and sets up the International Tribunal for the Law of the Sea (ITLOS) to rule in disputes (if the parties do not instead choose the ICJ or arbitration as dispute settlement mechanisms).

Just like with John Selden and Hugo Grotius in the 17th century⁵⁷, the architects of the UNCLOS had to deal with the fundamental debate of whether to favor coastal state jurisdiction over adjacent waters or to protect free navigational rights by nearly all means necessary. The aim was of course to somehow incorporate both elements. That is why the Convention attempts to protect both dominion and freedom.

The creators of the UNCLOS have been wise in many a way. This is certainly true when it comes to the way in which they have tied delimitation and dispute settlement to rather static entities. Dispute settlement in international treaties is usually contained within separate protocols. In the UNCLOS, however, it was incorporated in, and made a part of the treaty itself, thus making it compulsory for those party to the Convention to utilize its dispute settlement mechanism if/when disputes with other parties materialize.

Second is the negotiating principle that was adopted; consensus – as opposed to voting. This is why negotiations took as long as nine years to conclude. Tendencies of bloc voting had been evident for quite some time within the UN system, and to avoid that the NIEO-wind⁵⁸ would paralyze the negotiations, the consensus principle was chosen.

Another way in which they have been wise has been to make the UNCLOS a package deal – meaning that it has been presented to the parties as a “yay or nay”, leaving no room for individual amendments or reservations on specific articles of the treaty. In this way they have attempted to overcome or alleviate a very typical procedural obstacle which often will change a treaty into becoming more of a *lowest common denominator*⁵⁹.

⁵⁷ See Potter (1924/2002:57-78) for more.

⁵⁸ By the turn of the 1970s fiscal and monetary problems had begun to loom large and the US (Nixon) decided to take the dollar off of the gold standard, effectively ending the Bretton Woods system. Soon thereafter, the exchange rate regime collapsed due to floatatious currencies. At approx. the same time a war broke out in the unstable Middle East, with the oil-rich Arab nations reacting to US support of Israel by employing their crucial market position in cutting oil shipments to the US and various western nations for six months - creating huge problems within the oil-dependent liberal western sphere. This is in many ways the backdrop to the position taken up by the developing world in their call for NIEO (Lake 2009:222-223). They witnessed the success in which the Arabs managed to exploit an asset and turn it into very real, coercive power and set about trying to levy their own power to promote their interests. It was, in other words, essentially about growing disparities in wealth between the developed and developing worlds.

⁵⁹ Speth and Haas 2006:102-103.

The well-informed would of course point to the '94 Agreement as being precisely what was sought to avoid; an important country succeeding in changing the agreement to fit its interests. That is an accurate observation. Still, in comparison with the total scope of the treaty the '94 Agreement amended fairly small parts of it. In addition, one would obviously have to weight it and choose between the two “evils”; the full original treaty lacking the signature of the world’s most important state, or a slightly watered down version that enables all to climb onboard.

One could indeed question the semantics and wish for even more detailed provisions. Part VI, which deals with the continental shelf, is a good example. There is bound to be at least some ambiguity tied to certain terms in Article 76, like for instance “foot of the continental slope”⁶⁰ or “natural prolongation of its land territory”⁶¹.

In the case of the latter, however, it seems as though the concept of *natural prolongation* has been phased out in case law⁶² and replaced with geologically more precise measures. The former could still render some definitional confusion within the scientific milieu, but rulings from the CLCS expected later this year and in 2011 will surely set precedent on this rather technical matter and as such, perform its intended function.

International treaties and the regulatory regimes they bear with them are often heavily reliant on precedent - a concept which is not altogether free of problems – not the least of which is its (additional) susceptibility to interpretation. There are however few alternatives. International law and its arbitration systems are and will remain very much bound by custom, precedent and case law⁶³.

The Northwest Passage dispute revisited

The Northwest Passage is much like a labyrinth - it is a complex topic and can be entered at many points. This begets a need for limitation. The reading of the legal

⁶⁰ Article 76, 4a (i and ii)

⁶¹ Article 76, 1

⁶² Although China and certain others seem to have missed that point in their submitted claims to CLCS.

⁶³ In a comparative perspective, this is especially true with regard to the ITLOS (Miller 2002:498).

ramifications of the UNCLOS, for instance, can be drawn out in great length and will consequently be dealt with in a selective and limited fashion.

Although disagreement over the status of the Northwest Passage has long prevailed, there are two seminal historical events I wish to emphasize. They have in their own ways both contributed greatly to the framework in which the dispute is currently being construed by the two countries party to it.

They are but exerts, but I choose to focus on them a bit because it is precisely the stirs of sentiment (particularly on the Canadian side) which was created by these two occurrences back then which is *now* being rekindled in the face of the effects of global warming.

The Manhattan voyage

On March 12th 1968 a huge petroleum field was discovered at Prudhoe Bay on the North Slope of Alaska - a field which would become the biggest in North America⁶⁴. Although it was still not economically viable at the time, authorities and oil companies began dabbling with how to transport the oil and gas to US markets when the threshold would be overcome and exploitation could commence⁶⁵. Of the many suggestions at hand, transporting the bounty to eastern refineries by supertankers through the Northwest Passage was one of only a handful of possible solutions that were deemed feasible enough to investigate further. Hence, this was the official and external backdrop to why a group of oil companies⁶⁶, with the blessing of the federal government, invested some \$50+ million into refitting the 150 000 ton 306 meter supertanker *SS Manhattan* for ice-breaking capabilities and in late August 1969 sent it through the Passage on a trip that took it from Chester, Pennsylvania to Point Barrow at the northernmost tip of Alaska. There it loaded a ceremonial barrel of oil and ventured back. The three month⁶⁷ voyage was not without its perilous moments though. In the McClure Strait the ice proved thick enough to significantly slow down the *Manhattan*, even to the point where it needed help from the two Coast Guard

⁶⁴ Which it remains to this very day.

⁶⁵ The turning-point was the Arab oil embargo in the early 1970's, which sent gasoline prices sky-high and gave President Nixon the incentive he needed to push for rapid commencement of exploitation.

⁶⁶ Spearheaded by what is now Exxon (then Humble Oil).

⁶⁷ The 9000 mile trip was expected to take only two months.

icebreakers which accompanied it⁶⁸. The decision was thus made to alter the route, and the ship turned back and successfully navigated through the Prince of Wales Strait instead. In addition, the ice had also damaged the hull to the extent that it took several months to repair it when the ship came back to New York in November.

The Manhattan voyage had three important consequences – one immediate and Alaskan oil-related only, and the other two more long-term and contextually important. Firstly, the trials and tribulations of the trip and the damage incurred on the ship made the oil companies disregard shipping through the Passage as an economically feasible and (particularly) safe option (for *their* needs at *that* time)⁶⁹. Secondly, and more importantly, it proved that traversing the Passage by *merchant* ice-breaking ships was in fact technically doable. This lesson had a resounding effect on the political scenes on both sides of the border, though especially in Canada, because it was actual, physical evidence of the inherent potential of the Passage – whether perceived as a good or a bad. Third, and closely linked with the second lesson, the voyage caused great environmental concern in Canada, not only among the Inuit and the people at large, but also in Ottawa. The fact that the *Manhattan* came back from its first trip⁷⁰ anything but unharmed only served to exacerbate the concerns about detrimental oil spills in the pristine North. Hence, as a direct effect of the voyage Canadian legislators felt pressure from the populous to enact tougher environmental regulations and expediently passed the Canadian Arctic Waters Pollution Prevention Act in 1970⁷¹. The bill gave Canadian authorities a 100 mile⁷² reach outwards from the coast to regulate safety and environmental concerns through ship construction and operations provisions. The US reacted by making it unequivocally clear that it would not, and could not, accept Canada making Arctic waters their own internal waters⁷³.

⁶⁸ The *Westwind* (US) and the *John A. McDonald* (Can). A scouting helicopter also accompanied it from above.

⁶⁹ Instead they went for the option of a land-based pipeline. Consequently, the Trans-Alaskan Pipeline System was constructed between 1974 and 1977 to the cost of over \$8 billion.

⁷⁰ There were in fact two. The *Manhattan* repeated its 1969 voyage the following summer.

⁷¹ Inspired by the Canadian move, the Soviets enacted similar environmental regulations for the Northeast Passage in 1971. Unsurprisingly then, the Soviets did not protest to the Act. Neither did the two other Arctic states Denmark and Norway.

⁷² Recently extended to 200 nautical miles.

⁷³ Which the Canadian step implicitly amounted to.

“Such acceptance would jeopardize the freedom of navigation essential for United States naval activities worldwide, and would be contrary to our fundamental position that the regime of the high seas can be altered only by multilateral agreement. Furthermore, our efforts to limit extensions of coastal state sovereignty over the high seas worldwide will be damaged when other nations see that a country -- physically, politically and economically -- as close to the United States as Canada, feels it can undertake such action in the face of United States opposition” – Memorandum from the US State Department, March 12th 1970.

(U.S. Department of State 2010)

Thus, two conflicting legal postures had been assumed.

The Polar Sea voyage

Although the Manhattan voyage served to create some public debate in Canada as to the Passage’s sovereignty status (analog to the environmental concerns), it was little compared to the fuzz that followed a voyage some 16 years later by the US icebreaker *CGS Polar Sea*. It set out from Thule in Greenland, ventured through the Northwest Passage and sailed into Point Barrow, Alaska in just over two weeks. A fairly straight-forward task for a powerful icebreaker when faced with mere August ice – and the issue at hand was not really even about the fact that the trip was done. The controversial part was that Washington ignored Canada’s sovereignty claims and had not asked permission to sail through. In between the *Manhattan* and *Polar Sea* voyages, some three other ships, one Polish and two Swedish, had made full or partial transits of the Passage, but only after having asked and secured permission to do so from Ottawa. The fact that the *Polar Sea* had not stirred a heated public debate and caused anxiety in Canada (Griffiths 1987:243). .

The voyage was obviously not as dramatic as it might have been portrayed in Canadian media at the time. In fact, the US *did* notify Ottawa of the impending voyage⁷⁴, and three Canadian observers went along for the ride. What mattered, however, was the fact that the US had explicitly (and probably consciously⁷⁵) not asked *permission*. Regardless of what the true US rationale for the voyage was and

⁷⁴ On May 21st (Molot & Tomlin 1986:191)

⁷⁵ There has been much contradictory evidence, so it is still uncertain to this very day whether the US made the transit to assert its claims or merely due to operational requirements.

regardless of whether or not the Canadian response was well thought through, the *Polar Sea* voyage was an important milestone in three respects.

First, it made it unequivocally clear what was the American view on the issue of the status of the Passage. The US had long *stated* that it deemed the Passage to be an international strait, but it had now *shown* it through action.

Second, it had the effect of sharpening the signals from Ottawa. Previous statements vis-à-vis the claim to the Passage as internal waters had been limited, but the *Polar Sea* incident led the Mulroney government to introduce a straight geographic baseline system⁷⁶ in accordance with Article 7 of the UNCLOS and thus enclose the channels of the Arctic Archipelago as fully internal to Canada, effective January 1st 1986. Nothing had changed with regard to the claim itself, but the Canadians had now altered the justification for said claim – an important step with regard to possible future adjudication in, say, the International Court of Justice (ICJ).

Third, it served to bring the parties to the negotiating table and eventually lead to an agreement of sorts. Following pressure at home, the Canadian government had reacted to the voyage by hurriedly announcing six policy initiatives. It was an ad-hoc reaction which accompanied the straight baseline system (which was more carefully vetted), but they nonetheless came to make up the fundamentals of Canadian Arctic Policy for the rest of the decade and well into the new one (Huebert in Micaud & Nossal 2001:84). One of these initiatives⁷⁷ (and the only one that really represented something *new per se*) was the decision to approach the US with hopes of coming to an understanding. After quickly realizing that the US stood steadfast on its views on both the status of the Passage and the UNCLOS (as the treaty stood at the time), the Canadians shifted focus and a deal was eventually struck once President Reagan and

⁷⁶ *Straight baselines* involve drawing straight lines from headland to headland instead of following every indentation of the coast when marking maritime delimitation. It was actually Norway who first came up with the notion of drawing straight baselines. It did so before World War II in order to protect its jagged coastline and penetrating fjords from foreign trespassing, and the practice got international recognition when Britain challenged the validity of it before the ICJ and lost in 1951.

⁷⁷ The five other initiatives included (1) deciding to construct a new class of icebreakers to better enforce the northern areas, (2) lifting the reservation Canada had attached to the Arctic Waters Pollution Prevention Act with regards to letting it be challenged in the International Court of Justice (a reservation which had essentially been an admittance of the fact that the Act was illegal until the UNCLOS provided for a 200 mile regulatory zone in 1982), (3) increasing aerial and naval activities in the High North, (4) introducing the Canadian Laws Offshore Act which was intended to clarify and bolster the reach of the Canadian law, and (5) deciding to introduce a straight baseline system all around the Arctic archipelago so as to establish a legal claim to the area under the provisions in the UNCLOS (Huebert in Micaud & Nossal 2001:chapter 6). This fifth initiative was protested by both the US and the EU.

Prime Minister Mulroney got involved personally. The Arctic Cooperation Agreement, as it was called, was signed in mid-January 1988 and contained five short articles (United Nations 2010b). The message conveyed by these was simple enough; that the US and Canada would actively cooperate in Coast Guard icebreaker⁷⁸ operations in one another's Arctic waters without prejudice to their respective positions on the larger legal matter. The Canadians scored a little win in that the Americans pledged to seek consent when traversing the contested waters, while the US got a more cooperative⁷⁹ little brother without having to forego its legal claim⁸⁰. It was in essence a *modus vivendi* – an agreement to disagree.

The viability of the Passage

With the exception of military and expeditionary navigation, there is still virtually no commercial shipping going *through* the Passage. There *is* some going in and out – to mines and oil sights and such – but not much going *through*⁸¹. That means the ice – the old and new – is still a significant enough factor to halt the development of the economic *Shangri-la* some envision.

In addition, new survey data indicate that most of the seven routes of the Passage are too shallow at the most shallow points to be able to handle the supertankers of today. Consequently, with the possibility of dredging excluded, the waters of the Northwest Passage are not *necessarily* interesting for all segments of the shipping market, generally loosing out to the deeper Northeast Passage/Northern Sea Route. The latter is also favourable in that the Arctic winds usually blow in such a way as to make for safer passage. Plus, there are already fully operational deep-sea ports along the route.

⁷⁸ Note that the agreement thus far only extends to coast guard icebreakers. The commercial and naval vessels of both countries are not included.

⁷⁹ For the US it was also a plus that the agreement led to the scrapping of the Canadian submarine program. The Mulroney government had planned to construct expensive nuclear submarines to flex its muscles up north. However, this would mean that the Canadians would forego many of its commitments to the defense of Europe (among which was the 1987 announcement that Ottawa would not send troops to Norway in times of crisis) which represented a problem for the US. Thus, US pressure combined with domestic concern about the costs led to the abandoning of the plans.

⁸⁰ A *narrow* strategic evaluation of the relative gains achieved through the agreement would perhaps see Canada as having benefited the most in that although the agreement didn't bolster the Canadian claim in and of itself, it did negate the possible impact of American actions that might otherwise have hurt the claim.

⁸¹ During September 2009 the very first commercial ship ventured through the Passage, transporting cargo from Montreal to a site in the Nunavut territory (CBC 2008).

In fact, the Russians have already begun to allow foreign commercial vessels passage through the Northern Sea Route, charging up to \$500 000 per transit⁸².

On the other side however, *Russia is Russia*⁸³. And shipping interests might be sensitive to this point.

It is important to bear in mind that, given the premise of a linear continuation of the ice-melt, the viability of the Northwest Passage is most likely going to be but a temporary matter. When the melting closes in on leaving the entire Arctic Ocean ice-free, vessels will choose the shorter and (then) easier route right across the North Pole. That day is however somewhere off into the uncertain future, and bears little relevance in how the Americans and Canadians position themselves in the dispute.

The legal dispute and the arguments explained

“There is no doubt about Canada’s territorial sovereignty over the islands forming the Canadian Arctic Archipelago nor about Canada’s exclusive rights over the continental shelf of those islands, but the extent and basis of Canada’s jurisdiction over the waters of the archipelago in question is not as certain” (Pharand 1971:1)

Canadian law professor Donat Pharand⁸⁴ sums it up quite neatly. It is not about sovereignty per se – it is about navigational rights⁸⁵. That means first agreeing on the legal status of the waters. After all, the waterways in question obviously must have a legal status – and there are but three choices. They constitute either (1) internal waters, (2) a territorial sea or (3) an international strait. The legal dispute essentially evolves around which of these three are applicable to the channels and straights of the Passage.

⁸² Should the Northwest Passage open up completely and Canada could make the case that it is internal, the Canadians could charge transit fees, perhaps in the range of the Panama and Suez Canals, where fees amount to between \$2 to 4 billion per year.

⁸³ See page 82.

⁸⁴ Mr. Pharand is still publishing articles although he is closing in on 90 years old. He has written in the field of UNCLOS and Arctic issues for half a century and is regarded as the Canadian with the most expertise in the field.

⁸⁵ The question of if other states are to be granted right of transit and/or right of innocent passage.

I do not purport to be a law scholar myself. A comprehensive assessment of the validity of the legal claims may thus be beyond the scope of both my abilities and, surely, this thesis. However, a tentative probe into the judicial aspects is necessary to understand the issues at hand. So be it, then, if it will need to be of a limited and surface-dwelling nature.

4.2.1 The Canadian legal case

Canada claims the waters of the Passage as internal and has done so by invoking two legal methods of delimitation.

The precursor to these two was the so-called *sector principle*⁸⁶ - the oft-announced claim made in the years and decades after the transfer of title of the Arctic Archipelago from the British to Canada in 1880. It informally promulgated that the area between the 60th and 141st meridians of longitude all the way to the Pole (90 degrees N) was the dominion of Canada. Implicit in this lay the claim to the waters as well. That is to say, that not only did Canada own the region per se, its waters were also just as Canadian as the lakes and rivers of Ontario, and could consequently be dealt with as Ottawa pleased. Practically no other nations concurred. However, the entire issue was never particularly relevant seeing as though the area was packed with ice and held little or no strategic interest.

Following the *Manhattan* voyage of 1969, a shell-shocked Canada felt obliged to state its claims in clearer terms and went about formulating a more coherent argument with reference to international law. From this point⁸⁷ onwards, Canada began arguing that the Passage constituted [Canadian] “historic internal waters”.

Claim I : “The Passage is Canada`s internal waters by virtue of historic title”

⁸⁶ Although the theory itself dates back a few hundred years, it is generally considered that Senator Pascal Poirier was the one who first put it into a systematized and Canadian context when he used the concept to claim territorial sovereignty in the Arctic in a speech delivered before the Senate in 1907 (Parker & Madjd-Sadjadi 2009:6). Although not gaining particularly much sympathy from the government at the time, the theory got a good enough foothold so as to stay relevant and has on various occasions been (unsuccessfully) employed as legal justification. Nowadays it is deemed more or less defunct.

⁸⁷ The first official statement to this effect came in 1973 when the Bureau of Legal Affairs released a memo making the historic waters claim explicit (Pharand 2007:10).

By invoking such a justification Canada is making the case that there is something inherent and defined by the course of history which enables it to supersede purely geographical considerations to prevent the application of those rules and regulations that apply to the territorial sea, the EEZ or the high seas, and uphold the entire area as one being within its domestic jurisdiction (Dufresne 2007). In less cloudy language this means that Canada would point to specific things like; (1) the fact that British explorers had mapped large parts of the Archipelago prior to the 1880 transfer of title⁸⁸, (2) that the indigenous population, the Inuits, who are [now] Canadian citizens, have lived on and with the areas for hundreds and even thousands of years, and (3) that few non-consensual transits have occurred.

Although it is generally recognized in international law, the *historic waters* concept is a poorly grounded one. Both its precise legal definition and the basic requirements for its acquisition have been subject to debate. As of today, the consensus that exists flows from the 19th century concept of *historic bays* and the manner in which a handful of 20th century court cases⁸⁹ and UN committees⁹⁰ have interpreted its application to specific claims and thus created a [slight] body of authoritative definitions. In order to claim historic title one must satisfy three basic requirements; (1) exclusive exercise of state jurisdiction, (2) a long lapse of time and (3) acquiescence by foreign states (Pharand 2007:7).

These are the three criteria to which the Canadian claim is compared.

The third one is obviously not satisfied, in so far as the US and the European Union (EU) have both made their objections known – and in writing at that. Consequently, the historic title claim must fall already at this point. In addition, [Canadian] Donat

⁸⁸ The legitimacy of which no one refutes or counters. One *could* thus argue that that means that in this specific argumentative instance there is no timeline being broken at the point of takeover in 1880 and Canada can draw historic lines all the way back to the exploits of Henry Hudson, John Cabot and their likes.

⁸⁹ Among which was the *Fisheries Case* of 1951 between the United Kingdom of Great Britain and Northern Ireland (UK) and Norway. In addition one could mention other cases which were important to support the historic consolidation claim; like the 1975 Spain vs Morocco dispute over Western parts of Sahara wherein the presence of nomadic people was accepted as a way of establishing sovereignty, or in the much earlier case of the 1933 Norway vs. Denmark dispute over Eastern Greenland where the court ruled that the degree of presence needed to claim title over territory is lower in inhospitable regions (like the Arctic) than in warmer climates.

⁹⁰ Mainly two UN Secretariat documents prepared for the first Law of the Sea Conference, “1957 Memorandum on Historic Bays” and “1962 Juridical Regime of Historic Waters, including Historic Bays”.

Pharand (2007:13) and others have also shown that it is highly doubtful that Canada would be able to meet the former two either.

Claim II : “The Passage is Canada`s internal waters due to being located within straight baselines”

More than being an altogether different claim in and of itself, the straight baseline claim is in fact building on the historic waters claim. If there was still doubt as to how Canada viewed the waters, this was made very clear in 1985 when it, as a result of the *Polar Sea* voyage, established straight baselines around its northern archipelagic coast – baselines that represented “the outer limits of Canada`s historic internal waters”⁹¹. Many deal with the straight baselines as a separate justification to that of the historic waters, and to a certain extent it may function as such. Technically though, providing for straight baselines around its Archipelago was but a mere delineation of its claim of historic waters made in reference to Article 7⁹² of the UNCLOS.

However, the essentials of the Canadian claim predate the UNCLOS (to which it acceded in 2003). This complicates matters. Whereas it now can point to Article 7 as a party to the UNCLOS, it could not in September of 1985. Instead it had to point to the *Fisheries Case* of 1951 and claim that the court`s line of reasoning in granting Norway a right to draw straight baselines around its extraordinary jagged northern coastline constituted customary international law and was applicable to the Canadian case as well. Investigating if or to what extent the Canadian northern coastline conforms with the criteria⁹³ established by the Court is a rather technical matter, but it is precisely where the Canadian advocates would have to expel most of their argumentative energy if the validity of the straight baselines would ever be dealt with by third-party adjudication.

⁹¹ As stated by Secretary of State for External Affairs Joe Clark when he announced the Order-in-Council in the House of Commons in September 1985 (Lalonde & Macdonald 2007:67-68)

⁹² The article which in six small sections stipulates when and how baselines may be drawn.

⁹³ Relating to the direction of the coastline, the close relationship between land and sea etc.

Unlike with the historic title claim, Pharand (2007:12-28) concludes that the straight baseline claim is valid. He sees no significant mismatch between the legal precedents established in the *Fisheries Case* and the Canadian coastline, the way the baselines have been drawn to conform to it and the supporting evidence the Canadians could put forth. His is but one opinion though, and seeing as though it has yet to be brought before third-party settlement procedures the jury is still out on the issue.

An American could for instance question the validity of such a move by referring to Part IV on archipelagic states. By doing so he might succeed in disproving Canada's right to draw baselines around its far-off islands and "bring them back". The discussion would evolve around two points; whether or not the provisions in Part IV are applicable to more than just mid-ocean islands (Canada is clearly not one) and how to determine the land-to-mass-ratio (Article 47 paragraph 1) and Canada's score. Even if the Canadian claims in regards to these two points were to gain recognition, one would still have to levy the right of archipelagic sea lane passage according to Article 53 which – in essence – would bring one right back to the American claim of the Passage being an international strait. A problem for Canada indeed.

Canada is not the only nation claiming straight baselines. In fact, over 80 countries have since the *Fisheries Case* laid claim to straight baselines under Article 7 of the UNCLOS⁹⁴. Through various forms of diplomatic maneuvering the US has opposed and protested about half of those. However, not being a party to the UNCLOS the US can't invoke the binding dispute settlement procedures it contains.

Although the two legal methods the Canadians are employing play off one another and are often dealt with as one, it is important to view them individually and have them "put to the trial" separately. The reason for this is that the results of such proceedings will have direct consequences for what navigational rights can be enjoyed by others; innocent passage or transit passage.

If the Canadian historic title claim gained recognition then the waters would be defined as internal waters and no other state would have a right of innocent passage⁹⁵. That right *might* very well exist, however, if the historic title claim is disregarded and

⁹⁴ Or under Article 4 of the UNCLOS I (the 1958 Geneva Convention) for those not party to the UNCLOS at the time of proclamation.

⁹⁵ As is made explicit in Article 18 (see Articles 17 and 19 for context).

the only valid Canadian justification is its 1985 straight baselines move. Then Article 8, section 2, would seem to activate and provide other states with the right of innocent passage seeing as though Canada had drawn baselines around waters which previously were not internal.

In arguing the Canadian case one could conceivably claim that Article 8 constitutes a product of *treaty law* which did not exist when Canada proclaimed the straight baselines with reference to *customary law* in 1985. Some indeed do⁹⁶. However, I do not see how they can escape the fact that Canada bound itself to this article (and all others⁹⁷) when it ratified the UNCLOS in 2003. On the other hand, however, the very fact that Canada became a party to the convention in 2003, some 18 years after drawing the baselines, means that making the innocent passage provisions in the UNCLOS apply entails retroactively changing an established legal status – and that can hardly be completely unproblematic. So, in that sense they *might* be right. That is, not being party to the 1958 Territorial Sea Convention⁹⁸ or the UNCLOS⁹⁹ *at the time*, Canada could have been entitled in drawing the baselines in accordance with customary law and the waters behind them might have acquired a solid status as *internal* in the course of those 9/18 years. These are however contested positions.

4.2.2 The American legal case

The US rejects both of the Canadian claims, but more importantly it brings forth a core claim of its own; namely that the Northwest Passage equals an *international strait* which secures for the US a right of *transit passage*.

An international strait is a sea corridor linking two oceans together which is used for international navigation. When making such a claim the US points to Part III of the

⁹⁶ For instance Donald McRae and Michael Byers. See Donald McRae, “Arctic Sovereignty? What is at Stake?”, *Behind the Headlines*, Vol. 64, January 2007, pp. 1-23 (pp. 13-14) [McRae]; see also Michael Byers, *Intent for a Nation: What is Canada for?*, Douglas & McIntyre, Vancouver, 2007, p. 156 [Byers].

⁹⁷ With the exception of those pertaining to the areas which Article 298 allows for certain exemptions to be tied to. None of the areas Canada declared exempt relate to the issues contained within Articles 7,8,17,18 or 19 (United Nations 2009a)

⁹⁸ Part of UNCLOS I.

⁹⁹ Although opened up for signature in 1982, the UNCLOS was not in effect in 1985 seeing as though the required 60th signatory didn't come until 1994. Thus it cannot be argued that its provisions had gained the status as customary international law by 1985.

UNCLOS. The legal definition is, however, missing from the provisions laid out there, and the reason for it simple; the states could simply not agree on one. That means that turning to customary law is the only way to go. The US has consistently invoked the *Corfu Channel* case¹⁰⁰ from 1949 wherein seemingly clear criteria were established. The *geographic* criterion states that for a legal strait to exist there needs to be an "overlap of territorial waters in the natural passage between land joining two parts of the high seas (or EEZ) or one part of the high seas (or EEZ) with the territorial sea of a foreign state" (Pharand 2007:34). In essence, this means that a legal strait needs to be narrower than 24 nautical miles and link two oceans together. Canada does not oppose that several key points in the Passage satisfy this criterion and, as such, the parties are in agreement on this matter. That cannot be said of the second criterion however. The *functional* criterion is the one which would occupy the lawyers' plates should the matter ever reach adjudication. It pertains to whether or not the strait in question has been used in such a manner as to qualify under the indeterminate tag-line "used for international navigation". The argument between the US and Canada on this matter is not *primarily* related to the exact number of ships that have ventured through the Passage over the years, the flags represented or even in what capacity they have sailed. The disagreement lies in the legal reading of the criterion itself. Whereas Canadians tend to count the number of transits in the Passage¹⁰¹ and claim that the non-consensual ones are way too few and far between to constitute *usage*, the US reads the *Corfu* case as clearly indicating that it is not the volume¹⁰² itself which is the pivot. Instead of the *actual* use, it is the *potential* use of the Passage for international maritime traffic which is the crux of the matter¹⁰³. If that premise was to gain recognition then it wouldn't matter how few ships had sailed it,

¹⁰⁰ One in which the ICJ ruled in a case involving British navy ships coming under fire from the Albanian mainland while in the Corfu channel. In its very first case ever, the ICJ (among other things) ruled that the Albanians had been wrong in denying the UK innocent passage. The case was viewed by many as an early warning of the Cold War which was to come and it irrespectively lead to severely entrenched UK-Albanian relations which really didn't return to normal until the end of the Cold War.

¹⁰¹ As does Donat Pharand (2007:37-42) in justifying his claim that the Passage cannot be classified as an international strait. In addition to a mere count, he ascertains the type of ship, nature of voyage and state of registry for each of the counts.

¹⁰² *Volume* understood as the amount or number of individual transits made throughout history.

¹⁰³ In fact, an objective reading of the Corfu Channel case would seem to indicate that the ICJ did not focus much on the functional criterion at all. That does not however mean that the US could escape having to satisfy this criterion in making its case for the Passage as an international strait. The ICJ's lack of focus to the functional criterion is best ascribed to the fact that the brunt of the dispute lay in the geographic delimitation and that transits had been numbering in the thousands, as opposed to only a handful in the Passage.

that there was a lack of deep water docks or any other circumstance.

The ice was the impediment - and that impediment is literally melting away.

Under the categorization "international strait" the American and other states' vessels would have the right of *transit passage* – similar to that of “walkers on footpaths through British farmland” (Byers 2009:42).

If the American reading of the legal premises was not to prevail, the Passage could still end up becoming an international strait if more American or other foreign ships sailed the Passage without Canadian consent and the Canadians were unable to enforce its resistance. Given the potency of precedent, such a gradual process of internationalization would counter any perceived weakness in the American legal claim¹⁰⁴.

Canada was granted certain concessions in the wheeling and dealing of the UNCLOS III-negotiations. Article 234 is perhaps the most obvious one, and one which was dubbed “the Canadian exception”¹⁰⁵. It gave proprietors of severely ice-covered areas the right to regulate marine pollution from vessels.

The American response to the Canadian claims post-*Polar Sea* would be to point to Article 234 and ask “what does not Canada have under Article 234?”. From before it had control over the fish in the water and the oil and gas on the seabed. With Article 234 it got the right to protect the pristine environment¹⁰⁶. That essentially only leaves one thing¹⁰⁷; namely the ability to control the passage of warships. Warships were in Article 236 made explicitly exempt from the rights given in Article 234. Plus, Americans would add, the control of warships is something Canada would not even have in its territorial sea.

In the dispute, Article 234 actually seems to work in the benefit of the US more so than Canada – at least slightly so. Upon US ratification the Americans could choose to bring the article before adjudication to establish whether or not it can be said to

¹⁰⁴ And be detrimental to the Canadian claim. That is precisely why Pharand (2007:48ff) and others have stated that the best thing the Canadians can do, irrespective of whether or not their two claims were to prevail, is to *beef up* their presence in the North and make sure they can *actually* enforce their claim to the waters.

¹⁰⁵ Although it would obviously apply equally to e.g. Russia's ice-covered areas.

¹⁰⁶ As long as it did not impede on navigational rights (Paulsen 2007:97).

¹⁰⁷ Aircraft overflight rights would *possibly* make a second. In Article 234 there is no mention of it.

apply as the ice melts and leaves the areas ice-free all – or at least parts – of the year. It hardly seems likely that it can be. If the conditions for an Arctic/Canadian exception were to disappear, it means that Canada's argumentative vantage point vis-à-vis the Passage might be even weaker at some point in the future than it is now – and conversely stronger for the US.

Unlike Canada, which has employed more than one justification through the years, the US has shown consistency in its claim vis-à-vis the Passage. This *could* represent an advantage when or if the time for adjudication comes.

A quick glance back to the aftermath of the *Manhattan* voyage could serve as an example. In addition to launching the Arctic Waters Pollution Prevention Act the Canadian government in 1970 also extended the territorial sea from three to 12 nautical miles - not a huge issue in itself seeing as though many others countries had already done just this¹⁰⁸. However, the extension had the effect of enclosing certain of the narrower parts of the Passage¹⁰⁹, thus giving the Canadian authorities the opportunity to regard [parts of] the Passage as its territorial sea and apply [essentially] whatever laws it pleased to those vessels which had the right of innocent passage. At the same time, though, the historic internal waters argument began to surface with increasing propensity. Employing both of these arguments simultaneously soon proved difficult because internal waters are by definition not territorial sea and vice versa. The contradiction and confusion led Canada to have to *choose*, so to speak, which of the two it wanted to employ. The US, on the hand, has not been presented with such a conundrum. Sure, it has dabbled with refuting the Canadian claims from time to time, but it has first and foremost been advocating its own claim and has done so in a consistent manner. That *could*, as noted before, become an advantage¹¹⁰.

4.3 US-Canadian relations

Could Canada and the US go to war over this issue? In theory yes, but it is of course highly implausible in the foreseeable future and even beyond. The two haven't stood

¹⁰⁸ And however reluctantly, the US followed suit under President Reagan in the 1980s.

¹⁰⁹ In that the most narrow straits were less than 24 nautical miles wide (12 nm + 12nm from two islands having the effect of overlapping one another and thus enclosing the water).

¹¹⁰ By employing Jurgen Habermas' method of ascertaining the consistency of a position, it becomes clear that the US position must be said to be *valid*, at least equal to or probably more so than the Canadian one.

opposite one another in true armed conflict since the War of 1812 and although there did exist a theoretical framework outlining a potential third US invasion of Canada in the *interbellum* years¹¹¹ much have changed since that time. The British Empire poses a threat to the US no more, two world wars and a cold one have to a large extent served to align their security policies and the amount of US-Canadian trade is unmatched in the world. Just to name a few things.

This quote by former US President Kennedy serves to represent the amicable relationship - uttered in a speech to the Canadian parliament a few months after he took office in 1961;

"Geography has made us neighbors. History has made us friends. Economics has made us partners. And necessity has made us allies. Those whom nature hath so joined together, let no man put asunder."

(The American Presidency Project 2010a)

There are in fact so many levels of bilateral dependency and cooperation that it seems almost preposterous to see the Northwest Passage dispute as creating anything but the occasional diplomatic stir. Those can however be damaging enough in and of themselves.

Keohane and Nye would also hold that the very nature of the subject matter - ocean politics - in and of itself would decrease the change for military conflict due to its global relevance and the way it ties states together.

The causal part of their argument lies in the core expectation that increased interdependence should lead to more cooperation. And as the world becomes increasingly complex, cooperation is just what is needed to alleviate some of its ills and transcend the anarchy of the international system.

The US and Canada have a long history of such cooperation, with regard to this topic matter as well. Just consider their joint proposal in 1960 to extend the territorial sea limits¹¹² or the aforementioned 1988 Arctic Cooperation agreement. There are newer examples as well. A Memorandum of Cooperation was signed in 1999 to collaborate

¹¹¹ Called *War Plan Red*. The Canadians developed their own draft called *Defense Scheme No. 1*.

¹¹² From three to six miles, with an additional six mile fishery protection prerogative. The proposal was rejected by other states at the time, although becoming a household concept later on (Barrett 2003:113).

in environmental and earth science. The two states have also established a Hydrographic Commission which seeks to figure out how to reflect unresolved boundary disputes (like the one in the Beaufort Sea) on maps and charts (Campbell 2008:3).

The ability to collaborate in functional terms even though the *modus vivendi* persists speaks volumes about the state of the US-Canada relationship, both in general and pertaining to ocean politics specifically.

4.4 Room for a bilateral deal between the US and Canada?

It might thus seem to be a puzzle that Canada and the US haven't succeeded in forging a comprehensive bilateral agreement on the issue *prior* to it becoming a hot one.

Should the issue be dealt with bilaterally or should it involve the rest of the world? Rather than answering that question flat out, I think it is proper to backtrack a bit and instead inquire; *is* the issue a bilateral one?

If indeed it ever was, it is certainly not *only* a bilateral issue anymore - thanks to global warming. Since knowledge of global warming has begun to seep into the public's awareness, people are starting to realize that the Northwest Passage dispute might not only be a bilateral US-Canadian issue. As an ocean-to-ocean strait¹¹³ with far-reaching consequences for the future, it pertains to the world at large.

That means that the time for *modus vivendi* and ad-hoc arrangements of various sorts might be over. Continued ad-hoc arrangements between the US and Canada will not extend to the latter the legal authority to act vis-a-vis third parties which are deemed a risk. That is at the crux of the matter. If the Passage opens up and becomes a viable shipping lane, American vessels will not be the only foreign ones traversing the waters. Hence, internationally accepted authority is as important to Ottawa as, or even more than, acceptance in Washington.

¹¹³ Escaping Canadian complaints by not calling it an *international strait*...

Some might argue for leaving the Arctic be and point to the Antarctic Treaty for inspiration. Looking south for inspiration may very well be a good idea. It seems, however, implausible that a special treaty for the Arctic will materialize.

There are just too many points of difference for there to even be a fruitful comparison of the two. The Antarctica is a continent within itself and is surrounded by oceans. The Arctic, however, is in essence an ocean closely surrounded by land. The former is an uninhabited region¹¹⁴. The latter region is habited by (potentially) millions of people¹¹⁵. One has easily discernable boundaries, while the borders and limits of the other is a matter of contention. Sure, there are similarities too of course. Both regions are climatologically rough, probably packed with natural resources and undoubtedly environmentally pristine. The point is merely that the aforementioned factors, in combination with there already being an UNCLOS, do not speak well for a hypothetical (general) treaty for the Arctic Ocean.

As I mentioned, there have been voices, both in the US and in Canada, calling for a special bilateral agreement as supposed to having the UNCLOS or any other multilateral treaty apply. There is no shortage of possible templates.

One could for instance envision a deal that would allow Canada and the US to jointly manage the Passage, as they already do the St. Lawrence Seaway and the Great Lakes. This is reminiscent of the comprehensive Northwest Passage Authority (NWP) which Brian Flemming (2008) at CDFAI¹¹⁶ has launched as a hypothetical proposal.

Another way to go could be to include Denmark and build on the 1983 Canada-Denmark Agreement for Cooperation relating to the Marine Environment to make for joint [tripartite] jurisdiction of all shipping over the North American continent (Canadian American Strategic Review 2009)

NAFTA could be a third possible template. If not a template, then at least a role model. The considerable free-trade agreement consolidated the co-operative nature of the US-Canadian relationship. Although issues under the NAFTA rarely if ever relate to matters of sovereignty, the two have shown they can come to agreement on the toughest of matters. Think of the softwood lumber dispute, which was one of

¹¹⁴ With the exception of the resident scientific milieu, numbering some X thousand people in total.

¹¹⁵ The exact number of which is highly dependent on where one draws the boundaries.

¹¹⁶ The Canadian Defense & Foreign Affairs Institute is a think tank based in Calgary, AB.

the lengthiest trade disputes in history. In 2006, the US and Canada chiseled out and signed an agreement which has more or less¹¹⁷ solved the quarter century old dispute. The agreement entailed compromises on both sides and, more importantly in this regard, set up a dispute settlement mechanism based around the London Court of International Arbitration¹¹⁸. Cases could be brought forth by both parties, the panel's proceedings would be translucent and public, and the rulings would be binding. Four years on, the mechanism has been used on more than one occasion and seems to be working adequately.

And yet, even though there are several potential templates out there, a bilateral agreement settling the Passage dispute seems very unlikely - especially after the Ilulissat Conference at the end of May 2008 where the five Arctic states signed a mutual declaration vowing to, among other things, “remain committed [to the UNCLOS] and to the orderly dispute settlement of any possible overlapping claims” (Arctic Council 2008).

The UNCLOS *is* the appropriate template.

Proper classification of the waters comes first. Then comes the accompanying jurisdictional entitlements under the UNCLOS.

4.5 The American UNCLOS arguments conceptualized

Rewind back to 2000/01.

The Clinton administration left office with the UNCLOS at the top of its list of unratified treaties¹¹⁹. According to John B. Bellinger III (2008)¹²⁰, the Bush administration picked up on that designation, passed it around to the various departments and government agencies and concluded after a long review process to support accession¹²¹. And it did so with more or less the same points of justification as its predecessor and successor.

¹¹⁷ (Bjørndal 2009:61)

¹¹⁸ A private, non-governmental body of arbitration.

¹¹⁹ A so-called “category one treaty priority”.

¹²⁰ Top legal adviser for the Secretary of State and the National Security Council under President Bush.

¹²¹ Even though it in most other respects chose to check the US out of many processes in the UN system.

Which are these points that evidently are so compelling that they were shared by two otherwise so dissimilar administrations?

There are a myriad of more or less mythical conceptions about the potential impact of the UNCLOS on US interests, some more ludicrous than others.

I think it will be wise not to handle them in the manner which UNCLOS` most eager proponents or opponents do. It is too ideological a matter.

What is clear is that the UNCLOS touches on a wide range of US interests.

Neo-functionalist thinker Ernst B. Haas once summed up some of the issues pertaining to regulating the seas;

“fishing, mining, merchant shipping, pollution control, underwater communications, oceanographic research, innocent passage through territorial waters, recreation, maintenance of law and order, the peaceful settlement of disputes, conservation of all living resources of the sea, maritime safety and ownership of vessels, slavery, piracy, the drug traffic, the development and diffusion of new ocean-related technologies, the use of underwater nuclear explosions, arms control” (Haas in de Wilde 1991:14)

These are *some* of the issues which ensure that ocean politics will be of the utmost strategic importance for the US.

It is obviously difficult to pit either of these against one another and attempt to rank them – which is often necessary for argumentative purposes. What, then, is easier is to see that most of them are very much *related* issues and that is precisely how a superpower like the US must approach it.

To answer my own question above, I could employ a few concise sentences from the plain-speaking former President.

“First, I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the

United States a seat at the table when the rights that are vital to our interests are debated and interpreted” – Presidential Oceans Policy Statement May 15, 2007
(The White House 2007)

Bush seems to make clear the compelling points of justification. Ratifying the UNCLOS will strengthen national security, improve the military’s capability to project power globally, secure access to resources, promote ocean health and broad environmental concerns, and give the US a vote in debates, interpretations and dispute resolutions.

Not a bad list indeed.

And yet, there is staunch and fierce opposition from a certain segment in the populous, represented by a small group in the Senate. What does this opposition amount to?

Instead of taking on each and every one of the many arguments against ratification, I have in the following chosen to group and conceptualize them into three over-arching conceptualizations. It is my contention that these catch and contain within them the spores to most of the opponents’ concrete objections¹²².

4.5.1 Creeping unquieness

Creeping uniqueness has become somewhat of a fashionable concept among the more intellectual of the UNCLOS skeptics and rears its face in the Passage dispute. The idea, of course, runs along the lines of; “because of some compelling local circumstance, normal rules do not apply”. Giving in to such a position is thought to be potentially harmful and could create a detrimental snowball effect by way of sending the wrong signal to not-so-benign countries whose waters surround some of the world’s more important straits. As such, it is not so much the Canadians and the Passage that is the concern. It is the Strait of Malacca and its immediate neighbors Indonesia and Malaysia (Macleans 2006). Or the Strait of Hormuz and its Iranian co-proprietors. Or Libya and its claims in the Gulf of Sidra, to name a third example. If these states were to take the Canadian approach and gain recognition for doing so, they would be able to regulate and, essentially, block or at least circumscribe

¹²² Which at times are so preposterous that a fair and balanced evaluation is made difficult.

American naval mobility in the straits. The end result would be that American vessels would be exposed to arbitrary and ever-changing rules and regulations around the world.

To be fair, there is nothing extraordinary or new in the US insistence on keeping international straits and gateways open. Although different administrations have brought different flavors to the mix, US oceans policy has still been a very consistent entity for some two hundred years. Underlying it has been the fundamental and profound defense of the freedom of the seas doctrine and insistence on navigational mobility worldwide. This insistence has been made evident through action time and time again. It supported a separatist revolution¹²³ and spent more than it had ever done on a single construction program up to that point to have the Panama Canal built. Or, to scurry back to present day, one could have a look at the continued American insistence on asserting US/Taiwanese interests in the South China Sea – an insistence which as late as in March of 2009 lead to quite a serious Chinese-US naval confrontation (New York Times 2009a).

However, although a legitimate one, the US fear of setting a problematic precedent is to a lesser and lesser extent well founded. After all, and primarily because of the UNCLOS, the status of most of the straits and waterways around the world that the US has sought to maintain as international ones have been resolved or are in the process of being resolved (Byers & Lalonde 2006:31) - the crucial Strait of Malacca being one of the ones which is all but there¹²⁴ (Koh 2007).

4.5.2 Sovereignty

“Striving not to make the Passage the Panama Canal of the 21st century”

This is how the most eager opponents of the UNCLOS view their battle. They allude to Jimmy Carter`s Panama Canal Treaty of September 1977¹²⁵ and claim UNCLOS is

¹²³ What today is Panama was then belonging to Colombia.

¹²⁴ After a cooperative mechanism has been agreed under the auspices of IMO, and with reference to Article 43 and others of the UNCLOS.

¹²⁵ Where the Panamanians were promised the control of the canal by the year 2000.

an equally big “give-away” of US sovereignty¹²⁶ and resources. It is not always easy to figure out the precise logic which underlines this view. For some, it is the funding of the ISA (which is seen as a global *tax*), for some it is the mandatory dispute settlement mechanism and for some it is simply the mere idea of multilateralism. All are however seen as diminutions of sovereignty/autonomy.

In actual fact, with respect to the increased resource jurisdiction the US would [probably] *legally* acquire by acceding to the UNCLOS, the numbers are quite staggering. The [geographical] areas that would fall under US control would be greater than those of the Louisiana Purchase and the acquisition of Alaska in combination – two cases which is often referred to as having been fantastic deals for the US and great feats of diplomacy, even by the most skeptical of UNCLOS skeptics. It would represent a doubling of the current American share in the Arctic. However, the opponents do not see it like that. American business interests can already exploit resources on the high seas and preeminent military power protects the US from foreign encroachment.

For them it might all appear quite reminiscent of two other vital moments in US history; the Jay Treaty of 1795 and the Treaty of Versailles from 1919. Both treaties caused quite a stir and faced strong opposition (and indeed amendment) in Senate due to the perceived way in which they diminished US sovereignty. Professor Bederman (2008) might very well be on to something when he draws lines of similarity between these two treaties and the UNCLOS. What he is essentially proposing, without voicing it explicitly, is that there is something innate in parts of the American character which purports to isolationism when faced with possible participation in more or less formal international institutions and authorities. Not *subjugation by*, but *participation in*.

¹²⁶ *Sovereignty* and *control* are two of the words that get thrown around. *Security*, *authority* and *perception* are three others. *Sovereignty* is assumed to be pursued for the purposes of protecting the *security*. But to claim *sovereignty* one has to be in physical *control*, have the material or moral *authority* and be *perceived* as the sovereign by others. My intention is not play tongue-twister with the reader, but simply to point to the complex ways these elements interact and tend to confound matters a bit, both in their semantic everyday usage and in the way they function as constructs of international law. What is interesting is that the concept of *sovereignty* – or rather the misuse of it – seems to unite the Canadian hardliners who stand firm on their claim to the status of the Passage and the American far right which vehemently oppose the UNCLOS. Both groups tend to push the sovereignty button. And both do so at least partly without merit.

If the fears of “sovereignty give-away” were mainly to relate specifically to the aversion to mandatory third-party settlement procedures¹²⁷ then it must be noted that this is in no way representative of something *new* in US politics. This aversion has led the US to reject many an international initiative through the years;

- The 1907 Central American Court of Justice
- The Taft Arbitration Treaties of 1911
- The League of Nations and the Permanent Court of International Justice it set up
- The 1961 Optional Protocol concerning the Compulsory Settlement of Disputes (which was tied in with the UNCLOS I-treaties of 1958)
- The Inter-American Court of Human Rights
(Noyes 2009)

In addition to these examples, I would also mention its notoriously halfway-approach to the International Court of Justice.

This aversion obviously also rears its head in the matter of the UNCLOS, where it is deemed to have an unfavorable impact on national security.

However, the fact that it cannot be ascribed to the vocal opponents *alone* is made evident by how the SFRC has dealt with the UNCLOS. When it issued its latest favorable Advice and Consent Resolution it nonetheless took advantage of Article 298 section 1b and declared military activities exempt from all third-party dispute settlement procedures and added that the US would take it upon itself to be the judge of what constitutes *military activities*¹²⁸. Perhaps not a shocking move in and of itself, but it does play into the idea of there being something *American* in the unease with multilateralism, not just something pertaining to the vocal right-wingers.

Regardless of which concrete arguments they tie to their objection, the opponents of the UNCLOS all seem to conform to a simple but crucial premise; that the US does not need to accede to it. By virtue of its tremendous power the US can merely “shoot its way” through disputes and altercations at sea. This is in my opinion a position fraught with faults. Let me mention a couple of the most important ones.

¹²⁷ Strictly speaking, the US does not have a problem with third-party settlement procedures. It is when their decisions are binding the US tends to retract.

¹²⁸ Which would not only work counter to the consensus idea of the Convention, but also create a potential problem for the US. By claiming military activities exempt it would be invoking section 3 which would prohibit the US to judicially challenging other states` military activities.

First of all, many of the disputes that the US has been a party to, including the one to which the brunt of the light is shed in this thesis, have involved other democracies. To intimidate states like Chile, Canada or India into submission may not only place a burden on their respective friendships with the US. It could also be counterproductive to several of the broader principles the US have been trying to push for years and years; like multilateralism instead of unilateralism, negotiation rather than bullying and generally; the rule of law as supposed to anarchy.

Secondly, it rests on an inherently temporary premise; that the US will remain militarily preeminent well into the distant future. This might be the case, but if history is any indication the hegemony will be lost at some point¹²⁹. As reflective of their view on *power*, Keohane and Nye argue along the same lines, although not with reference to history. They contend that it is unlikely that the superpower will remain hegemonic for eternity because of the changing facets of the notion of *power*. The idea is that as states (and non-states) become increasingly intertwined, the superpower will focus more on the (economic and social) gains and benefits it can reap within the new globalized system instead of necessarily worrying about another state increasing its military capability¹³⁰ - unless of course it has obvious malign intentions (Keohane & Nye 1977:42-49?). And it is not particularly relevant either. With increased interdependence comes a necessary downgrading of the option of military threat. Power, then, have moved *beyond* being just the sum of resources and military capabilities into also involving the appeal of soft power¹³¹. Still, when or if the point comes that the US is matched in a strict militaristic sense, it can no longer rely on its fist and will undoubtedly be more prone to negotiation and hedging. By not voluntarily having explored more multilateral arrangements while still being a superpower, much potential goodwill will have been lost¹³².

¹²⁹ Indicative of this very point is the objective fact that according to the American Shipbuilding Association the number of US Navy ships has dropped from 594 under Reagan to 276 under Bush jr. (Sea Power Ambassador 2010). This does not necessarily reflect a change in *relative* power capability, but it does affect the American capacity to project naval power at various locations around the world all at once.

¹³⁰ A clear deviation from realism (particularly structural realism as reflected through the writings of Kenneth Waltz) which argues that states will do everything they can to maximize their own power at the expense of others. Thus, Keohane and Nye de-rates the military option and add a lot of grey to what they see as the black and white of Waltz` realism.

¹³¹ A state`s ability (through co-option and attraction) to alter the behavior of other states and get them to do what it wants (Nye 2004)

¹³² Here, political goodwill is seen as an investment.

4.5.3 *In dubio pro natura?*

Although there are problems with his general position¹³³, I do believe that Lawrence A. Kogan hones in on something interesting when he speaks of a *legal competition* between the US and other nations (implicitly, this means Europe at large) of how to infer and interpret the core principles set forth both by the freedom of the seas doctrine and the environmental and economic provisions of the UNCLOS (Kogan 2009). The pivot, according to Kogan, is the so-called *precautionary principle*¹³⁴, which he sees as a European entity that is permeating the UNCLOS and would considerably alter both US law and the manner in which the US deals with international law. Or rather; alter the legal norms with which the US is used to operating. The premise is, of course, that the US was to accede to the treaty. Although it might seem to perplex him that the principle is seeping into the US, I do not believe this to be the case. Albeit it a rather new concept in US case law, the precautionary principle has been a talking point within environmental milieus since the early 1980s and really got a foothold through specific references in important environmental conferences a decade later¹³⁵ and particularly with the newly conceived EU adopting it as a guiding principle. Although late to follow suit, the US now seems destined to have their legislation affected as well - as witnessed by the landmark 2003 decision of the city of San Francisco¹³⁶ to have the principle underline all its environmental policies (City of San Francisco 2003). It, combined with other

¹³³ Which essentially is a not-so-well concealed intellectual defense of the American legal standard, to the disfavor of the European counterpart and, in this case, the UNCLOS itself. It makes the case that the UNCLOS has got so far-reaching legal environmental consequences that the Senate must vet it and its consequences in a multi-committee fashion. In fact, March, April and May of 2004 saw the Senate Environment and Public Works Committee, the Senate Armed Service Committee and the House International Relations Committee all holding hearings on the UNCLOS.

¹³⁴ From the original German phrase *Vorsorgeprinzip*. The precautionary principle is the legal (and moral and political) principle which states that when human activities may lead to morally unacceptable and/or irreversible harm (to the environment or human health) that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. It thus alters the burden of proof – placing it on the opposite side. The precautionary principle closely borders other adjacent judicial norms, like sustainable development and earth jurisprudence.

¹³⁵ The most famous of which is probably the Rio Declaration of 1992 and its Principle 15 (Science & Environmental Health Network 2003)

¹³⁶ Generalizing from famously liberal and progressive San Francisco alone is not entirely unproblematic. There are however heaps of other federal and state laws that are clearly precautionary in *intent*, if not in black letter, like The Clean Water Act (1972) or the Endangered Species Act (1973). The Food Quality and Protection Act (1996) is an example of one of the rather new laws which clearly possesses codified precautionary elements.

new legislation and an assumed US accession to the UNCLOS, would seem to prove that the *legal competition* is no more – if it ever was. Although most certainly not there yet, the US is moving toward making the precautionary principle the rule as supposed to the exception. One would expect there to be quite a strong correlation between this movement and an expected movement toward an accession of the UNCLOS. But as the dictum states; correlation does not necessarily imply causation.

Not only have all branches of government slowly begun to incorporate facets of precaution in environmental regulation and the interpretation of which. If one takes a look at the actual content, it is also evident that some kind of movement towards understanding environmental ills as global ones is occurring¹³⁷.

The domestic legal trend, however slow-moving and implicit it might be at this point, thus seems to be paying tacit reverence not only to the precautionary principle, but also to the *equivalence principle* – that which secures more or less the same treatment of environmental harms regardless of whether they occur within one`s boundaries or not. My point is merely to indicate that there is by no means perfect congruence between the American treaty record and its domestic legal actions.

In itself the precautionary principle is not a particularly powerful tool of decision-making. It is more a moral-philosophical backdrop against which politics are conducted. Precautionary intent means nothing unless there is enforcement on the other side. Some would however argue, like Speth and Haas (2006:102) does in *Global Environmental Governance*, that weak enforcement is not the crucial flaw of treaties like the UNCLOS. The problem lies in the fact that the treaties themselves are too weak and not ambitious enough. This seems like a valid point when measured against a high standard of efficiency. But are extreme highs or absolutes the way to go? In as far as the treaties ought to reflect the ultimate goals, they are weak. In practice though, it makes little sense to deem, say, the UNCLOS as ineffective because its provisions on fisheries have not lead to rejuvenation of all fish species – to name one example.

¹³⁷ An example of which can be the National Environmental Policy Act which contains an explicit order directed at the agencies to “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment” (NEPA section 102, F) (Council on Environmental Quality 2010).

The reason why the precautionary principle even matters in relation to the topic matter is obviously because it would, if it becomes a widely accepted norm, give states, like Canada and others, a legal basis from which to restrict and affect US naval mobility by way of invoking environmental concerns. And invoking such concerns is no tall task as there are no shortages of examples to point to. Let`s take the crucial Strait of Hormuz in the Persian Gulf as an example. In January 2007 the US nuclear submarine *USS Newport News* was sucked up¹³⁸ by the supertanker *M/V Mogamigawa* sailing the waters above and collided with the 300 000 ton Japanese vessel. Another example is the 2009 occurrence where US nuclear submarine *USS Hartford* collided with the transport dock *USS New Orleans* in March. As chance would have it, no environmental harm were incurred in the former case, whereas the latter led to the spilling of 25 000 gallons of diesel (New York Times 2009b). “Imagine if it had been vice versa”, Canadians would say while pointing to the Northwest Passage as a possible future venue for such an environmental tragedy.

One of the interesting aspects of the current UNCLOS debate in the US is the fact that it can no longer be analyzed within a straight forward partisan paradigm. This was more the case under President Reagan in the 1980s, where this and other issues seemed to take on a more ideological spin.

Nowadays it is different. With former President Bush, several of his top liaisons, vocal incumbent GOP senators like Mrs. Murkowski, Dick Lugar, Ted Stevens and others in support of ratification, the Republican caucus is itself divided and one has to look to the right fringe of the party to find the opponents in the likes of Mr. Inhofe, Mr. DeMint, Mr. Vitter etc. The latter ones base their claims on deeply felt dogmatic¹³⁹ views of the importance of US national sovereignty and skepticism toward multilateral arrangements.

¹³⁸ The *venturi effect* was thought to be the culprit (Pilot Online 2007)

¹³⁹ To utilize the word “dogma” is dangerous in the sense that it for some carries negative connotations. In the true sense of the word it does not carry any connotations, neither positive nor negative, and this is the version I am employing.

However, insofar as Reagan had ideological considerations at heart when rejecting the treaty back in the 80s he nevertheless formulated his opposition in concrete and specific political objections. These have since been specifically addressed. Or have they?

I will in the following section look into the US skepticism toward the UNCLOS through the prism of the Reaganite era. It is my contention that this is a period which had formative effects and encapsulates many of the attitudes of UNCLOS-detractors today.

4.6 Reagan`s official objections

The official American objections were laid out in the “Statement on United States Participation in the Third United Nations Conference on the Law of the Sea” of January 29th 1982 (The American Presidency Project 2010b). Although vague in its semantic build-up¹⁴⁰, the statement indicates that the Reagan administration refused to sign primarily due to the provisions related to deep sea bed mining in Part XI (and Annexes III and IV).

More specifically it found the powers given to the ISA (an organ set up to govern the seabed and its activities) fundamentally unacceptable in that the two-thirds majority voting system could leave the US and other industrialized states at the mercy of the developing world`s will. Or to put it in another way; that the influence the US was given was incommensurate with its interests (and the amount its companies would contribute to the ISA budget). Secondly, the ISA would sell exploration & exploitation licenses and set up a commercial arm of its own which down the line would be able to compete for licenses with other companies. This management strategy might ring familiar to Norwegians with any knowledge of how Norway chose to handle it when it struck oil in the late 1960s, but for the Reagan administration it smelled of public enterprise¹⁴¹ and it was thus inconsistent with the free market philosophy so heeded in the US.

¹⁴⁰ Which necessitates a certain level of interpretation.

¹⁴¹ Which, to be fair, it was. It was even called *the Enterprise* in the UNCLOS text and was meant to be funded by mining states and receive the necessary technological know-how from them as well. It

Third, the idea that this Enterprise was to be (in essence) subsidized by mining states and that the latter's companies would be forced to transfer technology to it and developing nations¹⁴², was equally unacceptable. Fourth was the objection to the fact that there was no assured access to future deep seabed mineral resources and that production ceilings were likely to be introduced.

The fact that it was Part XI and accompanying annexes which constituted the problem was explicitly reiterated by President Reagan in his 1983 Oceans Policy Statement 14 months later;

“We have taken this step [of refusing to sign the UNCLOS] because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries”

(Ronald Reagan Presidential Library 2010)

4.6.1 The Reagan objections revisited

Alas, it is not necessarily such a straight forward task to interpret the Reagan administration and its position. There has been some controversy as to what were his true *rationale* for going against the advice of Secretary of State Alexander Haig and others around him who favored the treaty. Some of the ones who still vehemently oppose ratification are not deterred by those (like former Reagan aides Baker & Schultz¹⁴³) who say the '94 Agreement mended all the cracks and imperfections Reagan pointed to. They claim that the scope of his objections went wider than that which was uttered officially back in his tenure. That it was not so much about the technicalities of Part XI as what these were taken to *represent* for Reagan and many

would then be in a position to best safeguard the sea bed resources in line with the “common heritage of mankind”-tag

¹⁴² The treaty contained provisions which sought to lift forth so-called *liberation movements* in developing countries by way of, what in essence would be, subsidies from the mining states (i.e. the US). Not only was the US opposed to the principle. The administration also noted, with a sense of disgust, that such liberation movements would at that time include the likes of PLO, to name one example.

¹⁴³ See page 72.

with him. Or to put it in a slightly different way; that Part XI was merely a manifestation of the wider conceptual and ideological problems the President had with the UNCLOS.

This is a very valid point which deserves analytical attention.

Although evidence is scarce, their argument seems to rest on two things, one being proof of better quality than the other.

First, the best piece of evidence is perhaps the diary entry of June 29th 1982 which essentially made it clear that Mr. Reagan was not inclined to sign the treaty even if there were no provisions on seabed mining¹⁴⁴. If taken as a reflection of a consistent personal view (as opposed to a temporary one), it would seem to directly contradict the official position as reflected through public statements and the official Ocean Policy Statement of March 1983 (National Oceanic and Atmospheric Administration 2010). The point should be made, though, that this diary entry was made after a several months-long negotiation process to alter the treaty text into a more pro-US one seemed to come to an unsuccessful end. Like I mentioned, then, the entry could conceivably have been a reflection of frustration more than that of a consistent view. Still, a diary entry is generally a more reliable source than second-hand accounts – especially if it is to be employed to shed light on Reagan's personal opinion.

Second is the fact that chief UNCLOS negotiator for Reagan, James Malone, went on record more than a decade later (and *after* the '94 Agreement) confirming his 1984 justification¹⁴⁵ and making it unequivocally clear that Part XI was by no means the only objection the President had. Instead it was the collectivist and redistributionist nature of the treaty as a whole which put him off. This is ample evidence of the fact that these are deeply felt political views that are not to be construed as temporal ideology. However, whether or not Mr. Reagan *personally* shared those deeply felt views is a question which is not *necessarily* addressed by Mr. Malone publicly stating his opinion.

¹⁴⁴ The actual diary entry reads as following; "*Decided in [National Security Council] meeting -- will not sign 'Law of the Sea' treaty even without seabed mining provisions.*" (Reagan/Brinkley 2007:90)

¹⁴⁵ The US Senate 2007:25.

What strengthens Malone`s arguments is the fact that he by no means is the only former top Reagan liason who argue along these lines. William P. Clark¹⁴⁶ and Edwin Meese¹⁴⁷ are two others who are doing the same. In an article from 2007 they argue that the `94 Agreement did little in mending Reagan`s concerns about a treaty which had “mutated beyond recognition from an effort to codify certain navigation rights.....into a dramatic step toward world government” (Wall Street Journal 2007) Once again the President`s larger, contextual objections are in focus.

Their line of reasoning is supported by various anecdotal evidence and arguments, which for the most part are easy enough to crosscheck. Like for instance the claim that mr. Reagan so opposed the treaty that he dispatched a [young] Donald Rumsfeld¹⁴⁸ to key allies to explain the US objections and entice them to follow suit in not signing it. This was in fact the case. Mr. Rumsfeld travelled abroad in October and November of 1982 and got 10 Downing Street and other western European allies, as well as the Japanese, on board (Earney 1990:44).

None of the other claims that are made are particularly surprising (or flawed for that matter). Reagan had indeed been a critic of Jimmy Carter and the perceived weak hand with which he handled US interests in the wake of growing demands from third world countries. This had been evident for quite some time, but the presidential campaign in 1980 served to illuminate it thoroughly when Reagan promised to fully re-examine US foreign policy and mentioned the UNCLOS negotiations specifically. In fact, the law of the sea topic was one of the very few international ones he specifically mentioned on the campaign trail¹⁴⁹.

Although Reagan initially pulled the US from the UNCLOS process and began designing a set of alternative seabed mining agreements with other states¹⁵⁰, he decided to return to the negotiations in early 1982. Why this occurred is hard to pinpoint. One could perhaps attribute it to mr. Reagan`s objections to the `package deal` orientation of the treaty, as this “implied the acceptance of some form of *linkage*

¹⁴⁶ Served as National Security Adviser under Reagan.

¹⁴⁷ Served as Attorney General under Reagan.

¹⁴⁸ Then President Reagan`s special envoy to the UNCLOS. It was a part-time position he held alongside being CEO of a pharmaceutical company.

¹⁴⁹ The campaign trail featured almost exclusively domestic issues and a wide variety at that. The Iran hostage crisis and Reagan`s vow to seek out “peace through strength” were in addition to the matter of UNCLOS two of the few international ones that came up during the course of the campaign.

¹⁵⁰ (Earney 1990:44f)

between the various packages being debated simultaneously and of some give and take on the part of both the G77 and the United States” (Schmidt 1989:308). Such linking strategies were (as assumed by Keohane & Nye) undoubtedly employed by the G77-countries as they were tying elements of the UNCLOS negotiations, particularly those of Part XI, to calls for a NIEO. As such the move might have been an attempt to entice other nations away from the `package deal` principle, or at least to *test the waters* a bit. Alas, it led to no significant rapprochement on that matter. What is nonetheless clear is that his negotiators succeeded in forcing changes to the treaty document in those final months of deliberations. They were evidently not sufficient enough though, because President Reagan refused to sign the treaty when negotiations were concluded – perhaps due to ideological objections, as the diary entry might indicate.

One should remember that Reagan`s US was not alone in its views. Amid the conservative wind that blew in the 1980`s, several other countries in the West had objections which ran more or less along the same lines as the Americans`. Perhaps not as profound or ideologically construed as the latter`s, but objections nonetheless. Hence, none of the major powers, be it the UK, (West) Germany or France, signed on during the first round. Instead they waited until the Reaganite altercations to the deep seabed mining regime were made in the 90s (Schmidt 1989:307). This is an important point to bring forth inasmuch as it brings nuance to the view that the UNCLOS was universally supported right away. It was not, and in fact most NATO states did not join until after the `94 Agreement was in place.

Although Reagan himself never officially said anything to the effect, several of his top liaisons used the word *socialist* to refer to concepts in the treaty or even the treaty as a whole. James Malone, for instance, did so on several occasions when speaking of, among other facets of the treaty, the redistributionist principles he felt permeated the treaty (Malone 1983:31). Both Congress and the executive branch did however agree that it was based “on principles of central planning and controlled economy” (Mielke 1995). I would submit that this is about as *socialist* a description can be without being explicitly so. And irrespective of taking into account the `94 Agreement or not, it is difficult to argue against the fact that the treaty, as a whole, bears with it at least a moderate critique of capitalism and the forces of market.

The two-headed approach I have touched upon numerous times in this thesis seems to somehow be US-specific – like being something inherent in the American character. To revolt back to isolationism and/or unilateralism at various intervals, and at the expense of its heartfelt desire to engage the world, both at sea and on land. Reagan would perhaps not have dubbed it two-headed. He, like most of his peers, would more likely have pointed to the exceptional nature of the US. That is, the collective sense of the American self and the way in which it cannot be construed in ways others can. I am essentially speaking of exceptionalism as closely linked, and perhaps even interchangeable, with notions of one's identity or character.

4.7 Exceptionalism - a formative norm?

Appeals of America's exceptionalism is nothing new. As Simpson and Wheeler (2007) see it, this exceptionalism, and the back-and-forth motion between reverence for international law and 'going at it alone' it precipitates, can be traced all the way back to the nation's special inception.

“...the revolutionary aspirations of the American Republic run up against the constraining tendencies of the international legal order, and this tension can be seen in relation to the question of whether the United States should be granted [or rather; grant itself] exceptional rights or a form of extralegal sovereign exceptionalism” (Simpson & Wheeler in Biersteker et al 2007:121).

This helps put into perspective the *legalized hegemony*¹⁵¹ the US seems to be reverting back to at various but cyclical intervals, whether it would be as observed through the Bush Doctrine or through the design of permanent seating at the UN Security Council.

¹⁵¹ *The exception in law* or great power prerogatives, to put it in a simpler form.

American exceptionalism is a difficult concept to streamline into easy interpretation. This is because it touches on so many aspects, has taken many a form and is susceptible to partisan contention.

It holds that the rule of law is a much heeded premise and that American should lead the world, all the while it stresses the primacy of domestic law.

It is closely correlated to the party structure in the US, but is more a reflection of the American character than that of, say, the Republican Party alone.

Unlike Gerry Simpson and Nicholas J. Wheeler's rather generic application, others tend to deal with American exceptionalism in a more nuanced manner. Svein Melby (1995) would probably not disagree with Simpson and Wheeler's descriptions, but pits exceptionalism within a more traditional realism vs idealism scheme. He obviously sees American exceptionalism as belonging more to the latter category, but claims, implicitly, that American idealism is something quite different than idealism elsewhere. This is due to the two faces or perspectives of the American exceptionalism; the *sense of escape*¹⁵² and the *manifest destiny*¹⁵³. Together they form "an idealized American self image" (Melby 1995:21) and it is in the range between these two that the idealistic component of US foreign policy is created. This will obviously have to fuse with certain realist components, but the idealist component of US foreign policy has almost always been the most important contributor. This is not the least of which due to the central place ideas hold in the American context¹⁵⁴. Thus, as the point of gravity shifts between the sense of escape and the manifest destiny perspectives, American foreign policy bears with a "significant latent potential" for instability and credibility issues (Ibid:29-35).

¹⁵² A perspective that focuses on the power of example and holds that the best way in which American values and ideals can have appeal to others is to be a *city upon a hill*. This strand of idealism was particularly prevalent in the earlier periods of the American republic, but still plays a part in foreign policy thinking today. Proponents of the sense of escape perspective will favor a defensive and introverted approach and would much rather want to be an *empire by invitation* than the opposite. Consequently, the US can at times be pitted as the *reluctant superpower* (Melby 1995:22-25)

¹⁵³ A perspective that favors an extroverted and offensive approach to foreign policy. It plays on the age-old notion from the expansive mid 19th century of the US having a god-given right to project its values, norms and way of thinking to others. Proponents of the manifest destiny direction would like to see the US actively engage the world in an offensive and assertive fashion. This is due to the need to both protect America and also see to it that America reaches its goals abroad (Melby 1995:25-27).

¹⁵⁴ Unlike most other nation-states, the US was constructed on the basis of certain ideas, as supposed to geography, ethnicity, culture etc. These ideas, be it capitalism, personal liberty or democracy, are thus inexplicitly tied to the very existence of the nation itself.

There are two points to be made here. First, although that potential has rather negative connotations at face value, it can also be a positive force in that it can facilitate for *real* and *significant* change in the foreign policy¹⁵⁵, if the political wind were to blow in favor of that – which some would claim was the case after the last US presidential campaign. Second, in order to facilitate for a predictable, powerful and credible US foreign policy there seems to be a need for a larger, operational concept (Ibid:32). These, be it for instance *containment*, *rapprochement* or *protectionism*, will, if well formed and suited to the political reality they are applied, counter the disintegrative effects of the dichotomy within idealism and even between realism and idealism.

There are many ways of dissecting and analyzing American foreign policy. Focusing on the dynamic between realism and idealism is but one. Calling it pragmatism vs moralism is another. Walter Russell Mead's historic approach in which he identifies four different foreign policy schools¹⁵⁶ is yet another. Or perhaps one would want to leave Mead's classifications be and instead focus on four different stereotypical foreign policy personalities; the realists, the institutionalists, the expansionists and the isolationists.

Although the different ways of looking at US foreign policy have a tendency to cut across each other, they also bring nuances within their own right. Nuances that help paint a more comprehensible picture of US foreign policy and the framework within which the exceptionalism originates. Such a complex approach is after all needed, given the difficulty of deciphering US foreign policy in *quick and easy* ways.

George W. Bush, the 43th president, can serve as an example. When taking over after Bill Clinton in January of 2001 it was widely expected that the domestically focused Bush jr. would conduct foreign policy rather similar to that of his father, a *realpolitik*-styled administration if there ever was one. This did not turn out to be the case. Within six months of his presidency the 9/11 terrorist attacks took place and they lead to a significant foreign policy re-write¹⁵⁷.

Whether these foreign policy changes resulted from the President himself having an epiphany or because the events of 9/11 gave way to a political sentiment which in turn

¹⁵⁵ Which is a policy field that for most nations are characterized by stability.

¹⁵⁶ Named after four noted characters in US history; each of which brought a particular flavor to conducting foreign policy; Jackson, Hamilton, Wilson and Jefferson.

¹⁵⁷ The new platform would probably best be described in the Bush Doctrine of 2002.

empowered certain neo-conservative elements in his vicinity, is difficult to know precisely. And it is perhaps not so interesting either. The policies ought to be taken for what they were. Far from being something new or even something exclusively neo-conservative, his foreign policy actually gave heed to many core American foreign policy traditions; the efforts to pave the way for democracy in the Middle East would resonate quite well with Wilson; the willingness to take on the enemy head on would certainly please Jackson; the unyielding focus on inherent American values like *liberty* would play well to the likes of Jefferson who, like JFK or Reagan, would employ the term *city upon a hill* as a core virtue; and although Hamilton hated Jefferson¹⁵⁸, there was definitely some of the former there as well, for instance in the relentless trust in the free-market ideology and the willingness to employ it as leverage. Four different US foreign policy traditions which essentially share but one core characteristic; the belief that the US has a special place in the world. That the US is *exceptional*, if you will.

This, then, highlights the difficulty of pitting real-life policies into simplified descriptive boxes. Although every administration's foreign policy will spring from these traditions¹⁵⁹, it is however still very much worth analyzing – but then to do it with the aim of ascertaining the tilt or tendency of it, or rather; ascertaining which traditions are in the foreground and which are pushed back. Consequently, one can pit George W. Bush's presidency as primarily a Jacksonian-Wilsonian one, or make the distinction between his two terms – the second of which was less expansionist both in tone and style than the first. It is thus perhaps not so surprising that it was in the second term he found room for voicing his official embrace of an accession to the UNCLOS.

¹⁵⁸ *Hate* is perhaps too strong a word, insofar as Hamilton ended up backing Jefferson for president. Still, there were enough disagreement on policies and personality traits to justify its use.

¹⁵⁹ With the possible exception of the most isolationist strains of Jeffersonianism, which to a large degree have been marginalized since the 1950s (Melby 2004:47).

4.8 *The congressional hold-up*

Getting the UNCLOS ratified in the Senate will in many respects be a massive *critical test* for the old Washington axiom which states that multilateral treaties die and wither away once they reach the Senate floor¹⁶⁰. For seldom have the odds been stacked in such a manner against continued non-ratification. The Democrats control the White House and still have supermajority¹⁶¹ in the Senate, however fragile it might be. Both the Pentagon central command and all top ranking Navy and Coast Guard generals favor ratification. So does all relevant Departments at the bureaucratic level. In addition, support is also to be found from a huge cluster of interest groups, some of whom rarely if ever unite in policy issues. Representatives for the big oil and gas companies; environmentalists; the entire fishing and shipping industries; Wall Street; most communities along the coast; veterans; huge players within the military-industrial complex. A group of *strange bedfellows* for sure.

To top it off, even two of Reagan's own leading men from the 80s, James A. Baker¹⁶² and George P. Schultz¹⁶³, have come out publicly saying that their former boss' major objections have long been resolved and that "it is clearly time for the Senate to act" [and see through an accession] (Baker & Schultz 2007). And they are not the only Republicans who feel that way.

The problem clearly lies with select parts of the legislative caucus. The entire previous administration supported accession. President Bush, his powerful next-in-command Dick Cheney, the Navy and the rest of Pentagon. And yet, it was unable to get it through the Senate. The difference nowadays is of course the fact that the Democrats hold both the White House and Congress. In theory this would not seem to make the process of getting the bill to the full Senate floor an easier one, inasmuch as the problem lies with the GOP hardliners and the procedural make-up of the Senate, and not with the Democrats. Still, in practice, dual control in Washington usually

¹⁶⁰ As fate would have it with so many other treaties, the most famous of which are probably the International Criminal Court, the Kyoto protocol, the Comprehensive Test Ban Treaty and the Land Mine Treaty (Mead 2002:290)

¹⁶¹ Which would enable a majority to suppress a filibuster attempt by invoking cloture.

¹⁶² Served as Chief of Staff and Secretary of the Treasury under Reagan.

¹⁶³ Served as Secretary of State under Reagan.

makes for good leverage in seeing off filibusters¹⁶⁴. Whether this occurs through force or patience is uncertain thus far.

As witnessed by President Obama`s successful venture in turning¹⁶⁵ moderate GOP senator Olympia Snowe on the crucial healthcare issue in October of last year (The Telegraph 2009), creating movements within GOP ranks is possible on even the toughest and most ideological of issues.

Several of the UNCLOS opponents in the Senate are not representing particularly ocean-conscious constituencies, nor are they even coming from states with shorelines. Given that quite a few senators are on the fence on the UNCLOS matter, it is perhaps best to just look at those who have clearly and officially made their opposition known, through voting or otherwise. Senator Inhofe has long been one of the more vocal opponents of the UNCLOS and he is representing Oklahoma – a landlocked state. As are Kentucky and Minnesota, the states of senators McConnell and Coleman respectively – two other acknowledged opponents.

This, coupled with the nature of their arguments, leads to the obvious deduction that their opinions and concerns about the UNCLOS are founded along more philosophical and ideological lines than that of pleasing constituencies` particular interests. Several other GOP hardliners from coastal states (who on other issues are usually quite closely aligned with the aforementioned characters) have in the UNCLOS matter been *forced* to support accession - former Governor and vice-presidential candidate Sarah Palin being but one example.

During President Clinton`s reign it was Senator Jesse Helms who acted as the main brake, denying the treaty to be considered in Senate. After he stepped down in 2001 and the position of Chairman went to (first) Joe Biden and (then) Dick Lugar it quickly (and unanimously) passed through the Foreign Relations Committee in 2004, and then again in 2007.

¹⁶⁴ On the UNCLOS matter specifically, there is little doubt that initiating a standard filibuster would serve the minority little good. Both a Democratic supermajority and the mere fact that the issue is not really a partisan one would secure fairly easy roads to successfully invoking cloture or, at the very least, changing Senate rules. Instead, one would have to rely on old-school concession eliciting and debt collecting.

¹⁶⁵ Not without having to make concessions, obviously. The price for Mrs. Snowe`s vote would be to cut the public option.

If the axiom holds true and the administration fails to get the Senate's approval, it once again underscores the status-quo orientation of the US constitutional system. This would come as no surprise to anyone with some knowledge of the US and certainly not the Founding Fathers who, among other things, had this very concern at heart when drafting the Constitution. Its system of checks and balances ensures on the one hand that neither of the three branches of government can override the others, while on the other hand it gives, say, potentially very small minorities the chance to (under certain conditions) delay or even obstruct legislation. It is thus an inherently ineffective system – set up as to ensure freedom¹⁶⁶ more than efficiency.

Now, it is important to stress that having constitutional provisions which protects and favors the status quo is generally considered a good thing in the US, regardless of one's political inclination¹⁶⁷ (although Nixon¹⁶⁸ and other presidents have insinuated that the Constitution needs to be amended on this point so as to fit into the new era). In view of this, the Senate is merely functioning as intended when it acts as a restraint against what Thomas A. Birkland (2005:41) has dubbed “policy fads or flash-in-the-pan social movements”.

There is an additional constitutional hindrance as well. To be precise, it is not a hindrance in and of itself, but it is a technical feature of the American system which has the *practical* effect of creating impediments for ratification. I am referring to the so-called Supremacy Clause¹⁶⁹ of the US Constitution. In what many view as one of the major flaws of the Constitution, the Supremacy Clause states that “*all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding*” (Wikipedia 2010b). In layman's terms this translates to [the Constitution, federal laws and] treaties taking precedence over state law and that the entire judicial branch is bound to adhere to this principle in their court rulings. In practice this means that ratification has the automatic effect of opening up for legal *liability* – the crux of the matter, and something to which Americans have always

¹⁶⁶ Freedom in the sense of the Republic not falling into tyranny from within.

¹⁶⁷ Historically based on the premise that it will protect against the creation of tyranny – that “evil of Europe”. Nowadays the justifications for it vary a bit more, from nostalgia, to the desire for consensus in sensitive matters, to the US being such a large and heterogenic society etc.

¹⁶⁸ (Schlesinger 2004:252-253)

¹⁶⁹ Article VI, section 2.

been hesitant. And as everybody knows, the Congress *is*¹⁷⁰ the people, so this extends to it as well. Congress has thus become a reluctant and tacit part of the American system when it comes to matters pertaining to international accords. More often than not it will wait until the judiciary has interpreted the X and made it customary law before it ratifies and codifies the X, with all its implications for liability.

On the one hand, the effects of the Supremacy Clause amount to an extra impediment for ratification of treaties. On the other hand, it makes for few treaty violations and gives the US a great reputation for treaty compliance [vis-à-vis the treaties it *has* ratified]. The UNCLOS is one of many perfect examples. Even though one has been in good compliance with the treaty, one cannot ratify it and partake fully. One is, in other words, in good compliance with – not in perfect compliance with.

It should be noted that the US Supreme Court case of *Medellin vs Texas* from 2008 *might* have seriously rocked the interpretive boat that is the view on the Supremacy Clause (FindLaw 2010). I won't offer an opinion on this extremely contentious judicial case, other than to say that it is a good example of the activist role the American judiciary assumes at times - whether it ought to or not.

4.9 Obama`s window of opportunity

“I will work actively to ensure that the U.S. ratifies the Law of the Sea Convention -- an agreement supported 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” – Barack H. Obama 2008

(Los Angeles Times 2008)

It seems evident that the current President favors ratification.

Interestingly, he sat on the Foreign Relations Committee himself just prior to when the UNCLOS was recommended for approval last time, in 2007. He left to join another committee, but did several times express his eagerness for the US to join.

¹⁷⁰ Both Senators and Representatives are chosen through direct election.

Vice-president Biden, however, sat on the Committee all through the debate and vetting process. In fact, not only did he sit on the Committee at the time; he chaired it. The presidential team has, in other words, been exposed to the matter of the UNCLOS in previous capacities and has left no doubt as to where it stands.

Although President Obama has not really *pushed* for ratification yet, there are tell-tale signs he might do so. He has staffed his administration with highly UNCLOS-friendly people. Apart from the ones already mentioned Top Legal Adviser of the State Department, Harold Hongju Koh, is a good example. The former Dean of Yale Law School is an acknowledged advocate for international institutions and his educational mentor was none other than the late Louis B. Sohn, US delegate to the UNCLOS negotiations from 1974 to 1982 and one of the treaty's primary authors.

Another example is Anne-Marie Slaughter who sits as Director of Policy Planning at the State Department. She is an acknowledged UN-advocate, as evinced in her 2004 book *A New World Order*.

The key question is; how much political capital is the White House willing to spend on getting the UNCLOS through Senate?

It is futile to try to compare treaties and international engagements. However, if the Obama administration was to choose to pursue ratification of one or more international treaties as a token of real *change* (sic), the UNCLOS would certainly be a good candidate given its wide support on both sides of the aisle. It doesn't hurt either that the treaty is largely utterly uncontroversial abroad.

On the other hand, the fact that the healthcare reform was seen through despite fierce opposition from the GOP hardliners might make the latter hell-bent on stopping the UNCLOS from coming to the Senate floor. Instead of being an accelerant or catalyst for more momentum, the [partial] healthcare win might thus have the very opposite effect vis-à-vis ideological bills, like the UNCLOS. To the dismay of the many, and to the pleasure of the few.

If the will to spend the sufficient *political* capital is not there at present, the executive branch is nonetheless spending *financial* capital on the UNCLOS issue. Not willing to wait for the Senate to give its advice and consent to an accession, it is already in the

process of obtaining and compiling the data necessary to establish the outer limits of its continental shelf, spending some \$5,6 million on the matter in 2008¹⁷¹ (Carlson et. al. 2009:35). Whether this is to be deemed an act of constitutional treason *light* or merely a responsible preparatory act depends on one`s position on the UNCLOS issue, but it nevertheless speaks to a possible future course.

5. Conclusions

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I began this study by formulating three research questions. I will in the following section briefly sum up my findings as relating to each of these three.

1: Given that the issue is not a partisan one and that the US secured important concessions in the `94 Agreement, why has it nevertheless not yet ratified the UNCLOS?

It is indeed quite perplexing that the US is standing outside of the UNCLOS after having been profoundly engaged with the regulation of the seas for 200 years. Like I have shown, though, it is not because it does not want to – if “it” equals the majority. The proponents heavily outweigh the detractors, as they have for quite some time, and among the proponents one finds people and interests that very rarely unite. That implies that the force hindering US accession must be a strong one. And indeed it is. At the very basic level it amounts to the forceful opposition of a select few senators and the way in which they are able to maneuver procedurally to hinder the bill coming to the floor vote which would surely secure ratification. What is more interesting, though, is what *informs* these detractors, both broadly speaking and with specific regard to their arguments for staying out of the UNCLOS. This is the force I have humbly sought to describe and attempted to understand. To shed light on just that I have chosen to employ the three I`s - interests, ideas and identities.

¹⁷¹ Through the US Extended Continental Shelf Project.

Some say that material interests such as limbs, guns or dollar bills are *real*, whereas identities and ideologies are not. That might be the case, but as I have shown throughout this thesis, it does not seem to be a particularly valid position when it comes to the ambiguous American relationship with the UNCLOS. Quite the contrary, identity and ideology seem to shape and define much of it. This is particularly the case for the detractors. Although a minority, their opinions and arguments actually conform to long-standing strands of US tradition. There is thus something *American* about it - a particular American sense of self and its ideological underpinnings, if you will. I have employed their beacon of light Ronald Reagan to cast light on the nature of the skepticism. In his era there was indeed a break in the process towards a truly international oceanic code and in defense of his decision to not sign on to it President Reagan packaged it in much the same way as do the right-wing hardliners of today. However, interpreting the Reagan stance vis-à-vis the UNCLOS is not as easy as a first glance might predicate.

One should not forget that the amendments President Reagan called for - and essentially got in 1994 - were rather pragmatic and sensible – not polemic or overly ideological as one might have expected given the public reputation of his administration and how his tenure is cheerily construed by *followers* in the present. This might seem to contradict the spirit of his diary entry so crucial to the GOP conservatives in pointing back to their hero from the 1980s.

Instead of necessarily reading too much into this apparent contradiction, I am inclined to attribute it to the dynamic range between personal ideological attitudes on the one hand and on the other official decisions and policies, wherein other interests and opinions are consulted and/or included.

Given that it treats the UNCLOS as codification of customary international law, one could wonder why it is even relevant that the US has not formally ratified it yet. At the concrete level it is relevant because it leaves the US without a formal say in matters such as those pertaining to continental shelf claims and others. The US was granted provisional status after it signed 1994, which meant that it was member of key governing bodies while the ratification process at home was on-going. With granting this status, the international community was paying heed to the constitutional system of the US. The provisional status was only temporary however, and as no advice and

consent from the US Senate seemed to be coming, it was revoked in the middle of November 1998¹⁷².

In addition, it shuts it out from the dispute settlement mechanisms, which in the matter of the Northwest Passage would almost certainly represent an advantage to the US and serve to force the Canadians in line. It is quite evident that the third-party dispute settlement is a troubling part for many Americans. However, one ought not to forget the original justifications for including it in the treaty; that the US would generally benefit from the *certainty, predictability* and *stability* it would help facilitate.

At the symbolic level it continues to be a speck on the American multilateral record. Sure, UNCLOS detractors are correct in saying that the US enjoys a certain level of flexibility under customary international law. When disputes or questions arise, the US would as a UNCLOS member state, they would continue, be at the mercy of international bodies where the US has a *voice* – instead of under the flexible state of custom where it has a *veto*. This second level of the abstraction rests on a flawed cost/benefit assessment in my view. Under the conditions of the ever-deepening interdependencies the assessment of *cost* changes.

It will thus be “cheaper” for the US to accede to the UNCLOS than to venture out on its own and attempt to replicate the consensus and cooperative will the UNCLOS¹⁷³ has prepared the ground for.

Or, to construe the same sentiment in a language more amenable to even the most skeptic of the detractors; acceding to the UNCLOS, if not to achieve a certain common good, then at least to alleviate the costs of taking unilateral action.

2: What role can the Northwest Passage dispute be said to have played?

The dispute is by no means a new one, but it has taken on increased significance due to the warming of the climate. It is thus fair to say that the Northwest Passage dispute

¹⁷² The US and the other industrialized nations who had not signed the UNCLOS before the amendments of the '94 Agreement, all signed a document promising to ratify the treaty within four years time – hence the time-frame.

¹⁷³ Among the signatories of which are several `enemies` of the US.

can be taken as a token for an ever-more relevant expectancy in this day in age; *as the temperature rise, so do the stakes.*

With regard to the legal specificities, the Canadians continue to point to both historic title and a straight baseline claim, whereas the Americans refute the entire internal waters claim and posits with reference to both the UNCLOS and an ICJ verdict that the Passage constitutes an international strait. I have detailed the legal foundations underlying the claims of both parties and it seems quite evident that Canada has the weaker hand. By saying that the US seems to have a strong case, it goes without saying that I would expect that a ratification of the UNCLOS would serve its interests nicely, as it would facilitate the dispute settlement mechanism which most likely would force the Canadians in line. In addition, by ratifying the US would see a fundamental objection the international community has vanish – an international community which otherwise favors the American position vis-à-vis the Northwest Passage. Two birds with one stone, of sorts.

3: Going forward, what are the prospects of change?

Keohane & Nye (1977:231) would have called upon the US to assume a “multiple leadership” position so as to coax and organize nations around a legal regime for the seas. This would imply making certain concessions and foregoing short-term bargaining gains in order to reap the benefits of a stable international sea regime in the long-run.

The US *was* indeed in the process of assuming this very position by its central instigative and facilitative role in the process that lead to the enactment of the UNCLOS. It jumped off the train though. Or rather, to make the analogy more fitting; it never really boarded.

Although Secretary Clinton as late as in March of this year explicitly reiterated the Obama administration`s pledge to see through a ratification at the Chelsea summit, the American political landscape might very well preclude such an occurrence for quite some time still. My hope is that this thesis has gone a certain way in explaining why that is.

6. Epilogue

The success of the UNCLOS, I would submit, would seem almost unbelievable to those who first began contemplating an international legal regime governing the activities of the seas. Pitman Potter writes in 1923; *“Only when a true international navy comes into existence, subject to international control, can all states be sure to enjoy free seas, just as they can be sure of free passage in straits only when all shores of straits and fortified ports are demilitarized or internationalized”* (Potter 1924/2002:245).

Needless to say, what he envisioned has yet to materialize. True, there is for the first time in history a truly global navy, but it is not run internationally. Still, given benign intent the seas beyond the EEZ`s are in principle free for all states to enjoy. Most, if not all straits and bottlenecks have become open and levy free passage, but this has only partially come about through “internationalization”¹⁷⁴.

What we have is a weird albeit functional conjunction of a benign naval superpower and the comprehensive international legal framework it more or less created¹⁷⁵ and complies with, but still has not fully acceded to. It can hardly find it particularly satisfying, though, to “[at the annual States Parties meeting]...*sit as an observer in the back of the room, allowed to speak only after every party has had their say..and unable to vote...*” (Briscoe & Prows 2008:26).

After having taken a plunge into the legal details of the Northwest Passage dispute it seems to me that the US has a strong case, and Canada a rather weak one. Irrespective of this, I think Canada would benefit from making a strategic decision soon as to where it wants to go. Should it regard the US as a friend or foe in the North? Should the two countries collaborate on managing the Northwest Passage and resolve the

¹⁷⁴ Giving Potter the benefit of the doubt and interpreting his *internationalization* in a wider manner, as meaning complex negotiation processes conducted within the structure of a League of Nations (UN).

¹⁷⁵ The US was of course not alone in facilitating for the UNCLOS. It was however always one of the main driving forces.

border dispute in the Beaufort Sea while they are at it? Should they stand united against the Russian Bear or keep on looking their separate ways?

Ironically, it is in fact the Bear that has stood united, albeit not holding hands, with Canada on many an Arctic issue through the years. The Soviets were the only ones who validated the sector principle (because they made a similar one themselves). The Soviets were quick to validate the Arctic Waters Pollution Prevention Act when Canada enacted it in 1970 (because they launched their own variant the following year).

For that reason there are those Canadians who would favour real and pragmatic cooperation with the Russians. Such cooperation could be as limited or comprehensive as one would please, perhaps comprising of some of the following; recognition of one another`s claim in the Northwest Passage and the Northern Sea Route, Canada buying icebreakers from the Russians, and the two collaborating on environmental management of the Arctic.

On the other hand; Canada and Russia are bound to run into conflict when the Canadian claim to the seabed is finalized and sent to the CLCS. It will most likely blatantly overlap the Russian one unless negotiations occur and the two respective claims are modified¹⁷⁶.

And, as mentioned earlier, Russia is still Russia - at worst blatantly distrusted by the North Americans, and at best never fully and completely understood.

On this, the US can see eye to eye with its northern neighbour. In fact, they have shown they can do just that in many instances - cooperate. And that goes for issues pertaining to ocean law and management as well. The cooperative climate is generally good, as it should be between two great neighbours.

And yet, the dispute over the legal status of the Northwest Passage prevails.

Seen from the outside it must appear awkward for the US to point to the UNCLOS and ICJ in arguing its case vis-à-vis the Northwest Passage – two institutions it has had and continues to have problematic relationships with. In fact, and regardless of the differences between them, it makes sense comparing the two relationships. Both

¹⁷⁶ At the crux of the matter is the Lomonosov Ridge and whether it is to be deemed a natural extension of the Russian, Danish or Canadian continental shelf.

tell a story of heartfelt and thorough engagement on the one hand, while on the other of unwillingness to submit itself to plenary authority and skepticism towards consequences which are perceived as adverse to US interests.

The antinomies are perhaps not so evident from the American side of the table. Maybe former Secretary of State Madeleine Albright was on to something when she said that Americans tend to look at multilateral ventures¹⁷⁷ not as ends in and of themselves, but as means to promote US virtues and interests in the world (The Stanley Foundation 1995:5).

Whether this facet is something US-specific or something pertaining to the hegemon (be it which it may) is a different matter. I would lean toward postulating the latter¹⁷⁸, but seeing as though the hegemon and the US happen to be one and the same now, it holds little relevance.

Having signed but not ratified the UNCLOS, the US would by international law be bound to act so as not to *defeat the object and purpose* of the convention (UN 2005:8). Or would it? Ironically, the treaty which states as much is yet another one that the US has signed but not acceded to – the Vienna Convention on the Law of Treaties. Still, given that the US felt bound by it, it is a fairly imprecise and unenforceable prohibition. As such, the constraints upon US independence in maritime matters are thus far *strictly* speaking only customary international law and various bilateral or regional treaties.

¹⁷⁷ She spoke specifically with reference to the UN.

¹⁷⁸ See Cronin (2001) and others for more in-depth analysis of the hegemonic paradox.

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