Canada has painted itself into a corner. The United States and Canada are among the closest allies on Earth; our economies, people and destinies are intertwined. We share a fundamental interest in North American security. Neither country is secure if the other is vulnerable, which is why the two neighbours have integrated continental defence under the bilateral NORAD command for decades. Membership in NATO provides an additional opportunity for the two democracies to champion stability and freedom, with both countries sharing the burden of combat in Afghanistan.

But on the issue of the Northwest Passage, over the past few decades Canada has gradually, if perhaps unintentionally, embarked on a rather unilateralist course by claiming sovereignty over large areas of the Arctic Ocean. Canadian exceptionalism in the Arctic Ocean has weakened the ties between the two countries, and provided an unflattering glimpse into how governments in Ottawa – both on the left and the right – have irresponsibly used the Arctic to score political points at home and reject multilateralism abroad. At times all states are inclined to feel defensive within the international community, and going it alone feeds a certain hyper-sensitive sovereignty impulse that can appeal to our fears, our pride and our independence.

In a world fraught with both conventional and irregular military risk and political and cultural divide, with the global economy collapsing in slow motion, the United States, Canada and the strong network of free, democratic and capitalist allies, friends and partners form the fulcrum of stability that holds the world together. Ottawa and Washington are among the foremost defenders of a stable state world system. Both states are rich, with prosperity flowing from the enjoyment of peace, liberty and equality that is only possible with a safe and stable planet.

Seventy per cent of the globe is covered by the single interconnected ‘world ocean,’ and 80 per cent of the population of the world lives within 200 miles of the coastline. As well, 90 per cent of international trade travels by sea. Consequently, the diplomatic and legal framework for oceans governance is a direct concern to the maintenance of a stable world system. The foundation for oceans governance is the United Nations Convention on the Law of the Sea (UNCLOS), which is the constitution for the world’s oceans. Conflict avoidance, international peace and security and global stability are directly connected to the law of the sea.

In the United States, the sovereignty impulse has led us astray, convincing a handful of powerful Senators to reject the Law of the Sea Convention. They believe that going it alone protects US sovereignty and promotes American interests. But as one of the prime beneficiaries of a stable, fair and widely accepted global order, by not working multilaterally to join UNCLOS the United States has abandoned self-interest in favour of placating a false...
demonstration of independence.

Likewise, Canada is under the unilateralist spell of oceans sovereignty, going it alone in the Arctic Ocean in a vain attempt to grasp a future of security amidst a rapidly changing geophysical Arctic climate and unsettling and dynamic Arctic politics. Canada has resurrected ‘sovereignty’ patrols, loudly trumpeted plans to construct ice-strengthened patrol vessels to enforce unilateral rules in the Northwest Passage and retreated behind the mythos of Canadian Arctic sovereignty. The storyline is dutifully recycled by the government-media-academic complex in a desperate wish to obtain the approval – or at least the acquiescence – of the international community, and especially of the United States.

The problem is that the ice keeps melting and no other state has accepted Canada’s excessive claims of sovereignty. The reason is that Canada’s Arctic claims are inconsistent with the Law of the Sea Convention, to which Canada became a party in 2003. Canadian scholars, government officials and the media have circulated well-practised, if not slightly tortured, theories purportedly grounded in the international Law of the Sea in order to manufacture a rationale that would support Canada’s claims to sovereignty over an ocean – something no other state has done. Other states are not buying it, leaving Canada feeling vulnerable.

In particular, the loss of sea ice in the high north has renewed discussions over the legal status of the Arctic and sub-Arctic transcontinental maritime routes connecting the Atlantic Ocean with the Pacific Ocean. The routes, which shorten a transit from Europe to Asia by 4,000 miles, connect the North Atlantic and Labrador Sea with the Beaufort and East Siberian Seas, thereby constituting straits used for international navigation under Article 37 of the Law of the Sea. Canada has succumbed to the sovereignty impulse because it fears that without ‘ownership’ over vast swaths of the Arctic Ocean and unilateral control over the Northwest Passage, the safety, security and environmental protection of the Arctic archipelago – indeed of the entire country – will be exposed to the vagaries of shipping and aviation traffic from the outside world.

Much like 9/11 absorbed the psychological final measure of the American sense of security and innocence from terrorism, the disappearing ice cap threatens to impose the ugly reality of the world on the idyllic doorstep of Canada. Poorly maintained Third World merchant ships and their multi-ethnic crews from distant and unsavoury lands will discover the new superhighway between Asian manufacturers and European markets. The result is that the challenging ice-infested waters will produce oil spills, and the multiplying number of ships will bring illegal migrants, or even worse, terrorists.

In this regard, ensuring safety, security and environmental protection in the Arctic and the Northwest Passage is a shared concern – providing an opportunity for greater cooperation not only between Canada and the United States, but among all maritime states and future users of the waterway. Although it is common, but unhelpful, to cast the issue of the Northwest Passage as a bilateral disagreement between the United States and Canada, it is not. The issue is a multilateral matter, involving the interests and equities of states from Asia and Europe.

Consequently, Canada can best secure its interests in sovereignty, safety, security and environmental protection by proactively engaging now to develop an Arctic...
legal regime under the framework of Law of the Sea Convention. This will mean abandoning some of the more audacious and unsupported claims of sovereignty, and complying with the rules contained in the treaty. If it acts now, Ottawa will be able to lead the design and implementation of the new Arctic framework before the ships start to arrive.

Canada should move quickly. The Northwest Passage has been fully transited nearly 70 times by surface vessels belonging to Canada, the United States, Norway, the Netherlands, Japan, the Bahamas and Liberia, and the deep and wide passage has been susceptible to transit for decades by submarines of the United States and the United Kingdom and presumably, the Soviet Union and now Russia. Both the United States and Canada have an essential national interest in developing a widely accepted and respected legal regime for the Arctic Ocean and Northwest Passage before climate change alters shipping patterns. If the shipping arrives before the two North American partners can work with the international community to adopt an Arctic regime, both Washington and Ottawa will experience reduced negotiating leverage with the international community and the result will be less control over the Arctic north. Hard-line foot-dragging in Canada is squandering time and diplomatic capital needed to negotiate such an agreement, making both countries less secure in the long run.

Canada exercises complete sovereignty over the islands of the North American Arctic. Although there is not much open to question on the issue of Canada’s sovereignty over the northern lands (even if the point is typically obfuscated, generating chest-thumping reassurances of sovereignty), on 10 September 1985, Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines to encircle the entire North American Arctic. This claim is inconsistent with the Law of the Sea Convention.

Under UNCLOS, coastal states are entitled to draw normal baselines along the low-water mark of the shoreline, and claim a 12 nautical mile territorial sea projecting into the water. Straight baselines may be drawn in some localities, such as Norway, where the coastline is deeply indented and deeply cut into, or if there is a fringe of islands along the coast in its immediate vicinity. Straight baselines must fulfill two additional criteria: they must not depart to any appreciable extent from the general direction of the coast; and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. So while Canada has drawn a straight line nearly 100 miles wide, enclosing the Mc‘Clure Strait for example, that line extends far beyond the low-water mark and runs perpendicular to the general direction of the coastlines.

In some rare cases coastal states may claim parts of the ocean as historic internal waters. But the area claimed by Canada does not support a claim of historic internal waters. The UN has said that three factors are to be considered in determining whether a body of water may be considered historic internal waters: (1) the exercise of authority over the area of the claiming state; (2) the continuity of this exercise of authority; and, (3) the acquiescence of foreign states. This three-part test makes historic claims notoriously difficult to maintain. The Northwest Passage, which has never been accepted by another state as the internal...
waters of Canada, does not meet the test.6 It is particularly important to note that, within the context of the Canadian Arctic where straight baselines are established that have the effect of enclosing as internal waters areas that had not previously been considered as such, the international community retains the right of innocent passage through those waters.7 That is, even if one accepts Canada’s excessive claims for straight baselines or historic internal waters, international shipping still has the right of innocent passage through the waters.

International vessels and aircraft, however, actually are entitled to the more robust regime of transit passage through the Northwest Passage. The routes through the Northwest Passage meet the plain definition in Articles 34 and 37 of UNCLOS of a “strait used for international navigation,” in which vessels and aircraft are entitled to the non-suspendable right of transit passage. This means submarines may travel under the surface, aircraft may overfly passage lanes in the area above the water, and ships and airplanes may use the route without the permission of, or prior notice to, Canada. Waters within 12 nm of the coastline are still under Canadian sovereignty, but superimposed on Canada’s right of sovereignty is the non-suspendable right of transit passage. Canadian laws still apply, but only so long as they do not impede or impair transit through the strait.8

Seeking a positive way forward, some scholars in Canada and the United States have advocated a bilateral solution, suggesting that if only the two countries could cut a deal the issue would be resolved. A bilateral approach will not resolve the issue, however, because it involves global interests rather than purely bilateral equities. Any bilateral agreement between the two countries would not affect the rights of other states such as Korea, China or Germany. Furthermore, a special deal between the United States and Canada provides a precedent for other coastal states to develop a bilateral treaty for controlling traffic in any of the numerous strategic international straits around the world, such as Iran and Oman cooperating to control the Strait of Hormuz.

Under the Law of the Sea, Russian reconnaissance aircraft and Chinese intelligence-gathering ships are free to operate just beyond 12 nm of coastal states, including the United States, Japan and European countries. The Arctic Ocean is no different and Canada does not acquire any special protection in this regard. The benefit of recognizing freedom of the seas beyond 12 nm from the shore and through international straits is that both Canada and the United States are enriched by a liberal world order of the oceans that entitles their commercial shipping and naval vessels and aircraft to operate throughout the globe. Reliant on an increasingly expeditionary military force and with an economy dependent on transcontinental and cross-border trade, Canada has compelling economic and national security interests in a stable Law of the Sea regime. Being internationalist and outward-looking, and concerned about maintaining global order as part of a forward strategy for ensuring homeland security, both the United States and Canada should be strong proponents of the generous navigation regimes in the Law of the Sea Convention.

Others have suggested that the issues of the Northwest Passage may be best resolved in a new treaty architecture following along the lines of the Antarctic Treaty governing activities in the polar south. The difference is that Antarctica is a continent, the Arctic is an ocean. The oceans are already governed by a widely accepted treaty, and in order for UNCLOS
to be stable anywhere it should be observed everywhere. This means that UNCLOS is the point of departure for refining rules for the Arctic. Working in conjunction with the United States, Japan and the EU states, Canada should develop a comprehensive Arctic Ocean framework for ensuring appropriate sovereignty, and safety, security and environmental protection in the Arctic Ocean, including the Northwest Passage.

There is an international institution ready made to serve as an effective multilateral forum for increasing coordination and cooperation throughout the Arctic Ocean generally and the Northwest Passage – the International Maritime Organization (IMO). The IMO is the UN specialized agency for developing standards for shipping and the oceans. The organization already has adopted nearly 50 treaties and hundreds of codes, guidelines and recommendations. It should begin work now under Canadian leadership to develop rules that complement the application of the Law of the Sea in the Arctic. The IMO has in place number of widely accepted treaties that could be strengthened and extended for application to the Arctic Ocean, thereby accommodating Canada’s sensitivities and concerns within a strong and stable framework that is universally respected. Existing IMO treaties include:

- The 1974 Safety of Life at Sea Convention (SOLAS), for example, which applies to 98.8% of world shipping, and is generally considered to be the most important of all international treaties concerning the safety of merchant ships. Among the topics covered in its chapters are ship construction, subdivision and stability, fire protection, life-saving appliances and arrangements, radio communications, safety of navigation, carriage of cargoes and dangerous goods, safe management and maritime security. Chapter V provides for the establishment of ships’ routing measures and ship reporting systems, which can be made mandatory if the IMO approves them (Regulations V/10 and 11). SOLAS regulation V/12 provides for the establishment of vessel traffic services where the volume of traffic or the degree of risk justifies such services. Canada could enjoy ships’ routing and reporting measures under the authority of the IMO, rather than trying to impose unilateral measures haphazardly.

- The voluntary Guidelines for Ships Operating in Arctic Ice-Covered Waters (2002), which could be strengthened and extended and made mandatory, thereby controlling the types of vessels that are approved for Arctic transits.

- The International Convention for the Prevention of Pollution from Ships (MARPOL), which applies to 97.55% of the world’s shipping. Six annexes deal with oil pollution, pollution by

Clean-up crews use high-pressure washers to hose oil from the beach in Prince William Sound, Alaska after the Exxon Valdez ran aground in March 1989. Nearly 11 million gallons of crude oil leaked from the ruptured hull of the ship and washed ashore along 1,300 miles of coastline. Twenty years later and despite an extensive clean-up effort that spanned several years, oil still contaminates areas of the Alaskan coast.
The IMO can be an effective institution for strengthening appropriate sovereignty, security, marine safety and environmental protection. Through a process called the ‘Cooperative Mechanism,’ for example, the IMO helped the littoral states of the Straits of Malacca and Singapore – Indonesia, Malaysia and Singapore – develop a governance framework to manage the world’s busiest straits.

About one-third of the world’s trade and half its oil traverse the Straits of Malacca and Singapore each year, so resolving management plans and regulations to address safety, security and environmental protection was incredibly complex. But the IMO and the littoral states began meeting with about 30 other states beginning in 2005 to develop a comprehensive regime. After discussions in Jakarta, Kuala Lumpur and Singapore, the straits states and the user states reached a groundbreaking agreement for cooperation among stakeholders. The agreement, the Cooperative Mechanism, represents the first time ever that user states and states bordering a strait have come together in fulfillment of Article 43 of UNCLOS to manage cooperatively safety and environmental protection in a strait used for international navigation.

The littoral and user states of Southeast Asia now have a forum for regular dialogue to exchange views, a committee to coordinate and manage specific projects and a new fund to receive and manage financial contributions to build greater capacity to maintain aids to navigation. The multilateral approach for the Straits of Malacca and Singapore, which is supported by all the major maritime powers including Canada, Japan, the United Kingdom and the United States, is a model for the Northwest Passage, the longest and perhaps most environmentally sensitive international strait.

In the era of globalization, the IMO’s success on the Equator provides the ideal framework for promoting Canada’s goals of preserving the fragile Arctic environment, maintaining maritime domain awareness in Arctic waters and exercising appropriate security jurisdiction and regulatory oversight over the strait. This approach would open the door to widespread international recognition of Canada’s status as a strait state and attract support for appropriate measures to protect the Arctic ecosystem, ensure Canadian security and affirm Canadian sovereignty, and promote safe navigation through designated routes. Doing so would achieve a major diplomatic success for Ottawa and offers the best means for Canada to achieve its goal of obtaining widespread international acceptance of Canadian prerogatives in the maritime Arctic. And that will keep all of us safer.

Notes
* The views presented do not represent the official policy or position of the US government.
3. Article 7(1), Law of the Sea Convention.
4. Ibid.

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