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14. ABSTRACT The U.S. faces several long standing and unresolved maritime territorial disputes. This paper identifies the areas of historical dispute and explains the importance to the national security of each country. In addition, barriers to resolution are examined along with novel diplomatic approaches to help break the deadlock and achieve an agreement.					
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INTRODUCTION

The U.S. faces a challenge dealing with maritime boundary disputes by a rising nation that may become the world's "next superpower" according to former Assistant Secretary of Defense Sharon Burke.¹ This country, although a party to the U.N. Convention on the Law of the Sea (UNCLOS), routinely pursues a strategy of lawfare by claiming international straits as internal waters and maintaining excessive maritime claims that are of dubious historical authenticity and are held to be inconsistent with UNCLOS and commonly accepted international law. This country has used information warfare to change international perceptions and legitimize its excessive claims which are "at odds with much of the world."² This country has engaged in other grey zone tactics such as forcing vessels to check in to receive permission to transit international waters. It has issued oil exploration rights in the Exclusive Economic Zone (EEZ) claimed by another country. It has made improvements to uninhabited islands and placed paramilitary forces there to enforce its territorial claims. Lastly, there is even a history of its fishing fleet harassing lawful fishermen from other countries and terrorizing passenger vessels that have had the misfortune of getting caught up in the disputed maritime areas.

One could be forgiven if they assumed the country in question was China. In fact, the country in reference is America's neighbor to the north, Canada. Despite having friendly relations overall, the U.S. and Canada have been unable to settle several maritime border disputes which have simmered in varying degrees of intensity over the years. Because the U.S. places a high value on having a free and open maritime environment, I will argue that the U.S.

¹ "Assessing that Canada will be the Last Superpower," Divergent Opinions, accessed April 12, 2023, <https://divergentoptions.org/2022/06/06/assessing-that-canada-will-be-the-last-superpower/>

² "Canada Renames the Northwest Passage," The Maritime Executive, accessed April 12, 2023, <https://maritime-executive.com/article/2006-04-13canada-renames-the-northwest-passage>

should peacefully resolve these issues by examining the importance of these areas to the national interest, identifying historical barriers to resolution, and providing recommendations to break the deadlock through a bilateral negotiation process. To better understand the complexity of the disputes, a short history of each area is presented next, along with an explanation of their importance to the economy and national security of each country.

AREAS OF DISPUTE

Dixon Entrance

Dixon Entrance comprises the seaward entry point between Alaska and British Columbia. The dispute originated between the poorly demarked territorial claims of the Russian Empire and the United Kingdom and was then inherited by the U.S. and Canada in the late nineteenth century. All the terrestrial boundary disputes were resolved in a 1903 Court of Arbitration consisting of British, Canadian, and American judges. The court unanimously agreed that the A-B boundary line shown in Figure 1 would comprise the land boundary. What is still in dispute is that Canada claims this line is also the maritime boundary line, while the U.S. claims a maritime boundary in accordance with international maritime law, equidistant between the two land masses. As shown in Figure 1, this has created an area claimed by both countries of approximately 828 square nautical miles and a zone that neither country claims, approximately 21.4 square nautical miles.³

This dispute is important to national security because of the rich abundance of natural resources in the area. Although there is “little interest in hydrocarbon potential,” the area is

³ David H. Gray, “Canada’s Unresolved Maritime Boundaries,” *IBRU Boundary and Security Bulletin*, (Autumn 1997): 62

highly coveted by both parties due to the plentiful runs of salmon and other migratory fish.⁴ Five species of Pacific Salmon make their annual run through here on the way back to their home rivers along the coast, making Dixon Entrance a jackpot in an “aquatic gold rush.”⁵ Although the area is largely peaceful, flares occasionally erupt, such as in 1997 when a few hundred angry Canadian fishermen took matters into their own hands and took several hundred Alaska State Ferry passengers hostage by blockading the vessel in port for three days.⁶

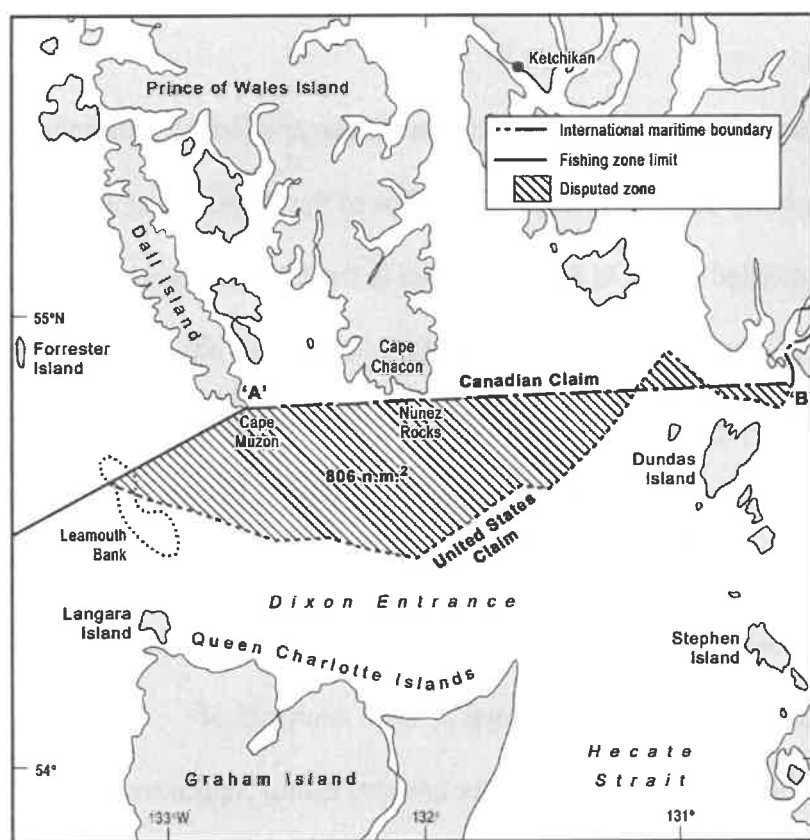


Figure 1: Dixon Entrance⁷

⁴ Donald M. McRae, “Canada and the Delimitations of Maritime Boundaries,” in *Canadian Oceans Policy: National Strategies and the New Law of the Sea*, ed. Donald McRae and Gordon Munro (Vancouver: University of British Columbia Press, 1989), 148.

⁵ Diane Selkirk, “The little-known US-Canada border war,” *British Broadcasting Corporation*, December 16, 2019, <https://www.bbc.com/travel/article/20191215-the-little-known-us-canada-border-war>.

⁶ Selkirk, “The little-known US-Canada border war.”

⁷ Gray, “Canada’s Unresolved Maritime Boundaries,” 62.

Another concern for national security is the need for U.S. submarines to transit Dixon Entrance to reach the Southeast Alaska Submarine Noise Measurement Facility (SEAFAC) located near Ketchikan, AK. On several occasions, Canadian government officials have insisted upon “advanced notice” of submarine transit and assurance of “appropriate protection with respect to compensation if there should be an accident.”⁸ The U.S. has released diplomatic notes to inform Canada that it does not accept Canadian authority or the need for Canadian consent to transit. The U.S. did agree however to provide 72 hours’ notice to Canada prior to the “commencement and durations of operations” at SEAFAC.⁹

West of the Juan de Fuca Strait

The U.S. and Canada maintain a dispute emanating at the mouth of the strait out to each country’s 200 nautical mile EEZ. Both countries have put forward claims utilizing the internationally accepted legal practice of equidistant lines, however, the dispute arises due to each country selecting a different baseline as a starting point.¹⁰ The U.S. has alleged that the straight baselines constructed by Canada run “contrary to established principles of [the] international Law of the Sea.”¹¹ To complicate matters further, the province of British Columbia has put forward a separate claim based on the concept of natural prolongation arguing that the submarine canyon of Juan de Fuca should form the boundary.¹²

⁸ Ted L. McDorman, “Canada-U.S. International Ocean Law Relations in the North Pacific,” in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, ed. Seoung-Yong Hong and Jon M. Van Dyke (Boston: Martinus Nijhoff Publishers, 2009), 185.

⁹ McDorman, “Canada-U.S. International Ocean Law Relations in the North Pacific,” 184.

¹⁰ David A. Colson and Robert W. Smith, “North American Maritime Boundaries,” in *International Maritime Boundaries Volume 5*, ed. David Colson and Robert Smith (Boston: Martinus Nijhoff Publishers, 2005), 3403.

¹¹ McDorman, “Canada-U.S. International Ocean Law Relations in the North Pacific,” 181.

¹² Douglas Johnston and Mark Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (Boston: Martinus Nijhoff Publishers), 102.

As shown in Figure 2, the area in contention is small at only 15 square nautical miles. The primary national security concern in this region is the fisheries, especially the salmon that migrate through the area and the various groundfish species on the offshore banks. As this is a cross-roads region for the migrating salmon species, it is quite easy for Canadian fishermen to intercept salmon of American origin and for American fishermen to reciprocate.¹³

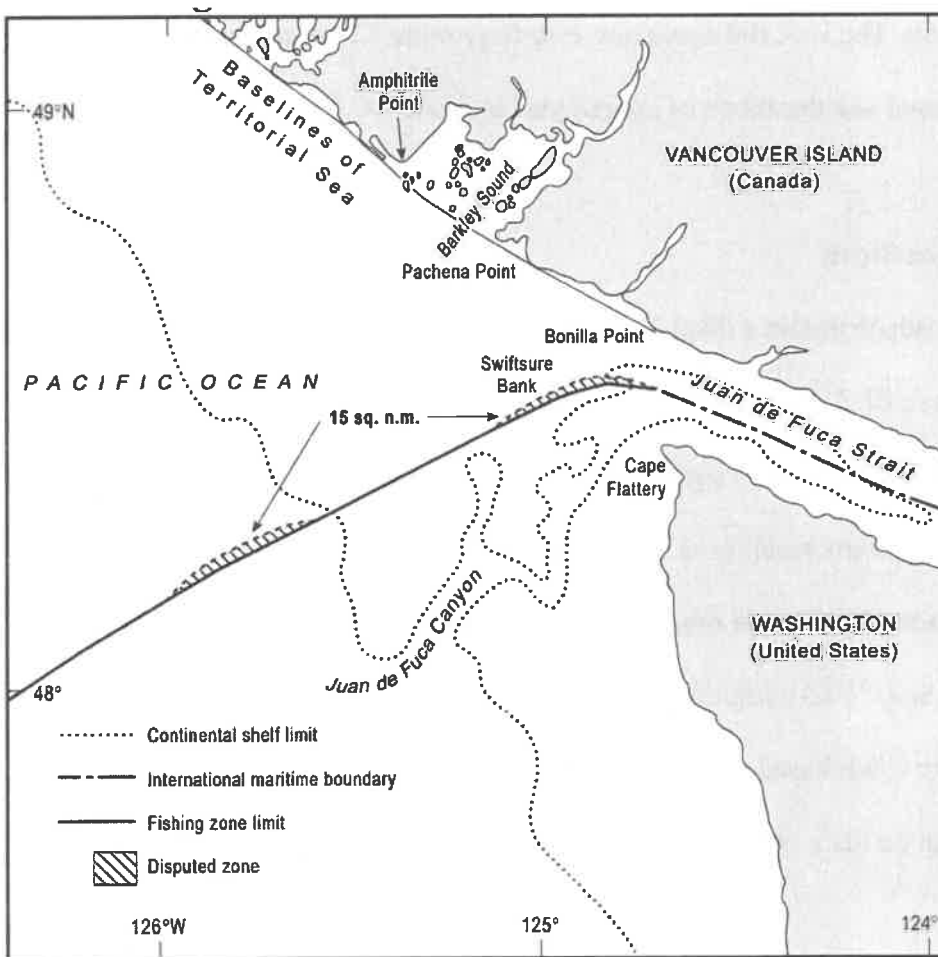


Figure 2: West of Juan de Fuca Strait¹⁴

¹³ Johnston and Valencia, *Pacific Ocean Boundary Problems*, 101.

¹⁴ Gray, "Canada's Unresolved Maritime Boundaries," 61

Beaufort Sea

The Beaufort Sea dispute concerns the maritime border between Alaska and the Yukon Territory in the Arctic Ocean. The land border was established in an 1825 treaty between Russia and Britain along the 141st meridian near Mount St Elias in the south and then “as far north as the Frozen Ocean.”¹⁵ The Canadian claim is a bit complex and depends on the interpretation given to the grammar of the French language in the original text of treaty. Based on an obscure interpretation, Canada claims the maritime border continues in a straight line from the terrestrial border. The U.S., on the other hand, claims a maritime border based on the principle of equidistance, as is commonly accepted in international law, and is at the heart of the matter for the Dixon Entrance dispute. Figure 3 shows a depiction of the overlapping claim area which equates to 6,250 square nautical miles.

This dispute was largely dormant in the early twentieth century due to the remoteness of the region and the persistent ice coverage. However, things changed in 1976 when Canada first issued oil and gas concessions in the area claimed for the U.S.’s EEZ.¹⁶ The two sides have since agreed to a moratorium on further development, but the presence of rich hydrocarbon deposits has made this boundary a significant issue for both countries.¹⁷

¹⁵ McRae, “Canada and the Delimitation of Maritime Boundaries,” 148

¹⁶ Gregory Sharpe, “An old problem, a new opportunity: A case for solving the Beaufort Sea boundary dispute,” *The Arctic Institute*, June 17, 2016, <https://www.thearcticinstitute.org/an-old-problem-a-new-opportunity-a-case-for-solving-the-beaufort-sea-boundary-dispute/>.

¹⁷ McRae, “Canada and the Delimitation of Maritime Boundaries,” 148



Figure 3: Beaufort Sea¹⁸

The Northwest Passage

This dispute deals with the characterization of the sea route that runs north of Canada through the Arctic as shown in Figure 4. The U.S.'s position is that this route is an international strait while Canada maintains that it is part of their internal waters. Former Secretary of State Mike Pompeo has called the Canadian claim "illegitimate" because it is "inconsistent with international law."¹⁹

The disagreement has largely been irrelevant in the past because the persistent sea ice made the route extremely dangerous, if not impossible. However, vessel traffic has increased in

¹⁸ Gray, "Canada's Unresolved Maritime Boundaries," 63

¹⁹ Zoë Schlanger, "The US is picking a fight with Canada over a thawing Arctic shipping route," *Quartz*, June 27, 2019, <https://qz.com/1653831/the-us-is-picking-a-fight-with-canada-over-an-arctic-shipping-route>.

the past few years and many experts forecast that it is “likely to see an increasing number of transits by large ships” as the sea ice continues to recede.²⁰ The dispute has defense implications as well, with former U.S. Navy secretary Richard Spencer advocating for freedom of navigation operations along the route, although he acknowledged that doing so without seeking Canada’s permission “would mark a clear provocation.”²¹

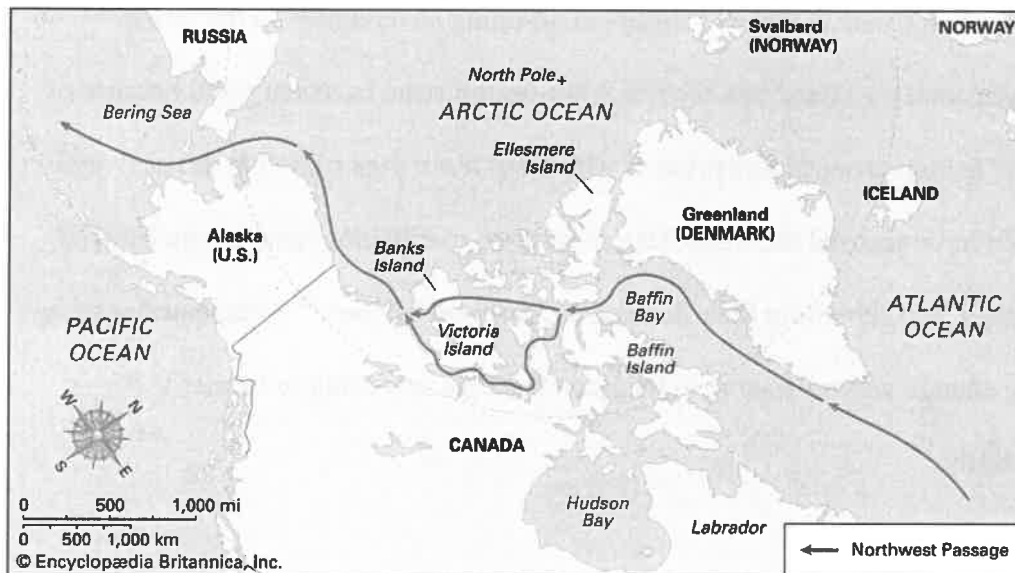


Figure 4:
NW Passage²²

Machias Seal Island

This is the only dispute that involves a piece of land. The island is a “20-acre, treeless lump that sits nearly equidistant from Maine and New Brunswick.”²³ The dispute originates from the 1783 Treaty of Paris between the U.S. and Great Britain at the end of the Revolutionary War which provided the U.S. with all islands “within 20 leagues of U.S. shores except those islands

²⁰ Kathrin Stephen, “Canada in the Arctic - Arctic Shipping: Routes, Forecasts, and Politics,” *The Arctic Institute*, April 27, 2012, <https://www.thearcticinstitute.org/canada-arctic-shipping-part2/>.

²¹ Schlanger, “The US is picking a fight with Canada over a thawing Arctic shipping route.”

²² *Encyclopædia Britannica*, s.v. “Northwest Passage,” accessed April 18, 2023, <https://www.britannica.com/place/Northwest-Passage-trade-route/Contemporary-issues>.

²³ Joshua Keating, “An Island Dispute of our Own,” *Foreign Policy*, November 28, 2012, <https://foreignpolicy.com/2012/11/28/an-island-dispute-of-our-own/>.

within the limits of Nova Scotia.”²⁴ Canada claims that the original 1621 Letters Patent establishing the colonies of Nova Scotia and New Brunswick can be interpreted to include Machias Seal Island; a claim that the U.S. disputes.

Currently, there are no full-time residents on the island, but Canada maintains a lighthouse with rotating staff performing shifts a month at a time. It should be noted that all of Canada’s other lighthouses have been automated, but it has kept this particular light manned by members of the Canadian Coast Guard as a means of asserting sovereignty on the island.²⁵ The maritime boundary around the island has become a hot-button issue in recent years because of the lucrative lobster fishing grounds, the price of which has more than tripled in the past decade. American fishermen have accused the Canadians of careless overfishing, keeping undersized lobsters, stealing traps, and subletting their licenses to non-local entities.²⁶ Anticipated scarcity induced by climate change will only serve to heighten tensions according to former U.S. diplomat Stephen Kelly.²⁷

²⁴ Gray, “Canada’s Unresolved Maritime Boundaries,” 67

²⁵ Robin Levinson-King, “Canada’s Tiny Disputed Island,” *British Broadcasting Corporation*, September 28, 2017, <https://www.bbc.com/travel/article/20170927-canadas-tiny-disputed-island#:~:text=Located%20smack%2Ddab%20between%20the,the%20waters%20that%20surrounded%20it>.

²⁶ Nik DeCosta-Klipa, “This strange, lobster-fueled border dispute off Maine has been simmering long before Trump,” *Boston Globe Media Partners*, July 22, 2018, <https://www.boston.com/news/local-news/2018/07/22/machias-seal-island-dispute/>.

²⁷ DeCosta-Klipa, “This strange, lobster-fueled border dispute off Maine has been simmering long before Trump.”



Figure 5: Machias Seal Island²⁸

HISTORICAL BARRIERS TO RESOLUTION

One of the primary barriers to resolving these disputes is that they involve assertions of sovereignty. These sorts of disputes tend to be symbolically significant and heavy with emotions, providing little room for flexibility.²⁹ Stephen Kelly asserts that fear of political blowback has prevented resolution due to the potential appearance that either side might be “giving away territory.”³⁰ Many of the previous disputes between the U.S. and Canada have been resolved through arbitration as in the case of the Alaska-Canada land boundary or through the International Court of Justice as in the Gulf of Maine dispute settled in 1984. In both cases, the

²⁸ Gray, “Canada’s Unresolved Maritime Boundaries,” 66

²⁹ McDorman, “Canada-U.S. International Ocean Law Relations in the North Pacific,” 179.

³⁰ Stephen Kelly, “Good Neighbors, Bad Border,” *New York Times*, November 26, 2012, <https://www.nytimes.com/2012/11/27/opinion/good-neighbors-bad-border.html>.

judges made rulings that split the differences between the claims, thus giving both sides a perceived loss of territory. Although these losses were offsetting and equitable, nevertheless a fear of an unfavorable ruling that would be binding on both parties has hindered progress. An approach through bilateral negotiations would help to neutralize this concern. Both parties could compromise to develop an agreeable solution for each dispute. Since the parties would be accepting the agreement voluntarily, rather than having it foisted on them by an international jurist, each side could herald the agreement as a *win-win* outcome to avoid domestic fallout.

Another historical barrier has been the lack of economic importance for each area. For example, the Beaufort Sea and Northwest Passage disputes were largely irrelevant until recently due to the persistent sea ice nearly year-round that made the region “treacherous for all but the burliest ships.”³¹ The concept of an EEZ is also relatively new and first complicated the maritime disputes when the two countries each passed laws in 1977 to establish Exclusive Fishing Zones out to 200 nautical miles.³² The lack of hydrocarbons and easily recoverable minerals in other regions have prevented them from becoming high-priority areas of diplomatic focus between Ottawa and Washington. However, climate change and rising sea temperatures could elevate the importance of these disputes. As the sea ice recedes in the Arctic, the Northwest Passage will be a viable transit route for longer periods of time each year. Likewise, offshore drilling for oil may soon be economically feasible in the Beaufort Sea. Changes in global food supply may increase the scarcity of the Pacific Salmon, American Lobster, and other valuable living marine resources. An effort to resolve these disputes now through bilateral negotiation is ideal because the tensions between the countries will only increase as time goes on and each area becomes more

³¹ Schlanger, “The US is picking a fight with Canada over a thawing Arctic shipping route.”

³² Gray, “Canada’s Unresolved Maritime Boundaries,” 67

economically valuable, thus making it harder for each side to compromise or find grounds for agreement.

Lastly, another major barrier to the peaceful resolution of these disputes is the incompatibility between Canadian claims and international law. Ted McDorman, a noted scholar in Canada-U.S. relations, describes Canada as being more aggressive, “seeking greater coastal state control over adjacent ocean areas” while the U.S. “is viewed as being more reluctant in pursuing similar coastal state interests” and more aware of the importance of not allowing coastal state authority to undermine international law or impinge on global freedom of navigation.³³ To further complicate matters, Canada has become a “prisoner of its political system” where in the case of the Juan de Fuca dispute, the federal government is unable to defy the wishes of the provincial government in British Columbia who advocate for an approach based on seabed contours that has already been “discounted by the International Court of Justice” in similar adjudications.³⁴ Given the unlikelihood that an international tribunal would adopt Canadian claims in contradiction of international law, one can easily see why the Canadians would be hesitant to submit the dispute before one of these courts. A bilateral approach at negotiation directly between the two parties remains the best approach because it allows the two parties to consider methods of settlement such as equitable resource allocation that are not currently part of international law. It also allows for the countries to bring in other topics, such as trade relations, to help offset any perceived loss by either country. For example, the U.S. could entice Canada to relinquish some of their territorial claims in exchange for more favorable trade agreements in Canada’s favor. Bilateral negotiations are the best way to solve these disputes because they allow the most flexibility and the most creativity in devising a mutually agreeable maritime border.

³³ McDorman, “Canada-U.S. International Ocean Law Relations in the North Pacific,” 178.

³⁴ Johnston and Valencia, *Pacific Ocean Boundary Problems*, 102.

BREAKING THE DEADLOCK

The maritime disputes between the U.S. and Canada have remained unresolved to this point due to the fact that they lie in remote regions and are generally quiet other than occasional regional interest stories. However, the fact that these disputes rarely rise to the level of national attention provides a strong argument that the time is now to resolve these issues. After all, as Stephen Kelly reminds us, we can look to the maritime disputes between China and its neighbors to realize that “border disputes do not go away; they fester.”³⁵ A future finding of hydrocarbon reserves that are easily recoverable or the collapse of a regional fishery may raise tensions to make resolution more difficult. Likewise, disagreements between the two countries on matters of trade, immigration, or any other number of hot-button issues may make it more difficult to resolve these disputes in a peaceful manner. Ideally, the U.S. and Canada should look to solve these disputes now; kicking the proverbial can down the road will only serve to make the problems more intractable.

The best way to resolve these issues is not through a piecemeal approach, examining one issue at a time, but rather through a holistic approach that attempts to resolve them simultaneously while considering the interests and concerns of each country and region. A holistic approach would allow greater latitude to address the “perceived linkages” between the various maritime boundary disputes that have thus far “hindered resolution of what should be a technical issue.”³⁶ For example, if a negotiated settlement were to produce a perceived loss in one region or for one particular interest group, it could be offset by a perceived win in another region or on another issue. Tackling these disputes all at the same time provides the federal government of each country with the maximum amount of leverage to overcome any regional

³⁵ Kelly, “Good Neighbors, Bad Border.”

³⁶ Colson and Smith, “North American Maritime Boundaries,” 3403.

resistance and avoid political backlash. The federal governments could also cooperate to overcome regional concerns through joint development programs or royalty-sharing agreements. In areas with high amounts of hydrocarbon and mineral resources such as the Beaufort Sea or Juan de Fuca, these development and royalty-sharing programs could make the actual lines of demarcation somewhat irrelevant because both sides would agree to share in the development costs and royalty collection to the benefit of all.

Another approach that would help to break the stalemate and encourage dialogue are the concepts of cooperative management and condominium. Cooperative management is the idea that nations can set up commissions or other bodies to jointly administer resources. It is widely recognized as a “scientifically and administratively enlightened approach to the treatment of boundary-related issues in the seas.”³⁷ This is already done to a certain extent with commissions on Pacific Salmon on the west coast, but there is certainly room for expansion, especially in the Gulf of Maine with lobster fisheries and with oil and mineral extraction in other areas. The concept of a condominium is the idea that both parties can exercise joint sovereignty over an area, such as is the case with Pheasant Island, located in the Bidasoa River on the northern border of Spain and France, which rotates every six months in ownership between the countries.³⁸ Although rotating ownership by itself might discourage long-term development or defective management of natural resources, when coupled with other cooperative management practices, it could be a symbolic way to allow both nations to save face while sharing the resources of an area. These novel approaches are widely recognized as best practices and may

³⁷ Johnston and Valencia, *Pacific Ocean Boundary Problems*, 28.

³⁸ “The island that switches countries every six months,” *British Broadcasting Corporation*, January 28, 2018, <https://www.bbc.com/news/stories-42817859>.

provide the two countries with the flexibility and political cover needed to finally resolve these long-simmering maritime boundary disputes.

COUNTERARGUMENT AND REBUTTAL

Some may argue that the best way to settle these disagreements is for the U.S. to finally ratify UNCLOS and submit the matters before the convention's international tribunal. In discussing similar disputes in the South China Sea, Senator Ben Cardin (D-MD) argues that the U.S.'s "failure to join UNCLOS provides justification to China for their flouting of international law."³⁹ Cardin and other proponents of the treaty contend that the U.S. has little moral footing for arguing maritime claims in the absence of ratifying UNCLOS. Therefore, they argue the best way to resolve the U.S.'s outstanding maritime claims is to first become a party to the treaty and then to work within its provisions to settle the disputes.

However, what these arguments do not address is the fact that Canada might resist bringing the matters before an international tribunal since many of their claims are inconsistent with UNCLOS provisions. If Canada were to receive an unfavorable ruling in this forum, there is nothing preventing them from ignoring the ruling as was done recently by China after a 2016 ruling in favor of the Philippines regarding a maritime dispute in the South China Sea.⁴⁰ Similarly, the U.S. might also resist the tribunal due to a perception that such international bodies are often stacked against the interests of the U.S.

³⁹ Will Schrepferman, "Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea," *Harvard International Review*, October 31, 2019, <https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/>.

⁴⁰ "China to ignore international court ruling," *Deutsche Welle*, July 13, 2016, <https://www.dw.com/en/china-to-ignore-international-court-ruling-over-south-china-sea-rights/a-19396768>.

Furthermore, ratification may have other unintended consequences that diminish U.S. sovereignty and are unfavorable toward its business interests. The Reagan administration opposed UNCLOS in large part due to the collectivist economic underpinnings regarding deep seabed mining covered under Part XI. Critics of the treaty acknowledge that while improvements were made in the 1990's, it still creates a "Rube Goldberg" system of management, would mandate still undetermined amounts of royalties from miners, and would provide council memberships to groups antagonistic to U.S. mining interests such as geographically disadvantaged countries and land-based mineral producers.⁴¹ Given that U.S. domestic law already provides U.S. businesses with the right to mine the high seas, ceding to this treaty would add unnecessary regulations and expose these businesses to potentially ruinous royalty payments and technology transfers.

The last argument against the ratification of UNCLOS concerns the national security implications of the Northwest Passage. Ironically, a ruling in favor of the U.S. would undermine its national security by designating this waterway as an international passage available to all vessels. According to Michael Byers, an expert on Arctic politics at the University of British Columbia, this could be detrimental because it would open "unrestricted passage by China and Russia" as well as other hostile actors.⁴² A better option might be for the U.S. to gain a special agreement from Canada to allow U.S. vessels unfettered access while allowing Canada to maintain restrictions on hostile foreign powers. For these reasons, the U.S. should not ratify UNCLOS but should pursue bilateral negotiations as the best option for peaceful resolution of U.S.-Canadian maritime border disputes.

⁴¹ Doug Bandow, "Don't Resurrect the Law of the Sea Treaty," *Journal of International Affairs* 59, no. 1 (Fall/Winter 2005): 30.

⁴² Schlanger, "The US is picking a fight with Canada over a thawing Arctic shipping route."

CONCLUSION

The U.S. and Canada have a prime opportunity to resolve their maritime border conflicts now while relations are friendly and tensions are low across the border. By taking a holistic approach to address the disagreements through bilateral negotiation, the two countries will be able to resolve their differences and avoid the historical pitfalls that have kept these disputes simmering for so long. Resolution using cooperative management and joint development concepts will help lower tensions further and provide the best chance of success. Lastly, by engaging each other in an accommodating manner, the U.S. and Canada will provide the world with a positive example of dispute resolution in the maritime commons, which may become the key to solving future disputes in the Arctic and other contested areas.