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Russia and the Arctic: Opportunities for Engagement Within the Existing Legal Framework

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RUSSIA AND THE ARCTIC: OPPORTUNITIES FOR ENGAGEMENT WITHIN THE EXISTING LEGAL FRAMEWORK

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INTRODUCTION	225
I. DEVELOPING THE “RULE OF LAW” IN THE ARCTIC DEMANDS STRENGTHENING THE EXISTING LEGAL FRAMEWORK, NOT A NEW “ARCTIC TREATY”	227
A. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (“UNCLOS”).....	229
B. ADDITIONAL SOURCES OF INTERNATIONAL LAW WITH IMPLICATIONS FOR THE ARCTIC.....	233
II. APPLYING THE EXISTING LEGAL FRAMEWORK TO THE CHALLENGES FACING THE ARCTIC.....	236
A. HYDROCARBON EXPLOITATION.....	236
B. COMMERCIAL SHIPPING.....	240
C. FISHERIES	244
CONCLUSION	247

INTRODUCTION

In August 2007, Russia grabbed the world’s attention by sending a pair of manned submersibles deep below the polar ice cap to plant a Russian flag on the seabed floor at the North Pole.¹ The stunt was an impressive and daring technical achievement, but carried no legal significance.² It neither bolstered nor confirmed a Russian claim to

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1. C.J. Chivers, *Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. TIMES, Aug. 3, 2007, at A8.

2. This view is widely-shared. *See, e.g.*, Oran R. Young, *Whither the Arctic?*

the Arctic seabed. Nor did it constitute a deviation from the rule of law. Rather, it signaled Russia's intention and ability to continue pressing a legal claim to a significant portion of the continental shelf beneath the Arctic Ocean.

Nonetheless, Russia's gambit accelerated a media obsession with the Arctic. In the more than two years since Russia's North Pole adventure—and against a backdrop of a retreating polar ice cap and rising temperatures³—journalists and scholars have come to describe the Arctic's future in alarmist terms. These reports include warnings of “a race for control of the Arctic,”⁴ and a “coming anarchy” in which states will “unilaterally grab” as much territory as possible to secure new sources of oil and natural gas.⁵ Some describe the Arctic as the site of “an armed mad dash” and a potential source of a future armed conflict, likely involving the United States and Russia.⁶ This troubling picture has generated calls for a new international agreement—an “Arctic Treaty”—to provide a comprehensive legal

Conflict or Cooperation in the Circumpolar North, 45 POLAR REC. 73, 74-75 (2009); John B. Bellinger, *Treaty On Ice*, N.Y. TIMES, June 23, 2008, at A21; *The Arctic: Drawing Lines in Melting Ice*, ECONOMIST, Aug. 18, 2007, at 49, 50.

3. See James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INT'L J. MARINE & COASTAL L. 257, 257-59 (2007) (remarking that during the summer, the amount of sea ice had “declined more dramatically” than usual); see also Andrew C. Revkin, *Arctic Melt Unnerves the Experts*, N.Y. TIMES, Oct. 2, 2007, at F1 (noting that, because the sea ice had dwindled so much, “two long-imagined” shipping routes over the Arctic were accessible for a short while).

4. Colin Woodward, *Who Resolves Arctic Oil Disputes?*, CHRISTIAN SCI. MONITOR, Aug. 20, 2007 at 1.

5. Scott G. Borgerson, *Arctic Meltdown; The Economic and Security Implications of Global Warming*, FOREIGN AFF., March/April 2008, at 63 [hereinafter Borgerson, *Arctic Meltdown*]; see also Thomas Omestad, *The Race for the Arctic, as the Ice Melts, Nations Eye Oil and Gas Deposits and Shipping Routes*, U.S. NEWS & WORLD REP., Oct. 13, 2008, at 53 (characterizing the Arctic as a “toxic brew” due to its prime location, potential source of natural resources, and lack of clear ownership).

6. See Borgerson, *Arctic Meltdown*, *supra* note 5 (describing the possibility of “armed brinkmanship” in response to disputed claims); see also Tony Halpin, *Russia Warns of War Within a Decade Over Arctic Oil and Gas*, TIMES (LONDON), May 14, 2009, at 34. Some Russian commentators have appeared willing—if not downright eager—to use the Arctic as a foil for nationalist rhetoric. See Keir Giles, *Looking North*, in MARK A. SMITH & KEIR GILES, RUSSIA AND THE ARCTIC: THE “LAST DASH NORTH” 10, 14-15 (Def. Acad. of the U.K., Russian Ser. 07/26, Sept. 2007).

regime for the region.⁷ In light of the above, it is easy to see why the casual observer would be left thinking that when it comes to the Arctic, we are operating in a legal vacuum.

But that is simply not the case. Indisputably, the Arctic poses many challenges, but it is not a twenty-first century incarnation of the Wild West. There are institutions and legal frameworks in place through which the challenges of Arctic governance and management can and should be addressed. As discussed below, the centerpiece of that framework is the 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or “Convention”).⁸ Moreover, within the existing governance structure, Russia’s track record with respect to the Arctic—perhaps in contrast to Russia’s recent record elsewhere—has arguably been more positive than not. As such, rather than fixating on the Arctic as a flashpoint for confrontation, it may be more useful to consider the Arctic as an opportunity for constructive engagement.

I. DEVELOPING THE “RULE OF LAW” IN THE ARCTIC DEMANDS STRENGTHENING THE EXISTING LEGAL FRAMEWORK, NOT A NEW “ARCTIC TREATY”

There should be no serious debate that the Arctic climate is undergoing dramatic change. The U.S. Geological Survey (“USGS”) reports that “in the past 30 years, average temperatures in the Arctic have increased at almost twice the rate of the planet as a whole.”⁹

7. See Donald R. Rothwell, *The Arctic in International Affairs: Time for a New Regime?*, AUSTL. NAT’L. UNIV. COLL. OF LAW, Res. Paper No. 08-37, available at <http://ssrn.com/abstract=1314546>; Scott Borgerson, Op-Ed., *An Ice-Cold War*, N.Y. TIMES, Aug. 8, 2007, at A19 [hereinafter Borgerson, *An Ice-Cold War*]; see also ROBERT HUEBERT & BROOKS B. YEAGER, WORLD WILDLIFE FUND [WWF], A NEW SEA: THE NEED FOR A REGIONAL AGREEMENT ON MANAGEMENT AND CONSERVATION OF THE ARCTIC MARINE ENVIRONMENT 24 (2008) (emphasizing the need for a “an ecosystem approach to management of the Arctic, rather than a merely sectoral or problem-based response”).

8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

9. U.S. GEOLOGICAL SURVEY [USGS], U.S. CLIMATE CHANGE SCI. PROJECT, PAST CLIMATE VARIABILITY AND CHANGE IN THE ARCTIC AND AT HIGH LATITUDES 11 (2009), available at <http://downloads.climate-science.gov/sap/sap1-2/sap1-2-final-report-all.pdf>.

This has resulted in the “substantial retreat and thinning of the Arctic sea ice cover.”¹⁰ Moreover, the retreat is “accelerating, and it is expected to continue. The Arctic Ocean may become seasonally ice free as early as 2040.”¹¹ Others predict “an ice-free summer period” by 2020,¹² or even, extraordinarily, by 2013.¹³

These developments pose significant challenges on a *global* level, particularly as melting ice introduces massive quantities of freshwater into the oceans and threatens higher sea levels. But most discussion of the Arctic focuses on the *regional* challenges at hand. The shrinking polar ice cap sets the stage for increased human activity in the region, notably through the development of oil and natural gas deposits, the prospect of seasonal or year-round commercial shipping, and the exploitation of newly accessible fisheries. Each of these developments poses legal and political challenges.

But do these challenges demand Arctic-specific solutions in the form of a comprehensive, non-sectoral “Arctic Treaty?” On this point, the United States and Russia agree: such a treaty is neither necessary nor desirable. In May 2008, representatives of the five Arctic coastal states (Canada, Denmark (through Greenland), Norway, Russia, and the United States) met in Ilulissat, Greenland to underscore that shared understanding:

The Arctic Ocean stands at the threshold of significant changes. Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and the potential exploitation of natural resources.

10. *Id.* at 418.

11. *See id.* (explaining also that as the sea ice diminishes each year, the Arctic will get warmer due to a “feedback mechanism between ice and its reflectivity”).

12. *See* Rosemary Rayfuse, *Warm Waters and Cold Shoulders: Jostling for Jurisdiction in Polar Oceans* 4, (Univ. of New S. Wales Faculty of Law Res. Series, Working Paper No. 56, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402390# (remarking that the estimates for an ice-free summer “are constantly being revised downward”).

13. Scott Borgerson & Caitlyn Antrim, Op-Ed., *An Arctic Circle of Friends*, N.Y. TIMES, March 28, 2009, at A21 (speculating that ice-free summers will lead to increases in shipping, fishing, and tourism in the Arctic).

. . . Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.

This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.¹⁴

The Ilulissat Declaration clearly rejects the proposal for “a new comprehensive legal regime” for the Arctic. But this is not a blow to the rule of law (as some suggest). On the contrary, it focuses attention on the political and legal mechanisms already in place that should be enhanced and applied to Arctic issues. A closer look at some of the key components of the existing governance structure may help explain why the Arctic states have taken this position, despite the very real change taking place.

A. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (“UNCLOS”)

UNCLOS is the cornerstone of the existing legal framework for the Arctic. Sometimes described as a “constitution for the oceans,” UNCLOS is “the product of centuries of practice, three U.N. Conferences (1958, 1960, and 1973-1982), and a subsequent agreement on implementation, negotiated from 1990 to 1994.”¹⁵ It is widely considered “one of the most comprehensive and well-established bodies of international law in existence [and] . . . is critical to creating a more secure international environment.”¹⁶

14. The Ilulissat Declaration, U.S.-Can.-Den.-Nor.-Russ., Arctic Ocean Conf., Ilulissat, Greenland, May 29, 2008, *available at* <http://arctic-council.org/file/archive/Ilulissat-declaration.pdf>.

15. SCOTT G. BORGERSON, COUNCIL ON FOREIGN REL., *THE NATIONAL INTEREST AND THE LAW OF THE SEA* 6 (2009).

16. See Devon Chaffee, *Freedom or Force on the High Seas?: Arms Interdiction and International Law*, SCI. DEMOCRATIC ACTION, June 2004, at 1, 2.

UNCLOS is wide-ranging in scope and attempts to strike a careful balance between the “exclusive” right of coastal States to control their marine resources and an “inclusive” freedom of the seas to which all states are entitled.¹⁷ On the one hand, UNCLOS codifies a 12 nautical mile (“nm”) territorial sea,¹⁸ a contiguous zone extending 24 nm from the coastline,¹⁹ and an Exclusive Economic Zone (“EEZ”) extending 200 nm from the coastline²⁰—maritime zones in which the coastal State wields substantial regulatory authority (and complete sovereignty with respect to the territorial sea). On the other hand, UNCLOS carefully preserves the traditional freedoms (e.g., navigation and other uses) of the high seas²¹—those waters beyond the EEZ—and codifies the concepts of “innocent passage” through the territorial sea,²² and “transit passage” through international straits.²³ The Convention sets forth a framework for the development of more specific measures aimed at the shared management of living marine resources²⁴ and the prevention and reduction of marine pollution.²⁵ It also provides a “menu” of options for the resolution of oceans-related disputes.²⁶ All of these provisions are relevant to the Arctic.

In particular, Article 76 of UNCLOS creates a system under which coastal states can acquire exclusive rights to the exploitation of defined sections of the ocean floor. Specifically, Article 76 defines the continental shelf, provides geological criteria relevant to establishing its outer limits beyond 200 nm from the coastline (up to the 350 nm limit), and creates an independent commission charged with reviewing and endorsing those claims.²⁷ This means that coastal states have exclusive rights to explore and exploit the natural

17. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L. J. 131, 167-75 (2005) (remarking that changes in the ways in which states manage their resources has somewhat “qualified” the freedoms traditionally enjoyed on the high seas).

18. UNCLOS, *supra* note 8, art. 3.

19. *Id.* art. 33.

20. *Id.* art. 57.

21. *Id.* art. 87.

22. *Id.* art. 17.

23. *Id.* art. 38.

24. *Id.* arts. 117-119.

25. *Id.* arts. 192-237.

26. *Id.* arts. 279-299.

27. *Id.* art. 76.

resources (e.g., oil and natural gas) of their continental shelves up to at least 200 nm from the coastline (corresponding to the limit of the EEZ), but also allows states to claim an “extended continental shelf” beyond the 200 nm limit if they can adduce sufficient scientific evidence of the shelf’s continuation.²⁸ A state must submit its application, including the relevant scientific data, within ten years of joining the Convention. It is largely this possibility—the right to claim an extended continental shelf—that underlies the media frenzy over the “scramble” to establish Arctic claims.

UNCLOS does not address the Arctic by name. It does, however, include a provision on “Ice-Covered Areas.” Article 234 provides as follows:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.²⁹

At some point, Article 234 may no longer apply to the Arctic if climate change results in a region that is no longer “ice-covered.”³⁰ But until that time arrives—and probably for a significant time yet—Article 234 provides the Arctic coastal States with significant leeway to regulate the use of Arctic waters within their EEZs on a non-discriminatory basis. That said, Article 234 does not provide any basis for regulation of the high seas that lie beyond the EEZs of the

28. *Id.* art. 77; see also David A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 AM. J. INT’L L. 91 (2003) (extensively discussing the continental shelf provisions, including the difficulty of reconciling legal and geological approaches to the concept).

29. UNCLOS, *supra* note 8, art. 234. As will be discussed, Canada and Russia have availed themselves of this provision to regulate Arctic shipping lanes.

30. See Rayfuse, *supra* note 12 (hypothesizing that there will be debates about the terms and phrases in Article 234, which could question its applicability).

circumpolar states—waters which may become largely ice-free and fully navigable.

There are currently 160 parties to UNCLOS, including four of the five Arctic coastal states: Canada, Denmark, Norway, and Russia (which joined in 1997).³¹ As of 2009, the United States had not yet acceded to the Convention, despite extensive and bipartisan support for it to do so.³² And while the United States bestows the status of customary international law on most UNCLOS provisions,³³ the failure of the United States to accede to the treaty has deprived it of a “seat at the table when the rights that are vital to [U.S.] interests are debated and interpreted.”³⁴ Non-party status precludes the United States from submitting an application for the recognition of any extended continental shelf it may be able to claim in the Arctic. Indeed, to the extent the United States is concerned about the adherence of Russia or any other country to the laws and norms that

31. See U.N. Div. for Ocean Aff. and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 06 November 2009, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#TheUnitedNationsConventionontheLawoftheSea (last visited Dec. 3, 2009).

32. See Michael A. Becker, *International Law of the Sea*, 43 INT'L LAW. 915, 915-16 (2009). For the last fifteen years, a small but vocal opposition—armed with flawed arguments—has prevented UNCLOS from receiving a full vote by the United States Senate. See David J. Bederman, *The Old Isolationism and the New Law of the Sea: Reflections on Advice and Consent for UNCLOS*, 49 HARV. INT'L L.J. ONLINE 21, 24 (2008), <http://www.harvardilj.org/online/126> (pointing out that opponents to UNCLOS rely on the weak argument that the provisions already exist under customary international law); William L. Schachte, Jr., *The Unvarnished Truth: The Debate on the Law of the Sea Convention*, 61 NAVAL WAR C. R. 119 (2008) (discussing the various and unpersuasive arguments against ratification, and also pointing out that the initial—and only—objections raised by the Reagan Administration to certain UNCLOS provisions relating to deep-sea mining were satisfactorily resolved by the subsequent Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41).

33. See Statement on United States Oceans Policy, 1 PUB. PAPERS 378, 378-79 (Mar. 10, 1983) (recognizing the necessity of navigation and overflight provisions and declaring a 200 mile EEZ).

34. Statement on Advancement of United States Maritime Interests, 43 WEEKLY COMP. PRES. DOC. 635 (May 15, 2007); see also John B. Bellinger III, U.S. Dept. of St., *The United States and the Law of the Sea Convention 3* (Law of the Sea Inst. Occasional Paper No. 5, 2008) (asserting that the United States “has an enormous stake” in the UNCLOS provisions and would have benefited by exerting “a level of influence commensurate with [its] interests”).

apply to the Arctic, the United States would considerably strengthen its position by swiftly acceding to the Convention.

B. ADDITIONAL SOURCES OF INTERNATIONAL LAW WITH IMPLICATIONS FOR THE ARCTIC

Several other agreements and institutions supplement the UNCLOS framework and have direct application to the Arctic. A non-exhaustive list includes:

- The Convention for the Protection of the Marine Environment of the North East Atlantic;³⁵
- The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the “Fish Stocks Agreement”);³⁶
- The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978;³⁷
- The International Convention for the Safety of Life at Sea;³⁸
- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;³⁹ and

35. Convention for the Protection of the Marine Environment of the North-East Atlantic, 32 I.L.M. 1072 (1992).

36. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88 [hereinafter Fish Stocks Agreement].

37. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61.

38. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278.

39. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, S. Treaty Doc. No. 102-5, 1673 U.N.T.S. 57.

- The Stockholm Convention on Persistent Organic Pollutants.⁴⁰

In addition, two institutions require mention here: the International Maritime Organization (“IMO”) and the Arctic Council.

The IMO is a specialized agency of the United Nations. Its mandate concerns the development and maintenance of a comprehensive regulatory framework for shipping. This includes the promulgation of rules and regulations relating to ship safety and the effect of shipping on the maritime environment. While not focused exclusively on the Arctic, the IMO develops rules and standards that have both general and specific application to the region. In particular, the IMO has developed guidelines for ships operating in ice-covered waters (the so-called “Polar Code”).⁴¹ These guidelines—which are currently only recommendatory—apply to the construction, equipment, and operation of vessels navigating in the Arctic.⁴²

The Arctic Council was established in 1996 as a high level intergovernmental forum for coordination among the Arctic states and indigenous Arctic populations. Its focus has historically been sustainable development and environmental protection. It is a “soft law” body that serves an advisory function, but the organization—which includes the United States and Russia as active participants—has successfully raised the profile of Arctic issues and facilitated a science-based, depoliticized approach to developing environmental policy for the region.⁴³ For example, it has issued extensive

40. United Nations Environment Programme [UNEP], Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532.

41. Int'l Maritime Org. [IMO], Guidelines for Ships Operating in Arctic Ice-Covered Waters, MSC/Circ.1056 (Dec. 23, 2002), *available at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6629/1056-MEPC-Circ399.pdf.

42. *See* ØYSTEIN JENSEN, FRIDTJOF NANSENS INST. [FNI], THE IMO GUIDELINES FOR SHIPS OPERATING IN ICE-COVERED WATERS: FROM VOLUNTARY TO MANDATORY TOOL FOR NAVIGATION SAFETY AND ENVIRONMENTAL PROTECTION?, at v (2007), *available at* <http://www.fni.no/doc&pdf/FNI-R0207.pdf> (noting that the guidelines are designed to address the risks associated with navigating the Arctic's international shipping routes).

43. *See* Young, *supra* note 2, at 79 (recognizing that including non-state actors in discussions about policy is key to the Council's achievements).

guidelines on offshore oil and gas activities.⁴⁴ It has also provided recommendations to improve the safety of shipping in the region.⁴⁵

Indeed, the Arctic Council occupies a critical role in developing policy and best practices for the region; this contribution should not be undervalued.⁴⁶ Whether or not a comprehensive treaty for the Arctic is desirable, it would undoubtedly face enormous—even insurmountable—political obstacles. As such, the Arctic Council holds greater potential to play an increasingly important role in efforts to improve Arctic governance by promoting the harmonization of national laws and regulations, a strategy that may be more effective than the promotion of comprehensive “top-down” solutions by treaty. At the same time, the Arctic Council can seek to ensure that international institutions in a position to effect widespread reforms—such as the IMO—are “well informed about conditions prevailing in the Arctic.”⁴⁷

In sum, UNCLOS and a wide range of complementary international agreements and organizations provide a legal framework for the issues we face—or soon will face—in the Arctic. That is not to say the existing framework provides clear or robust rules for *every* situation. Nor can it guarantee that any state—Russia, the United States, or any other—will always conduct itself in a manner that lives up to international standards. But the framework provides an adequate starting point, and it should also remind us that “new” challenges facing the Arctic are not necessarily unique or unfamiliar. Many of these issues—from drawing maritime borders to promoting safe navigation to protecting the marine environment—

44. ARCTIC COUNCIL, PROTECTION OF THE ARCTIC MARINE ENV'T WORKING GROUP, ARCTIC OFFSHORE OIL AND GAS GUIDELINES (2009), *available at* <http://arctic-council.org/filearchive/ArcticOffshoreOilandGasGuidelines2009.pdf>.

45. These recommendations provide the substance of a bill that was introduced in the U.S. Senate in August 2009—the Arctic Marine Shipping Assessment Implementation Act of 2009, S. 1514, 111th Cong. (2009). *See* Sen. Lisa Murkowski, Op-Ed., *Arctic Holds Both Promise and Challenges*, JUNEAUEMPIRE.COM, Aug. 20, 2009, http://www.juneauempire.com/stories/082009/opi_483649495.shtml (remarking that the Act was intended to enable the United States to tackle the challenges presented by the Arctic).

46. *See* Young, *supra* note 2, at 79 (acknowledging that the Council has elevated Arctic concerns to a global level, with particular emphasis on pollution).

47. *Id.* at 81.

are quintessential law of the sea issues to which international policymakers bring a wealth of experience.

II. APPLYING THE EXISTING LEGAL FRAMEWORK TO THE CHALLENGES FACING THE ARCTIC

As noted above, three of the principal ways in which melting ice will give way to increased human activity in the Arctic are through oil and natural gas recovery, commercial shipping, and fishing. This section will briefly discuss the application of the existing legal framework to those challenges.

A. HYDROCARBON EXPLOITATION

In an energy-driven world, the prospect of extensive and undiscovered hydrocarbon deposits has fueled the current focus on the Arctic. USGS scientists estimate that the Arctic contains conventional oil and gas resources totaling approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids.⁴⁸ This could amount to “just over a fifth of the world’s undiscovered, recoverable oil and natural-gas resources.”⁴⁹ These numbers highlight the importance of the UNCLOS provisions that govern the exploitation of resources in the continental shelf and beyond. By reaching agreements with neighboring states as to the delimitation of its continental shelf within the 200 nm limit⁵⁰—and by “certifying” claims to the extended continental shelf beyond that limit with the Commission on Limits of the Continental Shelf (“Commission”)—each Arctic coastal state can secure legal certainty over the scope of its

48. USGS, *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, USGS Fact Sheet 2008-3049 (2008), available at <http://pubs.usgs.gov/fs/2008/3049/>.

49. Stephen Power, *Bush Moves to Update U.S. Policy in Arctic Region*, WALL ST. J., Jan. 8, 2009.

50. See UNCLOS, *supra* note 8, art. 83 (“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution.”).

jurisdiction. This is a prerequisite to resource recovery projects that require massive amounts of public and private investment.⁵¹

In accordance with the procedures set forth in Article 76 of UNCLOS, Russia and Norway have already submitted extended shelf claims to the Commission.⁵² In 2001, Russia made the first such application, which included a claim to the Lomonosov Ridge, a 1,240-mile undersea mountain chain extending from the Russian coast to the North Pole and beyond.⁵³ The claim sought to add nearly one million square kilometers to Russia's arctic territory.⁵⁴ Other states, including the United States, objected to that application on the merits.⁵⁵ A year later, the Commission recommended that Russia make a revised submission based on additional scientific evidence.⁵⁶ Significantly, Russia accepted the Commission's ruling and is in the process of developing a stronger submission through the collection and analysis of additional evidence from the ocean floor. Elsewhere, submissions from Denmark and Canada are expected in the coming years. The United States—which, like its Arctic neighbors, is busily mapping the ocean floor to compile the necessary data for its own

51. See Richard R. Burgess, *The New Cold War? Melting of Ice Spurs Maritime Activity as Nations Rush to Stake Claims for Potential Arctic Resources*, SEAPOW, Oct. 2007, at 14 (observing that oil companies need “security of tenure” before financing and insuring continental shelf investments).

52. Comm'n on the Limits of the Cont'l Shelf (CLCS), Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submission by the Russian Federation, Ref. No. CLCS 01.2001.LOS (Dec. 20, 2001), available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm; Comm'n on the Limits of the Cont'l Shelf (CLCS), Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submission by the Kingdom of Norway, Ref. No. CLCS.07.2006.LOS (Nov. 26, 2006), available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm.

53. *Id.* at 15.

54. David Malakoff, *Nations Look For an Edge in Claiming Continental Shelves*, 298 SCIENCE 1877 (2002).

55. See *United States of America: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf*, U.N. Ref. CLCS.01.2001.LOS/USA (Mar. 18, 2002) (including a letter from Ambassador John D. Negroponte to U.N. Under-Secretary General for Legal Affairs Hans Corell, in which the Ambassador raised questions about the differences between Russia's scientific data and other data in the scientific community).

56. See The Secretary-General, *Report of the Secretary-General on the Oceans and the Law of the Sea*, ¶ 41, delivered to the General Assembly, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002)

claim—cannot submit an application to the Commission until it accedes to UNCLOS.⁵⁷

For purposes of this assessment, however, the crucial point is that mechanisms exist for the *peaceful* establishment of these claims through the submission of scientific evidence to the Commission.⁵⁸ And the Arctic states, including Russia, have been following the rules of the game, and, in some instances, working together to develop the necessary scientific data.⁵⁹ It is important to keep in mind that while these claims may implicate very large tracts of territory (as Russia's initial application certainly did), there is nothing inherently illegitimate about such claims; the extent of "the submerged prolongation of the land mass of the coastal State" and "the slope and the rise" of "the sea-bed and subsoil of the shelf" does not command a *pari passu* distribution of continental shelf among the Arctic states.⁶⁰ In brief, some states' shelves may simply be bigger than others. This outcome could be entirely consistent with the rule of law.

While there are legitimate reasons to be concerned that the Commission is overworked and understaffed, there is currently no indication that any country, Russia included, is prepared to charge ahead with an Arctic claim that has not received the Commission's

57. See *The Scramble for the Seabed: Suddenly, a Wider World Below the Waterline*, ECONOMIST, May 14, 2009, at 35 (noting that any country that ratified the treaty prior to May 1999 has ten years from the date of ratification to submit a claim for extension of their continental shelf beyond the normal 200 nm extension).

58. See UNCLOS, *supra* note 8, art. 279 ("States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means."); *but see, e.g.*, Rayfuse, *supra* note 12, at 6 (arguing that there are legitimate concerns that the existing legal framework may lack sufficient provisions "for coordinating activities occurring between the high seas water column and the extended continental shelf").

59. See Bellinger, *supra* note 2 (observing that Russia has complied with international law as it maps its extended continental shelf); *see also* MINISTER OF INDIAN AFF. & N. DEV., GOV'T OF CAN., CANADA'S NORTHERN STRATEGY: OUR NORTH, OUR HERITAGE, OUR FUTURE 12 (2009), available at <http://www.northernstrategy.ca/cns/cns.pdf>, at 12 [hereinafter CANADA'S NORTHERN STRATEGY] (describing the process as "not a race," but rather a "collaborative process based on a shared commitment to international law" in which Canada, Denmark, Russia, and the United States are working together).

60. UNCLOS, *supra* note 8, art. 76(3).

approval.⁶¹ Consistent with that view, it has emerged that February 2009 talks between Canada and Russia included discussion of a potential joint submission from Canada, Denmark, and Russia to the Commission.⁶² Such an application would not determine competing claims among the three countries, but would allow for demarcation of the area under the control of those coastal states from the area beyond. Furthermore, the collaboration required to produce a joint submission could itself be a valuable confidence-building measure that would defuse nascent disagreements over exactly where final borders should be drawn.

Indeed, there is a premium on cooperation among the circumpolar states when it comes to hydrocarbons. Without efforts to reach negotiated settlements, it may be very difficult to secure the investment that resource recovery in the region will require.⁶³ And the international approbation that would accompany an act of unilateral annexation of the Arctic continental shelf would likely not be worth the prize. A large percentage of the hydrocarbon deposits in the Arctic—and those which are probably most feasible to capture⁶⁴—are located within the 200 nm of continental shelf over which, for the most part, the littoral states *already* exercise jurisdiction and effective control.⁶⁵

61. It bears mention that even if a state sought to assert unilateral control, doing so would likely be easier said than done in the difficult Arctic conditions. And while Russia has a significant advantage over the United States in terms of Arctic infrastructure (most notably, a much larger fleet of icebreakers), the assertion of control through military force is difficult to imagine at this juncture. *See generally* Oleg Bukharin, *Russia's Nuclear Icebreaker Fleet*, 14 *SCI. & GLOBAL SECURITY* 25 (2006) (discussing the power of the Russian icebreaker fleet, and noting Russia's plans for expansion of the icebreaker program).

62. Randy Boswell, *Thaw May Be Underway in Ottawa-Moscow Arctic Issues*, CANWEST NEWS SERV., May 12, 2009, <http://www.canada.com/technology/Thaw+underway+Ottawa+Moscow+Arctic+issues/1589395/story.html> (last visited Dec. 4, 2009).

63. *See* Burgess, *supra* note 51, at 14 (“Determining the sovereignty of a section of continental shelf bears directly on the economics of resource exploration.”)

64. *See* McKenzie Funk, *Arctic Landgrab*, NAT'L GEOGRAPHIC, May 2009, at 2 (detailing the high expenses and danger associated with the initial journey of the *Mir I* and *Mir II*, two privately-funded Russian submersibles initially sent to the bottom of the North Pole).

65. *See* Borgerson & Antrim, *supra* note 13, at A21 (remarking that any oil or mineral fields found at the lower depths outside of countries' EEZs would be

B. COMMERCIAL SHIPPING

The prospect of seasonal or even year-round commercial shipping in the Arctic poses a different challenge. Some fear that if, or when, Arctic shipping routes become commercially feasible, significant environmental degradation will inevitably follow. Indeed, the Arctic's marine environment may be especially susceptible to the pollution caused by regular vessel traffic. The economist Robert Wade has set the risks against the potential gains in the following terms:

Shipping poses dangers to the ecosystem of the Arctic, which is even more vulnerable than more southerly environments. The biggest danger is from accidents, because oil and other organic substances decompose more slowly in cold water and ice, and ice can interfere with clean-up. Also, emissions from fossil-fuelled vessels may cause greying of the ice cap, accelerating melting. On the other hand, shorter shipping routes could significantly cut fuel consumption and greenhouse gas emissions, especially if engines use hydrogen or nuclear fuel⁶⁶

Historically, there have been two potential sea routes connecting the Atlantic and Pacific Oceans through the Arctic: the Northwest Passage, a series of straits and channels "through the northern tier of the North American continent,"⁶⁷ and the Northern Sea Route along Russia's northern coast. Compared to routes through the Panama Canal or the Suez, these routes reduce the journeys between New York and Tokyo or between Shanghai and Rotterdam by thousands of miles.⁶⁸

prohibitively expensive to extract).

66. Robert Wade, *A Warmer Arctic Ocean Needs Shipp Rules*, FIN. TIMES, Jan. 15, 2008, available at http://www.ft.com/cms/s/0/1c415b68-c374-11dc-b083-0000779fd2ac.html?ncllick_check=1.

67. Kraska, *supra* note 3, at 258.

68. *Id.*; see also Wade, *supra* note 66 (highlighting distance and security as two benefits to opening the northern shipping route); Erik Kirschbaum, *Climate Change Opens Arctic Route for German Ships*, REUTERS, Aug. 21, 2009, available at <http://www.reuters.com/article/GCA-BusinessofGreen/idUSTRE57K53Z20090821> (commenting on the savings in fuel costs and emissions that would result from using the Northern Route).

Russia has made limited use of the Northern Sea Route over the past century, in large part to support remote Siberian outposts—and only to the extent that ice-breakers made such transit possible. But an Arctic shipping infrastructure exists, and the Soviet Union “gradually developed the entire Northern Sea Route as an internal waterway, in support of the industrial development of Arctic resources.”⁶⁹ However, in the post-Soviet era, the route’s commercial use has remained highly limited; there is still significant ice blockage during much of the year and Russia, until 2009, had not approved transit through the Northern Sea Route by any non-Russian commercial vessel. Significantly, in August 2009, two German-owned ships, *Beluga Fraternity* and *Beluga Foresight*, undertook and completed the voyage, with Russian approval and without ice-breaker assistance.⁷⁰

This suggests an important evolution in the development of Russian law and regulation pertaining to commercial use of the sea route, but it is unknown at the time of writing whether or how Russia applied its traditional transit requirements to the *Beluga* vessels. Under the auspices of Article 234 of UNCLOS, Russia has traditionally required its own commercial vessels to pay a tariff and accept government escorts and ice-breaker assistance on the ground that the continuous presence of ice creates a safety hazard to vessels.⁷¹ As a result, the operational, political, and commercial risks of regular transit through the Northern Sea Route have prevented the international shipping industry from seizing the long-awaited opportunity to exploit an Arctic “short-cut” between East and West. Accordingly, the voyage undertaken by the *Beluga* vessels marks an important transition.

By comparison, the Northwest Passage has historically been non-navigable (with a few limited exceptions).⁷² It is not yet subject to

69. Claes Lykke Ragner, ‘Den Norra Sjövägen’ [The Northern Sea Route] in *BARENTS – ETT GRÄNSLAND I NORDEN* (Torsten Hallberg ed., 2008).

70. Kirschbaum, *supra* note 68; *German Ships Successfully Make “Arctic Passage,”* REUTERS, Sept. 12, 2009.

71. Ragner, *supra* note 69 (noting that Russia regulations require ships crossing through its EEZ to notify the Russian authorities of the voyage, apply for an ice-breaker to guide them along the route, and also pay an “ice-breaker fee”).

72. See Kraska, *supra* note 67, at 263-66 (stating that in 1969 an American vessel—accompanied by U.S. Coast Guard ice-breakers and without Canada’s

regular transit by commercial shipping vessels, but that situation appears to be changing. The passage was identified as “ice free” for the first time in 2007.⁷³ It became ice-free again in 2008 and saw its first recorded commercial voyage.⁷⁴ But the Northwest Passage lies at the center of a long simmering legal dispute between Canada on one side, and the United States and the European Union on the other. Canada contends that the Northwest Passage constitutes “internal waters” and is fully subject to Canadian sovereignty. The United States and the European Union deem the waterway an “international strait” subject to the regime of “transit passage” established by UNCLOS.⁷⁵ Whether under a theory of “internal waters” or pursuant to Article 234 of UNCLOS, Canada imposes stringent environmental standards on ships crossing Arctic waters within its EEZ and is seeking to require those ships to report to Canadian authorities.⁷⁶

In the abstract, Russian and Canadian efforts to impose tighter restrictions on vessel traffic through these waterways seem sensible; there are unique navigational dangers to traversing ice-covered waters. The underlying question is whether these measures are motivated predominantly by concern for the safety of seafarers and the polar environment, or instead are a pretext for nationalistic posturing and geopolitical brinksmanship. Under either scenario, are these measures at some level contrary to the rule of law? Some

permission—passed through the Northwest Passage, sparking the modern disagreement over the passage’s legal status).

73. John Roach, *Arctic Melt Opens Northwest Passage*, NAT’L GEOGRAPHIC NEWS, Sept. 17, 2007, <http://news.nationalgeographic.com/news/pf/38614724.html> (last visited Dec. 4, 2009).

74. *1st Commercial Ship Sails Through Northwest Passage*, CBCNEWS.COM, Nov. 28, 2008, www.cbc.ca/canada/north/story/2008/11/28/nwest-vessel.html (last visited Dec. 4, 2009) (explaining that the passage opened much sooner than scientists had predicted).

75. See generally Kraska, *supra* note 3, at 275 (arguing that UNCLOS does not support Canada’s “excessive” claims to the passage).

76. Canadian regulation over its Arctic waters long predates Canada’s 2003 accession to UNCLOS. The seminal statute is the Arctic Waters Pollution Prevention Act of 1971, which has since been amended to enhance and strengthen Canada’s regulatory presence. The Canada Shipping Act of 2001 now requires vessels transiting Arctic waters to report to the Canadian Coast Guard. See CANADA’S NORTHERN STRATEGY, *supra* note 59, at 11-12; *Canada Requires Ship Registration in Arctic*, MSNBC.COM, Aug. 27, 2008, http://www.msnbc.msn.com/id/26429116/ns/world_news-americas/ (last visited Dec. 4, 2009) (stating that previously registration with Canadian authorities had been voluntary).

exercise of non-discriminatory, science-based regulation pursuant to Article 234 is consistent with the UNCLOS framework, but claims to national sovereignty over the waterways—i.e., declarations that such waterways constitute historic “internal waterways”—are excessive. It would be interesting to see how Russian and Canadian authorities will react if current regulations are challenged. Would national or international courts deem those regulations consistent with either country’s international obligations under UNCLOS?

That said, disagreements stemming from access to and utilization of the Northwest Passage and the Northern Sea Route are disputes that are more appropriate for negotiation than litigation;⁷⁷ neither disagreement is likely to result in a serious escalation.⁷⁸ And if the ultimate interest is safe and clean commercial shipping for the benefit of all states, Arctic and non-Arctic alike, tough but reasonable standards will serve the community interest. As Professor James Kraska of the Naval War College has forcefully argued with respect to the Northwest Passage, “[t]he outcome of the debate may not be as critical as some would believe, since acceptance of the passage as an international strait would permit Canada to seek development of internationally accepted standards for protecting the strait at the [IMO].”⁷⁹ Similar arguments can be made with respect to the Northern Sea Route, although the waterway, strictly speaking, is not an international strait. The key factor is that the IMO is already

77. See, e.g., CANADA’S NORTHERN STRATEGY, *supra* note 59, at 13 (describing the U.S.-Canada dispute over the Northwest Passage as “well-managed,” posing “no sovereignty or defense challenges for Canada,” and, furthermore, having “no impact on Canada’s ability to work collaboratively and cooperatively” with its Arctic neighbors).

78. However, the prospect of Canada and Russia backing each other’s positions—aligned against the United States and the European Union on this issue—may complicate the discussions. But it is unlikely that the United States would accept the argument that acquiescence to Russian and Canadian jurisdictional assertions over the waterways benefits the international community at large. See Kraska, *supra* note 67, at 279.

This view undervalues concerns among other maritime powers over the negative precedent for worldwide freedom of the seas arising from unilateral assertions of excessive claims. For the United States in particular, maintaining a stable regime that ensures global maritime maneuverability and mobility is considered a cornerstone of the nation’s economic and national security.

Id.

79. See *id.* at 260.

addressing these issues (recall the development of the “Polar Code”) and is the best positioned international body to push for existing guidelines to become standard industry practice.⁸⁰ Indeed, Russia was scheduled to participate in the IMO’s “voluntary audit scheme” in the fall of 2009, which gave the IMO an opportunity to provide a comprehensive assessment of the state of Russia’s compliance with international standards.⁸¹ Russian participation in the audit is itself a positive sign that, at least with respect to commercial shipping, Russia is developing its Arctic policies under the auspices of the existing governance structure.

More generally, the prospect of a completely ice-free Arctic Ocean contemplates heretofore unimaginable shipping routes, straight over the North Pole itself and substantially through “international waters” (although such a route would still require vessels to pass through the EEZs of one or more coastal states to reach the Arctic high seas). That possibility means that coastal state regulation alone cannot address the challenge of Arctic shipping. It also demands asking whether an ice-free Arctic Ocean should even be conceptualized as a unique regime, separate and apart from the high seas regime that applies everywhere else. Does the fact that an ice-free Arctic Ocean constitutes a “new space” for human movement require a new legal approach? The more that climate change renders the Arctic Ocean an ice-free zone separating the North American and Eurasian continents and exposes weaknesses in the current high seas regime, the more we should question why the focus is not on efforts to reform and improve the high seas regime generally, without special reference to the Arctic, and for the benefit of the oceans system on a global basis.

C. FISHERIES

Finally, climate change appears likely to soon make commercial fishing activity possible “within areas of the Arctic Ocean previously

80. See Young, *supra* note 2, at 75 (arguing that the guidelines need a significant amount of work to form the foundation of an “effective regulatory regime” for a potential increase in commercial shipping, but noting also that “this is the sort of challenge that . . . the IMO [is] relatively well prepared to handle”).

81. *Russia is Ready to Participate in Voluntary IMO Member State Audit-Transport Ministry*, RZD-PARTNER, July 13, 2009, <http://www.rzd-partner.com/news/2009/07/13/342858.html> (last visited Dec. 4, 2009).

protected from fishing by ice cover.”⁸² Fishing stocks are heading north as water temperatures increase.⁸³ Illegal, unreported, and unregulated fishing is a worldwide problem, and the Arctic is no exception.⁸⁴

The key international legal instrument for fisheries management is the 1995 Fish Stocks Agreement,⁸⁵ an outgrowth of UNCLOS. The Fish Stocks Agreement facilitates coordination between coastal states and states with fishing vessels on the high seas to set and enforce catch limits with respect to “straddling stocks” or “highly migratory fish,” that is, fish populations that live in, or migrate between, more than one EEZ. Management is delegated to subsidiary bodies—Regional Fisheries Management Organizations (“RFMOs”)—that handle the actual work of monitoring the catch, adjusting limits, and enforcing the rules.⁸⁶

Fisheries management is contentious everywhere, and there is no reason to expect that it will not be in the Arctic as well. Already, the Arctic periphery is subject to the North East Atlantic Fisheries Commission (in which Russia participates) in the case of Arctic cod and spring spawning herring in the Norwegian Sea and the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (to which both Russia and the United States are signatories).⁸⁷ If these regimes can be expanded to address the opening of new fisheries in the Arctic, the member states should endeavor to do so.

82. HUEBERT & YEAGER, *supra* note 7, at 8 (identifying the potential increase in fishing activity as “[p]ossibly the greatest short- to medium-term threat to marine biodiversity”).

83. *Id.* at 9.

84. BURNETT ET AL., WWF, *ILLEGAL FISHING IN ARCTIC WATERS: CATCH OF TODAY - GONE TOMORROW?* 1 (Apr. 2008) (estimating worldwide economic losses associated with illegal, unreported, and unregulated fishing at \$15 billion per year).

85. Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 34 I.L.M. 1542.

86. Fish Stocks Agreement, *supra* note 36.

87. Young, *supra* note 2, at 75; *see also* BURNETT ET AL., *supra* note 84, at 9-10 (noting that Norway and Russia also participate in a Joint Norwegian-Russian Fisheries Commission that manages the cod stock habitat straddling the two countries’ EEZs).

Another possibility is the creation of an RFMO for the Arctic. More narrowly tailored than a comprehensive, ecosystem-based treaty for the region (which would cover everything from fisheries and dumping, to polar bears and the rights of indigenous peoples), this is the kind of regional cooperation that is both sensible and politically feasible.⁸⁸ Such an approach finds considerable precedent in the numerous RFMOs already up and running (with, admittedly, varied degrees of success). Because the individual EEZs of the Arctic coastal states do not provide complete coverage over the Arctic Ocean, the area of high seas beyond the EEZs will be susceptible to overfishing that will threaten stocks throughout the region. History has shown that fishing fleets act quickly to exploit such loopholes in the regulatory regime. Take, for example, the case of the so-called “donut hole” in the Central Bering Sea—an area of high seas completely surrounded by the EEZs of Russia and the United States.⁸⁹ The failure of neighboring states to jointly manage the area led to rampant overfishing during the 1980s and the total collapse of stocks by 1992.⁹⁰ Since then, the United States and Russia have jointly observed and enforced a moratorium on fishing in the area.⁹¹ Similar problems have plagued the so-called “loop hole” in the Barents Sea.

88. To this end, former President George W. Bush signed a joint resolution of the U.S. Congress that directs the United States to work with other nations on agreements for managing migratory and transboundary fish stocks in the Arctic Ocean. The resolution further requires the United States to support international efforts “to halt the expansion of commercial fishing activities in the high seas of the Arctic Ocean” until an appropriate RFMO can be established. *See* Pub. L. No. 110-243, 122 Stat. 1569, 1570-71 (2008). The United States took an additional step towards this objective in August 2009 when the U.S. Department of Commerce approved the Arctic Fishery Management Plan, which will effectively “prohibit the expansion of commercial fishing in federal Arctic waters until researchers gather sufficient information on fish and the Arctic marine environment to prevent adverse impacts of commercial harvesting activity on the ecosystem.” *See* Press Release, National Oceanic and Atmospheric Administration [NOAA], Secretary of Commerce Gary Locke Approves Fisheries Plan for Arctic (Aug. 20, 2009), http://www.noaanews.noaa.gov/stories2009/20090820_arctic.html (last visited Dec. 4, 2009).

89. BURNETT ET AL., *supra* note 84, at 18.

90. *Id.* (specifying that three years earlier, various nations caught around 1.4 million tons of fish from the donut hole, and stating that the fishery has not recovered from the resulting collapse).

91. *Id.*

Without venturing into the intricacies of how an RFMO for the Arctic Ocean might be established and operated, the point is that the United States, Russia, and the other Arctic states are familiar with the challenges of managing sustainable fisheries and the consequences of failing to act proactively. Furthermore, all eight Arctic states have ratified the Fish Stocks Agreement, a strong indication “that all eight states have already accepted the principles established by [UNCLOS] that includes the enforcement of regional fisheries agreements in the high seas.”⁹² In short, cooperation among the Arctic states, including Russia, seems more likely than conflict on fisheries issues. The real question may be whether those states allocate sufficient resources to the enforcement of whatever regime is put in place.

CONCLUSION

At the risk of oversimplifying these issues, this brief article has sought to provide a basic overview of the challenges facing the Arctic and the ways in which an existing legal framework already provides tools to address them. This does not mean the legal framework is adequate in every respect. But the existence of a sophisticated, multi-layered system of governance that extends to most, if not all, of the issues facing the Arctic strongly suggests that the way forward is not to sweep aside that structure in favor of something entirely new. Maritime delimitation disputes and the balance between coastal state control and the freedom of navigation are quintessential law of the sea issues. Furthermore, the need, for example, to prevent “bottom trawling” along the ocean floor or to promote and enforce vessel safety standards is not limited to the Arctic. And while the Arctic may require a new RFMO, other issues, such as standards for the construction of safe vessels or limitations on the transport of hazardous materials, are more appropriately handled on a global level. It makes little sense to spend political capital on a difficult and contentious project—a comprehensive treaty for the Arctic—that would unnecessarily isolate the region from the world’s oceans system as a whole.

92. HUEBERT & YEAGER, *supra* note 7, at 27.

Even efforts to create a “specific environmental regime for the Arctic”⁹³ or to establish an international “polar park”⁹⁴ should be viewed with caution. However well-intentioned it may be to promote a concept of “stewardship” for the Arctic, such approaches risk encouraging individual states or groups of states in other parts of the world to also declare “special regimes” that would subject other areas of the high seas to undesirable levels of coastal state interference.⁹⁵ That risk should not preclude the discussion of feasible and lawful approaches to protecting the Arctic marine environment or achieving cooperative arrangements, but it should not be ignored either.

Ultimately, rather than a potential conflict between Russia and its fellow Arctic states, the more realistic divergence of interests in the Arctic may lie between the circumpolar states and other interested parties from beyond the region (for example, China, Japan, or European Union members). Accordingly, to the extent the Arctic is to be treated differently, another consideration must be how to include non-Arctic states in the creation of any Arctic-specific regime that departs from the international standards that apply everywhere else. While this may create political headaches in the short-term, it is the better course for purposes of conflict prevention in the long-term. A starting point would be to grant non-Arctic states a more significant role in the activities of the Arctic Council.⁹⁶

Finally, is there a “Russian question” looming behind all of these issues? Whether we choose to proceed by strengthening and

93. Hans Corell, *Reflections on the Possibilities and Limitations of a Binding Legal Regime for the Arctic*, 37 ENVTL. POL'Y & L. 321 (2007) (suggesting that this regime could be accomplished within existing international legal structures).

94. Borgerson & Antrim, *supra* note 13; *see also* Young, *supra* note 2, at 81 (“[T]here is much to be said for a strategy of freezing jurisdictional claims in the central Arctic basin in order to stress the idea of stewardship and to direct attention toward issues . . . that call for the creation of cooperative arrangements.”).

95. Those who view the high seas regime as failing to adequately serve the interests of the world community might prefer this outcome. *See, e.g.*, Rayfuse, *supra* note 12 (arguing that the high seas regime has proven neither comprehensive nor effective). As a result of such failures, goes the argument, the high seas in the Arctic require special attention. But why seek to remedy the high seas regime only with respect to the Arctic? And why endow the Arctic states—who are not the only states entitled to the use of Arctic waters—with that authority?

96. *See* Young, *supra* note 2, at 77, 79-80.

extending the existing framework where we must, or to develop new solutions, will Russia choose to participate within that system? As noted at several points above, Russia, by and large, is already doing so. Moreover, Russian officials have been at pains to counteract the characterization of the Arctic described at the beginning of this article: the faulty notion of the Arctic as a future battleground between Russia and the West. For example, the Russian Foreign Ministry has publicly stated that discussion of “a possible military conflict for Arctic resources is baseless” and that the problems facing the region will be resolved “on the basis of international law.”⁹⁷ Even the provocative figure at the head of Russia’s North Pole expedition has sought to downplay the situation, remarking that “[n]obody’s going to war with anybody” and that while Russia will “defend [its] economic interests . . . a conflict in the near future” is unlikely.⁹⁸ Moreover, the United States has largely acknowledged that Russia is adhering to the applicable rule of law, in particular with respect to the extended continental shelf.⁹⁹ Simultaneously, Russia appears to be engaged with the international community when it comes to the Arctic: through the Arctic Council, through the IMO, and in bilateral and multilateral efforts with its fellow Arctic states.¹⁰⁰

At a minimum, Russia’s conduct in the Arctic appears broadly comparable to the conduct of other states with a presence in the region. Russia’s position on the Northern Sea Route may run afoul of international law to the extent it continues to impose burdensome requirements on prospective commercial shipping interests. Its position may become difficult to square with the relevant UNCLOS provisions and will also seem increasingly counterproductive with respect to developing the waterway’s commercial potential. But Russia’s position on this particular issue is generally consistent with that of Canada, the only other similarly-situated state (and not a state

97. *Moscow Asks To Stop Arctic War Intimidations*, INTERFAX, Oct. 22, 2008.

98. James Kilner, *Russia Plays Down Talk of Arctic Resource Conflict*, REUTERS, June 10, 2009.

99. Press Briefing, U.S. Dep’t of State, Office of the Spokesperson, Russian Claims to Arctic Territory (Taken Question) (Sept. 18, 2008) (on file with author).

100. To take just one example, the Russian Ministry of Regional Development and the Canadian Department of Indian Affairs and Northern Development have entered into a Memorandum of Understanding to examine cooperative projects with respect to indigenous peoples in the region. See CANADA’S NORTHERN STRATEGY, *supra* note 59, at 34.

that is frequently associated with lapses in adherence to rule of law principles). On continental shelf issues, Russia may be moving towards collaboration on a joint submission with Canada and Denmark. And on environmental and fisheries issues, Russia is at the bargaining table—again, at the Arctic Council, within various RFMOs, and elsewhere.

On all of these fronts, there will continue to be opportunities to engage with Russia on collaborative solutions to the challenges facing the Arctic—problems that lend themselves to multilateral solutions. These opportunities to engage with Russia should be seized by the United States and others. By finding common ground in the Arctic, these efforts may have a positive byproduct: the improvement of relations with Russia in other spheres of conflict and areas of shared interest.