

June 2022

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Recommended Citation

Ryan R. Migeed, *Ending the Game of Environmental Politics in the Arctic: How the Arctic States Can Achieve Dispute Resolution Using Existing Legal Frameworks*, 27 *Ocean & Coastal L.J.* 35 (2022).
Available at: <https://digitalcommons.minelaw.maine.edu/oclj/vol27/iss1/3>

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ENDING THE GAME OF ENVIRONMENTAL POLITICS IN THE ARCTIC: HOW THE ARCTIC STATES CAN ACHIEVE DISPUTE RESOLUTION USING EXISTING LEGAL FRAMEWORKS

Ryan R. Migeed *

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* J.D. 2022, The George Washington University Law School; B.A. 2015, American University. The author would like to thank Professor Daniel Richard for his guidance on prior drafts of this article as well as the editorial staff of the *Ocean and Coastal Law Journal*, particularly Heather Kenyon, for shepherding this piece to publication.

This article was the winner of the 2021 Albert S. Pergam International Law Writing Competition Award and will be republished in the *New York International Law Review*.

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ABSTRACT

Climate change is causing Arctic ice to melt at an alarming rate. But rapid changes in the Arctic are also raising pressing challenges to the Arctic States' collective management of the region, exercised through the Arctic Council. The first is a greater number of players entering the region, each with its own claims to a share of the Arctic's newly accessible oil reserves or to various bits of land or to newly navigable cost-effective shipping routes. The second is that increased shipping traffic brings greater environmental risks to Arctic States' coastlines, marine life, indigenous communities, and fishing stocks. These twin challenges are becoming linked by the ways in which regional and external actors are using environmental concerns to justify their actions in—or access to—the region.

Contrary to growing fears of conflict in the Arctic, however, this Article argues that the Arctic Council framework, together with the widely-recognized international law of the sea, give the Arctic States functional tools to resolve conflict. This Article evaluates existing dispute settlement mechanisms—including the International Tribunal for the Law of the Sea and the UNCLOS Commission on the Limits of the Continental Shelf—and recommends that the Arctic States, through the Arctic Council, rely on these mechanisms to strengthen inter-state dispute settlement. In creating a strategy for a stable Arctic, relying on existing mechanisms is in the Arctic States' collective best interest because they are efficient—the Arctic Council's structure enables it to implement relevant UN conventions—and carry international legitimacy as part of the framework of existing treaty regimes.

INTRODUCTION

Climate change is bringing the once-frozen Arctic to a boil. In 2019, the U.S. Department of Defense published a report on its Arctic Strategy by request of Congress, responding to increasing concerns that new waterways made accessible by melting ice will result in militarization of the Arctic.¹ Russia, whose coastline dominates half the Arctic Ocean, has been “reopening, fortifying, and building new military bases in the Arctic region” and “publicizing [its] military exercises” there.² The buildup has drawn comparisons to Russia’s seizure of Crimea, with the inference that Russia may be just as willing to seize territory in the Arctic.³

In response, U.S. intelligence agencies have assigned new analysts to monitor the Arctic full-time.⁴ In 2017, the United States deployed 300 Marines to Norway—“the first time since World War Two that foreign troops have been allowed to be stationed there.”⁵ And, just as Russia maintains bases along newly emerging coastline, so does Canada: its northernmost base, Alert, is located closer to Moscow than to Ottawa.⁶ There has also been a rush to build new “icebreakers,” ships with fortified hulls capable of traversing icy waters that remain part solid, part liquid.⁷

1. The report was an updated version of a previous 2016 strategy. OFF. OF THE UNDER SEC’Y OF DEF. FOR POL’Y, REP. TO CONG.: DEP’T OF DEF. ARCTIC STRATEGY (June 2019), <https://media.defense.gov/2019/Jun/06/2002141657/-1/-1/1/2019-DOD-ARCTIC-STRATEGY.PDF> [<https://perma.cc/UXE3-F8MV>].

2. Johnny Harris, *It’s time to draw borders on the Arctic Ocean*, VOX: BORDERS (Oct. 24, 2017), https://youtu.be/Wx_2SVm9Jgo [<https://perma.cc/4A77-GDAL>]; see Andrew Osborn, *Putin’s Russia in biggest Arctic military push since Soviet fall*, REUTERS (Jan. 30, 2017), <https://www.reuters.com/article/us-russia-arctic-insight/putins-russia-in-biggest-arctic-military-push-since-soviet-fall-idUSKBN15E0W0> [<https://perma.cc/MU3N-24NP>].

3. Osborn, *supra* note 2; see Michael R. Pompeo, U.S. Secretary of State, Looking North: Sharpening America’s Arctic Focus (Rovaniemi, Finland, May 6, 2019) (transcript available at <https://2017-2021.state.gov/looking-north-sharpening-americas-arctic-focus/index.html> [<https://perma.cc/F2TC-7TA6>] (“[W]e know Russian territorial ambitions can turn violent.”)).

4. Brian Bennett & W.J. Hennigan, *U.S. builds up Arctic spy network as Russia and China increase presence*, L.A. TIMES (Sept. 7, 2015), <https://www.latimes.com/world/europe/la-fg-arctic-spy-20150907-story.html> [<https://perma.cc/9J9H-UU8Y>].

5. Osborn, *supra* note 2.

6. James Kraska, *International Security and International Law in the Northwest Passage*, 42 VAND. J. TRANSNAT’L L. 1109, 1119 (2009).

7. Marc Lanteigne, *The Changing Shape of Arctic Security*, NATO REV. (June 28, 2019), <https://www.nato.int/docu/review/articles/2019/06/28/the-changing-shape-of-arctic-security/index.html> [<https://perma.cc/92Z3-6YE2>].

Even as the Arctic ice slowly melts, floating chunks of ice can still sink a ship.⁸

Contrary to fears of conflict in the Arctic, however, this Article argues that the Arctic Council framework, together with the widely-recognized international law of the sea, make the Arctic a highly stable region with functional tools to resolve disputes. The Arctic States are those with landmass in the Arctic Circle: Canada, Denmark (which administers Greenland), Finland, Iceland, Norway, Russia, Sweden, and the United States.⁹ Five of these eight, the “coastal states,” have coastline touching the Arctic Ocean (Canada, Denmark, Norway, Russia, and the United States). Through the consensus-based structure of the Arctic Council, all of the Arctic States are collectively involved in cooperation schemes for protection of the marine environment and emergency response in the Arctic, among others. The Arctic Council is the only formal grouping of states that meets regularly for intergovernmental “consultation on Arctic issues.”¹⁰

It is not the military buildup which should alarm observers, as new bases likely have a defensive posture on newly-exposed coastline. Rather, states’ purported claims to protect the environments of their coastlines or even the ecosystem of the Arctic more broadly may be used as convenient decoys for expanding or sustaining claims to territorial access contrary to international law. These expansive claims are what can ultimately lead to intractable conflict in the Arctic.

As melting ice opens greater access to the Arctic Ocean, the region will be confronted with two major challenges. The first is a greater number of players entering the region, each with its own claim either to a share of the Arctic’s oil reserves, or to various bits of land, or to access to newly navigable waterways that will serve as cost-effective shipping routes. The U.S. Geological Survey estimates that the Arctic contains 30 percent of all the undiscovered natural gas in the world;¹¹ as these untapped reserves become more accessible, states far from the Arctic are maneuvering to ensure they can cultivate some of these resources themselves. The second major challenge to the Arctic States is that increased shipping traffic plus

8. Dimitri Touren, *The Arctic: Low tensions in high latitudes*, LE J. INT’L (July 13, 2016), https://www.lejournalinternational.fr/The-Arctic-Low-tensions-in-high-latitudes_a3687.html [https://perma.cc/KXD6-RDL3].

9. This paper will refer to these states collectively as the “Arctic States,” as they are designated in the Declaration on the Establishment of the Arctic Council, discussed *infra*.

10. ARCTIC COUNCIL, DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL, OTTAWA, CANADA, ¶ 9, Sept. 19, 1996, <https://oaarchive.arctic-council.org/handle/11374/85> [https://perma.cc/9NHU-FB5P] [hereinafter Ottawa Declaration].

11. Harris, *supra* note 2.

increased fossil fuel extraction inevitably bring greater environmental risks to their coastlines, marine life, indigenous communities, and fishing stocks. These two challenges are becoming linked by the variety of ways in which regional and external actors are jockeying for position over claims in the region.

I. *DRAMATIS PERSONAE*: THE ACTORS PLAYING ENVIRONMENTAL POLITICS WITH TERRITORIAL CLAIMS

The international law of the sea, codified in the United Nations Convention on the Law of the Sea (UNCLOS),¹² explains many of the Arctic States' actions, and therefore, sketching key provisions is critical to understanding them. Under Article 3 of UNCLOS, every coastal state has the right to establish a territorial sea measuring 12 nautical miles (nm) from its territorial baseline, normally measured as the low-water line along its coast.¹³ A coastal state may exercise regulatory control to "prevent infringement of its customs, fiscal, immigration or sanitary laws" up to an additional 12 nm in what is known as the contiguous zone.¹⁴ A coastal state has additional rights in its exclusive economic zone (EEZ), which stretches 200 nm from its baseline.¹⁵ Within the EEZ, a state has exclusive rights for the purpose of exploring and conserving natural resources,¹⁶ constructing or authorizing the construction of artificial islands,¹⁷ as well as the right to determine the allowable catch of living resources.¹⁸

Ships of all states are permitted "innocent passage" through another state's territorial sea.¹⁹ However, such passage is expected to be "continuous and expeditious" and without activities that threaten peace or good order, such as intelligence collection or fishing.²⁰ The coastal state may still regulate innocent passage for the safety of navigation and conservation of living resources.²¹ The coastal state also has obligations

12. Although UNCLOS is a treaty, many states, including the United States, view the convention as a codification of some (if not all) of customary international law applicable to the high seas.

13. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 3, [hereinafter UNCLOS].

14. *Id.* art. 33.

15. *Id.* art. 57.

16. *Id.* art. 56(1)(a).

17. *Id.* art. 60.

18. *Id.* art. 61(1).

19. LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW CASES AND MATERIALS* 1329 (7th ed. 2019) (quoting UNCLOS art. 17).

20. *Id.* at 1329-30 (quoting UNCLOS arts. 18, 19).

21. UNCLOS, *supra* note 13, art. 21(1).

within its territorial waters, including a duty to warn of any known “danger[s] to navigation.”²²

By contrast, ships of foreign states do not have the right to enter a state’s internal waters.²³ However, states might have a right of innocent passage if the waters had not previously been considered internal.²⁴ Freedom of navigation through international straits, known as “transit passage” under UNCLOS, has long been recognized in customary international law—even for military vessels.²⁵ International straits were defined by the International Court of Justice (ICJ) in the *Corfu Channel* case as straits “connecting two parts of the high seas” that are “used for international navigation.”²⁶ Although transit passage, like innocent passage, must be expeditious,²⁷ it “requires respect of only international law rather than the domestic laws and regulations of the states bordering the straits.”²⁸

As for resources *below* the ocean—such as natural gas—UNCLOS provides for a state’s claim to sovereignty over its continental shelf, defined as “the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory [. . .] to a distance of 200 [nm].”²⁹ A state’s rights can extend further, to an “outer” continental shelf, “if the shelf itself naturally continues beyond that point.”³⁰ The UNCLOS Commission on the Limits of the Continental Shelf (CLCS) is the body tasked with receiving applications from states and issuing non-binding recommendations on the delimitation of states’ continental shelves.³¹

Russia and Canada are the largest players in the Arctic Ocean by amount of coastline. They also exert the most control over the two main shipping routes through the Arctic Ocean, the Northern Sea Route and the

22. *Id.* art. 24(2); see DAMROSCH & MURPHY, *supra* note 19, at 1330.

23. UNCLOS, *supra* note 13, art. 8 (defining internal waters as “waters on the landward side of the baseline of the territorial sea[,]” which includes bays and lakes); see DAMROSCH & MURPHY, *supra* note 19, at 1323.

24. UNCLOS, *supra* note 13, art. 8.

25. See *Corfu Channel*, Judgment, 1949 I.C.J. 15, at 29 (Apr. 9) (finding that Albania could be justified in regulating transit passage of warships in exceptional circumstances, but could not prohibit passage or subject warships to “the requirement of special authorization.”).

26. Henri Féron, *A New Ocean: The Legal Challenges of the Arctic Thaw*, 45 *ECOLOGY L. Q.* 83, 95 (2018).

27. UNCLOS, *supra* note 13, art. 39(1)(a).

28. Féron, *supra* note 26, at 95.

29. UNCLOS, *supra* note 13, art. 76(1).

30. Féron, *supra* note 26, at 101.

31. *Id.* at 100.

Northwest Passage. However, outside actors also have claims of access to resources and navigation in parts of the Arctic Ocean. This has led some to claim that Arctic issues are “global,” not regional.

A. Russia

The Arctic has both economic and geostrategic significance for Russia.³² The natural gas which Russia can already access has produced as much as twenty percent of Russia’s GDP.³³ Russia claims an outer continental shelf, which overlaps with Canada’s and Denmark’s own continental shelf claims.³⁴

Most importantly, one of the two shipping routes through the Arctic Ocean, the Northern Sea Route (NSR), runs through Russia’s EEZ and at various points also enters Russian internal waters or territorial sea.³⁵ Russia has used this as a basis to implement environmental protection regulations permitted in “ice-covered areas” under Article 234 of UNCLOS.³⁶ These include charging transiting ships a fee for “mandatory ice-breaker escort from the Russian breaker fleet.”³⁷ In 2019, then-U.S. Secretary of State Michael Pompeo called additional Russian requirements—the forced boarding of transiting ships by Russian pilots and threats to use military force against ships that do not comply—“illegal.”³⁸

Given that the Arctic is central to the Russian economy, its most recent Arctic strategy document sets goals for developing infrastructure like

32. Russia stands to gain economically from the thawing of the Arctic region generally, which is opening a vast amount of cultivatable farmland in eastern Russia. Abraham Lustgarten, *How Russia Wins the Climate Crisis*, N.Y. TIMES MAG. (Dec. 16, 2020), <https://www.nytimes.com/interactive/2020/12/16/magazine/russia-climate-migration-crisis.html?referringSource=articleShare> [<https://perma.cc/D4DP-HAXK>].

33. Kraska, *supra* note 6, at 1116.

34. Juha Käpylä & Harri Mikkola, *Arctic Conflict Potential: Towards an Extra-Arctic Perspective*, THE FIN. INST. OF INT’L AFFS. BRIEFING PAPER 138, at 4-5 (Sept. 2013), <https://www.files.ethz.ch/isn/170344/bp138.pdf> [<https://perma.cc/KN8S-5KC9>]; *see also* UNCLOS, *supra* note 13, art. 74.

35. Käpylä & Mikkola, *supra* note 34, at 4.

36. UNCLOS, *supra* note 13, art. 234 (“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 [EEZ], where . . . the presence of ice . . . create[s] obstructions or exceptional hazards to navigation . . .”).

37. Käpylä & Mikkola, *supra* note 34, at 4.

38. Pompeo, *supra* note 3.

seaports.³⁹ This strategy has suffered setbacks as sanctions have prevented U.S. and European companies from financing Russian Arctic development projects.⁴⁰ As a result, economic cooperation is likely to be at the center of Russia's priorities as it takes the rotating Arctic Council Chairmanship from 2021-2023.⁴¹ For this reason, one security expert said, “[w]e can expect Moscow to keep tensions low in the High North.”⁴²

Russia's quick response to the biggest oil spill in the Arctic to date—due to a Russian mining company—may have betrayed a recognition that an environmental disaster in the Arctic could threaten the state's credibility among regional actors hypersensitive to environmental dangers.⁴³

B. Canada

Despite the more recent attention Russia's activities in the Arctic have received from American observers,⁴⁴ Canada was the first Arctic state to declare controversial territorial claims over large swathes of the Arctic Ocean.⁴⁵ Although Canada is more likely to disagree with Russia over their overlapping continental shelf claims, it also has a long-running dispute with the United States over the Northwest Passage (NWP).⁴⁶

The NWP is the second of two main routes through the Arctic Ocean. Transit of goods through the NWP, connecting the Pacific to the Atlantic, could save two weeks of travel compared to current shipping routes which

39. Hilde-Gunn Bye, *Russia's Updated Arctic Strategy: New Strategic Planning Document Approved*, HIGH NORTH NEWS (Oct. 28, 2020), <https://www.highnorthnews.com/en/russias-updated-arctic-strategy-new-strategic-planning-document-approved#:~:text=The%20Strategy%20for%20Development%20outlines,of%20the%20Northern%20Sea%20Route> [https://perma.cc/L95U-G44Q].

40. Féron, *supra* note 26, at 120.

41. See Bye, *supra* note 39.

42. Bye, *supra* note 39.

43. See Yuliya Fedorinova, Ilya Arkhipov, & Olga Tanas, *Putin's Fury Over Norilsk Spill May Force Green Reform in Russia*, BLOOMBERG (June 11, 2020), <https://www.bloomberg.com/news/articles/2020-06-11/putin-s-fury-over-norilsk-spill-may-force-green-reform-in-russia> [https://perma.cc/3HU6-MYBM].

44. See, e.g., Megan Eckstein, *New Arctic Strategy Calls for Regular Presence as a Way to Compete with Russia, China*, USNI NEWS (Jan. 5, 2021), <https://news.usni.org/2021/01/05/new-arctic-strategy-calls-for-regular-presence-as-a-way-to-compete-with-russia-china> [https://perma.cc/K4LP-NRVK].

45. Kraska, *supra* note 6, at 1118.

46. Former U.S. Secretary of State Pompeo suggested Canada's sovereignty claim over the NWP continues to be “illegitimate” at a 2019 meeting of the Arctic Council. Pompeo, *supra* note 3.

use the Panama and Suez Canals.⁴⁷ The route navigates through straits between the Canadian mainland and the Arctic Archipelago, a series of islands over which Canada has complete sovereignty.⁴⁸ Because of this, Canada has drawn its territorial baselines from the archipelago and claimed that the waters of the NWP are actually internal waters.⁴⁹

However, Canada's claim that the NWP is part of internal waters depends to an extent on other states having considered them internal waters. The increasing rate of international shipping transiting the NWP could undermine Canada's claim.⁵⁰ Conversely, if Canada succeeds in advancing this claim, the NWP could become a highly regulated trade route, more like a canal than a strait. As indigenous communities foment increasing political pressure at home,⁵¹ the concerns of indigenous communities—including those living in the archipelago—could gain increased salience in Canada's internal politics and Canada's position on the NWP could harden as a result.

Canada has a long history of enforcing environmental regulations within and beyond its EEZ, which other states have assailed as contrary to international law. In 1995, Canadian officials intercepted, boarded, and arrested the master of a fishing vessel flying the Spanish flag on the high seas in an area outside of Canada's EEZ.⁵² The European Community,⁵³ in a strongly-worded diplomatic note, declared that Canada was “flagrantly violating international law [and] failing to observe normal behaviour of responsible States.”⁵⁴ For its part, Canada claimed jurisdiction for the action based on a national law, which extended the jurisdiction of its fisheries protection officers into an area “that is on the high seas” and permitted officers to board and search vessels found in that area in order

47. Kraska, *supra* note 6, at 1124.

48. *Id.* at 1126.

49. *See id.* at 1119, 1126-27; *see also* UNCLOS, *supra* note 13, art. 47.

50. Kraska, *supra* note 6, at 1119.

51. *See* Taylor C. Noakes, *2020 Was the Year of Indigenous Activism in Canada*, FOREIGN POL'Y (Dec. 17, 2020), <https://foreignpolicy.com/2020/12/17/2020-indigenous-activism-canada-trudeau/> [<https://perma.cc/N6CR-44K6>].

52. Fisheries Jurisdiction (Spain v. Canada), 1998 I.C.J. 443, ¶¶ 19-20 (Spain argued that, under Article 92 of UNCLOS, Spain had exclusive jurisdiction over the ship because it was on the high seas and flying its flag, and that Canada did not have jurisdiction to board a foreign vessel on the high seas) [hereinafter *Fisheries Jurisdiction Case*].

53. The European Community was a predecessor organization to the European Union. *E.g.*, Matthew J. Gabel, *European Community*, BRITANNICA, <https://www.britannica.com/topic/European-Community-European-economic-association> [<https://perma.cc/9UZR-7M6Z>] (last visited Feb. 4, 2022).

54. *Fisheries Jurisdiction Case* at 444, ¶ 20.

to prevent the destruction of fishing stocks.⁵⁵ Although Spain brought a claim before the ICJ, the court found that it lacked jurisdiction over the dispute.⁵⁶

Prior to the conclusion of UNCLOS, in 1970, Canada enacted a similar law, the Arctic Waters Pollution Prevention Act, which “prohibited waste discharge and ordered extensive regulations within 100 miles from the northern coast of Canada.”⁵⁷ Some have posited that states have such authority based on “custodial” jurisdiction over “contiguous zones,” claiming an international interest in preserving the environment.⁵⁸ But international law does not recognize such a basis for asserting jurisdiction.⁵⁹

C. United States

U.S. insistence on free navigation through the NWP—as transit passage rather than innocent passage—is consistent with its position regarding international straits in other regions, such as the South China Sea. Indeed, U.S. policymakers have been criticized for comparing the two very different regions.⁶⁰ Some commentators have suggested that the U.S. wants to avoid an outcome in the Arctic that could set legal precedent adverse to U.S. positions elsewhere, including the South China Sea.⁶¹ Even if this bolsters the UNCLOS regime, it also has the effect of imputing extra-regional concerns into Arctic governance.

Concerns external to the Arctic also threaten to intrude on U.S.–Russia cooperation in the Arctic. Due to Alaska’s position along the Bering Strait, which is the access-point to the Arctic Ocean from the Pacific, the United States is “poised to manage all traffic” transiting the fifty-two-mile-wide chokepoint.⁶² But it will have to manage this traffic in partnership with Russia, whose coastline makes up the other side of the chokepoint. Given tensions between the two states, external events could invade U.S. decision-making on this aspect of Arctic governance. A 2014 tacit

55. *Id.* at 439-40, ¶ 15 (quoting provisions of Canada’s Coastal Fisheries Protection Act, R.S.C. 1985, c. C-33 (Can.)).

56. *Id.* at 467, ¶ 87. Canada had amended its consent to ICJ jurisdiction to exempt matters arising from these very conservation measures. *Id.* at 438-39, ¶¶ 14-15.

57. Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENV’T L. & POL’Y REV. 1, 7 (2005).

58. *Id.* at 8.

59. *Id.*

60. Lanteigne, *supra* note 7.

61. Käpylä & Mikkola, *supra* note 34, at 4.

62. Kraska, *supra* note 6, at 1123-24.

agreement among the Arctic Council members to exclude external “political and security concerns from the Council’s deliberations” may forestall this possibility.⁶³ But experts expect that “conflicts elsewhere will spill over” because “the Arctic is not an insulated security space.”⁶⁴

The United States also risks falling prey to “Arctic alarmism”—fears of military aggression that prompt an Arctic arms race.⁶⁵ But its submarines “consistently outclass” Russia’s submarine fleet, and NATO’s combined naval forces outnumber Russia’s Cold War-era Northern Fleet.⁶⁶ Despite disagreement with Canada, the United States has advanced joint Arctic policy with its northern ally.⁶⁷ Moreover, the two states have integrated air defense through North American Air Defense (NORAD) for decades.⁶⁸

Finally, although the United States is actively conducting the research necessary to submit a continental shelf claim extending from Alaska,⁶⁹ it is unclear whether the CLCS will accept the U.S. application or issue a recommendation to a non-party to UNCLOS.⁷⁰ The United States may also find it increasingly difficult to base its positions in disputes with Russia, Canada, or others on UNCLOS as it remains a non-party to the convention.

D. Norway, India, and the Svalbard Treaty

Like Canada, Norway has been an active environmental regulator in the Arctic. In 2020, Norway announced that it will ban the use of heavy fuel oil in the waters surrounding the Svalbard archipelago.⁷¹ As of 2015,

63. Lanteigne, *supra* note 7.

64. Katarzyna Zysk, *Looking North: Conference on Security in the Arctic*, ATLANTIC COUNCIL (Mar. 19, 2021), <https://www.youtube.com/watch?v=IjzOKvD7WgA> [<https://perma.cc/XBC2-45L5>].

65. Robert David English & Morgan Grant Gardner, *Phantom Peril in the Arctic: Russia Doesn’t Threaten the United States in the Far North—But Climate Change Does*, FOREIGN AFF. (Sept. 29, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-09-29/phantom-peril-arctic> [<https://perma.cc/BU42-DQPK>].

66. *Id.*

67. Mark P. Nevitt & Robert V. Percival, *Polar Opposites: Assessing the State of Environmental Law in the World’s Polar Regions*, 59 B.C. L. REV. 1655, 1666-67 (2018).

68. Kraska, *supra* note 6, at 1120.

69. See *U.S. Extended Continental Shelf Project*, U.S. DEP’T OF STATE, <https://www.state.gov/u-s-extended-continental-shelf-project/> [<https://perma.cc/JCT5-78SP>] (last visited Feb 2, 2022).

70. See Nevitt & Percival, *supra* note 67, at 1659, 1691; see also discussion of UNCLOS, *supra* note 13.

71. *Norway Moves to Ban Carriage of HFO in Waters Near Svalbard*, MAR. EXEC. (Nov. 9, 2020), <https://www.maritime-executive.com/article/norway-moves-to-ban-carriage-of-hfo-in-waters-near-svalbard> [<https://perma.cc/S9PW-BMFF>].

over eighty percent of Svalbard's marine area, including fjords, is protected nature reserves.⁷² Russia has lodged a complaint with Norway over its "artificial expansion of nature protection zones," arguing that its regulation within the 200-mile EEZ around Svalbard is inconsistent with the shared nature of the archipelago.⁷³

Norway gained sovereignty over Svalbard under the 1920 Svalbard Treaty, but all contracting parties—which include all the Arctic States and states as far from the Arctic as Egypt, Argentina, and Japan⁷⁴—enjoy equal rights to the archipelago's territorial waters and to use the land for commercial purposes.⁷⁵ No state, including Norway, may use Svalbard for military purposes.⁷⁶

One prominent signatory to the Svalbard Treaty is India, which has conducted research from its Himadri research station on Svalbard.⁷⁷ India received observer status on the Arctic Council in 2013 and even published a draft Arctic policy in 2021.⁷⁸ While its presence on Svalbard is a legitimate exercise of its treaty rights, India's Arctic policy couches its research in terms of the impact that changes in the Arctic will have on monsoon patterns and the "global ecosystem."⁷⁹

E. China

China has "defined itself as a 'near-Arctic state,'" released its own Arctic policy in 2018, and in 2013 gained observer status at the Arctic Council.⁸⁰ China's ability to provide economic incentives to the Arctic

72. Øystein Overrein, *Svalbard's Protected Areas*, NOR. POLAR INST.: CRUISE HANDBOOK FOR SVALBARD (May 2015), <http://cruise-handbook.npolar.no/en/svalbard/protected-areas.html> [<https://perma.cc/V3QR-DVYF>].

73. *Norway Clarifies Svalbard Treaty After Russian Complaint*, THE MARITIME EXECUTIVE (Feb. 17, 2020), <https://www.maritime-executive.com/article/norway-clarifies-svalbard-treaty-after-russian-complaint> [<https://perma.cc/ZL5G-4VZB>].

74. *Id.*

75. Svalbard Treaty, Feb. 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 184, <https://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml> [<https://perma.cc/7M34-T82Z>].

76. *Id.* at art. I.

77. Sahana Ghosh & Mayank Aggarwal, *With a new policy, India aims to understand the impact of the Arctic region on its monsoon*, QUARTZ INDIA (Jan. 24, 2021), <https://qz.com/india/1939274/indias-arctic-policy-to-focus-on-climate-change-monsoon-rains/> [<https://perma.cc/BP5T-K2RS>].

78. *Id.*

79. *Id.*

80. GISELA GRIEGER, CHINA'S ARCTIC POLICY: HOW CHINA ALIGNS RIGHTS AND INTEREST 2 (European Parliamentary Research Service, May 2018), <https://www.euro>

States is readily apparent; it is one of the biggest mining investors in Greenland, and its acceptance as an observer state on the Council was due in part to encouragement from Iceland, which concluded a free trade deal with China in 2013.⁸¹ The Arctic's poorer states such as Iceland are welcoming the investments of outside actors.⁸² But merely by gaining observer status, China has achieved “symbolic recognition” that non-regional states have legitimate interests in the region.⁸³

China seeks to integrate Arctic shipping routes into its global economic and geopolitical strategy known as the Belt and Road Initiative (BRI), referring to Arctic trade routes as the “Polar Silk Road.”⁸⁴ It has been cooperating with Russia in developing these routes,⁸⁵ and a Chinese shipping company sends vessels through the NSR each year.⁸⁶

Like India, China also has spent significant resources on research initiatives in the Arctic, including building three research stations.⁸⁷ Indeed, China spends more on Arctic research than the United States.⁸⁸ However, a European Parliament report on China's Arctic policy concludes that this research supports geostrategic goals—including resource extraction and advancing Chinese satellite technology to improve navigation and missile positioning—rather than developing knowledge of climate change.⁸⁹

parl.europa.eu/RegData/etudes/BRIE/2018/620231/EPRS_BRI(2018)620231_EN.pdf [https://perma.cc/ZWK2-AUC8].

81. See Patricia Zengerle, *China granted observer seat on Arctic governing council*, REUTERS (May 15, 2013), <https://www.reuters.com/article/us-arctic-council/china-granted-observer-seat-on-arctic-governing-council-idUSBRE94E0IJ20130515> [https://perma.cc/KX6W-NRP6]; Matthew D. Stephen & Kathrin Stephen, *The Integration of Emerging Powers into Club Institutions: China and the Arctic Council*, 11 GLOBAL POL'Y 51, 58 (Oct. 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1758-5899.12834> [https://perma.cc/QK4G-PYG3].

82. David Auerswald, *China's Multifaceted Arctic Strategy*, WAR ON THE ROCKS (May 24, 2019), <https://warontherocks.com/2019/05/chinas-multifaceted-arctic-strategy/> [https://perma.cc/ASJ4-X2D6].

83. See Stephen & Stephen, *supra* note 81, at 55-56.

84. GRIEGER, *supra* note 80, at 5.

85. *Id.*

86. Alec Luhn, *Freezing cold war: militaries move in as Arctic ice retreats*, THE GUARDIAN (Oct. 16, 2020), <https://www.theguardian.com/environment/2020/oct/16/arctic-ice-retreats-climate-us-russian-canadian-chinese-military> [https://perma.cc/R38J-LUGL].

87. *China vies for seat at council on Arctic resources and trade routes*, PRI (July 31, 2012), <https://www.pri.org/stories/2012-07-31/china-vies-seat-council-arctic-resources-and-trade-routes> [https://perma.cc/W44V-3MBU].

88. Stephen & Stephen, *supra* note 81, at 56.

89. Grieger, *supra* note 80, at 5-6.

Although China reassured the Arctic States through its 2018 Arctic policy that it is committed to existing legal frameworks, including UNCLOS, this is contrary to China's own recent history in disregarding the Permanent Court of Arbitration's 2016 decision, based on UNCLOS, that rejected China's claims in the South China Sea.⁹⁰ China has also stated that its goals in the Arctic are to "build a community with a shared future for mankind," which the European Parliament report suggests is not mere rhetoric, but policy language that fits into its broader BRI framework.⁹¹

F. European Union

The European Union (EU) is also taking an active role in developing Arctic policy, though the contours of its involvement are still evolving.⁹² Although China and others gained observer status at the Arctic Council in 2013, Canada blocked the EU's application.⁹³ The EU potentially stands to gain the most from new shipping routes through the Arctic. The cost savings of faster transit times between the Atlantic and Pacific "will be especially beneficial to European and Asian nations."⁹⁴ For the EU, this also means more direct access to the emerging and expanding markets in East Asia.

While it cannot necessarily be said to be an outside actor (Denmark, which administers Greenland, and Sweden and Finland, noncoastal Arctic States, are EU members), the EU seems to embrace a "Global Arctic" model of international engagement with the region, potentially putting it at odds with Arctic States.⁹⁵ André Gattolin, vice-chair of the French Senate's European Affairs Committee, has authored three EU Arctic

90. *Id.* at 3.

91. *Id.* at 4 (citing Xinhua, *Concept of 'community with shared future for mankind' being transformed into action: Xi*, CHINA DAILY (Dec. 1, 2017), http://www.china-daily.com.cn/china/2017-12/01/content_35160220.htm [<https://perma.cc/FL5N-WXDL>]).

92. C. Mark Macneill, *Splitting Canada's Northern Strategy: Is It Polar Policy Mania?*, 20 SUSTAINABLE DEV. L. & POL'Y 13, 15 (2020).

93. Matt McGrath, *China joins Arctic Council but a decision on the EU is deferred*, BBC NEWS (May 15, 2013), <https://www.bbc.com/news/science-environment-22527822> [<https://perma.cc/2S5H-HEDC>].

94. Kraska, *supra* note 6, at 1124.

95. *See id.*

reports and recently opined that “[m]any issues have globalised the Arctic.”⁹⁶ “Top [of these] is climate change,” Gattolin wrote.⁹⁷

* * *

This is not an exhaustive list of territorial disputes in the Arctic. Rather, it illustrates a handful of disputes and potential disputes where there is overlap between environmental concerns and international boundaries, and where external considerations may creep into legal resolutions of these disputes as they develop. Even while highlighting how environmental protection claims might be manipulated by state and regional actors, however, it is important to note the very real environmental concerns that exist in the fragile ecosystem of the Arctic.

II. THE REAL ENVIRONMENTAL THREATS

“The Arctic is warming twice as fast as the rest of the planet,”⁹⁸ meaning that the effects of climate change will be felt faster in the Arctic than anywhere else. Melting landmass and sinking permafrost will require the relocation of coastal communities and costly repairs to infrastructure.⁹⁹ As one former defense analyst warned, “a rapidly warming Arctic will be the locus of a cascading series of environmental, economic, and public health disasters.”¹⁰⁰

Despite the growing number of cargo ships transiting the NSR, shifting weather patterns could actually make the Arctic *less* accessible in the future.¹⁰¹ Yet, the number of ships entering the Arctic area grew by 25

96. André Gattolin & Damien Degeorges, Opinion, *High geopolitics in the High North: A call for a deeper EU engagement*, EURACTIV (Dec. 17, 2019), <https://www.euractiv.com/section/arctic-agenda/opinion/high-geopolitics-in-the-high-north-a-call-for-a-deeper-eu-engagement/> [https://perma.cc/KH8K-BYFT].

97. *Id.*

98. Nevitt & Percival, *supra* note 67, at 1662.

99. See English & Gardner, *supra* note 65.

100. *Id.*

101. Zysk, *supra* note 64.

percent from 2013 to 2019, according to the Arctic Council's first Arctic Shipping Status Report.¹⁰² The ships are also sailing farther distances.¹⁰³

Shipping contributes both to the climate change causing the warming of the Arctic in the first place, and to the risk of oil spills in the ecologically sensitive region. "Today's ships are powered by high-carbon fuel, more commonly known as bunker fuel, which is by far the most polluting fuel variant used in commercial operation," according to two environmental law experts.¹⁰⁴ Many of the ships operating in the Arctic are also transporting oil and natural gas. Not only could a damaged ship leak its own fuel, but it could also leak its cargo. Oil spills are especially difficult to clean up in the Arctic because the cold prevents oil from breaking up, letting it linger in the ecosystem far longer.¹⁰⁵ As more ships operate in narrow ice-choked sea lanes, the risks attendant with collisions—including both economic loss and the harms of an oil spill—increase.

Economically, the warming of the Arctic could result in the loss of species sustaining current indigenous communities.¹⁰⁶ Conversely, easier access to Arctic fishing stocks could also lead to overfishing, which brought the five Arctic coastal states, Iceland, the EU, China, Japan, and South Korea together to sign a legally binding 16-year moratorium on commercial fishing until they can create mechanisms to preserve the fishing stocks.¹⁰⁷

The Arctic could also be "the source of the next global pandemic."¹⁰⁸ In 2016, an anthrax outbreak in Siberia, believed to have spread from a thawed reindeer carcass infected with the bacteria, prompted the Russian government to airlift families out of the area.¹⁰⁹ Researchers expect that

102. ARCTIC COUNCIL PROTECTION OF THE ARCTIC MARINE ENVIRONMENT, THE INCREASE IN ARCTIC SHIPPING 2013-2019, 10 (ARCTIC SHIPPING STATUS REPORT (ASSR) #1, Mar. 31, 2020), <https://www.pame.is/document-library/pame-reports-new/pame-ministerial-deliverables/2021-12th-arctic-council-ministerial-meeting-reykjavik-iceland/793-assr-1-the-increase-in-arctic-shipping-2013-2019/file> [<https://perma.cc/2LR7-ANZ8>].

103. *Id.*

104. Harsha Pisupati & Armin Rosencranz, *The Deteriorating Arctic and the Impact of the Shipping Industry*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10837, 10838 (2019).

105. See Dubner, *supra* note 57, at 15.

106. See English & Gardner, *supra* note 65.

107. Grieger, *supra* note 80, at 6.

108. English & Gardner, *supra* note 65.

109. Michaelen Doucleff, *Anthrax Outbreak In Russia Thought To Be Result Of Thawing Permafrost*, NPR (Aug. 3, 2016), <https://www.npr.org/sections/goatsandsoda/2016/08/03/488400947/anthrax-outbreak-in-russia-thought-to-be-result-of-thawing-permafrost> [<https://perma.cc/HN54-YZ5R>].

other dead animals and buried people frozen in the permafrost will release other pathogens as climate change warms the preserved bacteria.¹¹⁰

Rising fears of military confrontation in the Arctic—which would be environmentally catastrophic for all parties involved—have obscured the very real threats that climate change poses to this environmentally sensitive region.¹¹¹ Where “[u]nseasonal storms will threaten hundreds of lives” and any potential naval conflict would degenerate into harrowing search-and-rescue missions, “[t]he looming catastrophe can be managed only cooperatively.”¹¹²

III. THE ARCTIC GOVERNANCE STRUCTURES THAT PROVIDE WAYS TO MANAGE COMPETING TERRITORIAL CLAIMS AND ENVIRONMENTAL OBLIGATIONS

As one commentator has argued, a treaty among the Arctic States “could establish limits to exploitation of the Arctic natural resources, and institute other environmental standards to preserve the natural landscape and indigenous populations.”¹¹³ However, a legal regime already governs the Arctic. Indeed, the five coastal states tried to preempt attempts at “universalization” of the region which could flow from a new treaty regime.¹¹⁴ They agreed in the 2008 Ilulissat Declaration that there is no need to develop a new legal framework for the Arctic because “an extensive international legal framework applies to the Arctic Ocean,” including the “law of the sea.”¹¹⁵

A triumvirate of institutions generally provides governance over the Arctic. The Arctic Council, as a decision-making and action-oriented body of the Arctic States, acts as something like an executive. The International Maritime Organization (IMO), through regulations adopted with the consent of the Arctic States, provides an equivalent legislative function. UNCLOS, in setting out rules and dispute resolution mechanisms, provides a comparable judicial function.

110. *Id.*

111. *See id.*

112. *Id.*

113. Molly Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 OCEAN & COASTAL L.J. 307, 330 (2009).

114. Touren, *supra* note 8.

115. The Ilulissat Declaration, May 28, 2008, ¶ 3, <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf> [<https://perma.cc/3DJ3-2KMM>].

A. Arctic Council

Since its founding in 1996, the Arctic Council has evolved from an informal networking group on Arctic issues into “a more or less fully-fledged international organization with a permanent secretariat.”¹¹⁶ For those outside the region maneuvering to access the Arctic’s resources, the Council has established itself as the gatekeeper to that access.¹¹⁷

Modern cooperation among the Arctic States began in 1991, when they adopted the Arctic Environmental Protection Strategy (AEPS),¹¹⁸ which included four programs to coordinate conservation, climate change monitoring and analysis, and best practices in pollution reduction and emergency response.¹¹⁹ On September 19, 1996, the Arctic States signed the Declaration on the Establishment of the Arctic Council (Ottawa Declaration), which absorbed these programs into the new framework of the Arctic Council.¹²⁰

Today, there are also a number of observer states, intergovernmental organizations, and non-governmental organizations,¹²¹ whose involvement in the Council is governed by rules set out in the Arctic Council Observer Manual.¹²² Some have posited that the Council’s decision to invite observer states into the Council framework was itself a strategy to retain leadership of Arctic governance and prevent parallel decision-making bodies from developing under U.N. or IMO auspices.¹²³ Observers may propose projects, but their financial funding may not exceed the

116. Stephen & Stephen, *supra* note 81, at 54.

117. *See id.* at 55-56.

118. Dubner, *supra* note 57, at 7; *see also* CONSERVATION OF ARCTIC FLORA AND FAUNA: POLICY, <https://www.caff.is/policy-home> [<https://perma.cc/4UEF-UMSP>] (last visited Feb. 4, 2022).

119. The four programs are: Conservation of Arctic Flora and Fauna (CAFF), the Arctic Monitoring and Assessment Program (AMAP), the Protection of the Arctic Marine Environment (PAME), and Emergency Prevention Preparedness and Response (EPPR). *See Working Groups*, ARCTIC COUNCIL, <https://arctic-council.org/en/about/working-groups/> [<https://perma.cc/UP3T-YRUC>] (last visited Feb. 4, 2022).

120. *See* Ottawa Declaration, *supra* note 10.

121. Observer states include France, Germany, Japan, China, India, and South Korea. *Observers*, ARCTIC COUNCIL, <https://arctic-council.org/en/about/observers/> [<https://perma.cc/96S3-BEZ6>] (last visited Feb. 4, 2022).

122. ARCTIC COUNCIL, ARCTIC COUNCIL OBSERVER MANUAL FOR SUBSIDIARY BODIES 9 (May 15, 2013), https://oaarchive.arctic-council.org/bitstream/handle/11374/939/EDOCS-3020-v1B-Observer-manual-with-addendum-finalized_Oct2016.pdf?sequence=13&isAllowed=y [<https://perma.cc/4RL4-FEHH>] [hereinafter ARCTIC COUNCIL OBSERVER MANUAL].

123. *See* Stephen & Stephen, *supra* note 81, at 57-58.

contributions from the Arctic States.¹²⁴ And they must “[r]ecognize Arctic States’ sovereignty [. . .] and jurisdiction in the Arctic.”¹²⁵ The rules make clear that “[d]ecisions at all levels [. . .] are the exclusive right and responsibility of the eight Arctic States with the involvement of the Permanent Participants.”¹²⁶ Still, the Arctic Council retains a flexibility that a treaty regime would not have by incorporating participation of indigenous peoples, a community that is not generally invited by states to participate in formal treaties.¹²⁷

The Arctic Council is primarily designed as a mechanism for information-sharing and cooperation on the programs established by the AEPS, though it has taken on a more structured role in other areas of cooperation. While the Ottawa Declaration explicitly states that the Council “should not deal with matters related to military security,”¹²⁸ the Arctic States’ defense chiefs met biannually until meetings were suspended following Russia’s 2014 invasion of Ukraine.¹²⁹ Despite these tensions, the Arctic States created the Arctic Coast Guard Forum in 2015 to coordinate their regional coast guards.¹³⁰ Through the Council’s Emergency Prevention Preparedness and Response program, the Arctic States also engage in emergency response exercises.¹³¹ Increased competition between Russia and the United States and growing interest of outside actors—particularly China—in the region’s natural resources may be driving increased attention on the Council, which in turn has formalized its cooperation structures in response.¹³²

Although the Ottawa Declaration and Council working group recommendations are non-binding, decisions of the Arctic Council must be by consensus,¹³³ which ensures a level of consistency in members’ positions. The Arctic Council has also become more willing to create binding legal obligations on its members. In 2011, for example, the Council adopted the Arctic Search and Rescue Agreement; in 2013,

124. *See id.*

125. *See Féron, supra* note 26, at 98 (citation omitted).

126. ARCTIC COUNCIL OBSERVER MANUAL, *supra* note 122, at 6.

127. Although the Arctic States conferred only non-voting “permanent participant” status on indigenous peoples, the practice of states has been to exclude indigenous peoples from formal treaties. *See Nevitt & Percival, supra* note 67, at 1687 n. 214.

128. Ottawa Declaration, *supra* note 10, footnote to 1(a).

129. *See Käpylä & Mikkola, supra* note 34, at 7; *see also Féron, supra* note 26, at 118-19.

130. *See Féron, supra* note 26, at 118.

131. *See EPRR ABOUT*, ARCTIC COUNCIL WORKING GROUP, <https://eppr.org/about/> [<https://perma.cc/T2UG-LGYE>] (last visited Feb. 4, 2022).

132. *See Stephen & Stephen, supra* note 81, at 54-55.

133. Ottawa Declaration, *supra* note 10, art. 7.

members agreed to legally binding cooperation in oil pollution preparedness and response.¹³⁴

B. International Maritime Organization

The IMO is a specialized U.N. agency, created by a 1948 convention, which develops standards to improve safety and prevent pollution in global shipping.¹³⁵ IMO committees develop conventions which are made binding when member states accede to them; the IMO Assembly, made up of member states, also adopts mandatory resolutions.¹³⁶ All the Arctic States are members of the IMO and have acceded to a number of its conventions.

The 1974 International Convention for the Safety of Life at Sea (SOLAS) is “generally considered to be the most important of all international treaties concerning the safety of merchant ships,” and concerns measures such as fire safety, life-saving appliances and radio communications required onboard, and safety management practices.¹³⁷ The International Convention for the Prevention of Pollution from Ships (MARPOL) contains a number of annexes regulating the carriage of potentially pollutant chemicals, the discharge of sewage at sea, and other matters.¹³⁸ SOLAS and MARPOL are regularly amended to account for technological changes in shipping and environmental protection.

In 2014, the IMO adopted the International Code for Ships Operating in Polar Waters (Polar Code), which includes both mandatory and recommended measures for ship safety and pollution prevention.¹³⁹ Among other things, the Polar Code requires ships to apply for a Polar Ship Certificate designating its fitness to operate in the polar environment

134. See Nevitt & Percival, *supra* note 67, at 1665-66.

135. See Kraska, *supra* note 6, at 1129; see also *Frequently Asked Questions*, INT’L MAR. ORG., <https://www.imo.org/en/About/Pages/FAQs.aspx> [https://perma.cc/6BWH-7LT5] (last visited Feb. 4, 2022).

136. The IMO now oversees more than 50 conventions. See *Conventions*, INT’L MAR. ORG., <https://www.imo.org/en/About/Conventions/Pages/Default.aspx> [https://perma.cc/3TAH-TWW9] (last visited Feb. 4, 2022).

137. Kraska, *supra* note 6, at 1129 (citation omitted).

138. See *id.* at 1130; see also STATUS OF IMO TREATIES, INT’L MAR. ORG., (Sept. 29, 2021) <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202021.pdf> [https://perma.cc/AW8H-VQZ9].

139. See *Shipping in Polar Waters*, INT’L MAR. ORG., <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Polar-default.aspx> (last visited Feb. 4, 2022); see also *The Polar Code*, PAME, <https://www.pame.is/projects-new/arctic-shipment/pame-shipment-highlights/412-arctic-shipment-best-practice-information-forum> [https://perma.cc/YKW3-G8ZK].

based on inspections.¹⁴⁰ The Polar Code is implemented through states' obligations under SOLAS and MARPOL,¹⁴¹ and also includes new rules for waste disposal, discharges of oil residues, and guidelines for ship design based on the "harsh polar environments."¹⁴² More recently, the IMO also adopted a ban on the use and carriage of heavy fuel oil in the Arctic, effective in 2024.¹⁴³

The Arctic States are party to a number of other IMO conventions, which make additional shipping requirements operative in the Arctic. For instance, ships and operators of offshore units under the jurisdiction of the Arctic States are required to have oil pollution emergency plans and to develop national response systems and procedures for responding to oil spill incidents.¹⁴⁴ The Arctic States implemented these obligations through their 2013 Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic.¹⁴⁵ Under the 1972 London Convention, to which the Arctic States have also acceded, the parties agreed to take steps to prevent dumping of waste into the oceans and to harmonize their policies to that end.¹⁴⁶ More controversially, the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties permits a coastal state to take measures on the high seas that are necessary to prevent, mitigate, or eliminate the

140. *See id.*

141. The Polar Code is a package of amendments to SOLAS and MARPOL that became binding in 2017 through a mechanism of those conventions "which lets amendments enter into force after a certain period if no state party objects." Féron, *supra* note 26, at 108.

142. The Polar Code applies both to the Arctic and Antarctica. *See* Nevitt & Percival, *supra* note 67, at 1688-89.

143. *See UN approves ban on heavy ship fuel in Arctic*, REUTERS (Nov. 20, 2020), <https://www.reuters.com/article/shipping-arctic-imo/un-approves-ban-on-heavy-ship-fuel-in-arctic-idUKL8N2HY5IS> [<https://perma.cc/2B8W-GSJ4>]. The Arctic ban follows Norway's regulation to do the same around Svalbard. *See* Malte Humpert, *Norway announces plans to ban HFO around Svalbard, leapfrogging proposed IMO regulation*, ARCTIC TODAY (Nov. 13, 2020), <https://www.arctictoday.com/norway-announces-plans-to-ban-hfo-around-svalbard-leapfrogging-proposed-imo-regulation/#:~:text=The%20Norwegian%20government%20is%20finalizing,of%20HFO%20will%20be%20prohibited> [<https://perma.cc/MED2-HWKY>].

144. *See* International Convention on Oil Pollution, Preparedness, Response and Cooperation, arts. 3, 6, Nov. 30, 1990, 1891 U.N.T.S. 78.

145. *See* Féron, *supra* note 26, at 108.

146. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, arts. 1-2, Dec. 29, 1972, 1046 U.N.T.S. 120, <https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/LC1972.pdf> [<https://perma.cc/KLC2-HVHH>]. All the Arctic States are parties to the Convention, though the United States and Russia have not acceded to its additional protocols.

threat of oil pollution to its coastline following a maritime casualty.¹⁴⁷ Notably, Canada, Russia, and the United States have not acceded to this convention although the other Arctic States have.¹⁴⁸

C. U.N. Convention on the Law of the Sea

All of the Arctic States, with the exception of the United States, have ratified UNCLOS.¹⁴⁹ Although the United States has not acceded to UNCLOS, it did sign the treaty's 1994 implementing agreement and remains a party to its 1958 predecessor Conventions.¹⁵⁰ These treaty obligations, which are largely congruent with UNCLOS, remain binding on the United States.¹⁵¹

UNCLOS is essentially a set of rules to which state parties have agreed, though scholars and commentators have indicated ambiguities in the rules themselves and in their enforcement. A series of UNCLOS articles require state parties to “protect and preserve the marine environment,” cooperate on conservation of living resources, and “adopt measures against pollution.”¹⁵² But several have noted that UNCLOS is only a “framework” for making further commitments, “leav[ing] the substantive content of such anti-pollution measures” to the state parties.¹⁵³

Even a rule specific to the Arctic creates ambiguity which states can exploit or remain deadlocked on. While states usually must find a violation within their territorial waters to enforce domestic environmental regulations on a foreign vessel, Article 234 gives a coastal state “extended jurisdiction and enforcement powers for the protection of the marine environment in generally ice-covered areas” of its EEZ.¹⁵⁴ This is the

147. See *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969*, INT'L MAR. ORG., <https://www.imo.org/en/About/Conventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx> [<https://perma.cc/ZB4A-S7GL>] (last visited Feb. 4, 2022).

148. *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, Nov. 29, 1969, 970 U.N.T.S. 211.

149. See Nevitt & Percival, *supra* note 67, at 1690.

150. These include the Conventions on the Territorial Sea and the Contiguous Zone, on the High Seas, on the Continental Shelf, and on Fishing and Conservation of the Living Resources of the High Seas. See DAMROSCH & MURPHY, *supra* note 19, at 1312, 1315, 1318.

151. See *id.* at 1318.

152. Féron, *supra* note 26, at 107 (citing UNCLOS arts. 192, 197, 199, 207-12); see UNCLOS, *supra* note 13, art. 61.

153. *E.g., id.*; see Pisupati & Rosencranz, *supra* note 104, at 10844.

154. Féron, *supra* note 26, at 107; see UNCLOS, *supra* note 13, art. 234.

authority claimed by Canada and Russia to implement regulations in the NWP and NSR, respectively, though “the exact scope of these powers” has not been defined.¹⁵⁵ Of course, as one law professor observed, Article 234 only permits enhanced marine environmental protection measures when ice covers the EEZ area for “most of the year.”¹⁵⁶ When ice does not “create obstructions or exceptional hazards to navigation”¹⁵⁷ in seven months out of the year, Canada’s and Russia’s “application of pre-existing measures would be legally dubious.”¹⁵⁸

Similarly, the CLCS has only recommendatory power because it is not able to bind states to its findings on the delimitation of continental shelves.¹⁵⁹ While Article 76(8) instructs that recommendations of the CLCS “shall be final and binding,” one author has concluded that, practically speaking, this only binds a state to the limits of its own submission to the CLCS.¹⁶⁰ In fact, according to its own procedures, the CLCS cannot issue a recommendation on a dispute without the consent of all the relevant parties—and even then, its recommendation is “without prejudice to their position[s].”¹⁶¹ Moreover, it remains unclear whether the United States has a right at all to submit a claim for the delimitation of its continental shelf to the CLCS and whether, as a non-party, it would even be bound by its own submission.¹⁶²

The delimitation of the Arctic States’ continental shelves will have wide-reaching consequences because it will determine which parts of the Arctic Ocean seabed are left for non-Arctic states to cultivate as the “common heritage of mankind.”¹⁶³ The phrase, to which China has alluded in its efforts to justify access to Arctic resources, is legally operative under UNCLOS, carrying rights and duties for UNCLOS members in extracting resources.¹⁶⁴ Benefits derived from a “common heritage” area are subject to “equitable sharing” among states.¹⁶⁵

Determining whether the NWP and NSR are international straits or internal waters may prove the most intractable of these unsettled questions.

155. See Féron, *supra* note 26, at 107.

156. Donald R. Rothwell, *The Law of the Sea and Arctic Governance*, 107 AM. SOC’Y INT’L L. PROC. 272, 275 (2014); UNCLOS, *supra* note 13, art. 234.

157. UNCLOS, *supra* note 13, art. 234.

158. Rothwell, *supra* note 156, at 275.

159. Féron, *supra* note 26, at 102-03.

160. *Id.*

161. *Id.* at 103-04.

162. Nevitt & Percival, *supra* note 67, at 1691; *see id.* at 102-03.

163. Féron, *supra* note 26, at 101; *see* UNCLOS, *supra* note 13, pt. XI.

164. *See* Féron, *supra* note 26, at 101.

165. *See* UNCLOS, *supra* note 13, art. 140.

The answer to this question will decide whether the ships of other states must comply with Canada's and Russia's domestic regulations in innocent passage, or only "generally accepted international regulations" in transit passage.¹⁶⁶

UNCLOS provides for compulsory dispute resolution to sort out these ambiguities. Articles 286 and 287 confer jurisdiction over disputes regarding the interpretation or application of UNCLOS provisions to four bodies, at the contracting state's choosing: the International Tribunal for the Law of the Sea, the ICJ, or an arbitral tribunal constituted per Annexes VII or VIII of UNCLOS.¹⁶⁷ Alternatively, Article 282 provides that states parties can agree to a binding regional or bilateral dispute resolution procedure of their own, outside the UNCLOS regime.¹⁶⁸ And nothing precludes states parties from agreeing to a peaceful resolution between themselves,¹⁶⁹ such as the 2010 delimitation treaty between Norway and Russia which ended a long-running dispute in the Barents Sea.¹⁷⁰

However, a key problem facing the Arctic States in resolving their conflicting water boundary and continental shelf claims is that some states have declared exemptions to compulsory dispute settlement, which are permitted by UNCLOS.¹⁷¹ Canada has invoked the optional exemption under Article 298 regarding disputes relating to, *inter alia*, delimitations involving historic title.¹⁷² Canada's claim that parts of the NWP are internal waters is based in part on "historic use and occupation of the sea ice by Canadian indigenous people."¹⁷³ Russia and Denmark have invoked the same exemption that exempts jurisdiction over sea boundary delimitations.¹⁷⁴ Norway does not submit to alternate tribunals for the three categories of disputes listed in Article 298.¹⁷⁵ Even the United States has suggested that it will exempt itself from the same categories in the event

166. *Id.*, art. 39.

167. Julia Brower et al., UNCLOS Dispute Settlement in Context: The United States' Record in International Arbitration Proceedings 1-2 (Dec. 10, 2012) (unpublished student paper), https://law.yale.edu/sites/default/files/documents/pdf/cglc/yale_law_school_-_unclos_and_arbitration.pdf [<https://perma.cc/6ZEX-PQJU>]; UNCLOS, *supra* note 13, arts. 286-87.

168. UNCLOS, *supra* note 13, art. 282.

169. *Id.*, arts. 280-82.

170. Käpylä & Mikkola, *supra* note 34, at 7.

171. Féron, *supra* note 26, at 96-97, 104.

172. *Id.*; see UNCLOS, *supra* note 13, art. 298(1)(a)(i).

173. Féron, *supra* note 26, at 92.

174. *Id.* at 104.

175. UNCLOS, *supra* note 13, Norway Declarations (Norway also has chosen to submit only to the ICJ for dispute settlement regarding the interpretation or application of UNCLOS).

that it ratifies UNCLOS.¹⁷⁶ While Article 298 requires parties declaring an exemption to submit their dispute to conciliation if it is not settled “within a reasonable period of time,” these contested boundaries have existed for many years without resolution or submission to conciliation. The operative question, then, is: how can the Arctic States settle these disputes and disentangle them from their various environmental justifications?

IV. RECONCILING THE NEED FOR ENVIRONMENTAL PROTECTION WITH OBLIGATIONS IN INTERNATIONAL LAW UNDER ARCTIC COUNCIL LEADERSHIP

Although a state has the right to ensure proper conservation of living resources in its EEZ, UNCLOS directs that the coastal state and relevant international organizations “*shall* co-operate to this end.”¹⁷⁷ International cooperation—even on environmental matters of concern to a single state—is thus mandated by the legal instrument which the Arctic’s five coastal states agreed in the Ilulissat Declaration serves as the applicable legal regime in the Arctic.¹⁷⁸

The Arctic States need not attempt to negotiate a multilateral treaty for Arctic governance—which can get stalled by bilateral disagreements—when they have already made commitments through treaties and binding Arctic Council agreements. Using the tools provided by UNCLOS and the IMO, the Arctic States can take specific actions through the Arctic Council to enforce these commitments and regulate the protection of the Arctic environment.

Despite U.S. comparisons to the South China Sea, “the Arctic States have been remarkably successful in [balancing] national interests and peaceful cooperation” to keep the Arctic stable.¹⁷⁹ What the Arctic needs now is a set of decisions by the Arctic Council which will move some of the intractable disagreements of the Arctic States toward resolution even if they are not immediately solvable in the short term.

A. Collective Action of the Arctic Council

Given the rapidly changing landscape and the legitimate basis of environmental protection as justification for extraterritorial actions codified in UNCLOS, the Arctic States need to work from a common set

176. Brower et al., *supra* note 167, at 2.

177. UNCLOS, *supra* note 13, art. 61(2) (emphasis added).

178. See discussion of the Ilulissat Declaration in Part IV *supra*.

179. See Käpylä & Mikkola, *supra* note 34, at 6.

of facts. As regional warming changes the “facts on the ground,” the Arctic could become a battleground over competing scientific interpretations.

A common set of facts is not just an ideal policy, it is also written into the text of at least one UNCLOS provision at issue. Article 234, which extends a coastal state’s enforcement powers “for the protection of the marine environment in generally ice-covered areas” also requires that such regulations have “due regard to [. . .] the protection and preservation of the marine environment *based on the best available scientific evidence*.”¹⁸⁰ As states continue to chafe at the regulations imposed by Canada and Russia, and potentially others, they could seek out competing science that suggests the regulatory measures are unnecessary. This will become more readily apparent as melting ice eases transit, and potentially removes states’ justifications for environmental protection measures. Escalation—such as a ship refusing the escort of Russian icebreakers, and the Russians’ possible responses—is not hard to imagine. The delimitation of a state’s continental shelf is also a highly scientific process, in which slightly different measurement points can have vastly divergent outcomes. With the resources at stake, states have every incentive to use the most advantageous measurements possible.

Through information-gathering and -sharing, the Arctic Council’s different working groups are positioned to provide these common facts. The Council’s research, which can be presumed to be accepted by all the Arctic States, can provide the basis for joint environmental protections enforced collectively by the Arctic States. It can also provide legitimate grounds for new regulations which some scholars have recommended the Arctic States pursue through the IMO.

Rather than throwing open the door to economic development, which will inevitably alter the region, and trying to manage it individually on a case-by-case basis, the Arctic States can establish regional standards. Exerting regional leadership will have the dual effect of (1) reinforcing the Arctic Council’s role as gatekeeper to the region and (2) standardizing regulations in the interest of promoting consistent, sustainable economic development in line with the Ottawa Declaration.¹⁸¹

1. The Executive Function: The Arctic Council Should Enforce Joint Environmental Protections

The Arctic Council’s working groups have already developed a number of policy proposals that could be implemented. For instance, the

180. UNCLOS, *supra* note 13, art. 234 (emphasis added).

181. See Ottawa Declaration, *supra* note 10, art. 1(a).

Protection of the Arctic Marine Environment (PAME) has proposed establishing a network of “Marine Protected Areas” (MPAs), specially managed ecological areas identified for conservation measures under national laws.¹⁸² The proposal provides an overarching framework to link nationally managed MPAs within the separate EEZs of Arctic States to coastal and inland habitats, with the goal of harmonizing conservation and preserving biodiversity in the region.¹⁸³ The Arctic Council could turn PAME’s framework proposal into a binding agreement, as one author has suggested.¹⁸⁴

Indeed, much or all of PAME’s proposals—and the proposals of the Council’s other working groups—could be made binding in a one-time agreement to strengthen the working groups’ role as policymakers. While some IMO conventions have been critiqued as unenforceable because they are “framework norms or norms not tailored to Arctic conditions,”¹⁸⁵ their regional enforceability can be dictated by regional organizations. Enforcement of these agreements, with special concern to Arctic conditions, is squarely within the Arctic Council’s remit.

Through the Arctic Coast Guard Forum,¹⁸⁶ the Arctic States could coordinate multilateral patrols of MPAs to enforce their agreed-upon environmental regulations. Such patrols would replace more controversial exercises of environmental jurisdiction by Canada and Norway. External states are likely to comply with the Council’s decisions given their eagerness to join the Council as observers, which has lent legitimacy to the Council as gatekeeper to the region.¹⁸⁷

2. The Legislative Function: The Arctic Council Should Lead Efforts at the IMO to Pass Necessary Regulations.

As for regulating shipping, Commander James Kraska, a professor of international maritime law at the U.S. Naval War College, has pointed out that SOLAS regulation V/12 allows parties to establish vessel traffic

182. See Féron, *supra* note 26, at 114; see also ARCTIC COUNCIL/PAME, FRAMEWORK FOR A PAN-ARCTIC NETWORK OF MARINE PROTECTED AREAS 5, 6, 12 (Apr. 2015), https://pame.is/images/03_Projects/MPA/MPA_Report.pdf [<https://perma.cc/66HM-QVPW>].

183. See ARCTIC COUNCIL/PAME, *supra* note 182, at 11; see also Féron, *supra* note 26, at 114.

184. See Féron, *supra* note 26, at 114-15.

185. *Id.* at 107-08.

186. See *supra* Part IV-A.

187. See Stephen & Stephen, *supra* note 81, at 55-56.

services “where [. . .] the degree of risk justifies such services.”¹⁸⁸ Canada could work “under the authority of the IMO rather than trying to haphazardly impose unilateral measures,” Kraska wrote.¹⁸⁹ The same is true of Russia.

The Arctic Council might also draw lessons from similar water management agreements. The governing body of the Panama Canal, for instance, incentivizes shipping companies to use cleaner fuels by “giving priority to [] cleaner ships.”¹⁹⁰ Just as Indonesia, Malaysia, and Singapore negotiated a “Cooperative Mechanism” under the auspices of the IMO to “develop a governance framework” for use of the Straits of Malacca and Singapore, the Arctic States could do the same for the NSR, NWP, and any other future cross-polar route.¹⁹¹ Similarly, the Arctic Council could coordinate port inspection reporting through the IMO. In 2012, the IMO’s Maritime Safety Committee adopted a mandatory ship reporting system in the Barents Sea, proposed by Norway and Russia, requiring certain ships to report either to a Norwegian or Russian center.¹⁹² The Arctic Council could organize an Arctic memorandum of understanding similar to other regional MOUs¹⁹³ to share ship reporting data among all the Arctic States.

Finally, the Arctic States could lead an effort at the IMO to designate the Arctic as an emission control area (ECA) under Annex VI of MARPOL, with stricter restrictions on certain emissions in specific coastal areas,¹⁹⁴ as two environmental law experts have suggested.¹⁹⁵ Any enforcement required could be carried out under the guidance of the Arctic Coast Guard Forum. The Arctic States could even impose a shipping emissions tax to fund the Council’s environmental protection enforcement.¹⁹⁶

3. The Judicial Function: The Arctic Council Should Build Capacity for Dispute Resolution

The Arctic Council grew out of informal inter-state collaboration on scientific research, environmental conservation, and emergency response procedures. Such soft law can create expectations, but not binding legal

188. Kraska, *supra* note 6, at 1129.

189. *Id.*

190. Pisupati & Rosencranz, *supra* note 104, at 10839.

191. *See* Kraska, *supra* note 6, at 1131-32.

192. *See Shipping in Polar Waters*, INT’L MAR. ORG., *supra* note 139.

193. *See Frequently Asked Questions*, INT’L MAR. ORG., *supra* note 135.

194. Pisupati & Rosencranz, *supra* note 104, at 10839.

195. *See id.* at 10839-40.

196. *See id.* at 10843.

obligations. However, Council members have shown a willingness to subject themselves to more binding agreements.¹⁹⁷ In the interest of maintaining stability, the Arctic States should commit themselves to upholding the legal frameworks that already apply in the Arctic—such as UNCLOS—and supplementing these with additional legal obligations as needed.

First, the Arctic States should agree, in a binding document akin to its 2011 Search and Rescue Agreement and 2013 Oil Pollution Preparedness and Response agreement, to abide by the decisions of the CLCS. Given the number of overlapping continental shelf claims—and the highly profitable resources at stake—other commentators have noted that the CLCS’s ability to issue binding recommendations is at risk.¹⁹⁸ Because the CLCS appeals process is unclear,¹⁹⁹ intractable disagreements could ensue if one state refuses to accept a CLCS recommendation. The Arctic Council could avert deadlock, and ensure its own stability, by mandating compliance with CLCS recommendations. If necessary, it could also agree to an appeals process, such as submitting persistent continental shelf disputes to the ICJ.²⁰⁰

Second, the Arctic Council should begin forming internal processes of dispute resolution, such as an agreement to submit disputes to arbitration. Notwithstanding their claimed exemptions to compulsory dispute resolution, the Arctic States need not submit disputes in the first instance to an external body such as the International Tribunal for the Law of the Sea or the ICJ. UNCLOS Article 280 provides that states parties may settle disputes “by any peaceful means of their own choice.” The Arctic States could fund an Arctic arbitration process, potentially including consent to ICJ jurisdiction for the purpose of appeals, to resolve territorial disputes amongst themselves. Such a function could be managed by a body adjacent to the Council’s permanent Secretariat.²⁰¹

More controversially, the arbitration mechanism could be given jurisdiction over disputes regarding states’ environmental protection regulations as a way to enforce the Arctic States’ *collective* environmental regulations. The arbitral panel could assess whether certain regulations by an individual state are consistent with the PAME MPA framework or impermissibly deviate from it, for example. Where, as here, territorial

197. *See supra* Part IV-A.1.

198. *See* Nevitt & Percival, *supra* note 67, at 1693.

199. *See id.*

200. Such leadership would also provide a solution for the broader international community in appealing CLCS decisions.

201. *See Arctic Council Secretariat*, ARCTIC COUNCIL, <https://arctic-council.org/en/about/secretariat/> [https://perma.cc/97GX-GXCA] (last visited Jan. 30, 2022).

disputes are so intertwined with claims of right to enforce environmental protections, the dispute resolution mechanism—whatever form it takes—must be prepared and empowered to resolve disputes over environmental conditions and the consistency of purported environmental measures with the collective measures decided by the Arctic Council. Those regulations which are the initiative of a single state might then be suspect as pretense for exerting territorial sovereignty. While the arbitration mechanism itself may infringe *to an extent* on Arctic States' sovereignty, this is an outcome they may wish to accept in order to maintain their collective position as manager of the Arctic region.

If given the legitimacy of the Arctic States' participation, the mechanism they choose could extend to disputes with non-Arctic State actors. Such an Arctic-centric dispute resolution process will maintain the Arctic States' collective control over the region while ensuring peaceful resolutions of disputes within the consensus-based framework of the Arctic Council.

B. Individual Actions of the Arctic States

The Arctic States themselves should also prepare to actively monitor environmental conditions in the Arctic so that they can credibly contest assertions of environmental enforcement that are based on illegitimate, faulty, or falsified environmental data. This will require intelligence-gathering on more than just other states' military movements in the Arctic. It will also require intelligence-gathering on the Arctic itself: the condition of the seabed, coastal erosion, plant and animal life, the existence of pollutants, and the general health of the Arctic Ocean.

A number of Arctic States must also take actions to improve their own strategic positions in the Arctic as well as the overall strength of Arctic Council governance. First, the United States must accede to UNCLOS and ratify the 1994 implementing agreement. Although it is submitting an application to the CLCS as a non-party, the United States could remove doubts that it will comply with the CLCS's resulting recommendation—and in turn, help legitimize the findings of the CLCS in other Arctic disputes—by acceding to UNCLOS. Joining UNCLOS will also reinforce the Ilulissat Declaration, which the United States signed and which declared that the law of the sea applies in the Arctic. As long as it remains a non-party to UNCLOS, and can therefore avoid obligations under the treaty regime, the U.S. position of enforcing UNCLOS in future Arctic disputes will be untenable. Second, instead of unilateral action, Canada and Norway should work through the IMO, where “tough laws” on marine

protection can be replicated in a “multilateral context.”²⁰² Finally, the 2010 delimitation treaty between Norway and Russia may serve as a model for how individual states can resolve bilateral disputes to clear the way for more concerted action on common issues challenging Arctic governance.

CONCLUSION: DEVELOPING AN ARCTIC COUNCIL STRATEGY

The danger of armed conflict among the Arctic States is very low. The real danger confronting the Arctic is a rush for resources across unsettled boundaries and Arctic States’ reactionary responses, all of which has the potential to break down long-standing norms within the law of the sea and expose the sensitive region to further environmental degradation already heightened by climate change. Yet, assertions by environmentally-conscious states that they have interests beyond their borders will lead to unpredictable outcomes where there are no rules to accommodate their purported interests.

The Arctic States have signaled that they wish to remain the managers of this increasingly complex region by progressively formalizing the Arctic Council’s structure. But to retain its leadership role, the Council and its members will have to make commitments to each other and to the international rules-based order. In practice, the Arctic States should treat the Council as a regional security system, recognizing that their individual economic and military security is dependent on their immediate neighbors’ own security. In the event of environmental or natural disasters, they will be more reliant on each other than on external actors. Clearly, it is in the Arctic States’ interests—individually and collectively—for the Arctic Council to remain indispensable to Arctic governance and the sole gatekeeper to the Arctic.

The Arctic States should be quick to prevent an incremental *fait accompli* through the use of meritless environmental claims which result in dramatic changes to the *geopolitical* environment. But they also should not mistake defensive measures for offensive ones. Russia and Canada both are experiencing an unparalleled shift in defense strategy as the entire lengths of their northern borders become suddenly exposed to the threat of armed force.²⁰³ Reestablishing northern bases is as much a form of early-warning detection as it is an attempt at power projection. Canada and Russia can be expected to continue asserting their claims to internal waters or EEZ regulatory rights, respectively, if for no other reason than to delay the inevitable transit or innocent passage of foreign ships along their

202. Kraska, *supra* note 6, at 1130.

203. *See, e.g.*, Kraska, *supra* note 6, at 1117-18, 1124-25.

coasts. Building trust through regional collective action in the Arctic Council will ease these insecurities over time.

Together, the Arctic States should also make clear that the Arctic Ocean should not be treated differently than other comparable bodies of water under international law. It is home to a number of states' territorial seas as defined by UNCLOS. Claims, like China's, that the Arctic is "a community with a shared future for mankind" implicitly undermine that regime.

Yet, some of the Arctic States themselves are inviting outside actors into the region in ways that serve the outsiders' agendas. Arctic States should be wary of outside actors' large-scale investments which allow them to wield outsized influence in the region. Iceland and Greenland have welcomed investments by China.²⁰⁴ But those investments come with significant leverage, giving a non-Arctic State a foothold in the region which it parleyed into an observer seat on the Arctic Council.²⁰⁵ In a self-perpetuating cycle, outside states' increased participation in Arctic governance justifies their presence in the Arctic, which further justifies their taking on greater responsibilities, which will eventually dilute Arctic States' power within this governance structure.

Expansive environmental protection-based claims may also serve to reinforce the justifications used by outside actors to claim roles in Arctic governance. Indeed, outside states' professed interest in conducting climate change research rings hollow when it is self-evident that they are lured to the Arctic by deposits of rare earth minerals and untapped reserves of oil and natural gas.²⁰⁶

To be successful, Arctic States' strategy for the Arctic must be values-driven, not interest-driven. As such, it must be removed from the parochial concerns of individual states and based in upholding international legal regimes. Canada should not use its indigenous population as a cudgel to beat away compliance with UNCLOS. The United States should not resurrect Cold War-era fears to stimulate, or perpetuate, an Arctic arms race. Informed threat assessment and trust in the multilateral Arctic Council framework, which has fostered collaboration for decades, will help the United States and other Arctic States avoid an "ideologically driven blunder."²⁰⁷

A binding treaty to protect the Arctic environment is unnecessary where cooperation among the Arctic States will not only fill the gap in

204. See Auerswald, *supra* note 82.

205. See *id.*; see also Stephen & Stephen, *supra* note 81, at 55-56.

206. See Zengerle, *supra* note 81.

207. English & Gardner, *supra* note 65.

environmental protections but also foster greater collaboration on other issues that will inevitably confront the region. This broader collaboration will only be helped by an insider-outsider mentality, in which the Arctic States assert their regional authority over the Arctic Ocean as against non-Arctic States rather than succumbing to competition against each other. Reactionary cycles of escalation will not help the Arctic States ensure environmental protections or sustainable development of the Arctic's resources. But trust in existing frameworks like UNCLOS and the IMO—and the Arctic Council—will.

