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## The Arctic in the Public Order of the World Community

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THE ARCTIC IN THE PUBLIC ORDER OF THE WORLD COMMUNITY  
BY:  
CHARLES H. NORCHI<sup>1</sup>

- I. THE SOCIAL PROCESS OF THE ARCTIC
- II. AN ARCTIC CONSTITUTIVE PROCESS
- III. ARCTIC FUTURES

KEY TERMS:

Arctic, Arctic Council, Climate Change, Constitutive Process, Indigenous People, International Law, Law of the Sea, Maine, World Public Order

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*As an eyewitness to the changing topography of the Arctic, I was stunned to see the rapid repercussions of global warming for the region, its wildlife habitat and indigenous cultures.*

-Will Steger, Arctic Explorer

From early ages of exploration, the Arctic idea has resided in collective memories well beyond polar realms.<sup>2</sup> For people who live in the Arctic, that idea is a way of life that incorporates traditions and indigenous knowledge evolved to cope with demanding conditions. Consequences of cryospheric changes are causing states and non-states to assert more intense claims to Arctic resources. The Arctic is a base of power, wealth, and other values. Competence to make and apply law in a manner that accommodates inclusive versus exclusive demands in the common interest is of great import to the public order of the world community. Hence, Arctic engagement has extended to much of the planet, including the most easterly and northerly of the American contiguous forty-eight states—Maine.<sup>3</sup>

In the Fall of 2016, the world came to Maine for the Arctic.<sup>4</sup> The Senior Arctic Officials Meeting in Portland was the third of four plenary sessions under the U.S. Chairmanship of the Arctic Council and the only session convened outside Alaska. This seemed to confirm the observation by President Ólafur Grímsson of Iceland: “Maine is the Eastern pillar of U.S. Arctic Strategy.”<sup>5</sup> Thus, Maine hosted the leading intergovernmental forum promoting cooperation and coordination among Arctic states, indigenous peoples, and other inhabitants of the region on issues of common interest.

This was an occasion for The Center for Ocean and Coastal Law of the University of Maine School of Law and the *Ocean & Coastal Law Journal* to co-convene the Maine Arctic Forum where participants appraised conditions, trends, projections, and Arctic futures. This article further appraises trends in the Arctic social process, an evolving constitutive process, and plausible futures.

## I. THE SOCIAL PROCESS OF THE ARCTIC

The Arctic region is a vast and intense space characterized by cold, darkness, and ice. The context of geography is a key factor shaping a social process bearing on modes of transportation and communication, collective memory, expectations and demands of indigenous peoples’ and their ability to participate in their community development and formal structures of government. In the Arctic social process, participants pursue values through formal and informal institutions using a wide array of strategies and resources. It must be recalled that the Arctic is both land and the world’s fourth largest ocean. “The process of interaction by which the oceans are enjoyed involves most of the participants in the world social process, who seek a great variety of objectives in many significantly differing situations.”<sup>6</sup>

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<sup>2</sup> See William Barr, *The Expeditions of the First International Polar Year*, Arctic Institute of North America, University of Calgary, 2d ed. 2008.

<sup>3</sup> Maine has a maritime port poised to become a key link to high north sea routes.

<sup>4</sup> WELCOME TO MAINE AND THE ARCTIC, <http://www.maineandthearctic.com/> (last visited Jan. 13, 2017).

<sup>5</sup> Tom Bell, *President of Iceland calls Portland key shipping link*, PORTLAND PRESS HERALD (May 31, 2013), <http://www.pressherald.com/2013/05/31/icelands-president-speaks-in-s-portland/>.

<sup>6</sup> M. S. MCDUGAL AND W. T. BURKE, *THE PUBLIC ORDER OF THE OCEANS*, 14 (New Haven and London: Yale University Press, 1962).

The Arctic is an area above the Arctic Circle parallel of the latitude that runs 66°33'44" north of the Equator. The Arctic Monitoring and Assessment Program (AMAP), an Arctic Council Working Group, adopts a definition that includes "...the terrestrial and marine areas north of the Arctic Circle (66°32'N), and north of 62°N in Asia and 60°N in North America, modified to include the marine areas north of the Aleutian chain, Hudson Bay, and parts of the North Atlantic, including the Labrador Sea."<sup>7</sup> The American Arctic is defined as "all United States and foreign territory north of the Arctic Circle and all United States territory north and west of the boundary formed by the Porcupine, Yukon and Kuskokwim Rivers; all contiguous seas, including the Arctic Ocean and the Beaufort Sea, Bering Sea, the Chukchi Sea, and the Aleutian Island chain."<sup>8</sup>

Social interactions have been limited by geography and ice. Physical contours and environment have long imposed limitations on navigation and other marine activities, hydrocarbon exploration, and mining. This is changing. Dramatic climate change transforming sea ice is affecting livelihoods, commerce, security, and the environment. States, indigenous peoples, and corporations are now operating in a social process shaped by intensely evolving climatic conditions. Ice melt is producing more open water enabling increased human activity including navigation, tourism, and hydrocarbon exploration all affecting Arctic biodiversity. The NOAA Arctic Report Card released in December 2016 subtitled "Persistent warming trend and loss of sea ice are triggering extensive Arctic Changes,"<sup>9</sup> stated "the record-breaking delay in the freeze up of the sea ice cover in Fall 2016 is associated with unprecedented warm air and ocean surface temperatures."<sup>10</sup> Further, "[f]rom mid-October to late-November, the ice extent has been the lowest observed since the beginning of the satellite record in 1979."<sup>11</sup>

Professor Paul Mayewski is an explorer, glaciologist, climate scientist, and Director of the University of Maine Climate Change Institute. At the Maine Arctic Forum, Professor Mayewski described "dramatic losses of ice," emphasizing "the arctic, northern hemisphere in particular, are the most reactive to the evolution of global warming, as indicated by changes in temperature." He continued, "... the north pole was above freezing December 30, 2015, in the middle of winter...there is without a doubt, a clear and present local to regional scale change in the physical, chemical, biological and social components of the arctic and all of the abounding regions."<sup>12</sup> Scientists are projecting a seasonal (late summer) ice-free Arctic ocean by the 2030s.<sup>13</sup> Any existing summer ice will be thinner and more fragile.<sup>14</sup> As Dr. Patricia Matrai of Bigelow

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<sup>7</sup> THE ARCTIC MONITORING AND ASSESSMENT PROGRAMME, <http://www.amap.no/about/geographical-coverage> (last visited Jan. 13, 2017).

<sup>8</sup> Arctic Research and Policy Act of 1984 §112 (amended 1990), 15 U.S.C. § 4111 (2006).

<sup>9</sup> J. Richter-Menge, J.E. Overland, and J.T. Mathis, NOAA ARCTIC REPORT CARD (2016), <http://www.arctic.noaa.gov/Report-Card/Report-Card-2016> (last visited Jan.13, 2017), full text available at [ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard\\_full\\_report2016.pdf](ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard_full_report2016.pdf).

<sup>10</sup> *Id.*, ARCTIC REPORT CARD, full text, at 10.

<sup>11</sup> *Id.* at <http://arctic.noaa.gov/Report-Card/Report-Card-2016/ArtMID/5022/ArticleID/326>.

<sup>12</sup> MAINE ARCTIC FORUM, October 3, 2016 Portland, Maine. Transcript on file with author.

<sup>13</sup> Geophysical Research Letters by Muyin Wang and James E. Overland, *A Sea Ice Free Summer Arctic within 30 Years?*, 36, no. L07502 (April 3, 2009): 10.1029/2009GL037820; Geophysical Research Letters by Marika Holland, Cecilia M. Bitz, and Bruno Tremblay, *Future abrupt reductions in the summer Arctic sea ice*, 33, no. L23503 (2006); Dirk Notz, *The Future of Ice Sheets and Sea Ice: Between Reversible Retreat and Unstoppable Loss*, 49 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 106, 20590-20595 (December 8, 2009).

<sup>14</sup> See Arctic ROOS (Norway), *Daily Updated Time series of Arctic sea ice area and extent derived from SSMI data provided by NERSC* <http://arctic-roos.org/observations/satellite-data/sea-ice/ice-area-and->

Laboratories noted, “. . . more plants are growing in the Arctic, yet they are less productive. There are now a variety of activities which are influencing the arctic, all of which lead to the people who currently live in the arctic, as well as the people who are moving into the arctic, because there’s not only migration of charismatic mega fauna and micro flora, but also people who see economic opportunity.”<sup>15</sup> Thus, climate change modifies fauna, flora, and human activity. A United Nations General Assembly report of the Secretary-General on oceans and the law of the sea stated, “climate change is emerging as the most far-reaching and significant stressor on Arctic biodiversity.”<sup>16</sup>

A Congressional Research Services report summarizes the conditions affecting the social process of the Arctic: “. . . physical changes in the Arctic include warming ocean, soil, and air temperatures; melting permafrost; shifting vegetation and animal abundances; and altered characteristics of Arctic cyclones. All these changes are expected to affect traditional livelihoods and cultures in the region and survival of polar bear and other animal populations, and raise risks of pollution, food supply, safety, cultural losses, and national security. Moreover, linkages (“teleconnections”) between warming Arctic conditions and extreme events in the mid-latitude continents are increasingly evident identified in such extreme events, such as the heat waves and fires in Russia in 2010, severe winters in the eastern United States and Europe in 2009/2010 and in Europe in 2011/2012, and Indian summer monsoons and droughts. Hence, changing climate in the Arctic suggests important implications both locally and across the Hemisphere.”<sup>17</sup>

The Arctic is more accessible for human activities and this accessibility generates more claims to access and control evident by long-standing oceans problem. In 1602, when the Dutch East India Company seized a Portuguese galleon in retaliation for Portuguese resistance to Dutch trade in the East Indies, Hugo Grotius was commissioned by the Dutch to write the legal brief in the case. This would become the first important treatise on the seas -- *Mare Liberum* (The Freedom of the Seas) and the first published work to clarify the access versus control problem. Grotius argued the “high seas,” which came to be defined as the open ocean existing beyond national control, must be open for trade and exploration.<sup>18</sup> All property, he wrote, is grounded upon occupation—the sea then, like the air, cannot be appropriated: “Whatever cannot be seized or enclosed is not capable of being a subject of property . . . meaning that the vagrant waters of the ocean are necessarily free.”<sup>19</sup> The alternative view was that the seas were subject to appropriation and occupation. This problem of ocean access versus control persists today and has generated important international laws expressed in judicial decisions, custom, and conventions.

Increased Arctic access is being met with claims to control. The five Arctic littoral states--the United States, Canada, Russia, Norway, and Denmark (Greenland)--have historically asserted the most intensive Arctic claims followed by the non-littorals that possess territory above the Arctic Circle--Finland, Sweden, and Iceland. As Arctic claims are increasingly asserted by states and non-state actors beyond the region, melting ice may be a source of conflict between and among polar and non-polar States.

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extent-in-arctic. National Oceanic and Atmospheric Administration (NOAA) Arctic Report Card, available at <http://arctic.noaa.gov/Report-Card/Report-Card-2016>.

<sup>15</sup> MAINE ARCTIC FORUM, October 3, 2016 Portland, Maine. Transcript with author.

<sup>16</sup> UN Gen. Assembly A/65/69/Add.2 para 321 (2010)

<sup>17</sup> RONALD O'ROURKE, CONG. RESEARCH SERV., R41153 CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS 18 (October 14, 2016).

<sup>18</sup> See *Meaning of “High Seas,”* 7(6) HARVARD L. REV. 372-73 (Jan. 25, 1894).

<sup>19</sup> HUGO GROTIUS, FREEDOM OF THE SEAS (New York: Oxford University Press) 1916.

The Arctic was once a major security arena with air and naval maneuvers and ballistic missile testing. Since the end of the Cold War, the region has been characterized by order and cooperation. However, the consequences of abrupt climate change could disrupt the public order of the Arctic as dwindling sea ice opens new operating areas for naval surface ships. “In 2009, Norway moved its operational command to its northern territories above the Arctic Circle... Denmark has made it a strategic priority to form an Arctic Command. Canada is set to revitalize its Arctic fleet, including spending \$33 billion to build 28 vessels over the next 30 years.”<sup>20</sup> Naval operations of Russia, the United States, Canada and Nordic countries have increased. States have clear interests and occasionally assert overlapping claims although these have been managed and contained both bilaterally and multilaterally.

The United States National Security Strategy for the Arctic, released in May 2010, declared “the United States is an Arctic Nation with broad and fundamental interests in the Arctic region, where we seek to meet our national security needs, protect the environment, responsibly manage resources, account for indigenous communities, support scientific research, and strengthen international cooperation on a wide range of issues.”<sup>21</sup> The policy was further elaborated in a later statement that defined United States Arctic security interests as built on advancing United States security interests, pursuing responsible Arctic stewardship, and strengthening international cooperation, including working with the Arctic Council and achieving U.S. accession to the United Nations Convention on the Law of the Sea. There was emphasis upon making decisions using the best available information based on the most current science and traditional knowledge.<sup>22</sup> A Department of Defense report to Congress stated, “The United States needs assured Arctic access to support national interests in the Arctic. This access can be provided by a variety of proven capabilities, including submarines and aircraft, but only U.S.-flagged ice-capable ships provide visible U.S. sovereign maritime presence throughout the Arctic region.”<sup>23</sup>

In August 2007, a Russian submersible deposited an encased Russian Federation flag on the seabed near the North Pole. This was a symbolic act conveying no legal effect although it did bring world-wide attention to potentially overlapping polar claims. During the Maine Arctic Forum, Professor Betsy Baker observed that “Russia has about 50% of the coastline in the Arctic Ocean.” Professor James Kraska underscored that “of the region’s four million residents, two million are Russian. The country has sixteen deep water ports and thirteen airfields near or north of the Arctic Circle with an increased military presence- including six new Arctic bases. Since the collapse of the Soviet Union, insecurity is the mood of the country’s leaders.”<sup>24</sup>

As a major Arctic player, Russia possesses latent power that could be quickly actualized. Anders Fogh Rasmussen observes that “[R]ussia has long made clear its desire to enlarge its territory in the Arctic. Given its failure to modernize or diversify its economy, its determination to

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<sup>20</sup> Heather Conley, *The Colder War: U.S., Russia and Others Are Vying for Control of Santa’s Back Yard*, WASHINGTON POST (December 23, 2011) [https://www.washingtonpost.com/opinions/the-colder-war-us-russia-and-others-are-vying-for-control-of-santas-back-yard/2011/12/20/gIQAWBc7DP\\_story.html?utm\\_term=.61881271d734](https://www.washingtonpost.com/opinions/the-colder-war-us-russia-and-others-are-vying-for-control-of-santas-back-yard/2011/12/20/gIQAWBc7DP_story.html?utm_term=.61881271d734).

<sup>21</sup> THE WHITE HOUSE: NATIONAL SECURITY STRATEGY FOR THE ARCTIC 50 (May 2010).

<sup>22</sup> WHITE HOUSE: NATIONAL STRATEGY FOR THE ARCTIC REGION, [https://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf) (May 2013).

<sup>23</sup> DEPARTMENT OF DEFENSE: REPORT TO CONGRESS ON ARCTIC OPERATIONS AND THE NORTHWEST PASSAGE, (May 2011), [https://www.defense.gov/Portals/1/Documents/pubs/Tab\\_A\\_Arctic\\_Report\\_Public.pdf](https://www.defense.gov/Portals/1/Documents/pubs/Tab_A_Arctic_Report_Public.pdf).

<sup>24</sup> MAINE ARCTIC FORUM, 29 *The Working Waterfront* 5 (Nov 2016).

wring the greatest possible benefit from Arctic resource holdings can only be expected to grow. Russia's interest in the Arctic is profound. Much of its territory, and many of its mineral deposits, lie north of the Arctic Circle. The bulk of its fleet of nuclear submarines is home-ported in Arctic waters and there are expectations in Russia that the Northern Sea Route will bring significant earnings in the future."<sup>25</sup> Russia operates numerous High Arctic vessels including a fleet of nuclear powered icebreakers and has increased its Arctic military flights near both Canadian and Danish airspace. Because of minimal U.S. government waterborne presence in the Arctic, American maritime domain awareness is limited.

On January 21, 2015, President Obama issued Executive Order 13689, entitled "Enhancing Coordination of National Efforts in the Arctic" which stated in part, "As the United States assumes the Chairmanship of the Arctic Council, it is more important than ever that we have a coordinated national effort that takes advantage of our combined expertise and efforts in the Arctic region to promote our shared values and priorities."<sup>26</sup> Professor Kraska underscored "the United States has broad civil and military air and sea navigational interests in the Arctic, including an interest in ensuring that commercial shipping in the Arctic Ocean and adjacent seas is secure. As an Arctic nation, the United States can play a leading role in shaping Arctic governance regimes. The country is expanding international cooperation to support reliable shipping, deep-water port facilities, aids to navigation, designation of places of refuge, vessel-to-shore communication, weather modeling and ice forecasting, ship tracking and reporting, and hydrographic mapping."<sup>27</sup>

Russia asserts claims to vast amounts of Arctic sovereign and marine space. Russia's submission to the United Nations Commission on the Limits of the Continental Shelf (CLCS) appears to claim nearly 1.2 million square kilometers of territory, including the North Pole, which would include approximately half of the Arctic Ocean.<sup>28</sup> Russia's submission process will unfold before a United Nations Convention on the Law of the Sea Institution and the Commission on the Limits of the Continental Shelf where Russian claims will be contingent upon scientific verification.

A policy pronouncement approved by Russian President Vladimir Putin on February 20, 2013, titled "The development strategy of the Arctic zone of the Russian Federation," stated:

"In order to ensure military security, defense and protection of the state border of the Russian Federation shall provide for:

a) a favorable operating conditions in the Arctic zone of the Russian Federation, including the maintenance of the necessary level of combat readiness of troops (forces) of the total of the Armed Forces, other troops, military formations and bodies, in accordance with existing and predictable military dangers and military threats to the Russian Federation in the Arctic;

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<sup>25</sup> Anders Fogh Rasmussen, *The Arctic: A Place Apart*, 36 HARV. INTL REV. 3 (Spring 2015), <http://hir.harvard.edu>.

<sup>26</sup> NATIONAL STRATEGY FOR THE ARCTIC REGION, *supra* note 22.

<sup>27</sup> James Kraska, *The Law of Shipping in Arctic-American Waters*, in LEGAL ASPECTS OF ARCTIC SHIPPING (Directorate General for Maritime Affairs and Fisheries, European Commission of the European Union) (2009).

<sup>28</sup> See UNCLOS COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF, OUTER LIMITS OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES FROM THE BASELINES: SUBMISSIONS TO THE COMMISSION: SUBMISSION BY THE RUSSIAN FEDERATION, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_rus.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus.htm) (last visited Jan. 17, 2017).

- b) ensure comprehensive combat and mobilization readiness level required and sufficient for solving non-military pressure and aggression against the Russian Federation and its allies, ensure the sovereign rights of Russia's Arctic and the smooth implementation of all of its activities, including the exclusive economic zone and the continental shelf of the Russian Federation in the Arctic, to neutralize internal and external military dangers and military threats in peacetime, providing strategic deterrence, and in the event of armed conflict - repel aggression and cessation of hostilities on terms that meet the interests of the Russian Federation;
- c) improve the structure, composition, military, economic, and logistical support to the Armed Forces, other troops, military formations and bodies, the development of the infrastructure of their home in the Arctic zone of the Russian Federation, as well as a system of operational equipment in the area for the deployment of troops (forces) designed to perform tasks in the Arctic.”<sup>29</sup>

On December 1, 2016, the Ministry of Foreign Affairs of the Russian Federation issued a further pronouncement relevant to the Arctic, entitled “Strategy Concept of Foreign Policy of the Russian Federation.”<sup>30</sup> The document identifies the Arctic as “special international region,” where Russia is “pursuing a policy aimed at maintaining peace, stability and international cooperation.”<sup>31</sup> The document underscores that the Arctic states have a particular responsibility for the sustainable development of the region, and Russia supports the strengthening of cooperation in the format of the Arctic Council, the five Arctic coastal states, and the Barents/Euro-Arctic Council. The Russian pronouncement asserts that Russia will strongly oppose any attempts to politicize and militarize the region and underscores that the Northern Sea Route is essential to the development and transportation in the Russian Arctic, as well as for transit traffic between Europe and Asia.<sup>32</sup>

Russia has established six new Arctic military bases at Nagurskoye, Rogachevo, Sredny Ostrov, Temp, Mys Shmidta, and Zyvozdney.<sup>33</sup> As Russian military activities have intensified, NATO has become more active in the region. Since 2006, all of NATO’s Arctic member states – the United States, Canada, Denmark, Norway and Iceland – announced Arctic policies recognizing the threats and opportunities as the region is transformed by climate change with a view to reinforcing Arctic defense capabilities. According to former Secretary General of NATO Anders Fogh Rasmussen, “NATO’s duty is clear. Its commitment to defend any ally who is attacked—through Article 5 of the North Atlantic Treaty—does not stop at the Arctic Circle.... NATO is an Arctic alliance, because it has Arctic allies.... It is therefore crucial to ensure that the Alliance has

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<sup>29</sup> STRATEGII: DEVELOPMENT OF THE ARCTIC ZONE OF THE RUSSIAN FEDERATION AND THE NATIONAL SECURITY UP TO 2020, <http://www.research.kobe-u.ac.jp/gsics-perc/sympo/20160728/documents/Keynote/Russian%20Arctic%20strategy%202013.pdf> (last visited Jan. 17, 2017).

<sup>30</sup> See THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION: FOREIGN POLICY CONCEPT OF THE RUSSIAN FEDERATION [http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptICk6BZ29/content/id/2542248](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29/content/id/2542248) (Nov. 30, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Map of Russian Fortifying Bases in Arctic Region, [http://thf\\_media.s3.amazonaws.com/infographics/2015/02/SR-military-power-index-2015-russian-arctic-bases\\_HIGHRES.jpg](http://thf_media.s3.amazonaws.com/infographics/2015/02/SR-military-power-index-2015-russian-arctic-bases_HIGHRES.jpg) (last visited Jan. 17, 2017).

the ability to plan, lead and execute the collective defense mission in accordance with Article 5.”<sup>34</sup> Is a non-militarized Arctic feasible? Will the 2013 and 2016 Russian policy pronouncements and associated activities be the drivers toward a militarized Arctic? As Professor Kraska observed at the Maine Arctic Forum, “Russia is really the bellwether for the public order of the Arctic.”<sup>35</sup>

Non-polar States such as China, India, Korea, and Singapore have Arctic interests. China has emerged as a polar-capable state with interests in new shipping routes, energy resources, scientific research, and Arctic governance.<sup>36</sup> China signed a free trade agreement with Iceland and increased the size of its embassy staff in Reykjavik.<sup>37</sup> In October 2013, Chinese Vice Premier Ma Kai met with Icelandic President Ólafur Grímsson and stated that “China is willing to expand pragmatic [cooperation] with Iceland in fields of economy, trade, geothermal energy, Arctic research environment, science and technology and social development.”<sup>38</sup> The government maintains a research station at Svalbard and has one operational icebreaker and is planning more.<sup>39</sup> China’s growing interest in the Arctic is consistent with an evolving foreign policy underscoring an intent to influentially participate in the public order of the world community.

Dwindling sea ice is transforming Arctic shipping although most is still regional and not trans-Arctic. The Northern Sea Route (NSR), also known as the Northeast Passage, runs along Russia’s northern border from Murmansk to Provideniya. It is about 2,600 nautical miles in length and was opened by the Soviet Union for domestic shipping in 1931 and to foreign vessels in 1991. Currently, most Arctic shipping traverses the NSR. The Northwest Passage (NWP) traverses Canadian islands. There are several NWP routes. A southern route runs through Peel Sound in Nunavut. A northern route through McClure Strait from Baffin Bay to the Beaufort Sea north of Alaska and is more prone to ice blockage. The NWP could be useful for trade between northeast Asia and northeast North America. Scientists predict that by 2030 sufficient ice will have melted to render viable a northerly Transpolar Sea Route (TSR), also referred to as Central Arctic Shipping Route (CASR).

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<sup>34</sup> Anders Fogh Rasmussen, *The Arctic: A Place Apart*, 36 HARV. INTL. REV. 3 (Spring 2015).

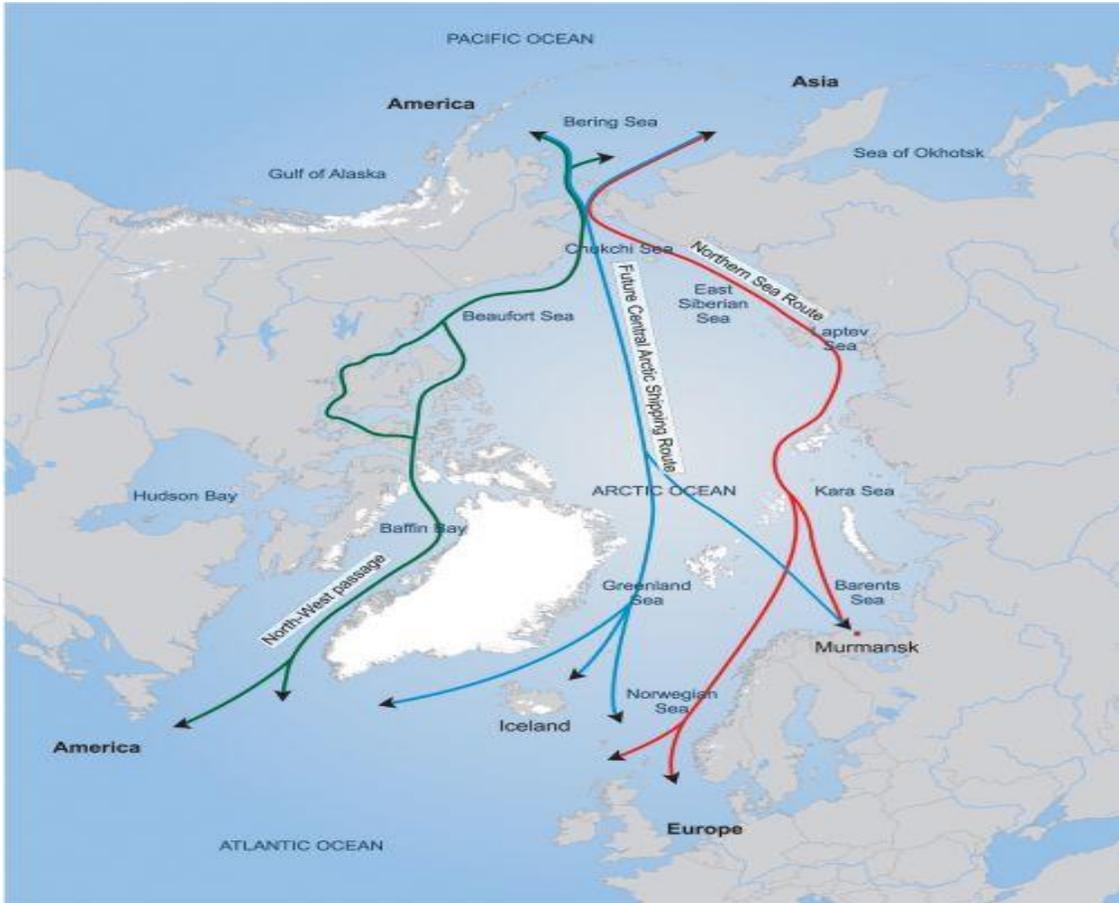
<sup>35</sup> MAINE ARCTIC FORUM, October 3, 2016 Portland, Maine. Transcript on file with author.

<sup>36</sup> See Aldo Chircop, *The Emergence of China as a Polar-Capable State*, 7 CANADIAN NAVAL REV. 1 (Spring 2011).

<sup>37</sup> Christopher Bodeen (Associated Press), *China Signs Free Trade Agreement with Iceland as it Looks for Foothold in the Arctic*, CANADIAN BUSINESS (April 16, 2013), <http://www.canadianbusiness.com/business-news/iceland-set-to-become-first-european-country-to-sign-free-trade-agreement-with-china/>.

<sup>38</sup> Einar Benediktsson and Thomas R. Pickering, *China Knocks on Iceland’s Door*, NEW YORK TIMES (March 12, 2013), <http://www.nytimes.com/2013/03/13/opinion/china-knocks-on-icelands-door.html>.

<sup>39</sup> Wang Yuanyuan, *Chinese Icebreaker Concludes Arctic Expedition*, XINHUA NEWS AGENCY (September 27, 2012), [http://news.xinhuanet.com/english/china/2012-09/27/c\\_131876712.htm](http://news.xinhuanet.com/english/china/2012-09/27/c_131876712.htm).



Arctic Shipping Routes. Map credit: NATO Parliamentary Report, *Security at the Top of the World: Is there a NATO Role in the High North?*, <http://www.nato-pa.int/default.asp?SHORTCUT=2082>.

Shipping is affected by severe weather including cold, fog, and storms that affect costs. The viability of Arctic shipping routes will depend upon oceanic climate conditions, shipping economics, and geopolitics. Operations in high north latitudes come with high cost related to icebreaking, search and rescue requirements, and shipping corridor fees. Two icebreakers per vessel may be required and Arctic specialized vessels are smaller accommodating fewer containers elevating freight unit costs. China, India, Korea, and Singapore are interested in the commercial viability of trans-Arctic shipping to the extent it could be more commercially viable than the longer Suez and Panama routes. From the perspective of shipping economics, it remains unclear whether the world's eighth ocean will actually become a "trans-Arctic Panama Canal," as President Ólafur Grímsson of Iceland declared in a speech in Maine on the occasion of Eimskip opening its Portland container operations.<sup>40</sup>

<sup>40</sup> Whit Richardson, *As polar ice recedes, Maine could become a logistical hub for North America, says president of Iceland*, BANGOR DAILY NEWS (May 31, 2013), <http://bangordailynews.com/2013/05/31/business/as-polar-ice-recedes-maine-could-become-a-logistical-hub-for-north-america-says-president-of-iceland/>.

A Lloyd's of London report noted, "Interest in the Arctic... has been growing in recent years as the perceived benefits of new shipping routes, reportedly significant oil and gas reserves and mineral deposits has become apparent. Overall, investment in the Arctic could potentially exceed \$100bn within the next decade, according to Lloyd's 2012 Arctic Opening report, which highlighted the opportunities and challenges of economic development in the region...there could be significant opportunities for shipping if the annual summer sea-ice continues to recede with climate change - transit times between Asia, Europe and North America using the Northern Sea Route could be cut by as much as 40%."<sup>41</sup>

New human activity spawned by climate change includes commercial shipping, cruise lines, oil and gas exploration, and mining. The Arctic Marine Shipping Assessment (AMSA) was established with Norway, Canada, Denmark/Greenland, and the United States as lead countries in the Arctic Council. The AMSA 2009 Report reviewed environmental impacts and threats from current and future Arctic marine shipping activities and called for Arctic States to identify areas of heightened ecological and cultural significance in light of changing climate conditions and increasing multiple marine uses, and where appropriate, to encourage the implementation of measures to protect these areas from the impacts of Arctic marine shipping. Melting Arctic ice creates new shipping routes that increase pollution risks rendering inter-state cooperation vital.

A U.S. Geological Survey (USGS) report concluded, "The extensive Arctic continental shelves may constitute the geographically largest unexplored prospective area for petroleum remaining on Earth."<sup>42</sup> However, a major concern is the threat of a large oil spill with potentially devastating impacts on the Arctic ecosystem. According to a 2014 National Research Council (NRC) report, "the lack of infrastructure in the Arctic would be a significant liability in the event of a large oil spill."<sup>43</sup> In 2010, the Obama Administration withdrew certain Arctic areas from oil and gas exploration.<sup>44</sup> A 2015 report by the National Petroleum Council stated that U.S. offshore oil and gas exploration in the Arctic over the next 35 years "would help sustain domestic supplies . . ."<sup>45</sup> and the incoming U.S. administration appears poised to allow hydrocarbon exploitation in the Arctic National Wildlife Refuge (ANWR).<sup>46</sup> However, in December 2016, the previous Administration relying on the Outer Continental Shelf Lands Act "withdrew from disposition" oil and gas activities on unleased lands on the U.S. Arctic Shelf. Because this effort was coordinated with the government of Canada, the Beaufort and Chukchi seas north of Alaska are currently

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<sup>41</sup>Lloyd's develops Arctic ice regime to compliment Polar Code, LLOYDS (Mar. 14, 2014), <https://www.lloyds.com/news-and-insight/news-and-features/emerging-risk/emerging-risk-2014/a-common-ice-regime-for-arctic-shippers>.

<sup>42</sup> USGS FACT SHEET 2008-3049: CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE, (2008), <http://pubs.usgs.gov/fs/2008/3049/>.

<sup>43</sup> NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES OF SCIENCE: RESPONDING TO OIL SPILLS IN THE U.S. ARCTIC MARINE ENVIRONMENT 9 (The National Academies Press, 2014).

<sup>44</sup> PRESIDENTIAL MEMORANDUM: WITHDRAWAL OF CERTAIN AREAS OF THE UNITED STATES OUTER CONTINENTAL SHELF FROM LEASING DISPOSITION March 31, 2010, available at <http://www.doi.gov/whatwedo/energy/ocs/upload/2010alaska-mem-rel.pdf>;

PRESIDENTIAL MEMORANDUM: WITHDRAWAL OF CERTAIN AREAS OF THE UNITED STATES OUTER CONTINENTAL SHELF FROM LEASING DISPOSITION, December 16, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/12/16/presidentialmemorandum-withdrawal-certain-areas-united-states-outer-con>.

<sup>45</sup> NATIONAL PETROLEUM COUNCIL, ARCTIC POTENTIAL: REALIZING THE PROMISE OF U.S. ARCTIC OIL AND GAS RESOURCES, (March 2015), available at <http://www.npc.org/reports/research.html>.

<sup>46</sup> Nick Cunningham, *Trump May Open Up Arctic Drilling*, OIL PRICE (Nov. 11, 2016), <http://oilprice.com/Energy/General/Trump-May-Open-Up-Arctic-Drilling.html>.

protected from drilling.<sup>47</sup> As polar ice dwindles there will be greater access to deposits of gold, iron ore, and other minerals for mining and to offshore hydrocarbon reserves, as well as a wider seasonal window for drilling.

The continental shelves of the five Arctic Ocean coastal states are becoming more accessible. The United Nations Convention on the Law of the Sea (UNCLOS) authorizes coastal state jurisdiction over resources, including oil and gas, of continental shelves. Arctic Ocean coastal states are preparing and making submissions to the Commission on the Limits of the Continental Shelf (CLCS) to support extended continental shelf claims.<sup>48</sup> States with broad continental margins may lawfully claim an extended shelf beyond 200 nautical miles, subject to formal submission of scientific and technical data to the CLCS. In view of the potential extended shelf claims, the significance of the CLCS for the Arctic cannot be overstated.<sup>49</sup> The U.S. has potentially vast extended continental shelves and the government maintains a very active State Department-led interagency Extended Continental Shelf Project<sup>50</sup> and has potentially overlapping Arctic extended continental shelf claims with Russia and Canada. However, as a non-party to UNCLOS, American cannot serve as members of the CLCS. Further, the question of whether a non-party may make a CLCS submission remains unresolved.

Abrupt climate change will increasingly affect the economy, health, infrastructure, societies, and lifestyles and cultures of Arctic indigenous peoples. Indigenous land, reindeer herding and access to freshwater, sea mammals, marine fish, and a range of subsistence activities will be impacted. Cryospheric trends are affecting indigenous people and the resources they steward as their lives unfold in the shadow of powerful actors who assert intense demands and claims.

Indigenous people reside in seven of the eight Arctic nations: Canada, Denmark/Greenland, Finland, Norway, Russia, Sweden, and the United States. Forms of governance vary. Some indigenous populations govern their lands within a national structure, as in the United States and Canada. Others have representative bodies within formal governments such as Saami parliaments in Finland, Norway, and Sweden. In some areas, indigenous populations are majority participants in national and sub-national governments such as Greenland and the Nunavut territory of Canada.<sup>51</sup>

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<sup>47</sup> THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, *Statement by the President on Actions in the Arctic and Atlantic Oceans* (Dec. 20, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/20/statement-president-actions-arctic-and-atlantic-oceans>. See also The Editorial Board, *Leaving the Arctic Alone*, THE NEW YORK TIMES A26, (Dec. 22, 2016) <https://www.nytimes.com/2016/12/21/opinion/leaving-the-arctic-alone.html>.

<sup>48</sup>Part VI of the United Nations Convention on the Law of the Sea (UNCLOS), concerns the Continental Shelf. UNCLOS Annex II establishes a Commission on the Limits of the Continental Shelf. UNCLOS defines the continental shelf, inter alia, as “the seabed and subsoil of the submarine areas that extend beyond its [coastal state’s] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin.” UNCLOS Art. 76. Four Arctic coastal states —Canada, Russia, Norway, and Denmark have made or are in the process of preparing submissions to the Commission on the Limits of the Continental Shelf to support claims to the outer limits of their extended continental shelves.

<sup>49</sup> See A.G. Oude Elferink, *The Continental Shelf in the Polar Regions: Cold War or Black Letter Law*, XL NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 121-181 (2009).

<sup>50</sup> See U.S. EXTENDED CONTINENTAL SHELF PROJECT, <https://www.continentalshelf.gov/> (last accessed Jan. 14, 2017).

<sup>51</sup> See GOVERNMENT OF NUNAVUT, <http://www.gov.nu.ca/> (last accessed Jan. 14, 2017).

Indigenous peoples possess distinct cultures and often operate according to distinct, vibrant customary and micro-legal systems.<sup>52</sup> Increasingly, indigenous peoples claims for full participation in community decision-making are met through regional and intergovernmental organizations, such as the Arctic Council. At the Maine Arctic Forum, Professor Betsy Baker observed, “. . . the indigenous peoples representative permanent participants in the Arctic Council have been very influential in pushing the science community to acknowledge that indigenous ways of understanding the natural world have valid lessons for everyone.”<sup>53</sup> Valuable indigenous knowledge associated with distinct cultures—the customs, traditions, tools and ways of thinking—have evolved to fulfill basic human needs in Arctic conditions. As those conditions abruptly change, so will indigenous culture. “To date, the Arctic Council has proved to be the most effective forum for the Arctic’s indigenous peoples to participate in a significant way, if not always effective way in decisions affecting the Arctic, marine and terrestrial.”<sup>54</sup>

## II. AN ARCTIC CONSTITUTIVE PROCESS

A critical question is how the Arctic constitutive process, driven by an ever-intensifying process of claims, will evolve in a context shaped by new cryospheric conditions that include abrupt climate change. One question raised by changing conditions is how power will be allocated, structures of authority designed, who will be the decision-makers, and what will be the procedures for that “process of human beings making choices”<sup>55</sup> that we know as law? “The constitutive process is authoritative power exercised to provide an institutional framework for decision to allocate indispensable functions; the particular decisions emerging from this process, which we call ‘public order’ decisions, may be specialized to the shaping and sharing of wealth, enlightenment, respect and all other values.”<sup>56</sup> Institutions are at the center of the Arctic constitutive process ---the UNCLOS institutions, the Arctic Council, the Barents Euro-Arctic Council, the ‘A5’ group of states littoral to the Arctic Ocean, the Nordic Council of Ministers, and NATO.

Since the Arctic is mostly ocean it is subject to the international law of the sea. “The historic function of the law of the sea has long been recognized as that of achieving an appropriate balance between the special exclusive demands of coastal states, and other special claimants, and the general inclusive demands of all states in the world arena.”<sup>57</sup> The primary legal instrument and

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<sup>52</sup> See generally Charles Norchi, *Indigenous Knowledge as Intellectual Property*, in SOCIAL CAPITAL AS A POLICY RESOURCE, (John Montgomery ed., Westview Press, 2000).

<sup>53</sup> MAINE ARCTIC FORUM October 3, 2016 Portland, Maine. Transcript on file with author.

<sup>54</sup> Betsy Baker, *The Developing Regional Regime for the Marine Arctic* 58, in THE LAW OF THE SEA AND THE POLAR REGIONS (Erik J. Molenaar, Alex G. Oude Elferink, Brill Nijhoff, and Donald R. Rothwell eds., 2013).

<sup>55</sup> W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 595 (1987).

<sup>56</sup> Myres S. McDougal, Harold D. Lasswell and W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS 192, (Myres S. McDougal and W. Michael Reisman eds., 1981).

<sup>57</sup> Myres S. McDougal and William T. Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 Yale Law Journal 541, 541 (1958).

framework is the United Nations Convention on the Law of the Sea (UNCLOS).<sup>58</sup> UNCLOS Article 234 pertaining to ice-covered areas provides:

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 ... create[s] 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.

Other UNCLOS provisions pertaining to maritime zones, delimitation, vessels, search and rescue, pollution, dumping and so on are also applicable. It should be reiterated that melting sea ice has an impact on maritime zones of States because as sea levels rise baselines and maritime zones, presumed to have been settled under conventional and customary international law, will change.<sup>59</sup> Importantly for the Arctic region, UNLCOS Articles 197 through 201 provide for regional cooperation to protect the marine environment, prevent pollution and collaboration on scientific research sharing data.<sup>60</sup>

A joint declaration concluded at Ilulissat, Greenland, in 2008 by the five littoral Arctic states underscored

an extensive international legal framework applies to the Arctic Ocean, that 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.<sup>61</sup>

Thus, the five Arctic littoral states reaffirmed their commitment to UNCLOS and, as such, this legal framework remains the core of the Arctic constitutive process. Because of the melting sea

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<sup>58</sup> UNCLOS was concluded and opened for State party signature at Montego Bay, Jamaica on 10 December 1982. The United States is not a party although abides by the provisions of the convention that reflect customary international law.

<sup>59</sup> See Davor Vidas, *Sea-Level Rise and international Law: At the Convergence of Two Epochs*, 4 CLIMATE LAW, 70, 70-84 (2014).

<sup>60</sup> See generally United Nations Convention on the Law of the Sea art. 197-201, Dec. 10, 1982, 21 I.L.M. 1245.

<sup>61</sup> THE ILULISSAT DECLARATION: ARCTIC OCEAN CONFERENCE, ILULISSAT, GREENLAND (May 28, 2008), [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).

ice, the law of the sea will be applied in new conditions yielding new navigational routes, claims to newly exploitable continental shelves within and beyond 200 miles, and new fish stock migration patterns associated with fishing activities.

The International Maritime Organization (IMO), a United Nations agency, oversees important conventions pertaining to ocean activities. These include the Safety of Life at Sea Convention (SOLAS) adopted in response to the Titanic disaster in 1912 and subsequently revised, the Prevention of Pollution from Ships (MARPOL), adopted in 1973, and the Standards for Training, Certification, and Watchkeeping for Seafarers (SCTW), adopted in 1978 and amended in 1995, and the Polar Code which came into effect January 1, 2017. The Polar Code is implemented through SOLAS and MARPOL.

The Arctic Council is a relatively new intergovernmental organization that is assuming an important role in the constitutive process. In this volume, the institution is considered in detail by Matthew Richwalder in his piece, "The Arctic Council: Twenty Years in the Making and Moving Forward." Although not a treaty body and lacking legal personality, the Council has been effective in performing certain decision functions bearing on the constitutive process of the Arctic. The Council is a critical intelligence arena -- gathering, processing, and disseminating scientific information. Most of the work is accomplished in working groups that meet regularly and directly overseen by Senior Arctic Officials who liaise with member state ministers. It is a forum where hard science bears on the Arctic environment, social science trends bears on Arctic communities, and economic developments are appraised and shared with state and non-state actors. Thus, the Council performs key promotion functions catalyst for authoritative policy and prescriptions.<sup>62</sup>

Although the Arctic Council was not designed to be prescriptive, it has mobilized two important prescriptive instruments. The first instrument is the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (SAR agreement) was signed in Nuuk, Greenland, on May 12, 2011.<sup>63</sup> This agreement is the first treaty made under the auspices of the Arctic Council. The second instrument is the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic signed at Kiruna on May 15, 2013.<sup>64</sup> The five littoral Arctic Ocean states declared the intention to contribute actively to the work of the Arctic Council and other relevant international fora.<sup>65</sup> As Dr. Svein Rottem has concluded, "...the Arctic Council can be expected to remain a decision-shaping body rather than a decision-making one."<sup>66</sup>

Increasingly important in the Arctic constitutive process is the OSPAR Commission.<sup>67</sup> A 1998 annex on biodiversity and ecosystems covers non-polluting human activities that can

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<sup>62</sup> The function of promotion in a process of decision is to propose and to advocate prescription. HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* 1193 (1992).

<sup>63</sup> The agreement divides up SAR responsibilities for the Arctic Ocean among Finland and Sweden, Denmark, Iceland, the United States, Canada and the Russian Federation. The Russian Federation has SAR responsibility for nearly half the Arctic. AGREEMENT ON COOPERATION ON AERONAUTICAL AND MARITIME SEARCH AND RESCUE IN THE ARCTIC, made at Nuuk, Greenland, (May 12, 2011), <http://www.ifrc.org/docs/idrl/N813EN.pdf>.

<sup>64</sup> UNITED STATES DEPARTMENT OF STATE: AGREEMENT ON COOPERATION ON MARINE OIL POLLUTION PREPAREDNESS AND RESPONSE IN THE ARCTIC, FACT SHEET (May 15, 2013), <http://www.state.gov/r/pa/prs/ps/2013/05/209406.htm>.

<sup>65</sup> THE ILULISSAT DECLARATION, *supra* note 61.

<sup>66</sup> Svein Vigeland Rottem, *A Note on the Arctic Council Agreements*, 49 OCEAN DEV. AND INTL. LAW 150, 56 (2015).

<sup>67</sup> OSPAR is named for the Oslo and Paris Conventions -"OS" for Oslo and "PAR" for Paris.

adversely affect the sea. The OSPAR member governments are Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. The organization is rooted in the 1972 Oslo Convention against dumping and was subsequently extended to land-based sources and offshore industry through the 1974 Paris Convention, which was incorporated in in the 1992 OSPAR Convention.<sup>68</sup> A 1998 annex on biodiversity covers non-polluting human activities that can adversely affect the sea.

Law-making is a process that communicates policy, indicates control, and generates expectations of authority.<sup>69</sup> The effective authority of a legal system depends upon the shared interests of the participants in that system, which is how the public order of the Arctic must be appraised. The evolving constitutive process must honor inclusive over exclusive interests. Responsible Arctic stewardship can only be secured by those processes of decisions consistent with regional and world community expectations about what is right, effective, and in the common interest.<sup>70</sup>

### III. ARCTIC FUTURES

Achieving an Arctic balance that accommodates the demands of special claims of near and distant State and non-state actors in the greater common interest and against conditions of climate change, new shipping routes, commercial fishing, maritime security, energy demands, and environmental protection is a critical challenge. As Betsy Baker has written, “How the regional regime for the marine Arctic will develop depends in part on how the balance will be struck between the interests and roles of the many actors that claim equities in the region.”<sup>71</sup>

As the United States hands over the chairmanship of the Arctic Council and a new government assumes power, 2017 is a key year for Arctic appraisal.<sup>72</sup> Law and policy frameworks must account for new shipping patterns, expanded oil and gas development, new business ventures, enhanced commercial fishing, and a changing polar security environment that includes naval force projection, nuclear deterrence, risks of terrorism and threats posed to the Arctic marine environment. Founder of the Climate Policy Center and former Deputy Assistant Secretary of State, Rafe Pomerance, inquired at the Maine Arctic Forum, “governments have not asked the question, really, in a focused way, what is the arctic we have to have? Where do we draw the line? What is the arctic future? Or do we just let it continue to unravel, and we suffer the consequences.”<sup>73</sup>

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<sup>68</sup>OSPAR COMMISSION, *How OSPAR works*, <http://www.ospar.org/about/how> (last visited Jan. 13, 2017).

<sup>69</sup> W. Michael Reisman, *International Law-making: A Process of Communication*, 101 PROCEEDINGS OF THE AM. SOC'Y. INT'L. L. (1981).

<sup>70</sup> “It is the perception of interdependence in community process that leads participants to appreciate the relevance of pursuing common interests and motivates them to clarify it. Myres S. McDougal, W. Michael Reisman, Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS LAW REV. 3, 810 (1988).

<sup>71</sup> Betsy Baker, *The Developing Regional Regime for the Marine Arctic*, in *THE LAW OF THE SEA AND THE POLAR REGIONS*, 37 (Erik J. Molenaar, Alex G. Oude Elferink, Donald R. Rothwell, and Brill Nijhoff eds., 2013).

<sup>72</sup> “The core problem of appraisal is the assignment of responsibility for success or failure in the realization of the goal values of public order.” HAROLD D. LASSWELL AND MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 1245 (1992).

<sup>73</sup> THE MAINE ARCTIC FORUM, October 3, 2016 Portland, Maine. Transcript on file with author.

One plausible Arctic future is that human activities could be restricted by a legal regime that embraces an ecosystem-based approach. At the Maine Arctic Forum, Executive Director of the Maine Port Authority John Henshaw noted, “Given the Arctic Council is meeting here this week, there is an opportunity to understand the interface between science and policy. I think it’s a moment in time that we have to help shape the future of the region.”<sup>74</sup> The Arctic ecosystem is increasingly fragile owing to climate change, progressive human activity, and ocean acidification, especially because the Arctic Ocean contains ecologically and biologically significant areas. Many of these areas are beyond national jurisdiction. Hence, an international legal instrument for conservation and sustainable use of marine resources beyond the competence of coastal states is needed. The United Nations General Assembly, in Resolution 69/292 of June 19, 2015, decided “. . . to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”<sup>75</sup> However the Central Arctic Ocean, where all states enjoy high seas freedoms<sup>76</sup> and is enclosed by the Exclusive Economic Zones of five coastal states enjoying distinct rights and jurisdictions,<sup>77</sup> could become a tense arena with conflicting demands and claims for conservation and exploitation of resources.

The public order of the Arctic will turn on how claims are managed and resolved. For example, Canada and Denmark, by virtue of Greenland, both claim a minor feature called Hans Island, which is a rock between Greenland and Canada’s Ellesmere Island. In the future, ice melt may render natural resources accessible. At present this is a frozen dispute managed by the claimants.<sup>78</sup> As global warming renders the Northwest Passage a more viable trans-Arctic shipping route, jurisdictional issues will arise as Ottawa maintains that the passage is an inland waterway and thus sovereign Canadian territory whereas the United States, the European Union, and others assert that the passage constitutes an international strait between two high seas. The United States and Canada have yet to conclude a bilateral boundary in the Beaufort Sea. In 1990, the United States and Russia (USSR) signed an agreement regarding a disputed area of the Bering Sea. The U.S. Senate consented to ratification although the Russian Duma has yet to approve the accord. Russia has taken the position that the Baker-Shevardnadze Agreement was invalid, claiming that USSR Foreign Minister Eduard Shevardnadze did not effectively represent Russian interests.

At the Maine Arctic Forum, Ambassador David Balton underscored, “There is an order, but it is changing very rapidly. There is no threat of armed conflict, no terrorism, mass migration nor narco-trafficking in the region. Although nations are claiming the sea floor, there is a process

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<sup>74</sup> *Id.*

<sup>75</sup> UNITED NATIONS GENERAL ASSEMBLY: RESOLUTION 69/292 (July 6, 2015), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/292](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/292).

<sup>76</sup> Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS) Article 87, High Seas freedoms are navigation, overflight, laying submarine cables and pipelines, installation of artificial islands, fishing and marine scientific research.

<sup>77</sup> See United Nations Convention on the Law of the Sea art. 56, Dec. 10, 1982, 21 I.L.M. 1245, “Rights jurisdiction and duties of the coastal State in the Exclusive Economic Zone.”

<sup>78</sup> This is reminiscent of the claim to Machias Seal Island by Canada and the United States that was set aside in the *Gulf of Maine (U.S. v. Canada)* case decided by the International Court of Justice. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada), 1984 I.C.J. 246 (Oct. 12), available at <http://www.icj-cij.org/docket/index.php?sum=346&p1=3&p2=3&case=67&p3=5>.

to determine which part belongs to whom.”<sup>79</sup> A common interest example is the establishment of an Arctic Coast Guard Forum that includes Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the United States. The Arctic Coast Guard Forum is an operationally-focused, consensus-based organization intended to leverage collective resources to foster safe, secure, and environmentally responsible maritime activity in the Arctic.<sup>80</sup> According to Professor Betsy Baker, “the Arctic Ocean and the larger marine Arctic present distinctive opportunities for regional cooperation under the global law of the sea regime.”<sup>81</sup> The public order of the Arctic may not be a Kantian ideal but neither is it a Hobbesian state of nature.<sup>82</sup>

The fundamental problem is how to balance exclusive interests to insure a greater common interest of the Arctic for people and States. Thus, a lingering question is what policy prescriptions, legal instruments and mechanisms might ensure robust and responsive regional governance in an environment affected by ice-melt that is accelerating Arctic-impact events? The problems manifest in overlapping claims to navigation, maritime boundaries, polar safety, maritime security, shipping, energy, indigenous rights, tourism, marine conservation, environmental protection and emerging demands of Arctic interest states such as China, India, Korea, and Singapore. These claims implicate law, climate science, business, and geopolitics. The problem is that State and non-state actors undertake activities to attain a range of outcomes that are not all guided by responsible custodianship. The policy problem raised is access versus control, for whom and by whom. There is an urgent need for robust international law and policy arrangements to effectively accommodate and regulate activities shaped by dramatic climatic transformations. The fundamental question is “Who gets what, when, how?”<sup>83</sup> The answer will shape the Arctic in the public order of the world community.

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<sup>79</sup>Tom Groening, *Maine and the Arctic: Opening waters emblem of environmental disaster, economic opportunity: international group focused on region meets in Portland*, THE WORKING WATERFRONT (Oct. 21, 2016, 6:07pm), <http://www.islandinstitute.org/working-waterfront/maine-and-arctic-opening-waters-emblem-environmental-disaster-economic>.

<sup>80</sup>Lt. Katie Braynard, *Establishment of the Arctic Coast Guard Forum*, COAST GUARD COMPASS (Oct. 30, 2015), <http://coastguard.dodlive.mil/2015/10/establishment-of-the-arctic-coast-guard-forum/>.

<sup>81</sup>Betsy Baker, *The Developing Regional Regime for the Marine Arctic*, in THE LAW OF THE SEA AND THE POLAR REGIONS, 35 (Erik J. Molenaar, Alex G. Oude Elferink, Donald R. Rothwell, and Brill Nijhoff eds., 2013).

<sup>82</sup>Andrew C. Revkin, *5 Countries Agree To Talk, Not Compete, Over the Arctic*, THE NEW YORK TIMES, (May 29, 2008), <http://www.nytimes.com/2008/05/29/science/earth/29arctic.html>.

<sup>83</sup>Harold Lasswell used this question to define politics in his classic book, POLITICS: WHO GETS WHAT, WHEN, HOW (New York: Whittlesey House) (1936).