

2015

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Recommended Citation

Shiloh Rainwater, *International Law and the "Globalization" of the Arctic: Assessing the Rights of Non-Arctic States in the High North*, 30 Emory Int'l L. Rev. 115 (2015).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol30/iss1/6>

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INTERNATIONAL LAW AND THE “GLOBALIZATION” OF THE ARCTIC: ASSESSING THE RIGHTS OF NON-ARCTIC STATES IN THE HIGH NORTH

ABSTRACT

Over the last two decades, accelerating climate change has catalyzed the globalization of Arctic affairs. As the polar ice sheet thaws to record-low levels, non-Arctic states are increasingly vying for a say in Arctic governance and economic development. The Arctic Council’s 2013 decision to admit six new non-Arctic states as permanent observers served to legitimize the interests of these distant interests in the region. Still, despite this largely symbolic gesture, non-Arctic states remain significantly disadvantaged with respect to pursuing their Arctic interests. Under the United Nations Convention on the Law of the Sea, most of the Arctic’s resources and both currently-accessible Arctic sea lanes are exclusively controlled by the littoral Arctic states. Regional actors also dominate arctic governance, as non-Arctic states are denied speaking and voting privileges at the Arctic Council. This Comment argues that these disparities not only harm the interests of non-Arctic states, but also undermine the effectiveness of the Arctic Council. This Comment concludes that a more inclusive, international approach to Arctic governance is imperative to address the challenges of a globalized Arctic.

INTRODUCTION

The Arctic region is the last global frontier and a region with enormous and growing geostrategic, economic, climate, environment, and national security implications for the United States and the world.

—U.S. Secretary of State John Kerry¹

The Arctic Circle, once a frozen and inaccessible backwater under the exclusive dominion of the littoral Arctic states, is rapidly becoming globalized. In May 2013, the Arctic Council—the region’s leading governing body—voted to grant permanent observer status to six new non-Arctic states.² With the exception of Italy, all are Asian countries that stand to benefit from newly accessible shipping routes and resource deposits in the thawing Arctic: China, Japan, India, South Korea, and Singapore.³ While permanent observers are granted only limited rights, the Council’s expansion to admit these distant states signals an important recognition that Arctic affairs are no longer “strictly regional,” as climate change makes the Arctic’s vast new economic opportunities accessible to the world.⁴ As the Danish Foreign Minister stated, “it reflects the fact that many countries outside the Arctic area also have legitimate interests in the development of the region.”⁵

Notwithstanding this recognition, non-Arctic states remain significantly disadvantaged by the legal regimes and norms administering the Arctic region. First, under the United Nations Convention on the Law of the Sea (UNCLOS),⁶ most of the Arctic’s natural resources are divided among the sovereign jurisdictions of the five littoral Arctic states—Russia, Canada, Norway, Denmark (via Greenland and the Faroe Islands), and the United States (U.S.).⁷ Non-Arctic states are thus severely limited in their ability to exploit

¹ Press Release, John Kerry, Secretary, U.S. Dep’t of State, Secretary Kerry Announces Department Will Establish a Special Representative for the Arctic Region (Feb. 14, 2014), <http://www.state.gov/secretary/remarks/2014/02/221678.htm> [hereinafter Secretary Kerry Announces].

² Steven Lee Myers, *Arctic Council Adds 6 Nations as Observer States, Including China*, N.Y. TIMES, May 15, 2013, at A9.

³ *Id.*

⁴ Shiloh Rainwater, Comment, *Race to the North: China’s Arctic Strategy and its Implications*, 66 NAVAL WAR C. REV. 62, 76 (2013).

⁵ Chris Irvine, *China Granted Permanent Observer Status at Arctic Council*, TELEGRAPH (May 15, 2013), <http://www.telegraph.co.uk/news/worldnews/asia/china/10060624/China-granted-permanent-observer-status-at-Arctic-Council.html>.

⁶ See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁷ See *infra* Part II.B.2.

these resources. Second, both currently-accessible trans-Arctic shipping routes are claimed by Russia and Canada as “internal waters” under international law, subject to the sovereign control of Moscow and Ottawa.⁸ As a result, foreign commercial vessels may face significant restrictions when navigating the Arctic, including denial of access to the region. Third, although non-Arctic observers are granted some influence at the Arctic Council, Arctic governance remains dominated by the circumpolar states.⁹ Non-Arctic states are therefore limited in their ability to participate in designing the rules and norms regulating Arctic affairs.

These disadvantages raise important questions as to the extent to which non-Arctic states will—and should—participate in Arctic governance and the development of newly accessible resource deposits and sea lanes in the Arctic region. While international law certainly privileges the rights of regional actors, distant states are entitled to some say in Arctic affairs, although the exact measure of that entitlement is somewhat unclear due to unresolved disputes among the Arctic states.¹⁰ What is clear, however, is that climate change has transformed the Arctic from an insular region with limited geopolitical and geoeconomic relevance into the next great frontier of opportunity for countries around the world. It is imperative, therefore, that the Arctic states take steps to accommodate the interests of distant actors when developing the Arctic region.

This Comment will analyze the legal rights of non-Arctic states in the Arctic region, and will present recommendations for circumpolar actors to respond to the interests of these states. Part I will explore the environmental and economic conditions catalyzing the “globalization” of the Arctic, and will proceed with a case study of China’s embryonic Arctic strategy. Part II will analyze the two primary legal arrangements governing Arctic affairs—UNCLOS and the Arctic Council—to determine the extent to which they restrict and/or expand the rights of non-Arctic states in the Arctic region. Particular consideration will be given to the practical and symbolic implications of the Arctic Council’s admission of new observers in 2013. Finally, Part III will analyze the structural disparities of the current Arctic regime, and will propose suggestions for Arctic governance reform. Suggestions will include enhancing the participatory rights of non-Arctic

⁸ See *infra* Part II.B.3.

⁹ See *infra* Part II.C.

¹⁰ See *infra* Parts II.B.2, II.B.3.

observers at the Arctic Council and adopting measures to increase coordination between regional forums.

I. THE CHANGING ARCTIC: THAW, GEOPOLITICS, AND THE GLOBALIZATION OF THE HIGH NORTH

A. *Climate Change and Economic Potential*

The Arctic landscape is transforming at an alarming rate, as regional temperatures rise twice as fast as the global average.¹¹ Since the 1980s, Arctic sea-ice coverage has diminished by seventy-five percent,¹² reaching record-low levels in 2007 and 2012.¹³ September 2014 marked the sixth-lowest level,¹⁴ capping off ten consecutive years of the ten-lowest recorded ice extents.¹⁵ Given this trend, the Arctic Ocean could experience ice-free summers by 2040,¹⁶ though some climate models predict such conditions as early as 2016.¹⁷ Indeed, certain areas of the Arctic Ocean and its peripheral seas are already ice-free during the summer months,¹⁸ leading to unprecedented levels of economic activity in the region.

Of the various natural resources made accessible by the melting of the polar ice sheet, hydrocarbons are the primary commercial target.¹⁹ According to the

¹¹ Christopher Joyce, *Arctic is Warming Twice as Fast as World Average*, NPR (Dec. 18, 2014, 3:36 AM), <http://www.npr.org/2014/12/18/371438087/arctic-is-warming-twice-as-fast-as-world-average>.

¹² KATHRYN D. SULLIVAN, U.S. DEP'T OF STATE, NOAA'S ARCTIC ACTION PLAN 2 (2014).

¹³ Maria-José Viñas, *Arctic Sea Ice Hits Smallest Extent in Satellite Era*, NASA (Sept. 19, 2012), <http://www.nasa.gov/topics/earth/features/2012-seaicemin.html>. Sea ice levels in 2014 melted to the sixth-lowest level on record. Doyle Rice, *Arctic Sea Ice Melts to 6th-lowest Level on Record*, USA TODAY (Sept. 22, 2014), <http://www.usatoday.com/story/weather/2014/09/22/arctic-sea-ice-extent-minimum/16064037/>.

¹⁴ Press Release, NASA, 2014 Arctic Sea Ice Minimum Sixth Lowest on Record (Sept. 22, 2014), <http://www.nasa.gov/press/2014/september/2014-arctic-sea-ice-minimum-sixth-lowest-on-record/#.VEbXmv14rYg>.

¹⁵ SULLIVAN, *supra* note 12.

¹⁶ *Id.*

¹⁷ Nafeez Ahmed, *U.S. Navy Predicts Summer Ice Free Arctic by 2016*, GUARDIAN (Dec. 9, 2013, 8:39 AM), <http://www.theguardian.com/environment/earth-insight/2013/dec/09/us-navy-arctic-sea-ice-2016-melt>. Indeed, Arctic warming has generally outpaced climate models. See *Beating a Retreat*, ECONOMIST (Sept. 24, 2011), <http://www.economist.com/node/21530079>; Suzanne Goldenberg, *Climate Change Poses Growing Threat of Conflict in the Arctic, Report Finds*, GUARDIAN (May 14, 2014, 12:54 AM), <http://www.theguardian.com/environment/2014/may/14/climate-change-arctic-security-threat-report> (“Things are accelerating in the Arctic faster than we had looked at . . . changes there appear to be much more radical than we envisaged.”).

¹⁸ SULLIVAN, *supra* note 12.

¹⁹ See Terry Macalister, *Exhausted Global Oil Supplies Make Arctic the New Hydrocarbon Frontier*, GUARDIAN (July 5, 2011, 10:05 AM), <http://www.theguardian.com/environment/2011/jul/05/oil-supplies-arctic>.

U.S. Geological Survey, roughly twenty-two percent of the world's "undiscovered, technically recoverable" petroleum is located in the Arctic region, including thirteen percent of the world's undiscovered oil and thirty percent of its undiscovered natural gas.²⁰ "About eighty-four percent of the estimated resources are expected to occur [in] offshore [areas]."²¹ In addition, 240 billion barrels of already-proven oil and natural gas reserves—about ten percent of the world's known petroleum—are located in onshore fields north of the Arctic Circle.²² As global reserves dwindle (leading to ongoing predictions of impending "peak oil"²³—the point at which oil demand eclipses global supplies), a new "Arctic Gold Rush"²⁴ is underway to exploit these once-frozen resource deposits.²⁵

Arctic warming is also leading to increased shipping activity in the region. Compared with traditional routes navigating the Suez and Panama Canals, newly accessible trans-Arctic shipping lanes are significantly shorter, offering reduced transit times and lower fuel costs. For example, the Northern Sea Route, which runs along Russia's Arctic coastline, cuts the distance from China to Northern Europe via the Suez Canal by forty percent.²⁶ Similarly, the Northwest Passage, made up of seven possible routes weaving through

²⁰ Jessica Robertson & Brenda Pierce, *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, U.S. GEOLOGICAL SURVEY NEWSROOM (July 23, 2008, 1:00 PM), http://www.usgs.gov/newsroom/article.asp?ID=1980#.VCcy_1dV8E. The presence of these resources in the Arctic has been generally known for decades, yet "full-scale resource development" has only recently become "technically and economically feasible" with the melting of the polar ice sheet. See ERNST & YOUNG, *ARCTIC OIL AND GAS 2* (2013). In fact, "[s]ome subarctic fields were discovered [as early as] the 1920s." Andrew Bishop et al., *Petroleum Potential of the Arctic: Challenges and Solutions*, OILFIELD REV., Winter 2010-11, at 38. However, the "discovery of the first true Arctic commercial hydrocarbon field . . . occurred [in 1968]." *Id.* at 36.

²¹ Robertson & Pierce, *supra* note 20.

²² KENNETH J. BIRD ET AL., U.S. GEOLOGICAL SURV., *CIRCUM-ARCTIC RESOURCES APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE 1* (2008).

²³ Roger Parloff, *Peter Thiel: Peak Oil Lives!*, FORTUNE (Oct. 24, 2014, 7:00 AM), <http://fortune.com/2014/10/24/peter-thiel-peak-oil-lives/>.

²⁴ See generally ROGER HOWARD, *THE ARCTIC GOLD RUSH: THE NEW RACE FOR TOMORROW'S NATURAL RESOURCES* (2009).

²⁵ Andrew Critchlow, *Arctic Drilling is Inevitable: If We Don't Find Oil in the Ice, Then Russia Will*, TELEGRAPH (Sept. 7, 2014, 8:57 PM), <http://www.telegraph.co.uk/finance/newsbysector/energy/11080635/Arctic-drilling-is-inevitable-if-we-dont-find-oil-in-the-ice-then-Russia-will.html>. See, e.g., Atle Staalesen, *Arctic Petroleum Year 2030*, BARENTS OBSERVER (Mar. 8, 2011), <http://barentsobserver.com/en/sections/energy/arctic-petroleum-year-2030> (explaining that by 2030 Russian oil company Gazprom "intends to produce an annual 200 billion cubic meters of gas and 10 million tons of oil" in the Arctic).

²⁶ Desmond Upcraft, *Arctic Transit: Northern Sea Route*, ROYAL BELGIAN INST. OF MARINE ENG'RS, http://www.gallois.be/ggmagazine_2013/gg_02_03_2013_90.pdf (last visited Oct. 1, 2015).

Canada's high Arctic Archipelago,²⁷ provides a forty percent shortcut between the Pacific and Atlantic Oceans over the Panama Canal route.²⁸ A third Transpolar Sea Route through the center of the Arctic Ocean could cut an additional twenty percent off transit time from both of these routes; however, this route will not be navigable until around 2050 when the sea ice at the North Pole melts to sufficiently thin levels for "icebreakers to carve a straight path between the Pacific and Atlantic Oceans."²⁹

To be sure, commercial traffic through the Arctic has increased markedly in recent years as warming makes shipping more technically and economically viable. Since 2010, the Northern Sea Route has been consistently ice-free during the late summer months each year, opening for six weeks in 2014.³⁰ Transits have significantly increased over this period: whereas just four commercial vessels navigated the Northern Sea Route in 2010,³¹ seventy-one made the trip in 2013 (a fifty-four percent increase over 2012).³² Total cargo volume has likewise increased, rising from 1.26 million tons in 2012 to 1.36 million in 2013;³³ by 2020, that figure could reach sixty-five million tons and by 2030 it could rise to 120 million.³⁴ Long-term climate forecasts tend to support these estimates: by mid-century, "most common open-water ships will be able, without the help of icebreakers, to cross the Northern Sea Route."³⁵ With this in mind, Russian officials have argued that the Northern Sea Route will soon "rival traditional trade lanes in service fees, security and quality."³⁶

²⁷ Andrea Charron, *The Northwest Passage Shipping Channel: Sovereignty First and Foremost and Sovereignty to the Side*, 7 J. MIL. & STRATEGIC STUD. 1, 1 (2005).

²⁸ Becky Oskin, *Cargo Ship Makes 1st-Ever Solo Trip Through Northwest Passage*, LIVE SCI. (Oct. 1, 2014, 3:52 PM), <http://www.livescience.com/48105-cargo-ship-solos-northwest-passage.html>.

²⁹ Emma Innes, *By 2050 the Arctic Ice Sheet Will be so Thin that Ships Could be Sailing Across the North Pole, Experts Predict*, DAILY MAIL (Mar. 4, 2013, 3:04 PM), <http://www.dailymail.co.uk/sciencetech/article-2288031/By-2050-Arctic-ice-sheet-ships-sailing-North-Pole-experts-predict.html>.

³⁰ *Ice Experts Review Northern Sea Route*, MAR. EXEC. (Oct. 28, 2014, 10:35 PM), <http://www.maritime-executive.com/article/Ice-Experts-Review-Northern-Sea-Route-2014-10-28> [hereinafter *Ice Experts*].

³¹ Trude Petterson, *Slow Start on the Northern Sea Route*, BARENTS OBSERVER (Aug. 27, 2012), <http://barentsobserver.com/en/arctic/slow-start-northern-sea-route-27-08>.

³² Kathrin Keil, *Evaluation of the Arctic Shipping Season 2013*, ARCTIC INST. (Jan. 13, 2014), <http://www.thearcticinstitute.org/2014/01/evaluation-of-arctic-shipping-season.html>. See also Lucy H. London, *LNG Carrier Lined up for Northern Sea Route Transit*, TRADEWINDS (Sept. 5, 2014), <http://www.tradewindsnews.com/weekly/344070/LNG-carrier-lined-up-for-Northern-Sea-Route-transit> (stating that in 2014, Russia received more than 604 applications to sail the route, approving 568 of those applications).

³³ Keil, *supra* note 32.

³⁴ *Id.*

³⁵ Innes, *supra* note 29.

³⁶ Gleb Bryanski, *Russia's Putin Says Arctic Trade Route to Rival Suez*, REUTERS (Sept. 22, 2011, 4:04 PM), <http://ca.reuters.com/article/topNews/idCATRE78L5TC20110922>.

Global shipping companies appear to agree somewhat with this assessment. In 2014, Russia received a record 604 applications to sail the route³⁷ (up from 421 in 2013),³⁸ indicating the shipping industry's increasing "expectations for higher profit margins" by utilizing the shortcut.³⁹

Across the Arctic Ocean in the Canadian Archipelago, the Northwest Passage is also experiencing increased traffic, albeit at a more modest rate. From 1903 to the end of the 2014 shipping season, a total of 220 vessels sailed the whole length of the passage.⁴⁰ Nearly half (109) of those voyages occurred after 2007⁴¹ when overall Arctic sea ice coverage melted to a record-low level⁴² and the passage first opened up to shipping in a "viable way."⁴³ However, even with less ice clogging the route and overall transits on the rise, commercial voyages remain relatively infrequent. Since 1903, just four tankers have made the trip, including one in 2011 and another in 2012.⁴⁴ Moreover, it was not until 2013 that a bulk carrier first navigated the passage, even then requiring an icebreaker escort.⁴⁵ Various factors explain this limited commercial traffic: parts of the route are shallow; Canada has not prioritized infrastructure development in the passage; and ice conditions in the passage remain unpredictable.⁴⁶ This latter point is particularly instructive. For example, 2014 was the first time in five years that the passage did not fully open⁴⁷ as parts of the route were blocked by thick, hazardous multi-year ice.⁴⁸ Interestingly, however, 2014 was also the first time that a cargo ship

³⁷ London, *supra* note 32.

³⁸ Bob Weber, *More Northwest Passage Travel Planned by Danish Shipper*, CANADIAN PRESS (Jan. 3, 2014, 7:52 AM), <http://www.cbc.ca/news/canada/north/more-northwest-passage-travel-planned-by-danish-shipper-1.2482731>.

³⁹ *Ice Experts*, *supra* note 30.

⁴⁰ R. K. HEADLAND, SCOTT POLAR RES. INST., TRANSITS OF THE NORTHWEST PASSAGE TO THE END OF THE 2014 NAVIGATION SEASON I (2014), <http://www.americanpolar.org/wp-content/uploads/2014/10/NWP-2014-X-5-layout-for-PDF.pdf>. Note that this only accounts for complete transits of the Northwest Passage; "incomplete transits are too numerous to record." *Id.* at 11.

⁴¹ *Id.* at 8.

⁴² Viñas, *supra* note 13.

⁴³ Ker Than, *Arctic Meltdown Opens Fabled Northwest Passage*, LIVE SCI. (Sept. 14, 2007, 10:59 AM), <http://www.livescience.com/1884-arctic-meltdown-opens-fabled-northwest-passage.html>.

⁴⁴ Weber, *supra* note 38.

⁴⁵ HEADLAND, *supra* note 40, at 10.

⁴⁶ See Paul Waldie, *A Reality Check on the Northwest Passage 'boom'*, GLOBE & MAIL (Jan. 7, 2014), <http://www.theglobeandmail.com/report-on-business/breakthrough/will-cold-dark-northwest-passage-see-more-ships/article16231502/>.

⁴⁷ *Ice Experts*, *supra* note 30.

⁴⁸ See Ollie Williams, *Arctic Ambition: The Race to Sail the Northwest Passage Heats Up*, CNN (Sept. 8, 2014, 1:03 PM), <http://edition.cnn.com/2014/09/08/sport/arctic-sailing-northwest-passage/>.

successfully navigated the entire Northwest Passage without an icebreaker escort.⁴⁹ By mid-century, this could be a regular occurrence as the melting ice yields to navigation by solo ice-strengthened ships and even some ordinary vessels.⁵⁰

In sum, climate change has transformed the Arctic from a frozen wasteland into the “last global frontier”⁵¹ of economic opportunity. While newly-unlocked Arctic hydrocarbons will help alleviate global energy needs, trans-Arctic sea lanes will impact global trade patterns as shipping through the region becomes more cost-effective. Still, overall economic activity in the Arctic is fairly limited at this point,⁵² and will remain that way for some time due to residual challenges associated with operating in the region.⁵³ The benefits of Arctic shipping, for example, are offset by the need for ice-hardened vessels and icebreaker escorts, the “unpredictability of the ice,” and the “shortness of the shipping season.”⁵⁴ To ensure that shipping through the Arctic is safe and economically viable, the Arctic states must develop “adequate infrastructure, such as icebreakers, ice-class vessels, technical services, emergency response mechanisms and search and rescue facilities.”⁵⁵ Only then will the Arctic become a key locus of global economic activity.

⁴⁹ Jeremy Plester, *Events That Mark Arctic Warming*, GUARDIAN (Oct. 26, 2014), <http://www.theguardian.com/news/2014/oct/26/weatherwatch-arctic-warming-northwest-passage-siberia>.

⁵⁰ Innes, *supra* note 29.

⁵¹ Secretary Kerry Announces, *supra* note 1.

⁵² See Keil, *supra* note 32 (showing that while shipping through the Northern Sea Route is on an upward trend, it accounts for a very small percentage of global trade and compares the seventy-one transits in 2013 with roughly 18,000 annual transits through the Suez Canal).

⁵³ See Alister Doyle, *High Arctic Costs Deter Business Despite Thaw*, REUTERS (Oct. 27, 2014, 9:03 AM), <http://www.reuters.com/article/2014/10/27/business-arctic-idUSL6N0SJ3YW20141027> (stating that other factors such as falling global oil prices are also leading businesses to look elsewhere for cheaper drilling opportunities). See also Steve Banker, *Logistics Impacts From Widening the Panama Canal*, FORBES (Sept. 6, 2013, 9:22 AM), <http://www.forbes.com/sites/stevebanker/2013/09/06/logistics-impacts-from-widening-the-panama-canal/> (stating that the current Panama Canal widening project will help accommodate more traffic through the route, particularly a “new class of supersized cargo ships . . . that are more than twice as big as the historical cargo shipping fleet.”).

⁵⁴ *Short and Sharp*, ECONOMIST (June 16, 2012), <http://www.economist.com/node/21556803>.

⁵⁵ Vijay Sakhuja, *Russia Commits to Building Northern Sea Route Infrastructure*, VALDAI CLUB (Aug. 8, 2014, 4:05 PM), <http://valdaiclub.com/economy/71280.html>. Russia has taken the lead in this regard, building several new icebreakers. See *New Russian Nuclear-Powered Icebreakers Named ‘Arctic,’ ‘Siberia’ and ‘Ural’*, SPUTNIK NEWS (Aug. 7, 2014, 4:23 PM), <http://en.ria.ru/russia/20140807/191814028/New-Russian-Nuclear-Powered-Icebreakers-Named-Arctic-Siberia-and.html>. Russia has also started building military bases in its Arctic territory. Alexey Eremenko, *Russia Starts Building Military Bases in the Arctic*, MOSCOW TIMES (Sept. 8, 2014), <http://www.themoscowtimes.com/business/article/russia-starts-building-military-bases-in-the-arctic/506650.html>. At the same time, Russia’s overall Arctic strategy generally emphasizes the need for additional infrastructure investments. See Sakhuja, *supra* note 55.

B. *Geopolitics and Distant Interests in the High North*

The Arctic Circle accounts for just six percent of the world's surface area,⁵⁶ yet it is rapidly becoming “one of the most hotly contested territories on Earth.”⁵⁷ Unlike the Antarctic where territorial claims are effectively barred by the 1959 Antarctic Treaty,⁵⁸ the Arctic region is “up for grabs” under international law;⁵⁹ as the Arctic thaws, circumpolar actors are therefore “racing to carve up the region” and claim its untapped riches.⁶⁰ Until recently, this “scramble for the Arctic”⁶¹ posed only limited challenges for regional governance. Territorial disputes arising over the last few decades, for example, were resolved via bilateral cooperation, not conflict.⁶² More recently, however, the littoral Arctic states have begun staking overlapping claims to the center of the Arctic Ocean⁶³ and have grown increasingly assertive with respect to their sovereignty in the region.⁶⁴ As a result, geopolitical tensions among the Arctic

⁵⁶ PHILIP BUDZIK, U.S. ENERGY INFO. ADMIN., ARCTIC OIL AND NATURAL GAS POTENTIAL 1 (2009), http://www.eia.gov/oiaf/analysispaper/arctic/pdf/arctic_oil.pdf.

⁵⁷ Ty McCormick, *Arctic Sovereignty: A Short History*, FOREIGN POL'Y (May 7, 2014), http://www.foreignpolicy.com/articles/2014/05/07/anthropology_of_an_idea_arctic_sovereignty_oil.

⁵⁸ See Antarctic Treaty art. 4, Dec. 1, 1959, 402 U.N.T.S. 71.

⁵⁹ McCormick, *supra* note 57.

⁶⁰ Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFF., Mar.-Apr. 2008, at 64. See generally MICHAEL BYERS, WHO OWNS THE ARCTIC? UNDERSTANDING SOVEREIGNTY DISPUTES IN THE NORTH (2010) [hereinafter BYERS, WHO OWNS THE ARCTIC?].

⁶¹ See Jayaseelan Naidoo, *The Scramble for the Arctic and the Dangers of Russia's Race for Oil*, HUFFINGTON POST (Nov. 6, 2013, 2:00 PM), http://www.huffingtonpost.com/jayaseelan-naidoo/the-scramble-for-the-arctic_b_4223661.html.

⁶² MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 6 (2013) [hereinafter BYERS, INTERNATIONAL LAW AND THE ARCTIC].

⁶³ *Denmark Challenges Russia and Canada Over North Pole*, BBC NEWS (Dec. 15, 2014), <http://www.bbc.com/news/world-europe-30481309>.

⁶⁴ See Tom Parfitt, *Russia Plants Flag on North Pole Seabed*, GUARDIAN (Aug. 2, 2007), <http://www.theguardian.com/world/2007/aug/02/russia.arctic>. In 2007, Russia planted a flag at the North Pole, *id.*, and resumed Cold War-era strategic bomber flights in the Arctic, see *Russia Restarts Cold War Patrols*, BBC NEWS (Aug. 17, 2007), <http://news.bbc.co.uk/2/hi/europe/6950986.stm>. Russia has reopened Arctic military bases, see Karl Ritter, *Cold War-Style Spy Games Return to Melting Arctic*, ASSOC. PRESS (June 11, 2014), <http://bigstory.ap.org/article/cold-war-style-spy-games-return-melting-arctic>; is adding new nuclear attack submarines to its Northern Fleet, see Matthew Bodner, *Russia's Northern Fleet Gets New Nuclear Attack Submarine*, MOSCOW TIMES (June 17, 2014), <http://www.themoscowtimes.com/business/article/russia-s-northern-fleet-gets-new-nuclear-attack-submarine/502078.html>; and plans to “deploy troops along the entire length of the Arctic,” see Thomas Nilsen, *Russia Says No Need for NATO in Arctic, Expands Own Military Presence*, BARENTS OBSERVER (Oct. 22, 2014), <http://barentsobserver.com/en/security/2014/10/russia-says-no-need-nato-arctic-expands-own-military-presence-22-10>. For its part, Canada has bolstered its Arctic military forces, see Allan Woods, *Canada Looking at Building Military Bases in Arctic*, STAR (July 14, 2011), http://www.thestar.com/news/canada/2011/07/14/star_exclusive_canada_looking_at_building_military_bases_in_arctic.html, and staked its own claim to the North Pole, see Jenny Johnson, *Who Owns the North Pole?*

states have escalated, fueling speculation of impending conflict in the High North.⁶⁵

Regional stakeholders are not, however, the only players in the emerging Arctic “Great Game.”⁶⁶ Over the last decade, accelerating climate change has catalyzed the “globalization” of the Arctic as an “issue area,”⁶⁷ as the Arctic melts, non-Arctic states with economic interests in the region are also competing for a say in the development of the Arctic. In short, the Arctic “is evolving from a regional frozen backwater into a global hot issue.”⁶⁸

Although numerous non-Arctic states have expressed their intent to participate in Arctic affairs, all are motivated by similar interests in the warming Arctic; namely, emergent resource exploitation and trans-Arctic shipping opportunities. Detailed analyses of each individual Arctic program are therefore unnecessary. Rather, this section will proceed with a case study of China’s extensive Arctic policies, which are emblematic of its non-Arctic peers’ aspirations and strategic goals in the Arctic region.

1. The People’s Republic of China: The Dragon Heads North

a. China’s Arctic Interests

By virtually every measure,⁶⁹ China’s meteoric ascendance to economic dominance over the last few decades has been the defining narrative of

Debate Heats Up as Climate Change Transforms Arctic, BLOOMBERG (Apr. 4, 2014, 11:08 AM), <http://www.bloomberg.com/news/2014-04-04/who-owns-the-north-pole-debate-heats-up-as-climate-change-transforms-arctic.html> (arguing that the area “is central to defending [its] Arctic sovereignty”). *But see* Michael Byers, *The North Pole is a Distraction*, GLOBE & MAIL (Aug. 20, 2014, 3:00 AM), <http://www.theglobeandmail.com/globe-debate/the-north-pole-is-a-distraction/article20126915/> [hereinafter Byers, *The North Pole is a Distraction*].

⁶⁵ *See, e.g.*, Ben Makuch, *Cold War Games: Russia’s Ramping Up Its Military Presence in the Arctic*, VICE MOTHERBOARD (Sept. 25, 2014, 10:40 AM), <http://motherboard.vice.com/read/cold-war-games-russias-ramping-up-its-military-presence-in-the-arctic>.

⁶⁶ McCormick, *supra* note 57.

⁶⁷ *See* Donald R. Rothwell, *The Law of the Sea and Arctic Governance*, 107 AM. SOC’Y INT’L L. PROC. 271, 273 (2013).

⁶⁸ Alexander Stubb, Minister for Foreign Affairs of Fin., A New Era and Finland’s Arctic Policy, Keynote Speech at the 20th Anniversary Seminar of the Arctic Center (Sept. 29, 2009), <http://www.formin.fi/public/default.aspx?contentid=171839>.

⁶⁹ Paul C. Avey et al., *The Ivory Tower Survey: How IR Scholars See the World*, FOREIGN POL’Y (Jan. 3, 2012), <http://foreignpolicy.com/2012/01/03/the-ivory-tower-survey/>. Academics and policymakers alike continue to view the rising power of China as the biggest foreign policy issue facing the U.S. *Id.*

international relations.⁷⁰ Since instituting market reforms in 1978, China's economic growth has generally outpaced the rest of the world,⁷¹ with annual Gross Domestic Product (GDP) growth rates averaging ten percent.⁷² Although this rate has slowed somewhat in recent years,⁷³ China's economy remains strong⁷⁴ and is on course to sustaining eight percent GDP growth rates for another ten to fifteen years or longer.⁷⁵ Indeed, in terms of purchasing power parity, China is now the world's largest economy, with an estimated GDP of \$17.6 trillion (compared with \$17.4 trillion for the U.S.).⁷⁶

Maintaining this economic momentum, however, "poses a considerable strategic problem for the Chinese Communist Party (CCP)."⁷⁷ Namely, over the last two decades, China's robust economic performance has resulted in massive dependence on foreign resource inputs.⁷⁸ Up until the early 1990s, China was a net oil exporter;⁷⁹ today, however, China is the world's largest net

⁷⁰ See, e.g., Charles Glaser, *Will China's Rise Lead to War? Why Realism Does Not Mean Pessimism*, FOREIGN AFF., Mar.-Apr. 2011, at 80 (noting that the "rise of China will likely be the most important international relations story of the twenty-first century"). China's economic development has sparked endless debate as to whether China can rise peacefully to great power status. See, e.g., John J. Mearsheimer, *The Gathering Storm: China's Challenge to US Power in Asia*, 3 CHINESE J. INT'L POL. 381, 381 (2010). Mearsheimer, the architect of the "offensive realism" school of thought in international relations, is one of the most vocal scholars predicting that "China cannot rise peacefully." *Id.* at 382. In any event, many scholars view China's rise to superpower status as an inevitability. See, e.g., Arvind Subramanian, *The Inevitable Superpower: Why China's Dominance is a Sure Thing*, FOREIGN AFF., Sept.-Oct. 2011, at 67.

⁷¹ *China Country Profile—Overview*, BBC NEWS (Mar. 13, 2015), <http://www.bbc.com/news/world-asia-pacific-13017877>.

⁷² *China Overview*, WORLD BANK (Mar. 25, 2015), <http://www.worldbank.org/en/country/china/overview>.

⁷³ Mark Magnier, Lingling Wei & Ian Talley, *China Economic Growth is Slowest in Decades*, WALL STREET J. (Jan. 19, 2015), <http://www.wsj.com/articles/china-gdp-growth-is-slowest-in-24-years-1421719453> (stating that in 2013, China's economy grew at a rate of 7.7%, while in 2014 the economy slowed to 7.4%). Some analysts argue that "the underlying causes for this slowdown are global, not China specific." Lin Yifu, *Western Analysts Are Wrong: China's Economy is Going Strong*, HUFFINGTON POST (Feb. 10, 2014), http://www.huffingtonpost.com/lin-yifu/western-analysts-china-economy_b_4762222.html. In any event, China is now the world's second-fastest growing economy, lagging only behind India. Eric Bellman, *India Passes China to Become Fastest-Growing Economy*, WALL STREET J. (Feb. 11, 2015), <http://blogs.wsj.com/indiarealtime/2015/02/11/its-official-india-has-passed-china-to-become-the-worlds-fastest-growing-economy/>.

⁷⁴ Michael Schuman, *China's Economy Continues to Defy Gravity. That May Not Be a Good Thing*, TIME (June 16, 2014), <http://time.com/2990640/chinas-economy-continues-to-defy-gravity-that-may-not-be-a-good-thing/>.

⁷⁵ Yifu, *supra* note 73.

⁷⁶ Brett Arends, *It's Official: America is Now No. 2*, MKT. WATCH (Dec. 4, 2014, 11:18 AM), <http://www.marketwatch.com/story/its-official-america-is-now-no-2-2014-12-04>.

⁷⁷ Rainwater, *supra* note 4, at 64.

⁷⁸ *China Overview*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/countries/cab.cfm?fips=CH> (last updated Feb. 4, 2014).

⁷⁹ *Id.*

importer of crude oil and other liquids.⁸⁰ In terms of demand, China is now the second-largest oil consumer and the largest overall energy consumer in the world.⁸¹ To be sure, China has taken steps to control the rapid growth of its foreign oil dependence. For example, China's 12th Five-Year Plan includes a measure to "cap oil imports at 61 percent by the end of 2015," which in 2012 amounted to fifty-seven percent of its needs.⁸² Yet China's breakneck economic growth requires exponential amounts of energy, and attempts to cap total imports are unlikely to be successful in the immediate term. By 2020, the U.S. Energy Information Institute projects that China will import more than sixty-six percent of its total oil; seventy-two percent will be imported by 2040, as demand is expected to outpace domestic crude supply.⁸³

Given this rising foreign energy dependence, the prospect of vast hydrocarbon deposits in the Arctic is a natural draw for the CCP.⁸⁴ Indeed, China is already strengthening trade relations with the Arctic states in order to secure long-term access to Arctic resources.⁸⁵ In April 2013, for example, China signed a free trade deal with Iceland, the "first of its kind between China and a European country."⁸⁶ China is also investing in infrastructure and offshore energy projects in the Arctic. In 2013, China paid Rosneft—Russia's state-owned oil company—\$60 billion to develop oil fields in the Arctic Ocean.⁸⁷ Since resource extraction in the Arctic is expensive and difficult, such investments can help position China as the "biggest player in [the]Arctic."⁸⁸

⁸⁰ Candace Dunn, *China is Now the World's Largest Net Importer of Petroleum and Other Liquid Fuels*, U.S. ENERGY INFO. ADMIN. (Mar. 24, 2014), <http://www.eia.gov/todayinenergy/detail.cfm?id=15531#>. China's rising oil consumption alone "accounted for one-third of the world's oil consumption growth in 2013." *China Overview*, *supra* note 78.

⁸¹ *China Overview*, *supra* note 78.

⁸² Michael Barris, *China's Oil Demand is Growing, US Agency Says*, CHINA DAILY (Feb. 6, 2014, 12:52 PM), http://usa.chinadaily.com.cn/epaper/2014-02/06/content_17269251.htm.

⁸³ *China Overview*, *supra* note 78.

⁸⁴ See discussion *supra* Part I.A.

⁸⁵ See Rainwater, *supra* note 4, at 72–73.

⁸⁶ Chen Zhi, *Xinhua Insight: Arctic Council Observer Status Guarantees China's Legitimate Rights*, XINHUANET (May 16, 2013, 9:21 AM), http://news.xinhuanet.com/english/indepth/2013-05/16/c_132387742.htm.

⁸⁷ Michael Byers, *China Could be the Future of Arctic Oil*, AL JAZEERA (Aug. 22, 2013, 2:09 PM), <http://www.aljazeera.com/indepth/opinion/2013/08/2013821135829162420.html> [hereinafter Byers, *China Could be the Future of Arctic Oil*].

⁸⁸ *Id.*

Aside from access to new resource deposits, “the Arctic offers China diversity, security and savings.”⁸⁹ China currently imports most of its energy from the Middle East, with nineteen percent of its crude oil supplied by Saudi Arabia in 2013.⁹⁰ Angola is the second-largest source, together with Saudi Arabia providing thirty-three percent of China’s total crude oil imports.⁹¹ After that, key suppliers include Russia, Oman, Iran, Iraq, and Venezuela.⁹² Although diversified, these sources constitute a perennial strategic problem for the CCP: as a symptom of its foreign energy reliance, China is now dependent on exporting nations located in politically volatile regions; as a result, China’s energy security is constantly at risk.⁹³ For example, although Sudan and South Sudan were once major suppliers, political conflicts between the two nations over oil resources caused production to shut down in 2012.⁹⁴ The Arctic, by contrast, is politically stable; China is thus looking north to further diversify its suppliers and ensure the security of its energy lifeline.

In addition to volatility at the source, China worries about the vulnerability of its supplies during transit. Two critical maritime “choke points” are of vital concern: the Strait of Hormuz, leading out of the Persian Gulf, and the Strait of Malacca, linking the Indian Ocean and South China Sea.⁹⁵ Around fifty percent of China’s oil imports pass through the Strait of Hormuz,⁹⁶ which Iran has occasionally threatened to close to “deny Persian Gulf oil to the global market.”⁹⁷ The Strait of Malacca, however, is even more troubling. Fully eighty percent of China’s oil transits this waterway, which is just two miles wide at its narrowest opening (compared with twenty miles in the Strait of Hormuz).⁹⁸ China’s so-called “Malacca Dilemma” is that, with limited power-projection capabilities, its energy supply-line is vulnerable to a hostile

⁸⁹ Andreas Kuersten, *Russian Sanctions, China and the Arctic*, DIPLOMAT (Jan. 3, 2015), <http://thediplomat.com/2015/01/russian-sanctions-china-and-the-arctic/>.

⁹⁰ Dunn, *supra* note 80.

⁹¹ *China Overview*, *supra* note 78.

⁹² *Id.*

⁹³ See Rainwater, *supra* note 4, at 65.

⁹⁴ Tore Knos & Michele Zebich-Knos, *South Sudan: Oil, the Environment and Border Conflicts*, NAT’L GEOGRAPHIC (Mar. 22, 2013), <http://voices.nationalgeographic.com/2013/02/22/86550/>.

⁹⁵ *World Oil Transit Chokepoints*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/beta/international/regions-tpics.cfm?RegionTopicID=WOTC/> (last updated Nov. 10, 2014).

⁹⁶ Annika Folkesson, *Part 1: Key Facts on Strait of Hormuz*, IRAN PRIMER (Jan. 11, 2012, 9:20 AM), <http://iranprimer.usip.org/blog/2012/jan/11/part-1-key-facts-strait-hormuz>.

⁹⁷ Rosemary A. Kelanic, *China’s Changing Oil Calculus*, NAT’L INT. (Nov. 12, 2013), <http://nationalinterest.org/commentary/chinas-changing-oil-calculus-9385>.

⁹⁸ *Id.*

shutdown in the Strait, particularly by the Indian Navy.⁹⁹ This fear is compounded by growing threats of piracy in the Strait—from 2009 to 2013, incidents increased by 200% (from 42 to 125),¹⁰⁰ making the Strait of Malacca the world’s “piracy hotspot.”¹⁰¹ In light of these vulnerabilities, trans-Arctic shipping routes provide an attractive, secure alternative for China’s maritime trade.¹⁰²

Economic factors provide additional incentives for trade diversion through the Arctic. As discussed above, Arctic straits are significantly shorter than traditional routes.¹⁰³ For example, the distance from Shanghai to Hamburg navigating the Northern Sea Route is roughly thirty percent shorter than the route via the Suez Canal.¹⁰⁴ Such a reduction in transit times and distance could result in substantial fuel savings and “increase China’s export potential to Europe.”¹⁰⁵ To realize these benefits, China is already investing more heavily in Arctic shipping research than even the U.S.¹⁰⁶ Chinese analysts predict that, by 2020, five to fifteen percent of China’s global trade, primarily container traffic, could use the Northern Sea Route.¹⁰⁷ And by 2030, up to half of the containers shipped between East Asia and Northern Europe could be diverted north through the Arctic.¹⁰⁸ Whatever the accuracy of these predictions, China certainly anticipates realizing some economic benefit from Arctic shipping.

⁹⁹ Shashank Joshi, *Can India Blockade China*, DIPLOMAT (Aug. 12, 2013), <http://thediplomat.com/2013/08/can-india-blockade-china/>.

¹⁰⁰ Ted Kemp, *Crime on the High Seas: The World’s Most Pirated Waters*, CNBC (Feb. 15, 2015), <http://www.cnbc.com/id/101969104>.

¹⁰¹ Patrick Winn, *The World Has a New Piracy Hotspot*, GLOBAL POST (Dec. 11, 2014, 10:13 AM), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/indonesia/140326/malacca-strait-piracy-hotspot>.

¹⁰² *But see* BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 261. Byers notes that non-state actors such as illegal immigrants and terrorists pose the greatest security threat in the Arctic, as they might “take advantage of ice-free waters to move contraband, people, or WMDs into North America or Europe, or between the Pacific and Atlantic Oceans.” *Id.* However, these are not significant threats at the present. *See id.*

¹⁰³ *See* discussion *supra* Part I.A.

¹⁰⁴ Jonathan Masters, *The Thawing Arctic: Risks and Opportunities*, COUNCIL ON FOREIGN REL. (Dec. 16, 2013), <http://www.cfr.org/arctic/thawing-arctic-risks-opportunities/p32082>.

¹⁰⁵ Kuersten, *supra* note 89.

¹⁰⁶ Darryl D’monte, *China Spending More on Arctic Sea Route Research Than US*, BUS. STANDARD (Mar. 14, 2013), http://www.business-standard.com/article/economy-policy/china-spending-more-on-arctic-sea-route-research-than-us-113031400028_1.html.

¹⁰⁷ Trude Pettersen, *China Starts Commercial Use of Northern Sea Route*, BARENTS OBSERVER (Mar. 14, 2013), <http://barentsobserver.com/en/arctic/2013/03/china-starts-commercial-use-northern-sea-route-14-03>.

¹⁰⁸ D’monte, *supra* note 106.

b. *China's Arctic Strategy*

Notwithstanding its status as a non-Arctic state, China has pursued a robust foreign policy line towards the Arctic region since the 1990s.¹⁰⁹ Thus far, China's Arctic strategy has primarily emphasized scientific research and diplomacy.¹¹⁰ China currently spends around \$60 million annually on polar research, including \$15 million on yearly expeditions to the Antarctic and Arctic.¹¹¹ Notably, China operates the "world's largest non-nuclear icebreaker,"¹¹² and has conducted six Arctic research expeditions¹¹³ aboard the vessel since purchasing it from Ukraine in 1993.¹¹⁴ By 2016, China plans to build a second, more advanced icebreaker worth \$613 million to further enhance its "polar research capability."¹¹⁵ In addition to these "mobile research station[s],"¹¹⁶ China also maintains a research base in Norway's Svalbard Archipelago¹¹⁷ (north of the Arctic Circle) as well as a "China-Nordic Arctic Research Center" in Shanghai.¹¹⁸ With these extensive research capabilities, China intends to assist not only in its own "economic and social development, but also [to] help[] deepen humanity's knowledge of climate change."¹¹⁹

While China's polar research interests are no doubt genuine,¹²⁰ these initiatives suggest that "Beijing is eager to camouflage its true interests in the

¹⁰⁹ Hugh Stephens, *Breaking the Ice: China's Emerging Arctic Strategy*, DIPLOMAT (Aug. 27, 2012), <http://thediplomat.com/2012/08/breaking-the-ice-chinas-emerging-arctic-strategy/>. For a lengthier treatment of China's Arctic strategy, see generally Rainwater, *supra* note 4.

¹¹⁰ Rainwater, *supra* note 4, at 71.

¹¹¹ Anne-Marie Brady, *Polar Stakes: China's Polar Activities as a Benchmark for Intentions*, JAMESTOWN (July 19, 2012, 3:34 PM), http://www.jamestown.org/single/?no_cache=1&tx_tnews%5Btt_news%5D=39647&tx_tnews%5BbackPid%5D=7&cHash=99f7e4c63e504c25e7be08acfd148db#.VFhxa_nF98F.

¹¹² Paul McLeary, *The Arctic: China Opens a New Strategic Front*, WORLD POL. REV. (May 19, 2010), <http://www.worldpoliticsreview.com/articles/5558/the-arctic-china-opens-a-new-strategic-front>.

¹¹³ Aboard Xuelong, *Arctic Ice Shrinkage Alarms Returning Chinese Expedition*, XINHUANET (Sept. 22, 2014, 4:36 PM), http://news.xinhuanet.com/english/china/2014-09/22/c_133662994.htm.

¹¹⁴ McLeary, *supra* note 112.

¹¹⁵ Wang Qian, *New Icebreaker Planned by 2016: Officials*, CHINA DAILY (Jan. 6, 2014), http://www.chinadaily.com.cn/china/2014-01/06/content_17216579.htm.

¹¹⁶ *Id.*

¹¹⁷ *China Launches Arctic Station*, XINHUANET (July 28, 2004, 7:49 PM), http://news.xinhuanet.com/english/2004-07/28/content_1666797.htm.

¹¹⁸ Thomas Nilsen, *China-Nordic Arctic Research Center Opens in Shanghai*, BARENTS OBSERVER (Dec. 12, 2013), <http://barentsobserver.com/en/arctic/2013/12/china-nordic-arctic-research-center-opens-shanghai-12-12>.

¹¹⁹ Zhang Yunlong & Ren Qinqin, *China Defends Arctic Research*, XINHUANET (Jan. 31, 2012, 10:58 PM), http://news.xinhuanet.com/english/china/2012-01/31/c_122637030.htm.

¹²⁰ For example, China fears that Arctic warming will "turn the Arctic ecosystem upside down, affecting many animals that are adapted to a life with sea ice." Stefan Rahmstorf, *Silent Warning That Must be Heeded*,

region.”¹²¹ Publicly, China represents its sense of entitlement to Arctic opportunities by depicting the Arctic as an “international zone where changes must make sense for all countries.”¹²² In 2009, for example, China’s Assistant Minister of Foreign Affairs cautioned that Arctic countries should “ensure a balance of coastal countries’ interests and the common interests of the international community.”¹²³ More recently, Chinese officials have also begun to refer to China as an “Arctic stakeholder”¹²⁴ and a “near-Arctic state”¹²⁵—remarkable assertions considering that the shortest distance between China’s northern border and the Arctic Circle is 900 miles.¹²⁶ Nevertheless, China contends that its proximity to the Arctic means that it is directly affected by “natural changes . . . in the Arctic, as reflected in China’s climate, ecological environment, [and] agricultural production.”¹²⁷ As such, China believes that it is entitled to participate in Arctic affairs.

Still, despite this sometimes brazen rhetoric, China’s Arctic strategy privileges soft power and cooperation over conflict.¹²⁸ Over the last few years, China has actively cultivated bilateral relations with the Arctic states in order to position itself as an “indispensable”¹²⁹ Arctic player. For example, in the wake of the 2008 financial crisis, China supplied economic aid to Iceland that proved critical to its recovery.¹³⁰ China and Iceland subsequently signed a free trade deal, the first Sino-European agreement of its kind.¹³¹ Meanwhile, China

CHINA DAILY (Oct. 21, 2011, 8:05 AM), http://usa.chinadaily.com.cn/opinion/2011-10/21/content_13945874.htm. These conditions will in turn “amplify global warming” and cause “sea levels worldwide [to] rise.” *Id.*

¹²¹ Arthur Guschin, *Understanding China’s Arctic Policies*, DIPLOMAT (Nov. 14, 2013), <http://thediplomat.com/2013/11/understanding-chinas-arctic-policies/>.

¹²² *Id.*

¹²³ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 125.

¹²⁴ Kit Dawnay, *China’s Ambitions in the Arctic*, CURRENT INTELLIGENCE (Mar. 19, 2013, 9:00 AM), <http://www.currentintelligence.net/analysis/2013/3/19/chinas-ambitions-in-the-arctic.html>.

¹²⁵ Johan Nylander, *China a ‘Near-Arctic State’: Swedish Think Tank*, SWEDISH WIRE (May 11, 2012, 4:35 AM), <http://www.swedishwire.com/business/13827-china-a-near-arctic-state-swedish-think-tank>.

¹²⁶ Gwynn Guilford, *What is China’s Arctic Game Plan?*, ATLANTIC (May 16, 2013), <http://www.theatlantic.com/china/archive/2013/05/what-is-chinas-arctic-game-plan/275894/>.

¹²⁷ *China Seeks Pragmatic Cooperation with Arctic Countries*, XINHUANET (Nov. 2, 2014), http://news.xinhuanet.com/english/china/2014-11/02/c_133759443.htm.

¹²⁸ *See generally* Rainwater, *supra* note 4.

¹²⁹ Gordon G. Chang, *China’s Arctic Play*, DIPLOMAT (Mar. 9, 2010), <http://thediplomat.com/2010/03/chinas-arctic-play/>. In 2010, Chinese Rear Admiral Yin Zhuo famously pronounced that “China must play an indispensable role in Arctic exploration as we have one-fifth of the world’s population.” *Id.*

¹³⁰ Andrew Ward, *Iceland Secures China Currency Swap Deal*, FIN. TIMES (June 9, 2010, 10:45 PM), <http://www.ft.com/intl/cms/s/0/81d100de-73fb-11df-87f5-00144feabdc0.html>.

¹³¹ Zhi, *supra* note 86.

has invested substantial capital in Greenlandic resource projects,¹³² indirectly “courting Danish leaders.”¹³³ As a result of these measures, Iceland and Denmark have grown “very supportive of China having a louder voice in Arctic affairs.”¹³⁴ Ultimately, this strategy resulted in all eight Arctic states endorsing China’s application for observer status at the Arctic Council, a central goal of the CCP.¹³⁵

In sum, China’s foreign policies towards the Arctic have proven effective in realizing its economic and strategic goals in the region thus far. As with all non-Arctic countries, however, China’s Arctic ambitions are limited by the international legal regimes and norms regulating the Arctic region. The following Part will analyze those legal arrangements, and Part III will present recommendations for Arctic governance reform in order to better incorporate the interests of non-Arctic states in the High North.

II. ARCTIC GOVERNANCE: DISTANT PARTICIPANTS IN A REGIONAL REGIME

A. Introduction

No single comprehensive legal regime currently governs the Arctic region.¹³⁶ Rather, “the regulatory picture [concerning the Arctic] is a *diffuse* one,”¹³⁷ consisting of a “patchwork of international treaties . . . various regional and sub-regional agreements, national laws and soft-law agreements.”¹³⁸ In this multi-layered framework, domestic legislation plays a particularly significant role, since much of the region “falls within the scope of national sovereignty of the Arctic nations.”¹³⁹ Beyond that, a handful of governance arrangements predominate in regulating the Arctic region.

¹³² Martin Breum & Jorgen Chemnitz, *No, Greenland Does Not Belong to China*, N.Y. TIMES (Feb. 20, 2013), http://www.nytimes.com/2013/02/21/opinion/no-greenland-does-not-belong-to-china.html?_r=0.

¹³³ Kuersten, *supra* note 89.

¹³⁴ *Id.*

¹³⁵ See discussion *infra* Part II.C.

¹³⁶ LILLY WEIDEMANN, INTERNATIONAL GOVERNANCE OF THE ARCTIC MARINE ENVIRONMENT: WITH PARTICULAR EMPHASIS ON HIGH SEAS FISHERIES 228 (2014). By contrast, the Antarctic is comprehensively regulated under the 1959 Antarctic Treaty. *Id.*

¹³⁷ Davor Vidas, *The Polar Marine Environment in Regional Cooperation*, in PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION 102 (Davor Vidas ed., 2000).

¹³⁸ WEIDEMANN, *supra* note 136.

¹³⁹ *Id.* at 45.

First, UNCLOS regulates “activities on, over, and beneath the Arctic [Ocean].”¹⁴⁰ As with all the world’s oceans, this treaty establishes navigation rights through Arctic waterways and sets guidelines for demarcating the maritime boundaries of the Arctic states. Second, the Arctic Council constitutes the “principle international forum for regional collaboration.”¹⁴¹ The Council’s work spans a wide range of areas including scientific assessments, policy statements and recommendations, guidelines, best practices, and, more recently, binding Arctic instruments.¹⁴² The Council is well-respected, and it is increasingly viewed as the most important political body in the region.

Given the primacy of these legal arrangements, this Part will analyze the extent to which they limit and/or expand the rights of non-Arctic states seeking to participate in Arctic affairs. From the outset, it is important to note that under the current legal regime, distant states possess very limited rights in the Arctic relative to regional ones. As the Arctic globalizes, however, this imbalance raises questions as to whether the current regional model of governance is “adequate,” or whether a more inclusive, international approach is now “necessary.”¹⁴³ As argued below, the regional approach is no longer sufficient to address changing conditions in the Arctic; the Arctic legal regime should therefore be reformed to better incorporate the interests of non-Arctic states in the Arctic region.

B. *The Law of the Sea Treaty*

1. *Solidifying the Hegemony of UNCLOS in the Arctic*

Called the “constitution” and “Magna Charta” of the oceans, UNCLOS provides a “comprehensive framework for oceans governance.”¹⁴⁴ Since opening for signature on December 10, 1982,¹⁴⁵ UNCLOS has succeeded in sustainably balancing the sovereign rights of littoral countries with the

¹⁴⁰ *The Emerging Arctic*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/polarregions/emergingarctic/p32620#/> (last visited Feb. 16, 2015).

¹⁴¹ *Id.*

¹⁴² Andrea Charron, *Has the Arctic Council Become Too Big?*, INT’L REL. & SECURITY NETWORK (Aug. 15, 2014), <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=182827>.

¹⁴³ Rothwell, *supra* note 67, at 273.

¹⁴⁴ Robert C. De Tolve, *At What Cost? America’s UNCLOS Allergy in the Time of “Lawfare”*, 61 NAVAL L. REV. 1, 2 (2012). UNCLOS codifies “centuries of state practice and *opinio juris*.” BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 6.

¹⁴⁵ UNCLOS, *supra* note 6.

“traditional navigational freedoms guaranteed all nations.”¹⁴⁶ To date, fully 167 countries have ratified UNCLOS, including seven of the eight circumpolar states.¹⁴⁷ The final circumpolar country—the U.S.—“accepts the key provisions of UNCLOS as customary international law.”¹⁴⁸ Interestingly, only one provision in the entire convention deals specifically with ice-covered regions. Article 234, or the “Arctic Article,”¹⁴⁹ permits “regulation for the prevention of pollution and safety of navigation in ice-covered areas,”¹⁵⁰ it does not, however, function to “clarify the status of ice.”¹⁵¹ Still, the treaty’s various provisions apply normally in the Arctic Ocean as they do elsewhere, creating an expansive regulatory regime.¹⁵²

In May 2008, the five littoral Arctic states (the “Arctic Five”)—Russia, Canada, Norway, Denmark and the U.S.—signed the “Ilulissat Declaration,” thereby reaffirming the primacy of UNCLOS as regulator of the Arctic Ocean.¹⁵³ While no explicit reference is made to UNCLOS, the Declaration is “very precise” in referring to the law of the sea,¹⁵⁴ noting that:

[A]n extensive international legal framework applies to the Arctic Ocean . . . [T]he 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.¹⁵⁵

The Declaration concludes by observing that there is “no need to develop a new comprehensive legal regime to govern the Arctic Ocean.”¹⁵⁶ Thus, despite

¹⁴⁶ De Tolve, *supra* note 144.

¹⁴⁷ *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 3 October 2014*, U.N. DIVISION FOR OCEAN AFF. & L. SEA, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm# (last updated Jan. 7, 2015).

¹⁴⁸ BYERS, *INTERNATIONAL LAW AND THE ARCTIC*, *supra* note 62, at 28.

¹⁴⁹ Stuart B. Kaye, *Territorial Sea Baselines Along Ice Covered Coasts: International Practice and Limits of the Law of the Sea*, 35 OCEAN DEV. & INT’L L. 75, 95 n.7 (2004).

¹⁵⁰ *Id.* at 77.

¹⁵¹ *Id.* at 95 n.7.

¹⁵² See BYERS, *INTERNATIONAL LAW AND THE ARCTIC*, *supra* note 62, at 6.

¹⁵³ Arctic Ocean Conference, *Ilulissat Declaration*, 1–2 (May 28, 2008), http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

¹⁵⁴ Donald R. Rothwell, *International Law and Arctic Shipping*, 22 MICH. ST. INT’L L. REV. 67, 72 (2013).

¹⁵⁵ *Ilulissat Declaration*, *supra* note 153.

¹⁵⁶ *Id.*

calls over the years for the creation of a new “Arctic treaty” similar to the Antarctic model,¹⁵⁷ the Declaration entrenches the authority of UNCLOS in the Arctic, while more generally affirming the Arctic Five’s commitment to the current multi-layered Arctic framework.¹⁵⁸

2. Territorial Provisions

For decades, UNCLOS has “played a central role in determining the boundaries between the maritime zones of adjacent coastal states”; the Arctic is no exception, with the same rules applying in the region as elsewhere in the world.¹⁵⁹ Under UNCLOS, coastal Arctic states may claim sovereignty over territorial seas extending twelve nautical miles from shore.¹⁶⁰ Within this band, coastal states can restrict foreign shipping and have “absolute rights” over living resources found in the water column (fish) and nonliving seabed resources (hydrocarbons).¹⁶¹ Further out, coastal states retain absolute rights over seabed resources and fisheries located within exclusive economic zones (EEZs) extending 200 nautical miles from shore,¹⁶² and seabed rights beyond 200 nautical miles where they can demonstrate that the seabed is a “natural prolongation of [their] land territory” (i.e., the “extended continental shelf”).¹⁶³ Only beyond the continental shelf are seabed resources considered the “common heritage of mankind,” equally open to exploration and exploitation by non-littoral and coastal nations alike.¹⁶⁴

Until recently, a small unclaimed “doughnut hole” at the center of the Arctic Ocean was thought to constitute this area beyond the sovereign jurisdictions of the Arctic countries.¹⁶⁵ One analyst even went so far as to argue that “[n]o country will ever ‘own’ the North Pole, which is located 400

¹⁵⁷ John B. Bellinger, *Treaty on Ice*, N.Y. TIMES (Jun. 23, 2008), http://www.nytimes.com/2008/06/23/opinion/23bellinger.html?_r=2&.

¹⁵⁸ See *Ilulissat Declaration*, *supra* note 153.

¹⁵⁹ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 6.

¹⁶⁰ UNCLOS, *supra* note 6, art. 2.

¹⁶¹ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 6.

¹⁶² UNCLOS, *supra* note 6, art. 57.

¹⁶³ *Id.* arts. 76–77.

¹⁶⁴ UNCLOS, *supra* note 6, pmb1.

¹⁶⁵ One analyst estimated that roughly eighty-eight percent of the Arctic seabed would likely be claimed by the circumpolar states. See Joseph Spears, *The Snow Dragon Moves into the Arctic Ocean Basin*, 11 CHINA BRIEF 1, 12–13 (2011).

miles to the north of any land.”¹⁶⁶ As such, the central Arctic Ocean would “belong[] to humanity,”¹⁶⁷ and would be open to development by all states.

Contrary to these assertions, however, the littoral Arctic states have begun staking overlapping claims to the center of the Arctic. In late 2014, Denmark submitted an official claim to the U.N. Commission on the Limits of the Continental Shelf (CLCS) that includes “all of the North Pole and 895,000 sq km of the Arctic.”¹⁶⁸ In preparation for its claim, Denmark “spent \$55m and 12 years collecting data.”¹⁶⁹ Yet Denmark is not alone in claiming the Pole; Russia asserted jurisdiction over the area as early as 2001, although its initial claim was deemed to be “insufficient” by the CLCS.¹⁷⁰ Russia has since conducted extensive research to support an updated claim to the area,¹⁷¹ which it is expected to submit soon.¹⁷² Further complicating affairs, Canada has also expressed its intention to claim the North Pole,¹⁷³ arguing that the area “is central to defending [its] Arctic sovereignty.”¹⁷⁴ A fourth claim could conceivably be staked by the U.S., which has conducted research on the length of its continental shelf extending from Alaska to the North Pole;¹⁷⁵ however, without ratifying UNCLOS, the U.S. cannot submit its evidence to the CLCS. The final littoral state—Norway—has indicated that it will not assert a claim to the North Pole under UNCLOS.¹⁷⁶

At the center of the dispute is the so-called Lomonosov Ridge, a massive underwater range splitting the central Arctic Ocean that Denmark, Russia, and Canada all claim as a “natural prolongation” of their landmass.¹⁷⁷ In other words, each claims the Lomonosov Ridge as part of their extended continental shelf under UNCLOS Article 76.¹⁷⁸ Since coastal states may exercise sovereignty over resources located in the sedimentary strata of their continental

¹⁶⁶ Michael Byers, *Rules for the North Pole*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/2011/08/19/opinion/19iht-edbyers19.html> [hereinafter Byers, *Rules for the North Pole*].

¹⁶⁷ *Id.*

¹⁶⁸ Richard Milne, *Denmark's Claim to North Pole Fans Geopolitical Rivalry*, FIN. TIMES (Dec. 18, 2014, 6:29 PM), <http://www.ft.com/intl/cms/s/0/49a5a1ca-85e3-11e4-b11b-00144feabdc0.html#axzz3P3558ktp>.

¹⁶⁹ *Id.*

¹⁷⁰ Johnson, *supra* note 64.

¹⁷¹ *Id.*

¹⁷² Milne, *supra* note 168.

¹⁷³ *Frozen Conflict*, ECONOMIST (Dec. 20, 2014), <http://www.economist.com/news/international/21636756-denmark-claims-north-pole-frozen-conflict>.

¹⁷⁴ Byers, *The North Pole is a Distraction*, *supra* note 64.

¹⁷⁵ Johnson, *supra* note 64.

¹⁷⁶ *Id.*

¹⁷⁷ Milne, *supra* note 168.

¹⁷⁸ See UNCLOS, *supra* note 6, art. 76.

shelves,¹⁷⁹ these claims have the potential to effectively lockup the entirety of the Arctic seabed and the energy resources found within (i.e., by effectively eliminating the previously-imagined “doughnut hole” in the central Arctic Ocean).¹⁸⁰ Non-Arctic states would thus be shut-off entirely from the ability to independently exploit the Arctic’s hydrocarbon wealth.

It is noteworthy, however, that even absent these claims, the vast majority of offshore energy resources are already expected to fall within the Arctic Five’s uncontested jurisdictions closer to shore.¹⁸¹ Moreover, drilling operations in the central Arctic are extraordinarily difficult and expensive, given the harsh conditions in the area.¹⁸² Consequently, non-Arctic countries may benefit from simply cooperating with the coastal Arctic states in developing the energy resources located within their uncontested EEZs. In either event, distant states will have extremely limited prospects of exploiting Arctic resources on their own.

3. *Navigation Provisions*

While overlapping territorial claims in the central Arctic Ocean make it difficult to assess the exact maritime boundaries of the Arctic Five, the legal status of Arctic straits is perhaps more obfuscated.¹⁸³ Although UNCLOS grants foreign vessels the right of “innocent passage” through territorial waters,¹⁸⁴ free navigation through EEZs,¹⁸⁵ and free navigation further out on the “high seas,”¹⁸⁶ no such rights of passage exist within internal waters—“waters on the landward side of the baseline” from which the territorial zone is measured.¹⁸⁷ Both Russia and Canada have long contended that the Northern Sea Route and Northwest Passage, respectively, constitute “internal waters” within the meaning of this provision, thus closed off to access by foreign vessels without express permission from Moscow and Ottawa.¹⁸⁸ Since these waterways are the only currently-viable trans-Arctic sea lanes,¹⁸⁹ Russia and

¹⁷⁹ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 6.

¹⁸⁰ *See* Spears, *supra* note 165.

¹⁸¹ *See* Byers, *China Could be the Future of Arctic Oil*, *supra* note 87.

¹⁸² *See id.*

¹⁸³ *See generally* BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 129–131.

¹⁸⁴ UNCLOS, *supra* note 6, art. 17.

¹⁸⁵ *Id.* art. 58.

¹⁸⁶ *Id.* art. 87.

¹⁸⁷ *Id.* art. 8.

¹⁸⁸ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 130.

¹⁸⁹ *See* discussion *supra* Part I.A.

Canada's claims have significant implications for commercial shipping through the region.

Neither claim is uncontested; the U.S. disputes both, arguing that both waterways are “‘international straits’ through which vessels from all countries may pass freely.”¹⁹⁰ According to the International Court of Justice in the 1949 *Corfu Channel Case*, a waterway constitutes an international strait if it has a “geographical situation as connecting two parts of the high seas” and it is “used for international navigation.”¹⁹¹ UNCLOS clarifies that foreign vessels navigating international straits necessarily pass through territorial waters, but “instead of the regular right of ‘innocent passage’ . . . they benefit from the enhanced right of ‘transit passage.’”¹⁹² This right entitles the vessels to “pass through the strait without coastal state permission.”¹⁹³

“Internal waters,” by contrast, are established through “long-term acquiescence of other countries.”¹⁹⁴ Such waters may also arise from the “drawing of ‘straight baselines’ between headlands and fringing islands,” according to the decision of the International Court of Justice in the 1951 *Anglo-Norwegian Fisheries Case* and under customary international law.¹⁹⁵ Where such waters exist, coastal states are entitled to exert full sovereignty over transit and may deny access to foreign vessels.¹⁹⁶

Given these standards, non-Arctic states are severely limited in their ability to mount a challenge to the legal status of Arctic straits. In the case of the Northwest Passage, a key issue is whether the strait was “used for international navigation” before Canada drew straight baselines in 1985.¹⁹⁷ However, there is no evidence that any non-Arctic state actually used the strait prior to the drawing of those baselines.¹⁹⁸ Only the U.S., which navigated a few vessels through the Passage before 1985, is positioned to argue that it used the strait

¹⁹⁰ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 129.

¹⁹¹ *Corfu Channel (UK v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 28 (Apr. 9).

¹⁹² BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 130; *see also* UNCLOS, *supra* note 6, art. 39.

¹⁹³ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 130. Foreign vessels exercising this right must “refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.” UNCLOS, *supra* note 6, art. 39.

¹⁹⁴ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 130.

¹⁹⁵ *Id.* at 130–131.

¹⁹⁶ *Id.* at 130.

¹⁹⁷ *Id.* at 134.

¹⁹⁸ *Id.* at 149.

for “international navigation.”¹⁹⁹ Similarly, having sailed a few vessels through the Northern Sea Route prior to Russia’s drawing of straight baselines in 1985, the U.S. is the only country that is positioned to dispute Russia’s claim that portions of the Route constitute “internal waters.”²⁰⁰ Indeed, no country other than the U.S. has taken a side in the dispute with Russia thus far, which dates back to 1963 when the U.S. sailed an icebreaker through Russia’s Laptev Sea.²⁰¹

In short, non-Arctic states have little recourse with respect to asserting their legal rights to sail commercial vessels through the Northwest Passage and the Northern Sea Route. However, even with legal uncertainty, there is no indication that either Russia or Canada are intent on fully shutting down shipping at this point; indeed, the rising volume of vessels transiting both sea routes illustrates that Canada and Russia are likely to continue to look favorably upon increased traffic through their Arctic corridors.²⁰² Still, some degree of restrictions will likely be imposed, such as permit fees and environmental standards, if for no other reason than for coastal states to exact an economic profit. As a result, shipping volume through the Arctic will remain limited for the foreseeable future, at least until the Transpolar Sea Route—which lies far beyond any coastal states’ “internal waters”—opens up to shipping in the central Arctic around 2050.²⁰³

C. The Soft-Law Regime: The Arctic Council

1. Introduction to the Council

Established under the Ottawa Declaration of 1996 as a “high level forum” for cooperation in the Arctic,²⁰⁴ the Arctic Council has emerged in recent years as “the most comprehensive international body in the Arctic region.”²⁰⁵ Tasked with addressing “common Arctic issues” (other than “matters related to military security”),²⁰⁶ the Council’s central mandate is to promote sustainable

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 144–46.

²⁰¹ *Id.* at 144.

²⁰² *See* discussion *supra* Part I.A.

²⁰³ *See* discussion *supra* Part I.A.

²⁰⁴ Declaration on the Establishment of the Arctic Council ¶ 1, Sept. 19, 1996, 35 I.L.M. 1382 [hereinafter Ottawa Declaration].

²⁰⁵ BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 8.

²⁰⁶ Ottawa Declaration, *supra* note 204, ¶ 1(a). The Declaration contains just two footnotes, one of which reads “The Arctic Council should not deal with matters related to military security.” *Id.*

development and environmental protection in the Arctic.²⁰⁷ Accordingly, the Council has coordinated²⁰⁸ a number of pioneering and influential scientific studies on emerging issues in the Arctic, including the 2004 Arctic Climate Impact Assessment,²⁰⁹ the 2007 Arctic Oil and Gas Assessment,²¹⁰ and the 2009 Arctic Marine Shipping Assessment.²¹¹ Through these initiatives, the Council has effectively raised the visibility of Arctic issues and contributed to national Arctic policy discussions.²¹²

Notwithstanding its achievements in scientific research and policy framing, however, the Arctic Council is rather “limited as an institution itself.”²¹³ By design, the Council was created as an informal cooperative forum, not a binding “intergovernmental organization” as defined under international law.²¹⁴ In general, international organizations must (1) be founded on a binding legal instrument;²¹⁵ (2) have “at least one organ with a will of its own;” and (3) be “established under international law.”²¹⁶ The Arctic Council, however, was created under the terms of a ministerial declaration, not a binding treaty.²¹⁷ It was created without a “separate independent organ . . . to carry out its particular functions.”²¹⁸ Indeed—at the insistence of the U.S.—it was expressly created “without legal personality,”²¹⁹ meaning it lacks the requisite

²⁰⁷ *Id.*

²⁰⁸ The Arctic Council conducts activities through working groups, task forces, and expert groups. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-435, ARCTIC ISSUES: BETTER DIRECTION AND MANAGEMENT OF VOLUNTARY RECOMMENDATIONS COULD ENHANCE U.S. ARCTIC COUNCIL PARTICIPATION 16 (2014).

²⁰⁹ See generally SUSAN JOY HASSOL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT (2004), <http://www.amap.no/arctic-climate-impact-assessment-acia>.

²¹⁰ See generally HENRY P. HUNTINGTON, ARCTIC MONITORING AND ASSESSMENT PROGRAMME, ARCTIC OIL AND GAS 2007 (2007), <http://www.amap.no/documents/doc/arctic-oil-and-gas-2007/71>.

²¹¹ See generally ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT (2009), http://www.arctic.noaa.gov/detect/documents/AMSA_2009_Report_2nd_print.pdf.

²¹² Paula Kankaanpaa & Oran R. Young, *The Effectiveness of the Arctic Council*, 31 POLAR RES. 1, 1 (2012).

²¹³ Alison Ronson, *Political Climate Change: The Evolving Role of the Arctic Council*, 33 NORTHERN REV. 95, 100 (2011). See also Kankaanpaa & Young, *supra* note 212, at 10 (stating that the Arctic Council is widely considered a “policy-shaping body rather than a policy-making body”).

²¹⁴ Evan T. Bloom, *Establishment of the Arctic Council*, 93 AM. J. INT'L L. 712, 712 (1999).

²¹⁵ See HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY §§ 34–36 (5th ed. 2011).

²¹⁶ *Id.* § 33.

²¹⁷ Some legal scholars question whether a founding treaty is actually required to qualify as an international organization. See, e.g., BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 9 n.36 (noting that “[a]lthough the Arctic Council is based on a declaration rather than a founding treaty, such a treaty is not a necessary condition for an international organization”).

²¹⁸ Waliul Hasanat, *Definitional Constraints Regarding Soft Law*, 3 AALCO Q. BULL. 8, 21 (2007).

²¹⁹ Bloom, *supra* note 214, at 714.

“capacity . . . to conclude treaties” on its own.²²⁰ Rather, the Arctic Council is a “soft law” institution—it “creates norms [and] standards of behavior without creating legally binding obligations on [its] member states.”²²¹ Decisions are reached by consensus, and members may elect to implement or reject Council recommendations based simply on national interests and political motivations.²²²

More recently, however, the Arctic Council has assumed a more authoritative role as the reality of accelerating climate change has altered its members’ national priorities in the region. At its 2011 Ministerial Meeting in Nuuk, Greenland the Arctic Council established a permanent secretariat to be located in Tromsø, Norway.²²³ According to one scholar, this “arguably transform[ed] the Arctic Council from an inter-governmental forum into an international organization.”²²⁴ However, while arguably an independent sub-organ of the Council under the international legal definition,²²⁵ the secretariat’s “mandate and function are relatively modest [and] mostly administrative in nature.”²²⁶ Additionally, while the secretariat itself holds domestic legal personality under Norwegian law,²²⁷ the Council as a whole continues to operate without international legal personality.²²⁸ Still, despite these

²²⁰ See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 6, *opened for signature* Mar. 21, 1986, 25 I.L.M. 543 [hereinafter Vienna Convention]. The preamble to the Convention states that “international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and fulfillment of their purposes.” *Id.* pmb1. This adopts the International Court of Justice’s approach in *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep. 151, at 167–68 (July 20).

²²¹ Ronson, *supra* note 213.

²²² Bloom, *supra* note 214, at 718. And even if members implement recommendations, the Council has difficulty evaluating such implementation as it possesses limited enforcement and monitoring power. Ronson, *supra* note 213.

²²³ Arctic Council, *Nuuk Declaration*, Seventh Ministerial Meeting, at 2 (May 12, 2011), http://arctic-council.npolar.no/accms/export/sites/default/en/meetings/2011-nuuk-ministerial/docs/Nuuk_Declaration_FINAL.pdf.

²²⁴ See, e.g., BYERS, *INTERNATIONAL LAW AND THE ARCTIC*, *supra* note 62, at 9.

²²⁵ See SCHERMERS & BLOKKER, *supra* note 215, § 33.

²²⁶ Charron, *supra* note 142.

²²⁷ Host Country Agreement Between the Government of the Kingdom of Norway and the Arctic Council Secretariat art. 2 (Mar. 2012). Under Article 2 of the Host Country Agreement, “The Secretariat has legal personality and capacity to perform its functions in Norway. It has, in particular, the capacity to contract, to acquire and dispose of movable and immovable property, and to institute and be a party to legal proceedings.” *Id.*

²²⁸ ERIK J. MOLENAAR, ALEX G. OUDE ELFERINK & DONALD R. ROTHWELL, *THE LAW OF THE SEA AND THE POLAR REGIONS: INTERACTIONS BETWEEN GLOBAL AND REGIONAL REGIMES* 41 (2013) (stating that “the Arctic Council still operates without legal personality”).

limitations, the establishment of a secretariat may go far to advance the Council's ability to "broker cooperation" in the Arctic.²²⁹

More significantly, the Council has recently become "the focal point for treaty-making" in the Arctic.²³⁰ In 2011, members adopted a search-and-rescue treaty,²³¹ "the first legally binding instrument concluded under the auspices of the Arctic Council."²³² A second binding agreement concerning oil spill preparation and response was signed at the Kiruna Ministerial Meeting in 2013.²³³ Whether these treaties are precedent-setting is uncertain at this point; there is certainly the potential for the Council to transform into a "policy-making," rather than a "policy-shaping" body.²³⁴ In any event, the Arctic Council's recent actions have solidified its status as a "prominent player" in Arctic affairs.²³⁵ Circumpolar as well as non-Arctic states are mindful of this growing prominence and increasingly view participation in the Council as a key avenue to influencing Arctic affairs.

2. *Expansion of the Council*

Several distinct groups comprise the Arctic Council: members, permanent participants, observers, ad-hoc observers, the Council chair (which rotates between members every 2 years), the secretariat, and six working groups.²³⁶ Full membership is limited to the eight nations with territory north of the Arctic Circle (the "Arctic Eight")—Canada, Russia, Norway, Denmark, the

²²⁹ REBECCA H. PINCUS & SALEEM H. ALI, *DIPLOMACY ON ICE: ENERGY AND THE ENVIRONMENT IN THE ARCTIC AND ANTARCTIC* 53 (2015).

²³⁰ Timo Koivurova, *Increasing Relevance of Treaties: The Case of the Arctic*, AJIL UNBOUND (May 6, 2014, 3:03 PM), <http://www.asil.org/blogs/increasing-relevance-treaties-case-arctic-agma-end-treaties>.

²³¹ See generally Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (May 12, 2011), https://oaarchive.arctic-council.org/bitstream/handle/11374/531/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011%20%281%29.pdf?sequence=1&isAllowed=y.

²³² BYERS, *INTERNATIONAL LAW AND THE ARCTIC*, *supra* note 62, at 9. In other words, members used the Council as a forum to conclude a treaty amongst themselves; however, the Council *itself* did not conclude the treaty, and thus it continues to operate without legal personality. See Vienna Convention, *supra* note 220.

²³³ See generally Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (May 15, 2013), https://oaarchive.arctic-council.org/bitstream/handle/11374/529/MM08_agreement_on_oil_pollution_preparedness_and_response_%20in_the_arctic_formatted%20%282%29.pdf?sequence=1&isAllowed=y.

²³⁴ Kankaanpää & Young, *supra* note 212, at 10.

²³⁵ *Id.* at 1.

²³⁶ The Council's six working groups, each with its own specific mandate, are the Arctic Contaminants Action Program (ACAP); Arctic Monitoring and Assessment Programme (AMAP); Conservation of Arctic Flora and Fauna (CAFF); Emergency Prevention, Preparedness and Response (EPPR); Protection of the Arctic Marine Environment (PAME); and Sustainable Development Working Group (SDWG). See *Working Groups*, ARCTIC COUNCIL (Apr. 15, 2011), <http://www.arctic-council.org/index.php/en/about-us/working-groups>.

U.S., Finland, Sweden, and Iceland.²³⁷ These nations are empowered to vote, make policy, and administer projects.²³⁸ By contrast, permanent participants—made up of groups representing indigenous Arctic communities—are not granted voting privileges; they are, however, entitled to participate in all meetings and to “full consultation prior to the forming of decisions.”²³⁹ This fairly unique structure is “comparatively new [] in international cooperation”²⁴⁰ as it grants indigenous groups a “more significant [role] than is typically afforded them at other U.N. or multilateral meetings and conferences.”²⁴¹

Observers are a significantly weaker—and larger²⁴²—constituency than Council members and permanent participants. Under the Ottawa Declaration, observer status is open to non-Arctic states and organizations that “the Council determines can contribute to its work.”²⁴³ Originally, six non-Arctic states—all of them European—held observer status: Germany, the Netherlands, Poland, and the United Kingdom, joined by France in 2000 and Spain in 2006.²⁴⁴ Then in 2007, China submitted an application for permanent observer status, triggering a new wave of interest from non-Arctic states in joining the Council.²⁴⁵ By 2009, Italy, South Korea, and the European Union (EU) had submitted applications,²⁴⁶ followed shortly thereafter by India, Japan, and

²³⁷ *Member States*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/member-states> (last updated Sept. 10, 2015). In 2013, each of the eight members contributed \$58,000 per year (a 12.5% equal contribution) toward the Secretariat budget. ARCTIC COUNCIL SECRETARIAT, INDICATIVE BUDGET FOR 2013, at 5 (2012).

²³⁸ Charron, *supra* note 142.

²³⁹ *Id.*

²⁴⁰ Hasanat, *supra* note 218, at 19.

²⁴¹ Charron, *supra* note 142. *See also* Press Release, Walter and Duncan Gordon Found., Eyeing Resources: India, China, Brazil, Japan, Other Countries Want a Voice on Arctic Council (Jan. 16, 2012) [hereinafter Eyeing Resources], <http://gordonfoundation.ca/press-release/438> (“The Arctic Council is the only international organization that gives indigenous peoples a formal place at the table”).

²⁴² There are currently twelve non-Arctic states and twenty organizations admitted as permanent observers, including nine intergovernmental organizations and eleven non-governmental organizations. *Observers*, ARCTIC COUNCIL (Apr. 27, 2011), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>. With a ratio of “4 observers for every Member State with decision-making clout,” the Council is fairly lopsided, posing potential problems. Charron, *supra* note 142.

²⁴³ Ottawa Declaration, *supra* note 204, ¶ 3.

²⁴⁴ Kathrin Keil, *A New Model for International Cooperation*, ARCTIC INST. (Feb 20, 2014), <http://www.thearcticinstitute.org/2014/02/a-new-model-for-international.html>. *See also* Charron, *supra* note 142.

²⁴⁵ Matthew Willis & Duncan Depledge, *How We Learned to Stop Worrying About China's Arctic Ambitions: Understanding China's Admission to the Arctic Council, 2004-2013*, ARCTIC INST. (Sept. 22, 2014), <http://www.thearcticinstitute.org/2014/09/092214-China-arctic-ambitions-arctic-council.html>.

²⁴⁶ Mia Bennett, *Round-up from the Arctic Council Ministerial Meeting*, FOREIGN POL'Y ASS'N (May 1, 2009), <http://foreignpolicyblogs.com/2009/05/01/round-up-from-the-arctic-council-ministerial-meeting-22/>.

Singapore, “along with a host of non-governmental organizations.”²⁴⁷ All of these applications, however, were deferred.²⁴⁸ The Arctic Eight were divided as to whether to admit new observers: Nordic countries were “favourably [*sic*] disposed to admitting any applicant who made a reasonable case,”²⁴⁹ while Canada and Russia feared that “a greatly enlarged contingent of observers would overwhelm the current members, particularly the indigenous groups.”²⁵⁰ The result was an impasse, since the Council requires consensus to act.²⁵¹

Russia and Canada’s aversion to expansion, however, was perhaps misguided. To be sure, permanent observers are granted a measure of influence at the Arctic Council. Unlike ad-hoc observers, permanent observers are automatically invited to all Council meetings.²⁵² They can utilize their “expertise and money [to] influence decisions in the [C]ouncil’s six working groups.”²⁵³ They can “propose projects” and finance them.²⁵⁴ And they can “submit written statements at Ministerial meetings.”²⁵⁵ Permanent observers are not, however, empowered to speak at Council meetings and have no voting rights.²⁵⁶ And while observers are permitted to finance projects, their contributions “may not exceed the financing from Arctic States.”²⁵⁷ Ultimate decision-making authority therefore rests entirely with the Arctic Eight, as does the primary ability to discuss Council policy and direct the Council’s six working groups.

Nevertheless, stasis among the Arctic Eight persisted, leading the Council in 2011 to publish an official observer manual²⁵⁸ and adopt a new set of criteria

²⁴⁷ Willis & Depledge, *supra* note 245.

²⁴⁸ As the first of the new applicants, China had its application for observer status denied three times (at each of the Ministerial Meetings occurring in 2007, 2009, and 2011), before finally being accepted in 2013. See Rebecca Lindegren, *Arctic Council Adds Five Permanent Asian Observers*, INT’L REL. ONLINE BLOG (June 13, 2013), <http://ironline.american.edu/arctic-council-adds-five-permanent-asian-observers/>.

²⁴⁹ Willis & Depledge, *supra* note 245.

²⁵⁰ See Eyeing Resources, *supra* note 241.

²⁵¹ Bloom, *supra* note 214, at 718.

²⁵² SENIOR ARCTIC OFFICIALS (SAO) REPORT TO MINISTERS 50–51 (2011) [hereinafter SAO REPORT].

²⁵³ *A Warmer Welcome*, ECONOMIST (May 18, 2013), <http://www.economist.com/news/international/21578040-arctic-council-admits-its-first-permanent-asian-observers-warmer-welcome>. See also SAO REPORT, *supra* note 252, at 51 (“[O]bservers should continue to make relevant contributions through their engagement in the Arctic Council primarily at the level of Working Groups”).

²⁵⁴ SAO REPORT, *supra* note 252, at 51. However, observers’ “financial contributions . . . may not exceed the financing from Arctic States, unless otherwise decided.” *Id.*

²⁵⁵ *Id.*

²⁵⁶ *A Warmer Welcome*, *supra* note 253.

²⁵⁷ SAO REPORT, *supra* note 252, at 51.

²⁵⁸ See generally ARCTIC COUNCIL, ARCTIC COUNCIL OBSERVER MANUAL FOR SUBSIDIARY BODIES (2011).

for admitting observers, including a restatement of the role of observers on the Council.²⁵⁹ These documents served two purposes: to reaffirm the primacy of the Arctic Eight on the Council, thereby reassuring Russia and Canada that expansion would not improperly dilute their influence, and to buttress the rights of the Council's permanent participants.²⁶⁰ Under the new criteria, observers must "recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic."²⁶¹ Observers must also "recognize that an extensive legal framework applies to the Arctic Ocean, including [] the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean."²⁶² Finally, observers must have "political willingness" and "financial ability" to contribute to the Council's work, as well as demonstrated "Arctic interests and expertise relevant to the work of the Arctic Council."²⁶³

Unsurprisingly, these conditions proved somewhat contentious. For example, it seemed unlikely that China would accept the second condition, which seemed to imply that the littoral Arctic states had "the right to administer the entire Arctic Ocean."²⁶⁴ In the past, a Chinese Rear Admiral had gone so far as to claim that the "Arctic belongs to all people around the world as no nation has sovereignty over it."²⁶⁵ Officially, however, China's remarks on the new criteria affirmed the "Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic, as well as their decision-making power in the Council."²⁶⁶ Regardless of whether China simply adopted this posture for political expediency, it has remained the official narrative through the present.²⁶⁷

²⁵⁹ SAO REPORT, *supra* note 252.

²⁶⁰ Willis & Depledge, *supra* note 245.

²⁶¹ SAO REPORT, *supra* note 252, at 50.

²⁶² *Id.*

²⁶³ *Id.* These conditions expand upon the Ottawa Declaration's brief statement that observers must be able to "contribute to [the Council's] work." Ottawa Declaration, *supra* note 204, ¶ 3.

²⁶⁴ See, e.g., BYERS, INTERNATIONAL LAW AND THE ARCTIC, *supra* note 62, at 255.

²⁶⁵ Chang, *supra* note 129.

²⁶⁶ Lan Lijun, Ambassador of the People's Republic of China to Canada, Statement at the Meeting between the Swedish Chairmanship of the Arctic Council and Observers (Nov. 6, 2012), http://www.arctic-council.org/images/PDF_attachments/Observer_DMM_2012/ACOBSDMMSE01_Stockholm_2012_Observer_Meeting_Statement_Ambassador_Lan_Lijun_China.pdf.

²⁶⁷ For example, after China gained observer status in 2013, Chinese Foreign Ministry spokesman Hong Lei reaffirmed that "China recognizes the Arctic countries' sovereignty, sovereign rights and jurisdiction in the Arctic area, as well as their leading role in the Arctic Council." Zhi, *supra* note 86.

Following the publication of these guidelines, observer applications were again deferred until the next Ministerial Meeting; however, by 2013, “the ‘observer question’ was beginning to assume its own degree of geopolitical importance.”²⁶⁸ As Arctic sea ice levels melted to record-low levels and commercial activity in the region increased,²⁶⁹ global economic players were keen to have a say in designing the rules and norms affecting that activity. Indeed, the Arctic Eight were conscious that failure to reach a decision as to observer applications would “undermine the [Council’s] status as the region’s key policy-shaping forum, [and] that other forums . . . might emerge to fill the leadership void.”²⁷⁰ Moreover, “[c]ontinued deadlock or a bungled outcome would [] damage the image of openness that the [Council] was seeking to project.”²⁷¹ Whatever residual objections the Arctic Eight had towards expansion, preserving the global legitimacy of the Arctic Council became the overriding concern, leading members to generally endorse the addition of new observers.²⁷²

Subsequently, after some debate,²⁷³ six new permanent observers were admitted to the Arctic Council at its 2013 Ministerial Meeting in Kiruna, Sweden.²⁷⁴ China, India, Japan, Singapore, South Korea, and Italy’s applications were approved;²⁷⁵ the EU’s bid, however, was again deferred pending the resolution of an ongoing dispute between the EU and Canada over a 2008 EU import ban on seal products.²⁷⁶ In response, EU foreign policy chief Catherine Ashton stated that the “EU will now work expeditiously with [Canada] to address the outstanding issue of their concern.”²⁷⁷

²⁶⁸ Willis & Depledge, *supra* note 245.

²⁶⁹ See discussion *supra* Part I.A.

²⁷⁰ Willis & Depledge, *supra* note 245.

²⁷¹ *Id.*

²⁷² See *id.*

²⁷³ *Id.*

²⁷⁴ Arctic Council Secretariat, *Kiruna Declaration*, Eighth Ministerial Meeting, at 6 (May 15, 2013), https://oaarchive.arctic-council.org/bitstream/handle/11374/93/MM08_Kiruna_Declaration_final_formatted.pdf?sequence=5&isAllowed=y [hereinafter *Kiruna Declaration*]. See also Myers, *supra* note 2.

²⁷⁵ *Kiruna Declaration*, *supra* note 274.

²⁷⁶ Andreas Østhagen, *In or Out? The Symbolism of the EU’s Arctic Council Bid*, ARCTIC INST. (June 18, 2013), <http://www.thearcticinstitute.org/2013/06/in-or-out-symbolism-of-eus-arctic.html>. The Council noted that it “affirmatively receive[d] the application of the EU for observer status,” but that it “defer[ed] a final decision on implementation until the Council ministers are agreed . . . that the concerns of Council members . . . are resolved.” *Kiruna Declaration*, *supra* note 274.

²⁷⁷ Nikolaj Nielsen, *China Beats EU to Arctic Council Membership*, EUOBSERVER (May 16, 2013), <https://euobserver.com/eu-china/120138>.

To an extent, Canada's veto of the EU's application symbolizes the growing significance of the Council as a "conveyor of substantial political messages."²⁷⁸ Although seal products hold little economic significance in EU-Canada trade relations, they remain of "grave importance to the local indigenous peoples living off such activities."²⁷⁹ Consequently, the dispute is "pivotal to Canada's self-portrayal as an Arctic nation."²⁸⁰ More generally, Canada's exercise of its veto power signals the dominance of the Arctic states in Arctic affairs.²⁸¹ Indeed, permanent observer status carries only limited benefits, so the real issue is symbolic: "who is in or who is out, and who has the power to decide."²⁸² For now, the EU is "out" until a resolution favorable to Canada is reached; China, India, Japan, Singapore, South Korea, and Italy, by contrast, are "in."

3. *Implications of Expansion*

The Arctic Council's expansion to admit six new permanent observers has significant implications for Arctic governance and development. In practical terms, additional observers will advance the Council's work by financing projects and contributing expertise on Arctic affairs.²⁸³ New observers will also strengthen cooperation on various Council initiatives, such as measures to combat climate change.²⁸⁴ However, since permanent observers have only limited rights,²⁸⁵ the implications of expansion are mostly symbolic.

First, expansion signals international consensus as to the legitimacy of the "patchwork" legal regime administering the Arctic region.²⁸⁶ Having accepted the 2011 admissions criteria, new observers explicitly affirm the primacy of the Arctic Eight's sovereignty and jurisdiction in the Arctic.²⁸⁷ By extension, this demonstrates "broad international acceptance" of the Council's role as the Arctic's leading inter-governmental forum and "strengthens the position of the

²⁷⁸ Nils Wang, *Arctic Security—An Equation with Multiple Unknowns*, 15 J. MIL. & STRATEGIC STUD. 16, 17 (2013).

²⁷⁹ Østhagen, *supra* note 276.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ SAO REPORT, *supra* note 252, at 50.

²⁸⁴ Charron, *supra* note 142.

²⁸⁵ *See* discussion *supra* Part II.B.2.

²⁸⁶ WEIDEMANN, *supra* note 136, at 228.

²⁸⁷ SAO REPORT, *supra* note 252, at 50. Observers "recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic." *Id.*

Arctic Council on the global scene.”²⁸⁸ Acceptance of the admissions criteria also explicitly signals international consensus as to the primacy of UNCLOS as the regulator of the Arctic Ocean.²⁸⁹ Because UNCLOS grants the Arctic Five exclusive jurisdiction over the vast majority of the Arctic’s resources,²⁹⁰ acceptance of this condition indicates new observers’ intent to cooperate with the Arctic Five in exploiting those resources.

Second, expansion greatly enhances the Arctic Council’s international profile. With the inclusion of five Asian states, the Council no longer exclusively represents the interests of non-Arctic European observers, as was the case prior to its 2013 Ministerial Meeting.²⁹¹ Furthermore, the admission of China means that all five U.N. Security Council permanent members—China, France, Russia, the United Kingdom, and the U.S.—are now either members or observers at the Council.²⁹² By “globalizing” its constituency to include these major world powers, the Council’s actions will carry greater apparent legitimacy; in turn, this will enhance the Council’s ability to coalesce broad international support for Arctic initiatives.

Third—and perhaps most significantly—the Council’s admission of six distant observers signals the legitimacy of non-Arctic states’ interests in the Arctic region. Chinese analysts were quick to reach this conclusion in the wake of the Council’s decision; for example, Qu Xing, head of the China Institute of International Studies, stated that “being granted observer status shows that China’s activities in and opinions about the region have been recognized by all member states.”²⁹³ China’s official news agency added that the decision would “guarantee [China’s] legitimate rights and activities in the region.”²⁹⁴ This sentiment was explicitly endorsed by the Danish Foreign Minister, who stated that the Arctic Council’s expansion “reflects the fact that many countries outside the Arctic area also have legitimate interests in the development of the

²⁸⁸ Myers, *supra* note 2.

²⁸⁹ Wang, *supra* note 278. Observers are required to “recognize that an extensive legal framework applies to the Arctic Ocean, including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean.” SAO REPORT, *supra* note 252, at 50.

²⁹⁰ See discussion *supra* Part II.B.2.

²⁹¹ See discussion *supra* Part II.C.2.

²⁹² Charron, *supra* note 142.

²⁹³ Zhi, *supra* note 86.

²⁹⁴ *Id.*

region.”²⁹⁵ The remaining Arctic states at least implicitly endorsed this notion by casting affirmative votes to admit the new observers.

III. REFORMING ARCTIC GOVERNANCE: GLOBALIZING ARCTIC COOPERATION

Notwithstanding the symbolic implications of the Arctic Council’s expansion to admit new observers,²⁹⁶ non-Arctic states remain disadvantaged under the Arctic legal framework. As discussed above, the vast majority of Arctic hydrocarbons²⁹⁷ and both currently-accessible trans-Arctic shipping routes²⁹⁸ are subject to littoral state control under UNCLOS. Arctic governance is likewise dominated by circumpolar actors, as the Arctic Council significantly restricts the participatory rights of non-Arctic states. Not only are non-Arctic observers denied speaking and voting rights, but their financial contributions are prohibited from exceeding those of the Arctic Eight.²⁹⁹ Ad-hoc observers have even fewer rights, requiring permission to attend all Council meetings.³⁰⁰ As the Arctic region globalizes, these structural disparities threaten the continued viability of the Arctic Council in two primary ways.

First, limited participation by non-Arctic states will inhibit the overall effectiveness of the Arctic Council. Caps on financial contributions by observers, for example, may result in Council projects going underfunded, particularly since funding from member states is fairly unreliable.³⁰¹ Indeed, under the Council’s voluntary financing system, members may simply opt out of funding projects altogether, even once those projects are already underway.³⁰² Thus, while observers may propose projects and fund them to the

²⁹⁵ Chris Irvine, *China Granted Permanent Observer Status at Arctic Council*, TELEGRAPH (May 15, 2013), <http://www.telegraph.co.uk/news/worldnews/asia/china/10060624/China-granted-permanent-observer-status-at-Arctic-Council.html>.

²⁹⁶ See discussion *supra* Part II.C.3.

²⁹⁷ See discussion *supra* Part II.B.2.

²⁹⁸ See discussion *supra* Part II.B.3.

²⁹⁹ SAO REPORT, *supra* note 252, at 51.

³⁰⁰ Jane George, *Arctic Council: EU Out But China Likely In, Academics Say*, NUNATSIAQ ONLINE (Apr. 29, 2013, 3:39 PM), http://www.nunatsiaqonline.ca/stories/article/65674arctic_council_eu_out_but_china_likely_in_academics_say/.

³⁰¹ Kankaanpaa & Young, *supra* note 212, at 4. Indeed, the “greatest hindrance to the effectiveness of the council is the lack of a reliable source of funding to cover general operating expenses.” *Id.*

³⁰² WEIDEMANN, *supra* note 136, at 56. If a project simply “drops from the agenda of the funding state and no other [member] is willing to take over, it may fail before being completed.” *Id.* This happened, for example, to the Circumpolar Protected Areas Network project in 2010. See *id.*

same extent as members,³⁰³ they remain powerless to see those projects through to completion. Given the risk of wasted time and resources, this rule may ultimately discourage non-Arctic states from funding Council projects or even bringing their own scientific initiatives under the umbrella of the Council.³⁰⁴ As a result, the Council will remain limited in its ability to produce influential environmental studies and policy guidelines.

More fundamentally, restrictions on non-Arctic observers' speaking rights will inhibit effectiveness by stifling the "cross-pollination of ideas"³⁰⁵ at the Arctic Council. As an informal cooperative forum with a diverse constituency, the key component of the Council's success is its facilitation of "dialogue among different knowledge groups."³⁰⁶ Largely restricting that dialogue to regional actors—even as the Arctic itself globalizes—will inevitably constrain the breadth and diversity of ideas exchanged at the Council, thereby limiting the Council's capacity to generate creative and effective solutions to emerging Arctic issues.

Second, limited opportunities for participation at the Council may lead non-Arctic states to pursue alternative avenues for regional engagement.³⁰⁷ For example, non-Arctic states might view bilateral dealings with the Arctic states as a superior means to achieve regional goals. China has pursued such a strategy in recent years, individually courting the Arctic Eight to position itself as an indispensable Arctic player.³⁰⁸ Similarly, non-Arctic states may view participation in various alternative forums as more rewarding than the Council. One potential alternative is the nonprofit Arctic Circle, an inclusive³⁰⁹ forum that facilitates dialogue among global stakeholders on "rapid changes in the Arctic."³¹⁰ Already numerous distant states, frustrated by their inability to speak at the Council, have begun to focus their attention on the Arctic

³⁰³ SAO REPORT, *supra* note 252, at 51.

³⁰⁴ Aldo Chircop, *Should Observer Participation in Arctic Ocean Governance be Enhanced?*, CAN. NAVAL REV., Winter 2012, at 2, 3.

³⁰⁵ Charron, *supra* note 142.

³⁰⁶ Kankaanpaa & Young, *supra* note 212, at 4.

³⁰⁷ *Id.* at 11.

³⁰⁸ See Rainwater, *supra* note 4, at 71–73.

³⁰⁹ The Arctic Circle is "open to all." Paul Koring, *New Arctic Group Gives Canada Political Competition*, GLOBE & MAIL (Apr. 16, 2013, 3:30 AM), <http://m.theglobeandmail.com/news/politics/new-arctic-group-gives-canada-political-competition/article11243970?service=mobile>.

³¹⁰ *Global Leaders Gather for Inaugural Arctic Circle Assembly Oct. 12-14, 2013, in Reykjavik, Iceland*, PR NEWSWIRE (Oct. 7, 2013), <http://www.prnewswire.co.uk/news-releases/global-leaders-gather-for-inaugural-arctic-circle-assembly-october-12-14-2013-in-reykjavik-iceland-226735641.html> [hereinafter *Global Leaders Gather*]. The forum grants all stakeholders an equal say under "one large 'open tent.'" *Id.*

Circle.³¹¹ This surge of interest will no doubt test the Council's status as the "region's key policy-shaping forum,"³¹² and could lead to the inevitable "marginalization of the [Council] as a force to be reckoned with."³¹³

In sum, the current regional model of Arctic governance is no longer adequate to meet the challenges of a globalized Arctic. As the Arctic develops, non-Arctic states are vying for a say in designing the rules and norms regulating that development. Failure to meaningfully engage these states threatens the viability of the Council, both in terms of its institutional effectiveness and its regional primacy. As a result, the Arctic Council should implement structural reforms that better account for the interests of non-Arctic states in the region, as well as increase its collaboration with alternative Arctic forums that offer distant actors significant participatory rights.

In terms of structural reform, the Arctic Council should abolish its prohibition on non-Arctic observers' funds exceeding those of Arctic Eight. Apart from "exercise of control," this rule serves no functional purpose;³¹⁴ rather, it hampers the Council's work, especially as funds from member states are unreliable under the voluntary system.³¹⁵ Likewise, the Council should grant observers limited speaking rights at ministerial meetings. Currently, observers are allowed only to submit written statements at such meetings;³¹⁶ this right should be expanded to empower observers to make verbal statements, subject to the discretion of the Chair, after the Arctic Eight and permanent participants have spoken. This will encourage a broader exchange of ideas at the Council, thereby allowing for a more robust dialogue on emerging Arctic issues.

Undoubtedly, efforts to enhance non-Arctic state participation will be met with resistance from Russia and Canada, who remain worried that increasing external influence will dilute their status at the Council.³¹⁷ However, without voting rights, non-Arctic state observers will continue to play a secondary role at the Council, leaving ultimate decision-making authority to the Arctic Eight.

³¹¹ Koring, *supra* note 309. Indeed, at its inaugural assembly in 2013, the Arctic Circle was likely "the largest and most diverse gathering of its kind," with over 900 participants from forty countries, including Arctic Council observers such as China and India. *Global Leaders Gather*, *supra* note 310.

³¹² Willis & Depledge, *supra* note 245.

³¹³ Kankaanpaa & Young, *supra* note 212, at 13.

³¹⁴ Chircop, *supra* note 304, at 3.

³¹⁵ Kankaanpaa & Young, *supra* note 212, at 4.

³¹⁶ SAO REPORT, *supra* note 252, at 51.

³¹⁷ See Eyeing Resources, *supra* note 241.

Indeed, under the strict 2011 Admissions Criteria, observers explicitly affirm the authority of the Arctic states in Arctic affairs. Rather, structural reforms will greatly enhance the Council's effectiveness in fulfilling its mandate of sustainable development and environmental protection. First and foremost, reforms allowing for greater funds and increased dialogue will strengthen the Council's operational capabilities. At the same time, efforts to enhance the participation of non-Arctic states in Council activities will increase their commitment to Council outputs,³¹⁸ and will help position the Council as "the most logical and appropriate venue for shaping international coordination in the Arctic."³¹⁹

In addition to these structural reforms, the Council should increase its engagement and coordination with alternative regional forums. As globally-inclusive forums such as the Arctic Circle grow in prominence, the Council's influence will diminish, leading to the decentralization of Arctic policy-shaping. Since the Arctic Eight do not necessarily play a dominant role at such forums, Arctic policy may ultimately be designed "without the consent of, and even opposing, the Arctic states."³²⁰ Disparate regional guidelines and standards may consequently proliferate, creating confusion and harming the effectiveness of the Council. The Council should therefore take the lead in engaging these forums to coordinate a coherent regulatory regime. Further, since non-Arctic states may hold significant influence in these alternative forums, coordination will ultimately ensure that their preferences are represented in the overarching Arctic framework.

CONCLUSION

Over the last two decades, the Arctic region has fundamentally transformed from a frozen wasteland into the "last global frontier" of economic opportunity.³²¹ As the polar ice sheet melts to record-low levels, vast untapped hydrocarbon deposits and shipping shortcuts are opening up to commercial development. As a result, the Arctic is rapidly becoming globalized as non-Arctic states increasingly vie for a say in Arctic affairs.

³¹⁸ Kankaanpaa & Young, *supra* note 212, at 12.

³¹⁹ *Id.*

³²⁰ Kaisa Pulkkinen, *The Arctic Council and the Northeast Asian Observers*, UI BRIEF (Swedish Inst. Int'l Affairs, Stockholm), Nov. 22, 2013, at 1, 5.

³²¹ Innes, *supra* note 29.

In some significant ways, the Arctic states have taken steps to accommodate the interests of these distant states. Most notably, the Arctic Council's admission of six additional non-Arctic observers in 2013 served to generally legitimize the interests of non-Arctic states in the region, while also granting those six states a measure of influence in Arctic affairs. For example, non-Arctic observers are empowered to influence the Council's work by financing projects and sharing their expertise on Arctic matters.

However, despite this gesture, non-Arctic states remain significantly disadvantaged with respect to pursuing their Arctic interests. Under UNCLOS, most of the Arctic's resources and both Arctic sea lanes are exclusively controlled by the littoral Arctic states. Arctic governance is also dominated by regional actors, as non-Arctic states are denied speaking and voting privileges at the Arctic Council. These structural disparities not only harm the interests of non-Arctic states, but also undermine the effectiveness of the Council and may ultimately cause the Council to lose its relevancy as non-Arctic states simply focus their attention elsewhere.

Consequently, the current Arctic regime is no longer adequate to address the challenges of a globalized Arctic; as such, a more inclusive, international approach to Arctic governance is now necessary. Namely, the Arctic Council should enhance the participatory rights of non-Arctic states by abolishing caps on financial contributions and permitting observers some speaking rights at ministerial meetings. At the same time, the Council should engage other Arctic forums to coordinate coherent Arctic policies that account for the interests of states around the world.

To be sure, the Arctic Eight should continue to play a predominant role in Arctic affairs; non-Arctic states should not be elevated to the same status as regional actors, given their inherent detachment from local Arctic challenges and opportunities. Yet, as one study has noted, “[g]iven the economic and political shifts occurring at the global level today, there is no way to address Arctic issues successfully without recognizing the heightened connectivity between the Arctic and the global system.”³²² Indeed, the Arctic is no longer a

³²² Kankaanpaa & Young, *supra* note 212, at 12–13.

strictly insular region; circumpolar actors must therefore take steps to adapt to the challenges of a globalized Arctic.

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