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## Arctic Climate Change and U.S. Accession to the United Nations Convention on the Law of the Sea

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### I. INTRODUCTION

New data released by the National Aeronautics and Space Administration (NASA)<sup>1</sup> and the National Oceanic and Atmospheric Administration (NOAA)<sup>2</sup> in 2012 and 2013 reveals that the Arctic is melting much faster than originally predicted. In September 2012, the Arctic Ocean ice pack shrank to its lowest extent on record—49 percent below the average over the past 35 years.<sup>3</sup> This accelerated decrease in sea ice led the Administra-

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1. Rani Gran and Maria-José Viñas, *NASA Finds Thickest Parts of Arctic Ice Cap Melting Faster*, NASA GODDARD SPACE FLIGHT CENTER, Feb. 29, 2012, [www.nasa.gov/topics/earth/features/thick-melt.html](http://www.nasa.gov/topics/earth/features/thick-melt.html) (“A new NASA study revealed that the oldest and thickest Arctic sea ice is disappearing at a faster rate than the younger and thinner ice at the edges of the Arctic Ocean’s floating ice cap.”); *A change of pace*, NATIONAL SNOW AND ICE DATA CENTER, July 17, 2013, <http://nsidc.org/arcticseaicenews/2013/07/a-change-of-pace/> (“During the first two weeks of July, ice extent declined at a rate . . . 61% faster than the average rate of decline over the period 1981 to 2010.”).

2. Jeffries, M. O., J. A. Richter-Menge and J. E. Overland, Eds., *December 2012: Arctic Report Card 2012*, 36–42, <http://www.arctic.noaa.gov/reportcard> (“Sea ice extent in September 2012 reached the lowest observed in the satellite record (1979–present).”)

3. Joel Clement, John Bengtson and Brendan Kelly (Lead Authors), *Managing for the Future in a Rapidly Changing Arctic*, A Report to the President from the Interagency Working

tion to re-think the need for a new national strategy to address the significant management, safety and security challenges posed by a rapidly changing Arctic environment.<sup>4</sup> After several months of deliberation, the White House released a new *National Strategy for the Arctic Region* on May 10, 2013 that seeks to “guide, prioritize, and synchronize efforts to protect U.S. national and homeland security interests, promote responsible stewardship, and foster international cooperation.”<sup>5</sup> Eleven days later, the U.S. Coast Guard rolled out its new Arctic Strategy, recognizing that there will be an “increasing demand for the Coast Guard to ensure the safety, security and stewardship of the nation’s arctic waters” as Arctic ice recedes and maritime activity increases.<sup>6</sup> The new National Strategy will also likely cause the U.S. Navy to look at its Arctic Roadmap published in 2009.<sup>7</sup>

The National Strategy is built on three lines of effort:

- Advance U.S. security interests;
- Pursue responsible Arctic region stewardship; and
- Strengthen international cooperation.<sup>8</sup>

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Group on Coordination of Domestic Energy Development and Permitting in Alaska (Mar. 2013).

4. The Interagency Working Group report to the President recommended that the U.S. Government:

- Adopt an Integrated Arctic Management approach that integrates and balances environmental, economic and cultural needs and objectives when making stewardship and development decisions affecting the U.S. Arctic;
- Ensure ongoing high-level White House leadership on Arctic issues, including the development of a new National Strategy for the Arctic Region through the Presidential Policy Directive process;
- Strengthen key partnerships with the State of Alaska and Alaska Native tribal governments and organizations;
- Promote better stakeholder engagement on planning and management issues; and
- Coordinate and streamline federal action by identifying overlapping missions and reducing duplication of effort.

*Id.*, at 3.

5. *National Strategy for the Arctic Region*, May 10, 2013, at 5, available at [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf).

6. United States Coast Guard Arctic Strategy, *The United States Coast Guard’s Vision for Operating in the Arctic Region: Ensure Safe, Secure and Environmentally Responsible Maritime Activity in the Arctic*, May 21, 2013.

7. Memorandum from J.W. Greenert, Admiral, U.S. Navy, Navy Arctic Roadmap (Nov. 10, 2009), Annex U.S. Navy Arctic Roadmap (Oct. 2009).

One of the key supporting objectives identified in the strategy to advance U.S. security interests is the need to preserve Arctic region freedom of the seas recognized under international law.<sup>9</sup> To that end, the new strategy suggests that U.S. efforts to strengthen international cooperation and partnerships can best be achieved by acceding to the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS).<sup>10</sup>

The remaining sections of this article will analyze whether the observed acceleration of climate change in the Arctic region provides the United States with new incentives that tip the balance in favor of finally acceding to the Convention.

## II. A CONSTITUTION FOR THE WORLD'S OCEANS

UNCLOS provides a comprehensive legal framework regarding uses of the oceans. Negotiated over a nine year period (1973–1982) by more than 150 delegations, UNCLOS carefully balances the interests of States to control activities off their coasts with those of all States to use the oceans without

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8. The new strategy will be informed by the following guiding principles:

- Safeguard peace and stability;
- Make decisions using the best available information;
- Pursue innovative arrangements; and
- Consult and coordinate with Alaska Natives.

*National Strategy for the Arctic Region*, May 10, 2013, at 2–3.

9. The *National Strategy* states,

The United States has a national interest in preserving all of the rights, freedoms, and uses of the sea and airspace recognized under international law. . . . Existing international law provides a comprehensive set of rules governing the rights, freedoms, and uses of the world's oceans and airspace, including the Arctic. The law recognizes these rights, freedoms, and uses for commercial and military vessels and aircraft. . . . We will also encourage other nations to adhere to internationally accepted principles.

*Id.*, at 6.

10. The *National Strategy* states,

Accession to the Convention would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and overflight through the Northwest Passage and the Northern Sea Route. . . . While the United States is not currently a party to the Convention, we will continue to support and observe principles of established customary international law reflected in the Convention.

*Id.*, at 6.

undue interference. Although the United States played a key role in developing the terms of the Convention consistent with U.S. national interests, President Reagan elected not to sign the treaty when it opened for signature, citing concerns with Part XI of the Convention on deep sea bed mining.<sup>11</sup> Despite America's refusal to sign UNCLOS, the President recognized that the Convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and

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11. President Ronald Reagan's Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, Jan. 29, 1982:

[L]ast March, I announced that my administration would undertake a thorough review of the current draft and the degree to which it met United States interests . . . . Our review has concluded that while most provisions of the draft convention are acceptable and consistent with United States interests, some major elements of the deep seabed mining regime are not acceptable. . . . In the deep seabed mining area, we will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:

- will not deter development of any deep seabed mineral resources to meet national and world demand;
- will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;
- will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;
- will not set other undesirable precedents for international organizations; and
- will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The United States remains committed to the multilateral treaty process for reaching agreement on Law of the Sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification.

*See also* President Ronald Reagan's Statement on United States Oceans Policy [*hereinafter* Ocean Policy Statement], Mar. 10, 1983:

Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

fairly balance the interests of all states.”<sup>12</sup> Accordingly, the President announced that the United States was:

prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.<sup>13</sup>

Widespread recognition that the Convention’s deep seabed mining regime was fundamentally flawed and required basic change in order to make it generally acceptable to the industrialized nations prompted the U.N. Secretary-General to convene a series of informal meetings in New York in 1990 to begin negotiation of a new agreement that would correct the objectionable provisions of Part XI. These efforts resulted in the adoption of the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex*.<sup>14</sup> The Implementing Agreement (IA) contains a number of legally binding changes that meet the six objections to Part XI raised by President Reagan in 1982. As a result, the United States and all other major industrialized nations have signed the IA.<sup>15</sup>

On October 7, 1994, President Clinton submitted UNCLOS and the IA to the Senate for advice and consent to accession and ratification, respectively. Despite widespread bi-partisan support, the concurrence of all the Federal agencies and departments with ocean interests, and support from the U.S. maritime industries (oil and gas, shipping, telecommunications, marine science, fishing) and environmental groups, the Convention and its Implementing Agreement have languished in the Senate for the past 20 years.

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12. Ocean Policy Statement, Mar. 10, 1983.

13. *Id.*

14. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, Oct. 7, 1994, S. Treaty Doc. No. 103-39, 103d Cong., 2d Sess. (1994) [hereinafter Annex to AI]. A/RES/48/263, July 28, 1994.

15. Letter from George P. Shultz (Secretary of State under President Reagan) to Senator Richard Lugar, June 28, 2007, [http://www.jag.navy.mil/organization/code\\_10\\_law\\_of\\_the\\_sea.htm](http://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm) (“The treaty has been changed in such a way with respect to the deep seabed that it is now acceptable, in my judgment. Under these circumstances, and given the many desirable aspects of the treaty on other grounds, I believe it is time to proceed with ratification.”); S. Treaty Doc. No. 103-39, at 59–60 (1994) *reprinted in* <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg77375/pdf/CHRG-112shrg77375.pdf>.

The United States is the only major maritime power and major industrialized nation that has not joined the Convention. UNCLOS entered into force on November 16, 1994, and as of August 2013 has 166 parties. The IA entered into force on July 28, 1996, and currently has 145 parties. Although the United States is not a party to UNCLOS, it continues to view the Convention's navigational provisions as reflective of customary international law and therefore binding on all nations.<sup>16</sup>

Clearly, the original objections to the deep seabed mining provisions of the Convention have been rectified and are no longer grounds for objection. Thus, while the U.S. military, commercial interests and certain non-governmental organizations have recognized and advocated for the United States to accede to the Convention for many years, the Senate has failed to act. The impacts of climate change in the Arctic region, however, should provide the necessary impetus for the U.S. Senate to revisit UNCLOS and provide its advice and consent to support U.S. accession to this important treaty.

### III. BENEFITS OF JOINING UNCLOS

Since 1994, all succeeding Administrations—Democrat and Republican alike—have strongly supported U.S. accession to the Convention. UNCLOS has likewise garnered significant attention on Capitol Hill, with 13 full committee hearings devoted exclusively to UNCLOS being convened by five different Congressional committees in the last 20 years. Nonetheless, despite widespread support by all major stakeholders since the mid-1990s, proponents of the Convention have not succeeded in convincing a handful of ideologues—who continue to fallaciously view UNCLOS as an assault on U.S. sovereignty—that accession is in the best interests of the United States. The reasons for this failure are varied. First, while many of the arguments advanced by UNCLOS supporters over the years remain valid today, others have not stood the test of time or have lost much of their luster in the intervening years. Second, some UNCLOS proponents have eroded support for the Convention by articulating factually incorrect or overinflated statements in an effort to sensationalize the need to join the Convention, in the same way UNCLOS opponents argue against U.S. ratification by conjuring up the evils of the New International Economic Or-

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16. This position does not allow the United States to benefit from many of the other provisions of the Convention.

der and the original flaws of Part XI. In short, having operated outside the Convention for 30 years, senators opposing accession remain unconvinced that it is still critical for the United States to accede to the Convention. Climate change in the Arctic region provides the current Administration with an opportunity to re-engage these skeptical senators with new reasons that support Senate advice and consent to accession.

#### *A. Extended Continental Shelf Resources*

As a result of melting sea ice, access to sizeable and lucrative offshore hydrocarbon and other mineral reserves in the Arctic Ocean will occur sooner than projected. Many of these resources are located beyond 200 nautical miles (nm) off the coast.

According to a 2008 assessment by the U.S. Geological Survey (USGS), “the total mean undiscovered conventional oil and gas resources in the Arctic are estimated to be approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids.”<sup>17</sup> The overwhelming majority of these resources—84 percent—is expected to occur in offshore areas. Over 70 percent “of the mean undiscovered oil resources is estimated to occur in five provinces: Arctic Alaska, Amerasia Basin, East Greenland Rift Basins, East Barents Basins, and West Greenland-East Canada.”<sup>18</sup> Similarly, over 70 percent “of the undiscovered natural gas is estimated to occur in three provinces: the West Siberian Basin, the East Barents Basins, and Arctic Alaska.”<sup>19</sup> Arctic Alaska, the Amerasia Basin, and the North Chukchi-Wrangel Foreland Basin provinces, portions of which could be claimed by the United States, account for over 40 million barrels of oil, 284 billion cubic feet of natural gas, 6.5 million barrels of natural gas liquids and 94 million barrels of oil and oil-equivalent natural

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17. *USGS Arctic Oil and Gas Report, Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, U.S. Geological Survey Fact Sheet (July 2008).

18. *Id.*

19. *Id.*

gas.<sup>20</sup> The value of these resources is estimated to be in the trillions of dollars.<sup>21</sup>

All states may claim a 200 nm continental shelf. In addition, States Parties to UNCLOS may file claims with the Commission on the Limits of the Continental Shelf (CLCS) for exclusive sovereign rights and jurisdiction over the seabed resources of an Extended Continental Shelf (ECS) extending hundreds of miles offshore.<sup>22</sup> If the United States becomes a party to UNCLOS, it has strong ECS claims over the resources of the Beaufort shelf and the Chukchi shelf.<sup>23</sup>

Offshore oil and gas exploitation could generate thousands of U.S. jobs and billions of dollars in new government revenues, as well as extend the life of the Trans-Alaska Pipeline System (TAPS). A 2010 study conducted by Northern Economics and the University of Alaska Institute for Social and Economic Research found that developing oil and gas resources off Alaska would create an average of 54,700 new jobs per year, result in a total of \$145 billion in new payroll nationwide, and generate a total of \$193 billion in new government revenue.<sup>24</sup>

Between 1977 and 2010, TAPS supplied U.S. refineries with over 17 billion barrels of oil. However, due to the fall in production of oil in Prudhoe Bay over the past 20 years, the amount of oil flowing through the pipeline has fallen from 2.1 million to 600,000 barrels per day. According to Peter Slaiby (Vice President of Shell Alaska), “[i]f the throughput in the pipeline continues to decline and no new supplies are developed, TAPS will eventually be shut down, cutting access to one of the largest sources of domestically produced oil in the country” and increasing U.S. dependence

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20. *Id.* See also USGS assessments in 2012 confirming these findings, *Assessment of Undiscovered Petroleum Resources of the Arctic Alaska Petroleum Province*, U.S. Geological Survey Scientific Investigations Report 2012–5147; *Assessment of Undiscovered Petroleum Resources of the Amerasia Basin Petroleum Province*, U.S. Geological Survey Scientific Investigations Report 2012–5146).

21. The price of oil and natural gas on Aug. 14, 2013 was US\$106.55/bbl and US\$3.36/MMBtu, respectively.

22. United Nations Convention on the Law of the Sea (“UNCLOS”), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], art. 76.

23. S. Treaty Doc. No. 103–39, *supra* note 15, at 56.

24. S. Hrg. 112-234, *Defending U.S. Economic Interests in the Changing Arctic: Is There a Strategy?*; Hearing before the Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard of the Committee on Commerce, Science and Transportation, United States Senate, 112th Congress, 1st Session, (July 27, 2011) (statement of Peter E. Slaiby, Vice President, Shell Alaska).

on foreign oil imports.<sup>25</sup> Offshore oil deposits in U.S. Arctic waters would breathe new life into TAPS.

Granted, as UNCLOS critics are quick to point out, access to the ECS under UNCLOS is contingent upon payment of royalties to the International Seabed Authority (ISBA) for oil and gas development beyond 200 nautical miles (nm).<sup>26</sup> However, the royalty framework is relatively insignificant compared to the fee-sharing arrangements for overseas oil and gas development and the enormous economic benefits anticipated from offshore resource development. Revenue sharing does not begin until the 6<sup>th</sup> year of production of a particular well or site, starts at 1% of the value of production and increases 1% per year. By the 12<sup>th</sup> year and remaining years thereafter, the royalty is 7% of the value of production, paid either in kind or in dollars.<sup>27</sup> During the 1970s, these revenue sharing provisions were negotiated in consultation with the U.S. oil and gas industry.

Payments are to be distributed by the ISBA to States Parties of UNCLOS in accordance with Article 82(4) on the basis of equitable criteria that take into account economic development factors. Of note, this distribution is distinct from the distribution of revenues generated from deep seabed mining operations under Part XI of the Convention. As a State Party to UNCLOS, the United States would have a permanent seat in the ISBA to ensure both kinds of distributions are made in ways acceptable to the United States—Section 3(15) of the Annex to the IA guarantees the United States a seat on the ISBA Council in perpetuity.<sup>28</sup> Any ISBA decision regarding revenue sharing must be approved by the Council.<sup>29</sup> Additionally, if distributions are made to a country that is already receiving U.S. foreign aid, the United States could offset aid to that country by the amount of distributions paid by the ISBA, in essence eliminating any increase financial burden to the American taxpayers.

Critics suggest accession to UNCLOS is not required in order for the United States to claim an ECS, since the 1958 Continental Shelf Convention and the 1945 Truman Proclamation already support a unilateral U.S.

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25. *Id.*

26. UNCLOS, *supra* note 22, art. 82.

27. *Id.*

28. Annex to IA, *supra* note 14, Section 3(15) (providing that the State with the largest economy in terms of gross domestic product as of November 16, 1994, is guaranteed a seat on the Council).

29. Annex to IA, *supra* note 14, Section 3(5); UNCLOS, *supra* note 22, arts. 161(8)(d) & 162(2)(o).

claim. Although that may be true, the metric for determining the outer extent of the ECS is more generous in UNCLOS than in the 1958 Convention or the Truman Proclamation, both of which rely on an “exploitability criterion” to identify the outer limit of the ECS.<sup>30</sup> More importantly, the U.S. oil and gas industry believes that unilaterally claiming an ECS outside UNCLOS may be challenged by other nations in courts throughout the world, and has therefore repeatedly argued that legal certainty/security of tenure to explore and exploit the resources of the ECS can be obtained only through UNCLOS.<sup>31</sup> The bottom line is that U.S. industry will not invest in offshore oil and gas production in the ECS unless the United States is a party to UNCLOS.<sup>32</sup>

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30. Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 499 U.N.T.S. 311:

For the purpose of these articles, the term ‘continental shelf’ is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

*See also* Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Sept. 28, 1945.

31. Convention on the Law of the Sea, S. Exec. Rpt. No. 110–9, Committee on Foreign Relations (Dec. 19, 2007) at 9:

In an era when the United States faces growing energy vulnerability, failing to accede to the Convention will constrain the opportunities of U.S. energy companies to explore beyond 200 nm. Mr. Paul Kelly, testifying on behalf of the oil and gas industry, asserted that under the Convention, the United States would have the opportunity to receive international recognition of its economic sovereignty over more than 291,000 square miles of extended continental shelf. Much of this is in the Arctic, which holds approximately one quarter of the world’s undiscovered oil and natural gas, according to the U.S. Geological Survey World Petroleum Assessment in 2000.

32. U.S. Dep’t of State Press Release, Statement of Secretary of State Hillary Rodham Clinton, *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification*, *The U.S. National Security and Strategic Imperatives for Ratification* (May 23, 2012), at <http://www.state.gov/secretary/rm/2012/05/190685.htm>:

U.S. oil and gas companies are now ready, willing, and able to explore this area. But they have made it clear to us that they need the maximum level of international legal certainty before they will or could make the substantial investments, and, we believe, create many jobs in doing so needed to extract these far-offshore resources. If we were a party to the convention, we would gain international recognition of our sovereign rights, including by using the convention’s procedures, and therefore be able to give our oil and gas companies this legal certainty. Staying outside the convention, we simply cannot.

The sea-bed and ocean floor beyond the limits of national jurisdiction—that is, beyond the 200 nm continental shelf or beyond the ECS established pursuant to UNCLOS—to include all resource exploration and exploitation activities, are regulated by the ISBA, in accordance with Part XI of the Convention and the Part XI IA. If the United States continues to delay establishing the outer limit of its ECS in the Arctic, other nations may undercut U.S. claims and receive ISBA license to extract resources in areas that otherwise could be under exclusive U.S. jurisdiction.

In May 2013, five Asian nations—including China—were granted observer status in the Arctic Council, and China has stated it does not intend to be a “wallflower” in the forum.<sup>33</sup> Beijing has expressed an interest in developing new shipping routes through the Arctic that will connect China with its largest export market—the European Union. To that end, in August 2013, a Chinese merchant vessel loaded with heavy equipment and steel set sail from Dalian en route to Rotterdam via the Arctic’s Northern Sea Route (NSR).<sup>34</sup> China has also expressed an interest in developing Arctic resources. In March 2010, Rear Admiral Yin Zhou of the People’s Liberation Army Navy stated at the Eleventh Chinese People’s Political Consultative Conference that “under . . . UNCLOS, the Arctic does not belong to any particular nation and is rather the property of all the world’s people” and that “China must play an indispensable role in Arctic exploration as it has one-fifth of the world’s population.”<sup>35</sup> Officials from the State Oceanic Administration have similarly indicated that China is a “near Arctic state” and that the Arctic is an “inherited wealth for all humankind.”<sup>36</sup> As a party to UNCLOS, the United States could claim an ECS in the Arctic and forestall any encroachment of U.S. ocean resources by China or any other nation.

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33. Linda Jakobson, *Preparing for an ice-free Arctic*, CHINA DIALOGUE, Apr. 21, 2010 (Although China recognizes that the Arctic is primarily a regional issue, the Assistant Minister of Foreign Affairs indicated in a speech at an Arctic forum in 2009 on Svalbard that “concerns over climate change and international shipping gave [the Arctic] inter-regional dimensions.”).

34. Bill Savadove, *China reveals its Arctic ambitions in new shipping route*, JAPAN TIMES, Aug. 18, 2013.

35. Jakobson, *supra* note 33.

36. Bhavna Singh, *China And The Arctic: The Next ‘Strategic’ Frontline?*, EURASIA REVIEW, Oct. 19, 2012.

*B. Freedom of Navigation*

U.S. freedom of navigation interests in the Arctic would be bolstered by joining UNCLOS. Both Russia and Canada have maritime claims in the Arctic that are inconsistent with the rules contained in the Convention.

Russia<sup>37</sup> and Canada<sup>38</sup> draw excessive straight baselines in the Arctic and restrict the right of transit passage in various international straits in the Arctic, including the Northeast Passage, the Northwest Passage and various straits located within Russia's Northern Sea Route (NSR)—the Demitri, Laptev and Sannikov Straits. Russia's straight baselines closing the NSR straits and Canada's straight baselines around its Arctic Islands do not meet the legal criteria contained in Article 7 of the Convention.<sup>39</sup> According to UNCLOS Article 5, the correct baseline for these areas is the low-water line. UNCLOS Article 38 also provides that the right of transit passage through international straits cannot be suspended or impeded by the bordering States. Use of straight baselines by Russia and Canada to close these international straits is therefore inconsistent with the Convention. Furthermore, under UNCLOS Article 8(2), all nations enjoy at least the right of innocent passage in areas within newly drawn straight baselines.

The United States has diplomatically protested and operationally challenged these excessive straight baseline claims under the U.S. Freedom of Navigation Program, citing the provisions of UNCLOS and customary in-

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37. List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the USSR, Adopted by Decrees of the USSR Council of Ministers on Feb. 7, 1984; List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the USSR, Adopted by Decrees of the USSR Council of Ministers on Jan. 15, 1985; Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, Adopted by the State Duma on July 16, 1998, Approved by the Federation Council on July 17, 1998.

38. Territorial Sea Geographical Coordinates (Area 7) Order, P.C., SOR/1985-872 (Can.).

39. UNCLOS, *supra* note 22, article 7 states,

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining the appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

ternational law.<sup>40</sup> However, the U.S. legal position would be on better footing if the United States was a party to the Convention.

Russia and Canada have also enacted domestic laws and regulations to regulate maritime traffic in their Arctic waters, citing UNCLOS Article 234 as their legal basis.<sup>41</sup> Although Article 234 does allow coastal States to adopt and enforce measures to prevent, reduce and control vessel-source pollution in ice-covered areas, such measures must have “due regard to navigation.” Both the Russian and Canadian laws and regulations in question, however, exceed what is permissible under international law, including the Safety of Life at Sea Convention (SOLAS)<sup>42</sup> and UNCLOS. They also exceed current International Maritime Organization (IMO) construction, design, equipment and manning (CDEM) standards set out in the IMO Polar Code.<sup>43</sup>

Russia’s NSR regulations<sup>44</sup> and Canada’s Northern Canada Vessel Traffic Service Zone Regulations (NORDREGS)<sup>45</sup> were unilaterally adopted without IMO approval. However, mandatory ship routing,<sup>46</sup> mandatory

40. U.S. Dep’t of Defense, *Maritime Claims Reference Manual*, DOD 2005.1-m (June 23, 2005), available at [http://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm).

41. UNCLOS, *supra* note 22, art. 234 (Ice-covered areas) provides:

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

42. International Convention for the Safety of Life at Sea, Annex, Ch. V, Reg. 33(1), Nov. 1, 1974, T.I.A.S. No. 9700 [hereinafter SOLAS].

43. Guidelines for Ships Operating in Polar Waters, IMO Doc.A26/Res. 1024 Annex (Dec. 2, 2009), available at [http://www.imo.org/blast/blastDataHelper.asp?data\\_id=29985&filename=A1024\(26\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=29985&filename=A1024(26).pdf).

44. Regulations for Navigation on the Seaways of the Northern Sea Route, Approved by the USSR Minister of Merchant Marine, Sept. 14, 1990; Requirements for Design, Equipment and Supply of Vessels Navigating the Northern Sea Route; 1996 Regulations for Icebreaker and Pilot Guiding of Vessels Through the Northern Sea Route.

45. Northern Canada Vessel Traffic Services Zone Regulations, Canada Gazette, Vol. 144, No. 9, Feb. 27, 2010.

46. SOLAS, *supra* note 42, Regulation V/10 provides, in part,

1. . . . Ships’ routing systems . . . may be made mandatory . . . when adopted and implemented in accordance with the guidelines and criteria developed by the . . . [IMO]. 2. . . . Contracting

ship reporting<sup>47</sup> and mandatory vessel traffic services (VTS)<sup>48</sup> that apply beyond the 12-nm territorial sea of a coastal State must be submitted to and approved by the IMO under SOLAS Chapter V. SOLAS Regulations V/10(9) and V/11(8) further provide that all routing and reporting “systems and actions taken to enforce compliance with those systems shall be consistent with international law, including . . . [UNCLOS].”

Coastal State maritime traffic regulations adopted by the IMO must also be applied consistent with the right of transit passage guaranteed to all ships and aircraft by Part III of UNCLOS.<sup>49</sup> To the extent that the Russian and Canadian regulations require compulsory pilotage and prior permission to transit international straits, they violate UNCLOS Articles 38 and 42, which prohibit coastal States from adopting domestic measures that impede or “have the practical effect of denying, hampering or impairing the right of transit passage.”<sup>50</sup>

Application of domestic environmental laws and regulations adopted pursuant to Article 234 is also subordinate to UNCLOS Article 236, which exempts all sovereign immune vessels from the environmental provisions of the Convention.<sup>51</sup> NORDREGS exempts warships from compliance;

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Governments shall refer proposals for the adoption of ships' routing systems to the...[IMO]. . . . 4. Ships' routing systems should be submitted to the . . . [IMO] for adoption.

47. SOLAS, *supra* note 42, Regulation V/11 (providing, in part, “[a] ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the . . . [IMO] . . . , shall be used by all ships. . . . Contracting Governments shall refer proposals for the adoption of ship reporting systems to the . . . [IMO].”

48. SOLAS, *supra* note 42, Regulation V/12 stipulates, in part, “[the use of VTS may only be made mandatory in sea areas within the territorial seas of a coastal State.”

49. SOLAS, *supra* note 42, Regulations V/10(10), V/11(9) and V/12(5) (providing that “[n]othing in this regulation nor its associated guidelines and criteria shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes.”).

50. Of note, on August 23, 2013, a Greenpeace icebreaker—the *Arctic Sunrise*—set sail for the Arctic to challenge Russia’s prior permission regime for the NSR after being denied a permit to transit the Russian waterway on three previous occasions. Bob Weber, *Greenpeace to defy Russians, enter Arctic seas without permit*, THE CANADIAN PRESS, Aug. 26, 2013.

51. UNCLOS, *supra* note 22, art. 236 (Sovereign immunity):

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such

however, other government sovereign immune vessels are not exempt. The NSR regulations do not exempt sovereign immune vessels from the duty to comply. To the extent that the Russian and Canadian laws and regulations apply to sovereign immune vessels, they are inconsistent with international law, including UNCLOS Article 236 and SOLAS, Regulation V/1.<sup>52</sup>

As a party to UNCLOS, U.S. opposition to these unilateral laws and regulations would be strengthened to include the possibility of compulsory dispute settlement under Part XV of the Convention. Application of these domestic measures in the EEZ and in international straits clearly interferes with U.S. high seas freedoms of navigation and overflight and other lawful uses of the seas. Such actions also exceed IMO-approved rules and standards for the protection of the marine environment in the EEZ. Moreover, neither government has provided sufficient data to demonstrate that their domestic laws and regulations are based on the best available scientific evidence, as required by UNCLOS Article 234. The Convention's compulsory dispute settlement procedures can be invoked by a State Party for a number of reasons, including interference with high seas freedoms of navigation and overflight and other lawful uses of the sea in the EEZ (Article 297(1)(a)) and contravention of international rules and standards for the protection and preservation of the marine environment in the EEZ (Article 297(1)(c)).

### *C. American Leadership*

The United States has historically been the world leader in protecting the common interest in navigational freedom and the rule of the law in the oceans. However, America has temporarily lost that leadership by its con-

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vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

52. Consistent with UNCLOS, *supra* note 22, art. 234, SOLAS, *supra* note 42, Regulation V/1 states, in part:

Unless expressly provided otherwise, this chapter shall apply to all ships on all voyages, except: .1 warships, naval auxiliaries and other ships owned or operated by a Contracting Government and used only on government non-commercial service . . . . However, warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on government non-commercial service are encouraged to act in a manner consistent, so far as reasonable and practicable, with this chapter.

tinued non-adherence to UNCLOS. U.S. accession to the Convention will restore that role and advance U.S. leadership in Arctic Ocean issues.

Joining UNCLOS will put the United States on an even footing with the other Arctic nations, as America assumes the chairmanship of the Arctic Council from Canada in 2015. All of the Council's member States (except the United States) and its 12 observer States are parties to the Convention. Moreover, in 2008, the five Arctic coastal States (Canada, Denmark, Russia, Norway and the United States) declared at Ilulissat that the law of the sea, as reflected in UNCLOS, is the legal framework that governs the Arctic Ocean, and there is no need for a new legal regime to govern the Arctic Ocean.<sup>53</sup> Therefore, U.S. participation in the Arctic Council recognizes UNCLOS as the governing framework in the Arctic.

The Arctic Council provides a forum for promoting cooperation, coordination and interaction among the Arctic States on common Arctic issues, in particular issues of sustainable development and environmental protection. The Council adopted an Arctic Search and Rescue (SAR) agreement in 2011<sup>54</sup> and an Arctic oil response agreement in 2013,<sup>55</sup> both of which take into account the relevant provisions of UNCLOS. The member States of the Arctic Council are also leading the way for the development of a mandatory Polar Code at the IMO that will give context to UNCLOS Article 234, while giving due regard to navigation.

Similarly, the Council will have an increasing role in developing management regimes for Arctic fisheries beyond areas of national jurisdiction. Although there are currently no commercial fisheries in the Arctic, salmon and other fish are expected to move north as global warming alters sea ice

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53. The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, May 27-28, 2008:

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

54. Arctic Council's Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011, *available at* [http://www.library.arcticportal.org/1474/1/Arctic\\_SAR\\_Agreement\\_EN\\_FINAL\\_for\\_signature\\_21-Apr-2011.pdf](http://www.library.arcticportal.org/1474/1/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf).

55. Arctic Council's Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013.

conditions.<sup>56</sup> This northern migration will result in a concomitant increase in the number of fishing vessels operating further north of their traditional fishing grounds. Increased fishing activities in the region could lead to increased foreign incursions into the U.S. EEZ, as well as overfishing in areas beyond the EEZs of the other Arctic States. As a result, in 2009, the United States imposed a moratorium on commercial fishing in the Arctic Management Area—U.S. Federal waters north of the Bering Strait in the Chukchi and Beaufort Seas—until more information is available to support sustainable fisheries management.<sup>57</sup>

Nevertheless, the United States cannot “go it alone” in the Arctic—it will need the cooperation of the other member States of the Arctic Council to ensure that U.S. conservation efforts initiated with the Arctic Fisheries Management Plan are not put in jeopardy. The Council’s work in this regard will be informed by the provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (Articles 63 and 64), as well as the 1995 Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement, which elaborates on the fundamental principles of conservation and management established in UNCLOS Articles 116-120.

U.S. leadership in evaluating other nations ECS claims in the Arctic is also lacking. As a non-Party to UNCLOS, the United States is not only precluded from filing an ECS claim with the CLCS, it also cannot participate in the CLCS process to evaluate and make recommendations on other States’ ECS claims in the Arctic and elsewhere. Russia submitted an Arctic ECS claim to the CLCS in 2001 (partially revised in February 2013).<sup>58</sup> In February 2002, the United States filed a notification with the United Nations regarding the Russian submission, indicating that it lacks sufficient

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56. Joel Clement, John Bengtson and Brendan Kelly (Lead Authors), *Managing for the Future in a Rapidly Changing Arctic*, A Report to the President from the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska (Mar. 2013).

57. Fisheries of the United States Exclusive Economic Zone off Alaska; Fisheries of the Arctic Management Area; Bering Sea Subarea, 74 FR 56734, Nov. 3, 2009.

58. Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Russian Federation, Dec. 20, 2001, and Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial revised Submission by the Russian Federation, Feb. 28, 2013, [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

scientific data to support Russia's ECS claim in the Arctic.<sup>59</sup> The U.S. notification also invoked UNCLOS, stressing "the importance of promoting stability of relations in the oceans, and of complying with the provisions of Article 76 of . . . [UNCLOS]."

However, as a non-Party to UNCLOS, the United States lacks standing to challenge other nations' excessive claims in the Arctic citing the provisions of the Convention. The same is true in other regions of the world. China, for example, continues to pursue an aggressive posture in the South China Sea and routinely criticizes the United States for not being a Party to UNCLOS—"the U.S. insists that China must base its [South China Sea] claims solely on the 1982 UNCLOS although the U.S. itself has not ratified it."<sup>60</sup> Similarly, when Iran signed UNCLOS in 1982, it filed a declaration indicating, *inter alia*, that "only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein, [including] the right of Transit passage through straits used for international navigation."<sup>61</sup> Thus, Iran argues that the United States does not enjoy a right of transit passage through the Strait of Hormuz because that right is contractual in nature. Joining the Convention would put the United States on solid legal ground to conclusively "put to bed" these assertions.

#### IV. Conclusion

The United States has basic and enduring national interests in the oceans. These diverse interests—security, economic, scientific, dispute settlement, environmental, and leadership—are best protected through a comprehensive, widely accepted international agreement that governs the varying (and sometimes competing) uses of the sea. Although the United States has lived outside the Convention for 30 years, climate change in the Arctic provides the current Administration with a new and urgent incentive to re-engage the Senate and urge that body to provide its advice and consent to

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59. United States of America: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf, CLCS.01.2001.LOS/USA, Mar. 18, 2002, [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) ("The United States believes that the submission has major flaws as it relates to the continental shelf claim in the Arctic.").

60. Mark Valencia, *The South China Sea: What China Could Say*, NAPSNet Policy Forum, May 7, 2013.

61. Declaration by the Islamic Republic of Iran upon signing the 1982 United Nations Convention on the Law of the Sea, Dec. 10, 1982, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm).

U.S. accession to the treaty at the earliest opportunity. As a nation with both coastal and maritime interests, the United States would benefit immensely from becoming a party to UNCLOS—accession will restore U.S. oceans leadership, protect U.S. ocean interests and enhance U.S. foreign policy objectives, not only in the Arctic, but globally.