

Multilateral Code to Govern Arctic Offshore Resource Development¹

By

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INTRODUCTION

The Arctic seabed contains large quantities of resources. According to the US Geological Survey, “approximately 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids” are yet to be discovered in the areas north of the Arctic Circle, and 84% percent of the undiscovered deposits are located offshore.² While some Arctic offshore drilling operations are already in production³, many more deposits remain untapped; hence, there is a window of opportunity in which to ensure that the development is done responsibly.

This article marshals a case for establishing a multilateral code, negotiated under the auspices of the Arctic Council, to govern Arctic offshore oil and gas development.⁴

As such it answers two broad questions. First, why is a multilateral code needed?

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² “Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle”. *Fact Sheet* 2008-3049. Washington, 2008, p. 2. It is worth noting that the deposits “are not evenly distributed: fields containing 100 trillion or more cubic feet of natural gas are expected only north of Alaska and in western Siberia.” *Arctic Resource Development: Risks and Responsible Management*. (Oslo: Fridtjof Nansen Institute and DNV, 2012), p. 7.

³ Some offshore oil production is taking place in Russian, Norwegian and US waters.

⁴ While mining is of huge economic importance in the Arctic, the focus is on land-based operations rather than seabed mining; thus, discussions of offshore Arctic resources concentrate on oil and gas.

Second, why is the Arctic Council the preferred forum for negotiating the code? It concludes that a code is needed to protect the fragile Arctic environment, to promote the orderly and peaceful development of resources, and to ensure that offshore operations offer meaningful participation and significant, long-term benefits to Arctic peoples. Current legal norms do not comprise the comprehensive regime required to realize these objectives. The code would be less ambitious than a treaty addressing all aspects of Arctic marine governance⁵, but more holistic and comprehensive than the existing array of legal instruments. A code to govern offshore oil and gas exploration and exploitation represents a middle ground from what is all too often two solitudes: those who want to see development take place at almost any cost and those opposed to development because of the risks it poses to the environment and Aboriginal culture. The Code would best be negotiated under the auspices of the Arctic Council because the latter is the principal multilateral organization devoted to facilitating cooperation on Arctic issues, especially in the areas of environmental protection and sustainable development, and the only such body in which the participation of Indigenous peoples is enshrined.⁶

The code will apply to oil and gas development within coastal state jurisdiction,

⁵ See Timo Koivurova and Erik J. Molenaar, "International Governance and Regulation of the Marine Arctic: A Proposal for a Legally Binding Regime" (Oslo: WWF International Arctic Programme, 2010); and Rob Huebert, "The Need for an Arctic Treaty: Growing from the United Nations Convention on the Law of the Sea" in Aldo Chircop, Scott Coffen-Smout and Moira McConnell (Eds.) *Oceans Yearbook*, 23(2009): 27-37.

⁶ Six Indigenous groups (the Aleut International Association, Arctic Athabaskan Council, G'wichin Council International, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North, and Saami Council) are Permanent Participants.

which is where most of these resources lie.⁷ The *United Nations Convention on the Law of the Sea* (hereafter Law of the Sea Convention or LOSC) defines several maritime zones within coastal state jurisdiction: internal waters, the territorial sea, the exclusive economic zone, and the continental shelf. When coastlines are deeply indented, as is the case in the Arctic, straight baselines are drawn to serve as starting points for delineating these maritime zones. On the landward side of the baselines, the coastal state has unimpeded sovereignty over its internal waters.⁸ In the territorial sea, which extends 12 nautical miles out from the baselines, the coastal state has sovereignty over the airspace, water, seafloor and subsoil.⁹ The exclusive economic zone is the area extending from the outer edge of the territorial sea up to “200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.¹⁰ Within the exclusive economic zone, the coastal state exercises sovereign rights to explore, exploit, conserve, and manage the living and non-living resources in the water column and seabed.¹¹ The right of innocent passage prevails in the exclusive economic zone; hence all states enjoy the freedom of navigation and overflight as well as the right

⁷ Resource exploitation on the seabed beyond national jurisdiction is governed by the regime outlined in Part XI of the United Nations Convention on the Law of the Sea and the 1994 *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*.

⁸ LOSC, Article 8, p. 4. There is one exception to this provision: the right of innocent passage prevails if it developed as a customary norm before the baselines were drawn.

⁹ LOSC, Articles 2 and 3, p. 3. The right of innocent passage prevails in the territorial sea as long as passages are “continuous and expeditious” and innocent (i.e., “not prejudicial to the peace, good order or security of the coastal State”). Article 19, p. 6.

¹⁰ LOSC, Article 57, p. 18.

¹¹ LOSC, Article 56(1)(a), p. 18.

to lay submarine cables and pipelines.¹² All ships and aircraft enjoy the unimpeded right of innocent passage through the exclusive economic zone as long as the transit is “continuous and expeditious”.¹³

The continental shelf

comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹⁴

When such prolongations extend beyond 200 nautical miles, they belong to the coastal state up to a distance of 350 nautical miles from the baselines or 100 nautical miles measured from the 2,500-metre isobath.¹⁵ On its continental shelf, the coastal state has sovereign rights to explore and exploit “the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species.”¹⁶

Before examining the need for the code, it is important to insert a caveat:

¹² LOSC, Article 58, p. 19 and Article 87(1), p. 31.

¹³ LOSC, Article 38(2), p. 12. A coastal state may only interfere with the freedom of navigation if a vessel’s actions threaten its rights pertaining to the living and non-living resources of the exclusive economic zone.

¹⁴ LOSC, Article 76(1), p. 27. The rules and regulations governing the continental shelf beyond 200 nautical miles are discussed in greater detail in Elizabeth Riddell-Dixon “Meeting the Deadline: Canada’s Arctic Submission to the Commission on the Limits of the Continental Shelf”. *Ocean Development and International Law* 42(4)(2011): 368-382. See also Ted L. McDorman, “The Continental Shelf Beyond 200 nm: Law and Politics in the Arctic Ocean”. *Journal of Transnational Law and Policy* 18(2009): 155 - 193.

¹⁵ LOSC, Article 76(5), p.27. The 2,500-meter isobath is a line that connects the parts of the seabed that lie at a depth of 2,500 meters.

¹⁶ LOSC, Article 77, p. 28.

offshore resource development, especially in the Arctic, is extremely expensive and highly risky. Oil rigs are very costly to build, let alone to transport to Arctic waters, and the drilling season only last three to four months in the summer. Highly specialized seismic and drilling technologies are required to operate in Arctic waters where icebergs abound, storms are frequent and violent, and powerful currents are prevalent.¹⁷ Operating a floating offshore rig costs between US \$260,000 and US\$513,000 per day¹⁸. When accidents occur, expenditures soar. After the tanker Exxon Valdez ran aground off Alaska in 1989, spilling 257,000 barrels of oil, Exxon was forced to pay US\$2.5 billion for the clean up.¹⁹ Since the 2010 Deep Horizon spill in the Gulf of Mexico, environmental safeguards have been strengthened for offshore operators resulting in additional expenses related to emergency response and containment. There are also the high insurance premiums and huge costs of transporting oil and gas to southern markets. In short, Arctic seabed resources are neither as accessible nor as economically viable as media coverage would lead us to believe.

Arctic oil and gas, particularly in Alaska, Canada and Greenland, will not be commercially viable for decades²⁰ due to inadequate infrastructures, remoteness, harsh climactic conditions and the enormous costs of exploration, exploitation and

¹⁷ “Opportunities and Challenges For Arctic Oil and Gas Development”. *Eurasia Group Report* (Washington, D.C.: Wilson Center, December 10, 2013), p. 4. http://www.wilsoncenter.org/sites/default/files/Arctic%20Report_F2.pdf (accessed May 14, 2014)

¹⁸ Rig Zone, “Offshore Rig Day Rates,” *Rig Data*, May 13, 2014. <https://www.rigzone.com/data/dayrates/> (accessed May 13, 2014).

¹⁹ Carrie Holba, *Exxon Valdez Oil Spill: FAQs, Links and Unique Resources at ALIS* (Anchorage: Alaska Resources Library and Information Services, 2014).

²⁰ “Opportunities and Challenges For Arctic Oil and Gas Development”, p. 4.

transportation. They cannot compete, at least not in the short-run, with more accessible southerly sources, such as the Alberta oil sands and the shale gas deposits in the United States; hence, oil and gas companies have been scaling back on their investments.²¹ . Nonetheless, land-based deposits are finite and world wide demand for oil and gas is expected to rise in the next 20 years²², prompting ongoing interest in the longer-term development of Arctic offshore resources. When commercial Arctic development does take place, it will be essential to have rules and regulations in place to minimize the risks and maximize the benefits. Hence, we are at a propitious time to negotiate the Code, when there is significant interest in resource development among Arctic and non-Arctic states yet when the pressure for immediate exploitation is not extreme, thus giving the Arctic Council time to negotiate a comprehensive, well-conceived code.

²¹ Chris Plecash, “Arctic hydrocarbon boom a long way off: Low prices and out of reach reserves make new oil and gas mega projects in the territories unlikely in near future” *Hill Times*, November 5, 2012; and Steven Kopits, “Regional Report: The Arctic”. *World Oil* 234(11)(2013). <http://www.worldoil.com/November-2013-Regional-Report-The-Arctic.html> (accessed April 14, 2014). “In 2001-2002, oil and gas companies drilled between 10 and 15 wells from December to March in four locations (Beaufort Sea, Central Mackenzie Valley, Mackenzie Delta and Southern NWT). In 2002-2003, it grew to between 20 and 25 wells. In 2011-2012, that fell to less than five wells drilled”. *Northern Oil and Gas Annual Report* (Ottawa: Department of Aboriginal Affairs and Northern Development, 2012), p. 23. <http://www.aadnc-aandc.gc.ca/eng/1367341676920/1367341870731> (accessed April 14, 2014).

²² The International Energy Agency estimates that “global oil and gas demand could grow by more that 35% from 2010 to 2035”, as cited in “Opportunities and Challenges For Arctic Oil and Gas Development”, p. 6. The Canadian Polar Commission’s report points out that “long-term demand for energy, metals and precious gems accompanied by shrinking global reserves will continue to gradually shift competitive advantage to the region’s high cost-depositions prompting future growth of the North’s non-renewable resource sector.” *The State of Northern Knowledge in Canada* (Ottawa, 2014), p. 9.

WHY IS A MULTILATERAL CODE NEEDED?

To answer the question of why a multilateral code is needed, one needs to address two subsidiary questions. Why is multilateral regulation necessary? Why are the existing legal norms insufficient to meet these regulatory needs?

Why Are International Legal Norms Necessary?

There are five sets of needs that can best be addressed through a multinational code. First, international legal norms are required to protect the environment. In 2010, it took three months to stop the oil spill in the Gulf of Mexico, where in spite of “thousands of highly skilled workers, scores of specialized vessels and several nearby ports and staging areas, a gusher of unstoppable oil spewed nearly five million barrels of oil for 87 days until it was plugged in a multibillion-dollar effort.”²³ Cleaning up the devastation caused by that massive spill continues to this day. An oil spill in Arctic waters would be more catastrophic in light of fragile Arctic ecosystem. It would also be much harder to address because of a myriad of problems: remoteness, ice-clogged channels, winter darkness, high waves that disperse oil and impede the recovery work by skimmers, and ice fog that prevents aircraft from spraying dispersants. Furthermore, oil trapped in or under the ice is less susceptible to bacterial degradation. Global warming causes glaciers to calve, sea ice to become more mobile and weather to be less predictable and more extreme, all of which increase the risks of damage to rigs and shipping accidents.²⁴ None of the Arctic countries has adequate infrastructures,

²³ Paul Koring, “Proposed Arctic Council treaty on oil spills ‘useless,’ Greenpeace says” *Globe and Mail*, February 4, 2013. <http://www.theglobeandmail.com/news/politics/proposed-arctic-council-treaty-on-oil-spills-useless-greenpeace-says/article8158237/> (accessed May 9, 2014).

²⁴ *Arctic Resource Development*, p. 11.

equipment or trained personnel to respond effectively to a major oil spill. Since pollution transcends national borders, Arctic countries have a vested interest in cooperating to establish and enforce environmental standards.

Secondly, a code would help to ensure that offshore operations offer meaningful participation and significant, long-term benefits to Arctic peoples, especially Aboriginal peoples. Of the Arctic's 4 million inhabitants, some 500,000 are indigenous peoples.²⁵ Oil and gas operations have the potential to cause severe environmental damage and irreparable harm to the economic and cultural well-being of Aboriginal peoples, who have for centuries depended on marine mammals, sea birds and fish for food, clothing and tools. These creatures also have cultural significance for the indigenous peoples of the north. Increased traffic to and from oil and gas operations may disrupt the traditional migration and breeding patterns of marine mammals, sea birds and fish. Oil slicks can kill them. The noises from seismic blasts and drilling can drive away these valuable, living resources, and invasive species may enter Arctic waters on the hulls of ships and in the ballast water they carry.²⁶

At the same time, resource development has the potential to provide much needed employment and funds to address the myriad of social and economic problems facing the North. Women as well as men need to be able to participate in offshore

²⁵ Arctic Council, "Permanent Participants", *About Us*. (April 27, 2011) <http://www.arctic-council.org/index.php/en/about-us/permanent-participants> (accessed May 11, 2014). "The indigenous share of the population varies significantly among the Arctic states, from zero in Iceland to the vast majority in Greenland. It is minimal in Sweden, Finland and Russia and somewhat higher in Norway and the USA. In Canada, around half of the Arctic population is indigenous." *Arctic Resource Development*, p. 5.

²⁶ *Arctic Resource Development*, p. 13.

resource exploitation and share in the benefits derived from it. Proactive efforts are needed to promote gender equity, as evidenced by the composition of existing governance bodies. Women are badly underrepresented on the land claims boards that were established in Canada's three northern territories to give aboriginal peoples influence over decisions affecting their lands.²⁷ Of the 210 members of the co-management boards, only 16% are women.²⁸ To date most discussions of Arctic oil and gas development have focused on production for southern markets, but the north faces an energy crisis, which will become more acute as the population grows, economic activities increase, and the long, dark winters continue.²⁹ A multilateral code is needed to maximize the advantages of Arctic offshore oil and gas development, particularly for Aboriginal peoples, and to minimize the risks to their ways of life.

Thirdly, the code will promote the orderly and peaceful development of resources. Some deposits span international borders, others lie in close proximity to maritime boundaries and still others lie in areas claimed by more than one state.³⁰ In all these scenarios, activities within one jurisdiction affect neighbouring states. Without

²⁷ Graham White, "'Not the Almighty': Evaluating Aboriginal Influence in Northern Land-Claim Boards" *Arctic* 61(1)(2008): 76.

²⁸ David C. Natcher, "Gender and Resource Co-Management in Northern Canada" *Arctic* 66(2)(2013): 218.

²⁹ Bernard W. Funston, *Sustainable Development Working Group Report on Arctic Energy*. (Ottawa: Arctic Council, 2009).

³⁰ Such is the case in the Beaufort Sea, where "overlapping claims to ownership involve some 6,250 square nautical miles of pristine and potentially hydrocarbon-rich maritime territory within a triangle-shaped area north of Alaska, the Yukon Territory, and the Northwest Territories." Betsy Baker, "International Arctic Change and the Law and Politics of the Arctic Ocean Seabed: Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-U.S. Cooperation in the Beaufort Sea". *Vermont Law Review* 34(57)(2009): 232.

an agreement among Arctic countries, operations may degenerate into a race to lower standards (e.g., how can country A produce more cheaply than country B and hence have the competitive advantage?) Some coastal state deposits may overlap with the international seabed - the seabed beyond coastal state jurisdiction - hence, it is important to ensure that developments within national boundaries are compatible with - or at least are not incompatible with - the regime to govern the international seabed that is outlined in Part XI of the LOSC.

Fourthly, a code would strengthen the hand of Arctic countries when dealing with multinational corporations and other direct foreign investors. If international legal standards were established, countries would be less vulnerable to corporate pressure to lower their environmental and social standards.

Fifthly, clear and consistent expectations would assist investors in more accurately assessing the costs and benefits of exploration and exploitation. It is likely to take at least 20 years of costly investments before Arctic offshore oil and gas are brought to market, during which time the operator must invest in the highly specialized technology required to operate in Arctic waters.³¹ As mentioned earlier, the costs of exploration, exploitation, transportation, and insurance premiums are extremely high. Furthermore, huge financial outlays are no guarantee of success.³² In light of the enormous costs, very long lead times and challenges of developing and shipping Arctic

³¹ "Opportunities and Challenges For Arctic Oil and Gas Development", p. 4.

³² "In 1983, twelve companies spent nearly \$2 billion drilling for oil in the Beaufort Sea, North of Alaska. The exploration was based on oil stains found. But the well turned out to be a dry hole with no oil." Merlin Flower, "Oil Drilling - An Expensive Business" *Oil Price*, 2009. [Http://www.oil-price.net/en/articles/oil-drilling-expensive-business.php](http://www.oil-price.net/en/articles/oil-drilling-expensive-business.php) (accessed May 15, 2014).

offshore oil and gas, investors would benefit from having a stable, long-term, predictable regime in which to operate. It is not in a corporation's best interest to operate under different regulations in each national jurisdiction, especially when deposits are adjacent to or span international borders.

In short, a multilateral code is needed to safeguard against environmental degradation, meet the needs of Arctic peoples, promote peaceful and orderly exploration and exploitation, enable Arctic states to negotiate more effectively with multinational corporations and other foreign investors, and provide stable expectations and consistent rules for all participants. Through harmonizing their policies and cooperating to monitor and enforce compliance, Arctic states can best ensure sustainable development. There is significant literature advocating for greater regulation of Arctic oil and gas development to protect the environment.³³ This focus is understandable since oil and gas exploitation poses serious threats to the Arctic environment and the well-being of those dependent on it; however, it is also important to get the other regulatory needs on the agenda.

Why are Existing International Legal Norms Insufficient to Meet the Regulatory Needs of Offshore Development?

There are international and multilateral legal instruments dealing with aspects of the topic but they do not establish the comprehensive regime necessary to address all

³³ See, *Arctic Resource Development*; Lucien Chabason, "Offshore Oil Exploitation: A New Frontier for International Environmental Law". *Working Paper* 11. (Paris: Institut du développement durable et des relations internationales, November 2011); Rob Huebert and Brooks B. Yeager, *A New Sea: the Need for a Regional Agreement on Management and Conservation of the Arctic Marine Environment*. (Oslo: World Wildlife Federation International Arctic Programme, 2008), p. 31; and Koivurova and Molenaar, "International Governance and Regulation of the Marine Arctic".

four sets of regulatory needs.³⁴

International Legal Norms

The principal international instrument is the *United Nations Convention on the Law of the Sea*, which provides the regulatory framework for governing the world's oceans. Of the eight Arctic countries, only the United States is not a party to the convention, although it considers most of the convention's provisions to have passed into customary international law. The LOSC addresses a breadth of relevant law of the sea issues, including resource development, environmental protection, navigational rights, and marine scientific research. Furthermore, it encourages peaceful, cooperative relations among states. Yet apart from Article 234, which deals with "marine pollution from vessels in ice-covered areas", the provisions are not Arctic specific. In addition, there are gaps. For example, how is liability to be assessed for damages caused by drilling operations? How is compensation to be calculated? How is the economic, social and cultural well-being of Aboriginal peoples to be safeguarded?

Issue-Specific Legal Instruments

There are also relevant international conventions dealing with specific issue areas. The International Maritime Organization has developed legal instruments pertaining to shipping and marine pollution, including the 1973 *International Convention for the Prevention of Pollution from Ships* and its 1978 Protocol (MARPOL 73/78); *International Convention on Oil Pollution Preparedness, Response and Cooperation*

³⁴ For a discussion of the fragmented nature of international environmental law and the need for a coherent, comprehensive legal regime, see Chabason, "Offshore Oil Exploitation".

(1990 OPRC and its 2000 HNS Protocol); and *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and 1996 Protocol* (London Convention and its 1996 Protocol). All eight Arctic countries are party to these conventions³⁵, which contain valuable provisions aimed at preventing marine pollution. Yet they, too, have their gaps. For example, issues of liability and compensation are not addressed. Furthermore, they are not Arctic-specific, although IMO is currently working on mandatory polar shipping code.³⁶

Region-Specific Instruments

There are also relevant instruments that are region-specific, such as the *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*³⁷. While it is good to see the Arctic Council developing legal instruments to address important issues, the agreement, itself, is limited. It focuses on responding to spills rather than on preventing them, its provisions lack specificity, and it focuses only on pollution, while ignoring economic and social issues. A more rigorous and comprehensive code is needed.

³⁵ The record of ratification of the protocols and annexes is somewhat less stellar. In terms of the MARPOL, the US has not ratified Annex IV and Iceland has not agreed to either Annex IV or VI. Canada, Iceland, Russia and the US are not Parties to the OPRC's 2000 Protocol, and neither Iceland nor the US is bound by the London Convention's 1996 Protocol.

³⁶ A coherent set of standards came into effect on 1 January 2011: the IMO's *Guidelines for Ships Operating in Polar Waters*; however, they are voluntary rather than legally-binding. For a history of the evolution of the polar shipping code, see Peter Kikkert, "Promoting National Interests and Fostering Cooperation: Canada and the Development of a Polar Code" *Journal of Maritime Law and Commerce* 43(3)(2012): 319-334.

³⁷ The agreement has been signed by the eight Arctic countries.

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) is geographically limited but could serve as a role model for the code. It outlines principles essential to environmental protection, including the precautionary approach, the concept that the polluter pays for any damages caused, and the need to use best environmental practices/best available techniques.³⁸

In addition to the legal instruments discussed above, there are other important resources on which to draw when drafting the code, including documents pertaining to Aboriginal rights, voluntary guidelines emanating from Arctic Council and other international organizations, and works by scholars and practitioners. Although not legally binding, there are several important international and multilateral documents pertaining to Aboriginal rights that need to be considered, in particular the *United Nations Declaration on the Rights of Indigenous Peoples*, *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*, and *A Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat*. All these documents confirm that resource development must involve Aboriginal participation in governance matters affecting their communities and must significantly safeguard and improve their economic, social and cultural well being.

The Arctic Council and its working groups have produced some highly relevant studies and guidelines. For example, in 2009 the Protection of the Arctic Marine Environment Working Group issued recommendations pertaining to the “planning, exploration, development, production and decommissioning” of Arctic oil and gas operations, which establishes minimum standards for protecting the marine

³⁸ Huebert and Yeager, *A New Sea*, p. 31.

environment.³⁹ The document outlines highly desirable principles to guide operations and important goals to mitigate the adverse environmental effects; however the focus is on avoiding harm rather than on actively pursuing positive outcomes for the Arctic and its peoples. Other relevant documents are discussed in the subsequent section on the Arctic Council.

Valuable insights can also be gained from the writings of scholars and practitioners advocating multilateral regulations to safeguard the Arctic environment and its peoples. Some discuss the principles necessary to ensure environmental protection and the relative utility of prescriptive and performance-based norms.⁴⁰ The literature on corporate social responsibility tells us that there is now an expectation on the parts of governments, Aboriginal groups and communities, the private sector, multilateral organizations and scholars that corporations must contribute to meeting societal needs and attaining social goals and avoid harming local communities or the environment.⁴¹ The narrow pursuit of self-interest is no longer acceptable; although the ways in which each set of actors defines corporate social responsibility can vary considerably. This literature argues that business success and social responsibility are not mutually

³⁹ Protection of the Arctic Marine Environment Working Group, *Arctic Council Offshore Oil and Gas Guidelines* (Akureyri, Iceland, 2009), p. 4.

⁴⁰ Huebert and Yeager, *A New Sea*. See also, Baker, "International Arctic Change and the Law and Politics of the Arctic Ocean Seabed"; Chabason, "Offshore Oil Exploitation"; and Koivurova and Molenaar, "International Governance and Regulation of the Marine Arctic".

⁴¹ Kristan Bondy, Jeremy Moon and Dirk Matten. "An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Forms and Implications." *Journal of Business Ethics* 111(2)(2012): 281-299; and John Gerard Ruggie, "Protect, Respect and Remedy: A United Nations Policy Framework for Business and Human Rights." *Proceedings of the Annual Meeting (American Society of International Law* 10 (2009): 282-287.

exclusive; to the contrary they can and should be mutually beneficial.⁴² Jason Prno and Scott Slocombe promote the concept of a social licence to operate, which “implies that developers require the widespread approval of local community members for their projects to avoid exposure to potentially costly conflicts and business risks.”⁴³ The need for corporate social responsibility is also reflected in guidelines and principles emanating from the United Nations⁴⁴ and the Organization for Economic Cooperation and Development⁴⁵.

In short, we need a multilateral code that builds on the framework provided in the LOSC, draws on relevant provisions from issue-specific and region-specific conventions

⁴² Michael Porter and Mark Kramer. “Creating Shared Value: How To Reinvent Capitalism – And Unleash a Wave of Innovation and Growth.” *Harvard Business Review* 89(1)(2011): 1-17, and “Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility.” *Harvard Business Review* 84(12)(2006): 78-92.

⁴³ “A Systems-Based Conceptual Framework for Assessing the Determinants of a Social License to Operate in the Mining Industry”. *Environmental Management* 53(2014): 672. See also Alison Leigh Browne, Daniela Stehlik and Amma Buckley “Social Licences to Operate: For Better Not for Worse; for Richer Not for Poorer? The Impacts of Unplanned Mining Closure for ‘Fence Line’ Residential Communities”. *Local Environment: The International Journal of Justice and Sustainability* 16(7)(2011): 707-725; Archie B. Carroll and Kareem M. Shabana, “The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice” *International Journal of Management Review* 12(1)(2010): 85-105; and Prno, “An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry”. *Resources Policy* 38(4)(2013): 577-590.

⁴⁴ United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*. (New York, 2011). <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>. (accessed June 2, 2014), and “The Ten Principles.” *United Nations Global Compact*, 2014. <http://www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html> (accessed June 2, 2014).

⁴⁵ OECD. *Guidelines for Multinational Enterprises*. (Paris, France, 2011). <http://mneguidelines.oecd.org/text/>. (accessed June 2, 2014).

as well as non-legally binding documents emanating from Aboriginal groups, multilateral and international organizations and scholarly literature, fills the considerable regulatory gaps, and thus provides a rigorous, coherent and comprehensive regime to govern Arctic offshore oil and gas development.

WHY THE ARCTIC COUNCIL?

The Arctic Council is the preferred forum for negotiating the code for several reasons. First, it is the principal multilateral organization dedicated to fostering cooperation among Arctic countries. It was established in 1996 “as a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic”.⁴⁶

Secondly, its membership comprises all eight Arctic states: Canada, Denmark (Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States. These countries have most at stake. Arctic coastal states will be the ones establishing the conditions under which exploration and exploitation occurs within the territorial seas, exclusive economic zones, and extended continental shelves and they will bear the costs if problems arise.

Thirdly, the Arctic Council is unique among multilateral bodies in institutionalizing the participation of Aboriginal organizations. The designation “Permanent Participants”

⁴⁶ Arctic Council, “About the Arctic Council”, *About Us*. (27 April 2011) <http://www.arctic-council.org/index.php/en/about-us/permanent-participants> (accessed May 11, 2014).

confers the right to full consultation in all Arctic Council meetings and activities. The Council provides some financial support to the Indigenous Peoples' Secretariat to help the Permanent Participants prepare for and attend its meetings. Through these provisions, the perspectives, experiences and knowledge of those most directly affected by offshore operations are incorporated into the decision-making process.⁴⁷

Fourthly, non-Arctic countries interested in acquiring access to Arctic resources, recognize the Arctic Council as the foremost negotiating forum on Arctic matters, as evidenced by their eagerness to obtain Observer status. As a condition for being granted Observer status at Arctic Council meetings, China, France, Germany, India, Italy, Japan, the Netherlands, the Republic of Korea, Poland, Singapore, Spain, and the United Kingdom agreed to respect the sovereignty of Arctic countries; the existing legal regime, in particular the provisions of the LOSC; and “the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants” as well as having “demonstrated a political willingness as well as financial ability to contribute to the work of the Permanent Participants and other Arctic indigenous peoples.”⁴⁸ Such guarantees are not found in any other multilateral organization.

Fifthly, the Arctic Council’s working groups are already addressing some issues directly relevant to the code. For example, the Arctic Monitoring and Assessment Programme Working Group produced the *Arctic Oil and Gas Assessment*, which provides “an holistic assessment of the environmental, social and economic, and human health impacts of oil and gas activities in the Arctic” and evaluates the likely

⁴⁷ It should be noted that decision-making within the Arctic Council remains the prerogative of member states and is based on consensus.

⁴⁸ Arctic Council, “Observers”, *About Us*.

future effects of future oil and gas activities.⁴⁹ An extensive Arctic Ocean Review project was undertaken by the Protection of the Arctic Marine Environment Working Group. The resulting report offers “guidance to the Council on possible ways to strengthen governance, and to achieve desired environmental, economic and socio-cultural outcomes in the Arctic through a cooperative, coordinated and integrated approach to the management of activities in the Arctic marine environment.”⁵⁰ The same working group also produced the 2009 *Offshore Oil and Gas Guidelines*⁵¹ (discussed on p. 15), while the Sustainable Development Working Group organized an Arctic Energy Summit in 2009⁵² and recently established a Corporate Social Responsibility Group. The Council’s Task Force on Arctic Marine Oil Pollution began meeting in January 2014 with a mandate “to identify how best the Arctic Council can contribute to marine oil pollution prevention in the Arctic, to recommend a concrete plan of action, and, as appropriate, to develop cooperative arrangements to implement the Action Plan.”⁵³ In short, the Council is already working on many issues salient to a code

⁴⁹ Arctic Monitoring and Assessment Programme Working Group, *Arctic Oil and Gas Assessment* (Oslo, Norway, 2007). <http://www.amap.no/oil-and-gas-assessment-oga> (accessed May 15, 2014).

⁵⁰ *Arctic Ocean Review Project, 2009-2013: Final Report: Phase II 2011-2013*. (Kiruna, Sweden, May 15, 2013), p. 1.

⁵¹ Protection of the Arctic Marine Environment Working Group, *Arctic Council Offshore Oil and Gas Guidelines*, p. 6.

⁵² In preparation for the summit, the working group’s chair, Bernard Funston wrote the *Sustainable Development Working Group Report on Arctic Energy*. The results of the summit are published in James R. Hemsath, *The Arctic Energy Summit: Final Report and Technical Proceedings* (Anchorage, Alaska, February 2010). <http://www.sdwg.org/media.php?mid=1205> (accessed June 13, 2014).

⁵³ Arctic Council. "TFOPP: Public Documents. (Tromsø, Norway, May 22, 2014). <http://www.arctic-council.org/index.php/en/tfopp> (accessed June 14, 2014).

to govern offshore oil and gas development.

Finally, there are precedents for negotiating legally binding documents under the auspices of the Arctic Council. The *Agreement on Cooperation and Aeronautical and Maritime Search and Rescue in the Arctic* has been ratified by all eight Arctic states and it entered force on January 19, 2013. For this treaty, as well as for the previously discussed *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*, the Arctic Council established separate task forces to draft the documents. Similar procedures could be used for the code.

Historically the Arctic Council's work has been greatly facilitated by a high degree of cooperation among its members, which in turn has resulted in valuable studies, recommendations and guidelines and in recent years in the drafting of two treaties. Unfortunately relations have soured in the past months as a result of positions taken over the political unrest in the Ukraine, which has pitted the Russian Federation against the other member states. The latter have criticized the Russian Federation for violating the sovereignty and territorial integrity of the Ukraine. There is widespread consensus that the impact of these geopolitical tensions on the Arctic Council has been relatively minor, where for the most part it has been "business as usual".⁵⁴ While US, Canadian

⁵⁴ Sarah Norris, "Despite Crimea, Western-Russian Cooperation in the Arctic Should Continue." Carnegie Endowment for International Peace, March 27, 2014 <http://carnegieendowment.org/2014/03/27/despite-crimea-western-russian-cooperation-in-arctic-should-continue/h5xq> (accessed June 13, 2014); Nigel Chamberlain and Ian Davis, "NATO and the Arctic Revisited: Spillover from Crisis in Crimea?" *NATO Watch Briefing Paper*. 48(March 27, 2014) http://www.natowatch.org/sites/default/files/briefing_paper_no.48_-_the_arctic_and_nato_revisited.pdf (accessed June 13, 2014); Kevin McGwin, "Canada Ratcheting Up Rhetoric Towards Russia." *The Arctic Journal*, April 16, 2014 <http://arcticjournal.com/politics/561/canada-ratcheting-rhetoric-towards-russia> (accessed June 13, 2014); and RIA Novosti. "Sanctions Won't Impact Arctic Projects - Russian Science Official." RIA Novosti, April 25, 2014 <http://en.ria.ru/russia/20140425/189367444/Sanctions-Wont->

and Norwegian officials have curtailed bilateral meetings and activities with their Russian counterparts and in May Canada boycotted a Moscow meeting of the Arctic Council's Task Force on Black Carbon and Methane,⁵⁵ most Arctic Council meetings are proceeding as usual. In March 2014, all eight members attended the biannual Arctic Council meetings in Yellowknife, where the crisis in the Ukraine was not even on the agenda.⁵⁶ Views vary as to the longer term implications of the crisis for the future efficacy of the Arctic Council. Rob Huebert warns that Russian actions pertaining to the Ukraine may prompt Sweden and Finland to join NATO, which Russia would perceive as "a direct military threat".⁵⁷ The resulting escalation in tensions would not bode well for Arctic collaboration. Others point out that all member countries recognize their

[Impact-Arctic-Projects--Russian-Science-Official.html](#) (accessed June 13, 2014).

⁵⁵ Yereth Rosen, "U.S.-Russia tensions create worries for Arctic scientists" *Anchorage Daily News*, May 9, 2014. <http://www.adn.com/2014/05/09/3463580/us-russia-ensions-create-worries.html?sp=/99/188/> (accessed May 10, 2014).

⁵⁶ Heather Exner-Pirot, "The Arctic Council's Immunity to the Crimean Flu". *Eye on the Arctic*, March 31, 2014. <http://eyeontheartctic.rcinet.ca/blog-the-arctic-councils-immunity-to-crimean-flu/> (accessed June 13, 2014).

⁵⁷ His interview with Eleonora Milazzo appears in "Prospects for Cooperation in the Arctic: A Canadian Perspective." (Moscow: Russian International Affairs Council, April 18, 2014). http://russiancouncil.ru/en/inner/?id_4=3550#top (accessed June 13, 2014). See also Rob Huebert, "How Russia's Move in Crimea Upended Canada's Arctic Strategy." *Globe and Mail*, April 2, 2014. <http://www.theglobeandmail.com/globe-debate/how-russias-move-into-crimea-upended-canadas-arctic-strategy/article17766065/> (accessed June 13, 2014). Huebert is not alone in urging Canada and its NATO allies to strengthen their military capacity in the north in response to Russian aggression. See John Ivison, "Canada under increasing pressure to come up with co-ordinated NATO response to Russia in Arctic". *National Post* April 23, 2014. <http://news.nationalpost.com/2014/04/23/canada-under-increasing-pressure-to-come-up-with-co-ordinated-nato-response-to-russia-in-arctic> (accessed June 13, 2014)

mutual interest in continuing to cooperate on Arctic matters.⁵⁸ As John Eichelberger, Dean of the Graduate School at the University of Alaska Fairbanks said, “We can perhaps function with a G7 instead of a G-8, but an Arctic-7 instead of an Arctic-8 would be pointless”.⁵⁹ Michael Byers argues that Russia, like all Arctic states, has a strong vested interest in political and legal stability in the Arctic, both because of the horrendous costs of military engagement and because developing its Arctic oil and gas depends on foreign technology, capital and markets.⁶⁰ Furthermore, as Heather Exner-Pirot points out, “Russia has been an excellent partner and leader in the Council” in recent years, chairing three of its four task forces.⁶¹ To date the Arctic Council has focused on sustainable development and environmental protection and avoided geopolitical conflicts. How effective will it be in maintaining this course remains to be seen. The situation in the Ukraine is casting a negative shadow and if it continues, there may well be a diminution in the degree of collaboration, which may slow efforts to negotiate further legally binding instruments. Nevertheless, for all the reasons discussed above, the Arctic Council continues to be the logical choice of venue for negotiating an Arctic multilateral treaty.

⁵⁸ Exner-Pirot, “The Arctic Council’s Immunity to the Crimean Flu”; and John Crump, “How Will The Crisis in Ukraine Affect the Arctic Council?” *Rabble*. March 24, 2014. <http://rabble.ca/blogs/bloggers/behind-numbers/2014/03/how-will-crisis-ukraine-affect-arctic-council> (accessed June 13, 2014).

⁵⁹ As cited in Rosen, “U.S.-Russia tensions create worries for Arctic scientists”.

⁶⁰ Michael Byers, “Squeeze Putin, Yes, But The Arctic Is Not Ukraine.”, May 1, 2014. <http://www.theglobeandmail.com/globe-debate/squeeze-putin-but-the-arctic-is-not-ukraine/article18348971/> (accessed June 13, 2014).

⁶¹ Exner-Pirot, “The Arctic Council’s Immunity to the Crimean Flu”.

CONCLUSION

A multilateral code is needed to safeguard the environment, meet the needs of Arctic peoples, promote peaceful and orderly exploration and exploitation of oil and gas resources, enable Arctic states to negotiate more effectively with multinational corporations and other foreign investors, and provide a consistent, stable, predictable set of principles, rules and regulations for all participants. The existing legal instruments are insufficient to meet these regulatory needs. In spite of recent difficulties, the Arctic Council remains best positioned to serve as the forum for negotiating a multilateral code to govern Arctic offshore oil and gas development.