

The Road to the Arctic

By Coalter G. Lathrop, Scott Borgerson

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Summary:

To the Editor:

Scott Borgerson's article "Arctic Meltdown" (March/April 2008) is an addition to the recent wave of Arctic journalism rife with Wild West imagery of chaos and lawlessness -- a reporting trend spurred by Russia's August 2007 flag-planting stunt on the North Pole. Arctic frontier jargon that included "land grab" and "ungainly scramble" is now augmented by Borgerson's "gold rush" and "legal no man's land." While Borgerson correctly identifies the many sources of tension in the region, he is wrong when he writes that "the Arctic region is not currently governed by any comprehensive multilateral norms." The Arctic is not the "legal vacuum" invoked in his piece; it is a region governed by international law and, for the maritime issues that are the main subject of the article, specifically by the international law of the sea. With one exception ("growing talk of Greenland petitioning Denmark for political independence"), all of the Arctic problems that Borgerson raises -- offshore hydrocarbon exploration and exploitation, overlapping maritime claims, wide-margin continental shelves, the dumping of nuclear reactors, indigenous whaling, and a variety of shipping issues, including contested shipping routes, the use of flags of convenience, vessel-source pollution, and ship-based tourism -- are quintessential law-of-the-sea problems, around which a robust and widely adopted body of international law has grown.

Oddly, Borgerson seems to argue that because the Arctic Ocean is plagued by the full range of ocean problems, it is exempt from the rules designed specifically to address those same problems. This is illogical and wrong. The Arctic is an ocean to which the law of the sea applies, just as it does to all oceans, whether or not they suffer from a raft of "vexing problems" (and most of them do). Not only does the law of the sea apply to the Arctic in theory; it is being applied in practice. One recent example is the process of submitting science-based wide-margin continental shelf claims to the Commission on the Limits of the Continental Shelf. Russia submitted its claim to the commission in 2001. Norway submitted a claim in 2006, and Canada and Denmark are expected to do so before their respective submission deadlines of 2013 and 2014. So far, this has been a deliberate and orderly process.

There exists a comprehensive legal regime that defines the rights and obligations of states in, over, and under the world's oceans. It comes complete with customary rules, framework and subsidiary conventions, and dispute-settlement mechanisms and institutions. It applies to the Arctic Ocean.

Whether such a regime stinks of world government or rings of international cooperation, it is far from a "legal vacuum." Of course, the mere existence of rules designed to promote the peaceful use of the oceans cannot foreclose the possibility of Borgerson's "armed mad dash for [the Arctic's] resources." But if the Arctic descends into anarchy, it will be despite the rules that are already firmly in place.

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Scott Borgerson replies:

I strongly believe that it is in the United States' national interest to join the UN Convention on the Law of the Sea as soon as possible. That said, the treaty's drafters never could have envisioned perennial sea ice turning into open water. For this reason, the provisions of UNCLOS (written in 1982) do not fully address the dilemmas presented by the special case of the Arctic Ocean.

Foremost among these challenges is the politically complicated task of carving up the Arctic's vast and rich resource pie. UNCLOS established the Commission on the Limits of the Continental Shelf to make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelves. But this procedure, outlined in Article 76 of UNCLOS was not written with the Arctic Ocean's unique

geography in mind. As a result, this understaffed commission is facing an onslaught of competing claims on which it must make "recommendations." It would be much better and more efficient for the Arctic powers to gather around a negotiating table to strike a grand compromise and then to collectively submit, as the treaty requires, "relevant information, including geodetic data," for the commission's blessing.

Other legal complications abound, including the United States' and Canada's differing interpretations of UNCLOS' articles regarding the legal status of the Northwest Passage. Canada claims its Arctic archipelago to be "internal waters" and maintains that the area is subject to full Canadian sovereignty. The United States, however, views the Northwest Passage as a "strait used for international navigation" and thus insists that all ships, but especially those of the U.S. Coast Guard and the U.S. Navy, have a right to "innocent passage." Both arguments have merit, but so far the United States and Canada have been unwilling to bring this issue up for arbitration or judgment because neither party is fully confident it will win. In the meantime, these close allies continue to muddle through with the 1988 "agreement to disagree" as their only legal disposition of the passage. This diplomatic compromise is unlikely to last once this previously impenetrable shortcut transforms into a viable seaway.

Equally troublesome is the application of Article 234 of UNCLOS, which applies to "ice-covered" waters. Canada has used it as a guide to create its "Arctic Shipping Pollution Prevention Regulations," and Russia has taken advantage of the provision to develop its "Guide of Navigation Through the Northern Sea Route." Meanwhile, the United States presently lacks comparable guidelines. Furthermore, there are no uniform standards for the environmental policing of the Arctic or of the international shipping companies whose vessels are already plying these waters.

The European Union's foreign policy chief, Javier Solana, and the EU's commissioner for external relations, Benita Ferrero-Waldner, just issued a study highlighting the global dangers that will result from climate change. The potential for conflict in the melting Arctic topped their list. They share my view when they argue in the study that in order to manage increasing Arctic maritime activity, the international community needs to "revisit existing rules of international law, particularly the Law of the Sea." UNCLOS offers a solid foundation on which to build creative diplomatic solutions for governing the Arctic, but by itself it is not enough.