

A Note on U.S.-China Cooperation in the Arctic: Opportunities and Challenges

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Introduction

On March 18th and 19th 2021, the first U.S.-China high-level diplomatic meeting of the Biden administration took place in Anchorage, Alaska against the backdrop of fast deteriorating bilateral relations between the two countries since the beginning of 2020.¹ Nevertheless, the meeting started with angry rebukes and several sanctions were placed by both sides after the meeting finished.² On October 6th, 2021, the U.S. and Chinese top officials met again in Zurich, Switzerland, which resulted in an agreement in principle that the U.S. President Biden and Chinese President XI will hold a virtual summit by the end

of the year.³ Finally, the two powers appeared to try to ease some tensions.

How would the Arctic navigate the new U.S.-China competition? What are the effects of ongoing U.S.-China tensions in other areas on China's engagement in the Arctic? If U.S.-China Arctic cooperation is optimal and feasible, where are the best opportunities and main constraints to the collaboration? This note attempts to answer these questions by focusing on three key areas in which the two countries have opportunities to interact with each other and develop dialogue and collaboration: (1) the application of the United Nations Convention on the Law of the Sea (UNCLOS)⁴ to the Arctic Ocean, with a focus on the issue of freedom of navigation; (2) the implementation of new Arctic treaties, such as the Agreement on Enhancing International Arctic Scientific Cooperation and the Agreement to Prevent Unregulated High Seas

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¹ Humeyra Pamuk, Michael Martina & David Brunnstrom, *U.S., Chinese Diplomats Clash in First High-level Meeting of Biden Administration*, REUTERS (Mar. 18, 2021), <https://www.reuters.com/article/uk-usa-china-alaska-idAFKBN2BA2II>.

² See Econsult Solutions, *After US and China Alaska Meeting: A 2021 Outlook for US-China Relations*, Apr. 9, 2021, <https://econsultsolutions.com/us-and-china-alaska-meeting-2021-outlook-us-china-relations/>.

³ David E. Sanger, *Biden and Xi Jinping of China Agree to Hold a Virtual Summit*, THE NEW YORK TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/us/politics/biden-xi-jinping-china-summit.html>.

⁴ U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

Fisheries in the Central Arctic Ocean; and (3) China's trade and economic activities in Alaska.

Situating the Arctic in U.S.-China Relations

The Arctic for China

The diminishment of Arctic sea ice is opening new shipping routes and making natural resources more accessible in the Arctic, a dramatic change that has presented unprecedented opportunities and challenges for both Arctic and non-Arctic states. As a non-Arctic country, China's contemporary involvement in the region started in the 1990s through its conduct of scientific research and expeditions. In June 2017, Beijing introduced the Polar Silk Road, also known as "Arctic Silk Road" or "Ice Silk Road," as an integral part of its Belt and Road Initiative (BRI).⁵ In January 2018, China released its first Arctic

Policy White Paper, detailing China's interests and goals in the Arctic.⁶ Over the last three years, however, some Chinese companies have experienced a few setbacks in their Arctic engagement. For instance, In July 2019, the Alaska Gasline Development Corporation (AGDC) did not renew its 2017 nonbinding agreement with three Chinese state-owned companies for a \$43 billion liquefied natural gas (LNG) development project in Alaska.⁷ In May 2021, the Arctic Connect project was suspended for further assessment.⁸

Overall, there is no doubt that China identifies the Arctic as a strategically valuable region for its development and influence. Nevertheless, the Arctic does not constitute a foreign priority or a "core national interest" for Beijing. There are strong indications that China is becoming more confident about its participation in the Arctic. On the other hand, given its autocratic system, poor

⁵ See NATIONAL DEVELOPMENT AND REFORM COMMISSION & STATE OCEANIC ADMINISTRATION OF THE PEOPLE'S REPUBLIC OF CHINA, *Vision for Maritime Cooperation Under the Belt and Road Initiative*, (Jun. 20, 2017), available at http://www.xinhuanet.com/english/2017-06/20/c_136380414.htm.

⁶ See THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, *China's Arctic Policy*, (Jan. 26, 2018), available at http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm.

⁷ See Elwood Brehmer, *AGDC President Outlines Path Forward; China Deal is Dead*, ALASKA JOURNAL OF COMMERCE (Jul. 24, 2019), <https://www.alaskajournal.com/2019-07-24/agdc-president-outlines-path-forward-china-deal-dead>.

⁸ See Winston Qiu, *Trans-Arctic Cable Project Arctic Connect Comes to a Suspension*, SUBMARINE CABLE NETWORKS (May 29, 2021), <https://www.submarinenetworks.com/en/systems/asia-europe-africa/arctic-connect/trans-arctic-cable-project-arctic-connect-comes-to-a-suspension>.

record of complying with international law elsewhere, and the potential dual civil-military use of the projects that it has been investing in the Arctic, the suspicion China faces in the region is unlikely to be dispelled in a foreseeable

future. These suspicions and skepticism inevitably cast a shadow on China's bilateral and multilateral cooperation in the Arctic, including U.S.-China Arctic relations.



The Arctic for the United States

The United States is an Arctic state as well as an Arctic coastal state by virtue of Alaska. Although it has substantial interests in the Arctic,¹ the country has been behaved as “a reluctant Arctic power.”² The Arctic has been a

“stepchild” to the more pressing concerns of the U.S. security planners and strategists.³ The U.S. Arctic policy has been incoherent and inconsistent.⁴ The last U.S. national Arctic Strategy was published eight years ago by the Obama administration,⁵ which highlighted climate change and the

¹ See generally Congressional Research Service (CRS), *Changes in the Arctic: Background and Issues for Congress*, R41153, available at <https://sgp.fas.org/crs/misc/R41153.pdf> (last updated on 12 October 2021).

² See Rob Huebert, *United States Arctic Policy: The Reluctant Arctic Power*, 2 SCHOOL OF PUBLIC POLICY (SPP) BRIEFING PAPERS 1 (2009); Andreas Østhagen, *The United States as an Arctic Actor*, The Arctic Institute, Center for Circumpolar Security Studies (Dec. 12, 2011), <https://www.thearcticinstitute.org/united-states-arctic-actor/>.

³ Michael T. Corgan, *US Security Policy in the American Arctic*, in ROUTLEDGE HANDBOOK OF ARCTIC SECURITY 152 (Gunhild Hoogensen Gjørsv et. al., 2020).

⁴ For a more detailed overview of the evolution of the U.S. policy regarding the Arctic, see *id.*, at 153-161.

⁵ THE WHITE HOUSE, *National Strategy for the Arctic Region*, May 10, 2013, https://obamawhitehouse.archives.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

importance of international cooperation to the U.S. Arctic policy. It was superseded by many events⁶ and basically ignored by the Trump administration. Between 2019 to 2021, several U.S. military branches released their own Arctic strategies.⁷ Many of these military strategies emphasized great power competition and depicted China as a rule-challenger in the Arctic. In short, they tend to overstate the divergence of the national interests of the U.S. and China in the Arctic, downplay their shared concerns, and neglect the issues where both countries could benefit from cooperation.

The Biden administration is expected to form a new national Arctic strategy. For example, climate change would be very likely put back on the U.S. Arctic agenda and the U.S. may take more leadership on the issue.⁸ Accordingly, many commentators have suggested

that combating Arctic climate change is an urgent issue for the U.S. and China to collaborate and coordinate.⁹

Taken together, the Arctic does not constitute a focal and priority issue in both Chinese and the U.S. foreign policies. This “*low-low*” status presents both challenges and opportunities for the U.S.-China Arctic cooperation: On the one hand, when both sides return to the negotiating tables, the Arctic may not gain enough attention and therefore be put in a far-off place. On the other hand, as a low priority region for both the U.S. and China, the Arctic offers many unique opportunities for the two powers to develop cooperation and achieve *win-win* results. For example, there are many non-traditional security issues in the Arctic region, such as climate change, scientific research, and marine environmental protection, where the

⁶ For instance, in May 2019, for the first time since its creation, the Arctic Council failed to reach agreement on a final declaration due to the U.S. government’s anti-climate stance. See generally Timo Koivurova, *How US Policy Threatens Existing Arctic Governance*, ARCTICTODAY (Jan. 17, 2020), <https://www.arctictoday.com/how-us-policy-threatens-existing-arctic-governance/>.

⁷ For a quick overview of these military strategies, see David Auerswald, *A U.S. Security Strategy for the Arctic*, WAR ON THE ROCKS (May 27, 2021), <https://warontherocks.com/2021/05/a-u-s-security-strategy-for-the-arctic/>.

⁸ See *Republican Senator: Expects Climate Changes as US Arctic Policy Priority with Biden Administration*, HIGH NORTH NEWS (Oct. 12, 2020), <https://www.highnorthnews.com/en/republican-senator-expects-climate-change-us-arctic-policy-priority-biden-administration>; Edward-Isaac Doveve & Paul LeBlanc, *Obama Swipes at Trump for “Four Years of Active Hostility” on Climate Change in Glasgow Speech*, CNN (Nov. 8, 2021), <https://www.cnn.com/2021/11/08/politics/obama-glasgow-speech/index.html>.

⁹ See, e.g., Pavel Devyatkin, “*Science Cooperation with the Snow Dragon: Can the U.S. and China Work Together on the Arctic Climate Crisis?*” THE ARCTIC INSTITUTE (Apr. 15, 2021), <https://www.thearcticinstitute.org/science-cooperation-snow-dragon-us-china-arctic-climate-crisis/?cn-reloaded=1>.

two countries naturally share common interests and concerns. Some of these opportunities have been identified and described by other authors elsewhere.¹⁰

Based on some new developments in the Arctic as well as the U.S-China relations over the last few years, the subsequent discussion chooses to focus on three other issues in which the U.S. and China could develop trust and cooperation, namely, the freedom of navigation in the Arctic, the implementation of new Arctic treaties, and Alaska-China economic relations. Before proceeding it is worth noting that the Arctic issues are usually not clear-cut, and they may overlap in specific sub-issues.

Freedom of Navigation in the Arctic Ocean

With respect to the freedom of navigation (FON) in the Arctic Ocean, the United States and China have shared national interests but different

practices. As its international trade and shipping expand under the BRI framework, navigational freedom is becoming essential to China. FON has long been vital to the U.S.' national and security interests. As the sea ice melts in the summer months, there are three alternative shipping routes for international trade and other needs in the Arctic Ocean: the Northern Sea Route ("NSR") between the Atlantic and the Pacific north of Russia, the Northwest Passage ("NWP") through the Canadian Arctic Archipelago, and the transpolar route (the "Central Route") across the North Pole area. The legal statuses of the NSR and the NWP have been contentious for decades. As a potential major user of the Arctic Sea routes, China is concerned with the existing absolute control of Russia and Canada over the NSR and the NWP in the Arctic Ocean. Nevertheless, Beijing has been careful not to take a clear side regarding the disputes. By contrast, the U.S. has formally challenged the sovereignty and control of Russia and

¹⁰ See, e.g., Nong Hong, "How Cooperation on Climate Change, Polar Research Can Help Thaw U.S.-China Relations," ICAS, (May 3, 2021), <https://chinaus-icas.org/research/how-cooperation-on-climate-change-polar-research-can-help-thaw-us-china-relations/>; Liz Bowman & Qingchao Xu, *China in the Arctic: Policies, Strategies, and Opportunities for the Alaska*, Center for Arctic Policy Studies, (Feb. 2020), [https://uaf.edu/caps/our-work/Bowman%20and%20Xu%20China%20in%20the%20Arctic Final18Feb2020.pdf](https://uaf.edu/caps/our-work/Bowman%20and%20Xu%20China%20in%20the%20Arctic%20Final18Feb2020.pdf); Heather A. Conley ed., *U.S-Sino Relations in the Arctic: A Roadmap for Future Cooperation*, Center for Strategic and International Studies, (Jan. 2017), available at https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170127_Conley_USSinoRelationsArctic_Web.pdf?Ri2iQmeBhGEHKyPQg0SnyeA8U0a0xeDN; Ingrid Lundestad & Øystein Tunsjø, *The United States and China in the Arctic*, 51 (259) POLAR RECORD 392 (2015).

Canada over the two main Arctic passages.

The ongoing U.S.-China tension in the South China Sea (SCS) also shows that the two countries have very different interpretations of the FON rules. Particularly, the U.S. asserts that China's historic claims within the nine-dash line in the SCS infringe the freedom of navigation in the region. In this context, how could the two countries develop trust and cooperation to ensure and promote the freedom of navigation in the Arctic Ocean?

To answer this question, we need to have a closer look into the possible legal bases for Canada and Russia to control and regulate the NWP and the NSR. In a nutshell, there are two principal legal grounds argued by Canada and Russia: historic titles and Article 234 of UNCLOS.

Historic maritime claims and the freedom of navigation

In the Arctic, Canada and Russia have long asserted sovereignty over large

Arctic waters based on historic grounds. Specifically, Canada claims that the NWP waters are its *internal waters* based on historic titles and, therefore, they fall under the full sovereignty of Canada. Despite that Russia's treatment of its NSR waters under the law of the sea is less clear, it has *de facto* placed the shipping of all foreign vessels through the NSR under its absolute control based on the doctrine of historic waters and Article 234 of UNCLOS.

As mentioned above, China also claims that its sovereignty over the Nansha Islands and their adjacent waters in the SCS "has been formed over a long course of history."¹¹ Although China has repeatedly committed itself to respecting the freedom of navigation in the disputed areas in the SCS, it has never clarified its commitment in detailed legal terms. To challenge China's various claims in the SCS, the U.S. has routinely conducted naval patrols and aerial surveillance through its freedom of navigation operations (FONOPs) program in the region.¹²

¹¹ See, e.g., PRC Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnam's Statement on the Chinese Government's Position Paper on Rejecting the Jurisdiction of the Arbitral Tribunal Established at the Request of the Philippines for the South China Sea Arbitration*, 12 December, 2014, available at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1218756.shtml.

¹² See generally Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, Belfer Center for Science and International Affairs, (June 2017), <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>.

Overall, although China's historic claim in the SCS is quite different from the historic maritime claims in the Arctic,¹³ it is unlikely that China would join the U.S. to challenge the control of Russia and Canada over the NSR and the NWP waters *on the basis of historic titles*.

Article 234 of UNCLOS and the freedom of navigation

However, to focus just on historic maritime claims in the SCS and the Arctic regarding the U.S.-China FON cooperation would be to miss half the picture. Another key legal basis used by Russia and Canada to regulate the NSR and the NWP waters is Article 234 of UNCLOS. The provision allows a coastal state to take unilateral action including enacting laws and regulations to protect the "ice-covered areas" from pollution from vessels within their economic exclusive zones (EEZs).¹⁴ To date, the Article 234 has raised numerous legal questions especially in light of the reduction of

sea ice cover and the enforcement of the new mandatory International Code for Ships Operating in Polar Waters (the "Polar Code").¹⁵ Especially, Article 234 is an *environmental* claim. However, both Canada and Russia have used it to support their *sovereign* control over the whole water areas of the NWP and the NSR. Moreover, both countries set *prior authorization* regimes to permit vessels to navigate in the waters rather than *prior notification*.¹⁶ Furthermore, contrary to the requirement of Article 236 of UNCLOS,¹⁷ both Russia and Canada require *all* vessels to obtain prior authorization to enter and transit the NSR and the NWP waters. Thus, the U.S. has repeatedly protested Russia's NSR regime and the Canadian Arctic navigation regime. In short, under the new circumstances, how to balance the coastal state's responsibilities to protect the maritime environment and pay due regard to the freedom of navigation in the Arctic waters remains highly debatable.

¹³ A more detailed analysis of the differences between the historic maritime claims in the SCS and the Arctic is provided in another article entitled "*China in the Arctic Ocean and the South China Sea: Beyond the (In)consistency Debate*," by this author. The article is available upon request.

¹⁴ See UNCLOS, *supra* note 4, art. 234.

¹⁵ The text of the Polar Code is available at <https://www.mardep.gov.hk/en/msnote/pdf/msin1540anx1.pdf>.

¹⁶ For a comprehensive discussion, see Jan Jakub Solski, *Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?* 35 OCEAN YEARBOOK 443 (2021).

¹⁷ Article 236 excludes the category of state vessels from the coastal state's regulation under Arctic 234. See UNCLOS, *supra* note 4, art. 236.

Unlike the issue of historic maritime claims, the implementation of Article 234 and the Polar Code does not necessarily create legal dilemmas for Beijing in terms of co-promoting the freedom of navigation in the Arctic Ocean. Looking ahead, it could serve as a fertile topic for U.S.-China Arctic FON dialogue concerning marine environmental protection and EEZ regime in general. For instance, China may join hands with the U.S. (and others) to address the inconsistency of Canada's and Russia's Article 234 regulatory regimes with Article 236 of UNCLOS because this specific issue is completely irrelevant to three countries' (Canada, Russia, and China) historic maritime claims in the Arctic and the SCS. This joint effort could also facilitate the navigation of China's *governmental* marine scientific research icebreakers and other vessels in the Arctic EEZ waters of Canada and Russia.¹⁸ Moreover, as China's naval

presence in foreign EEZs increases in the future, its positions on the navigation of warships could also evolve.¹⁹

Finally, the U.S.-China cooperation regarding the interpretation and application of UNCLOS in the Arctic, including Arctic FON collaboration, could be developed through negotiating Memoranda of Understandings (MOUs) or joint statements on some finely defined issues. In this regard, it is worth noting that, in 1989, the U.S. and the Soviet Union (USSR) harmonized their positions regarding the innocent passage of warships in the territorial sea.²⁰ Unfortunately, much conversation on social media now often plays up U.S.-China military confrontation in the SCS and beyond. Only a little audience knows that the two countries are actually the drafters and parties of the Code for Unplanned Encounters at Sea (CUES).²¹ Even in the

¹⁸ Of course, according to Article 246 (2) of UNCLOS, consent would be still needed for *conducting marine scientific research (MSR)* from coastal states in their EEZs and on their continental shelves. See UNCLOS, *supra* note 4, art. 246 (2).

¹⁹ See also Kimberly Hsu & Craig Murray, *China's Expanding Military Operations in Foreign Exclusive Economic Zones*, U.S.-China Economic and Security Review Commission Staff Research Backgrounder, June 19, 2013, available at https://www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder_China%20in%20Foreign%20EEZs.pdf.

²⁰ *Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Uniform Interpretation of Rules of International Law Governing Innocent Passage*, September 23, 1989, 28 (6) INTERNATIONAL LEGAL MATERIALS 1444-1447 (1989).

²¹ On April 22, 2014, the CUES was signed by 21 Pacific nations at the 14th Western Pacific Naval Symposium in Qingdao, China. The text is available at <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>.

East Asian seas, the U.S. and China have signed MOUs on Rules of Behavior for Safety of Maritime and Air Encounter²² and Notification of Major Military Activities Confidence-Building Measures Mechanism²³ to increase mutual trust and dialogue. These existing military confidence-building measures and mechanisms between the U.S. and China could inspire the two countries to develop constructive channels for their collaboration and trust-building concerning navigation in the Arctic Ocean.

Cooperation Opportunities regarding New Arctic Treaties

The Agreement on Enhancing International Arctic Scientific Cooperation

The Agreement on Enhancing International Arctic Scientific Cooperation was negotiated under the auspices of the Arctic Council (AC) during the U.S. chairmanship of 2015-2017. The Agreement was adopted by the eight Arctic states on May 11th, 2017 and entered into force on May 23rd, 2018.²⁴ Since the Agreement would be binding under international law and the issue is significant for non-parties, many non-Arctic observers in the AC, including China, were invited to participate in the negotiating process.²⁵ The goal of the Agreement is to “enhance cooperation in scientific activities in order to increase effectiveness and efficiency in the development of scientific knowledge about the Arctic.”²⁶ According to the Agreement, if scientists coming from

²² Memorandum of Understanding between the Department of Defense of the United States of American and the Ministry of National Defense of the People’s Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, November 10, 2014, available at https://dod.defense.gov/Portals/1/Documents/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf. It is worth noting that, in line with the rules of the CUES, the MOU has no specific geographic limitation, such as territorial sea, that could bring in political disagreement. For a further discussion, see Yan Yan, *Maritime Confidence-Building Measures: Assessing China-US MOU on Notification of Major Military Activities and Rules of Behavior*, in *MARITIME ORDER AND THE LAW IN EAST ASIA* 171 (Nong Hong & Gordon Houlden eds., 2018).

²³ Memorandum of Understanding between the United States of American Department of Defense and the People’s Republic of China Ministry of National Defense on Notification of Major Military Activities Confidence-Building Measures Mechanism, November 4, 2014, available at https://dod.defense.gov/Portals/1/Documents/pubs/141112_MemorandumOfUnderstandingOnNotification.pdf.

²⁴ The Agreement is available at <https://oaarchive.arctic-council.org/handle/11374/1916>.

²⁵ For a further discussion, see, e.g., Akiho Shibata & Maiko Raita, *An Agreement on Enhancing International Arctic Scientific Cooperation: Only for the Eight Arctic States and Their Scientists?* 8 Y. B. POLAR L.129 (2016).

²⁶ *Supra* note 32, art. 2.

non-parties countries partner in a project with scientists from an Arctic state, they would effectively benefit from the provisions of the Agreement.²⁷ Moreover, the Arctic states shall meet to review the implementation of the Agreement no later than one year after the enforcement of the Agreement, and from then on as decided by the Parties. Such meeting would invite Permanent Participants as well as observers to observe and provide information. Scientific cooperation activities with non-parties regarding the Arctic may also be taken into account when reviewing the implementation of the Agreement.²⁸

To date, no countries have invoked the Agreement to overcome a barrier to Arctic research. In addition, the awareness of the Agreement is low in both the U.S. and China.²⁹ On the other hand, as suggested by Heather A. Conley and others, utilizing the Agreement can help establish

transparency and new norms regarding Arctic scientific collection, data monitoring and analysis.³⁰ It could facilitate U.S.-China Arctic scientific cooperation and access to some key Arctic research.

The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean

The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (“CAOF Agreement”) was initiated by the five Arctic coastal states (Canada, Denmark, Norway, Russia, the United States) in June 2010. In December 2015, five other fishing countries and entities (China, the European Union, Iceland, Japan, and Republic of Korea) started to be invited to participate in the treaty-making process. Therefore, the negotiation of the Agreement has been known as the “Arctic Five-plus-Five process.”³¹ China has the world’s largest distant-

²⁷ *Id.*, art. 17 (2).

²⁸ *Id.*, art. 12.

²⁹ See John Farrell, *How the US Government is Implementing the Agreement*, in SUPPORTING IMPLEMENTATION OF ARCTIC SCIENCE AGREEMENT (Science Diplomacy Action Synthesis No.3), January 2019, at 17, available at <https://www.uarctic.org/media/1599347/science-diplomacy-action-synthesis-no-3-arctic-science-agreement-dialogue-panel-supporting-implementation-of-the-arctic-science-agreement-31jan19.pdf>.

³⁰ Heather A. Conley et. al., *America’s Arctic Moment: Great Power Competition in the Arctic to 2050*, A Report of the CSIS Europe Program, March 2020, at 6, available at <https://www.csis.org/analysis/americas-arctic-moment-great-power-competition-arctic-2050>.

³¹ See generally Joji Morishita, *The Arctic Five-plus-Five Process on Central Arctic Ocean Fisheries Negotiations: Reflecting the interests of Arctic and non-Arctic Actors*, in EMERGING LEGAL ORDERS IN THE

water fishing (DWF) fleet³² and is interested in the Arctic maritime resources, especially in the high seas area of the CAO, and therefore participated in the negotiations actively.³³ The CAO Agreement entered into force on June 25th, 2021.³⁴

The CAO Agreement adopted a precautionary approach to the conservation and management of the high seas fishing in the CAO. The parties agreed to ban unregulated fisheries in the high sea portion of the CAO for sixteen years to allow time for scientists to study the fish and fish habitat in the region and their suitability for commercial fishing.³⁵ During this period of time, a Joint Program of Scientific Research and Monitoring (JPSRM) will be put in place under the framework of the Agreement.³⁶ At the same time, the

JPSRM program could also further the study on the ecosystem of CAO and has a potential to contribute to the ongoing treaty negotiations on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ) and the protection of marine biodiversity in the Arctic Ocean. On the other hand, given the limited scientific knowledge regarding fisheries resources in the CAO, there are many challenges in implementing the CAO Agreement.³⁷ In this context, how to put this new treaty into practice offers specific opportunities for the U.S. and China to collaborate and enhance mutual trust regarding the Arctic. In fact, the U.S. and China have long worked together to combat illegal, unreported, and unregulated (IUU) fishing in other regions. For example, they have cooperated in patrolling high seas

ARCTIC: THE ROLE OF NON-ARCTIC ACTORS 109-131 (Akiho Shibata, Leilei Zou, Nikolas Sellheim & Marzia Scopelliti eds., 2019).

³² See Miren Gutierrez et. al., *China's Distant-water Fishing Fleet: Scale, Impact and Governance*, ODI Report, June 2020, at 8, available at https://cdn.odi.org/media/documents/chinesedistantwaterfishing_web.pdf.

³³ See Nengye Liu, *How Has China Shaped Arctic Fisheries Governance?* THE DIPLOMAT (Jun. 20, 2018), <https://thediplomat.com/2018/06/how-has-china-shaped-arctic-fisheries-governance/>.

³⁴ The text of the Agreement is available at <https://www.dfo-mpo.gc.ca/international/agreement-accord-eng.htm>.

³⁵ *Id.* art.13.

³⁶ *Id.* art. 4.

³⁷ For a more detailed discussion, see, e.g., David L. VanderZwaag, *Governance of Fisheries in the Central Arctic Ocean: Cooperative Currents, Foggy Future*, in GOVERNING MARINE LIVING RESOURCES IN THE POLAR REGIONS 92-108 (Nengye Liu et. al. eds., 2019) (discussing five aspects of the uncertainty regarding the implementation of the Agreement, including how to deal with future “exploratory fishing” under the Agreement, the compatibility of coastal states’ fisheries conservation measures, the unsettled outer continental shelf boundaries in the CAO, how to coordinate scientific research and cooperation, and the implications of a new BBNJ treaty for future Arctic fisheries).

illegal driftnet fishing in the North Pacific Ocean under the U.S.-China Shiprider Memorandum since 1993.³⁸

An Alaska Perspective on U.S.-China Economic Relations

In June 2018, then-Governor of Alaska Bill Walker completed an *Opportunities Alaska: China Trade Mission* in China to expand Alaska's export and investment relationship with China.³⁹ However, since the Trump administration started a tariffs war against China, Alaska's economic relationship with China has been caught in the crossfire. For instance, seafood is a top three economic driver for Alaska and one of the leading employers contributing to more than 60,000 jobs in Alaska alone.⁴⁰ China plays a vital role for Alaska's

seafood industry and maintained the top export partner for Alaska in 2020.⁴¹

Amidst the on-going U.S.-China trade war, China has imposed up to 37 percent levy for the U.S. seafood in retaliation of U.S. tariffs on Chinese goods. This plunged Alaska's seafood exports to China by 46 percent from a high in 2017.⁴² While some nontariff trade barriers were removed by Phase One trade agreement signed by the U.S. and China in January 2020,⁴³ most Alaska seafood products continue to face a 32 to 40 percent final tariff in the Chinese market.⁴⁴ At the same time, Beijing has lowered the applied most favored nation (MFN) import tariffs for certain seafood products from other

³⁸ *The Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991*, signed in Washington, D.C., on December 3, 1993. The MOU expired on December 31, 2019.

³⁹ Austion Baird, *China Trade Mission Delegates Return Home*, ALASKA NATIVE NEWS (Jun.7, 2018), <https://alaska-native-news.com/china-trade-mission-delegates-return-home/35506/>.

⁴⁰ USTR 301 Committee, *Section 301 Tariffs Public Hearing Proceedings*, August 23, 2018, at 11, <https://ustr.gov/sites/default/files/enforcement/301Investigations/0823USTR.pdf>.

⁴¹ See The U.S.-China Business Council, *2021 State Export Report: Goods and Services Exports by U.S. States to China Over the Past Decade*, May 2021, https://www.uschina.org/sites/default/files/state_export_report_2021_full_report.pdf#page=21.

⁴² Chu Daye & Tu Lei, *Alaska's China Exports Hurt by Trade War, Highlighting Lose-lose Situation*, GLOBAL TIMES (Mar. 19, 2021), <https://www.globaltimes.cn/page/202103/1218886.shtml>.

⁴³ See Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, January 15, 2020, available at [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic And Trade Agreement Between The United States And China Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic%20And%20Trade%20Agreement%20Between%20The%20United%20States%20And%20China%20Text.pdf).

⁴⁴ Department of Commerce, Community, and Economic Development, *State of Alaska FY2022 Governor's Operating Budget*, December 15, 2020, at 372, available at https://omb.alaska.gov/ombfiles/22_budget/DCCED/Proposed/budget_summary_dcced.pdf.

countries under the World Trade Organization (WTO) rules.⁴⁵

Particularly, because of labor shortages, a significant amount of Alaska's seafood is often sent to China for processing before re-exporting to other countries, including the U.S. However, many re-imports of Alaskan seafood processed in China are *not* exempt from the current retaliatory U.S. tariffs. In other words, those Alaska companies that reprocess U.S.-harvested seafood in China for re-exporting to the U.S. market are immediately affected.⁴⁶ Consequently, Alaska's congressional delegation has urged the U.S. Trade Representative (USTR) to remove U.S.-caught seafood from the tariff lists.⁴⁷ According to current USTR Katherine Tai, the U.S. government will be launching a new worker-centered trade strategy towards China and a key element of the

revised approach involves the launch of a new exclusion review process for Section 301 tariffs on Chinese exports.⁴⁸

In addition, since September 2020, approximately 3,600 cases have been filed in the U.S. Court of International Trade (CIT), challenging the imposition of a third and fourth round of tariffs on products from China by the USTR Office pursuant of Section 301 of the Trade Act of 1974.⁴⁹ The lawsuits have been consolidated behind the initial HMTX lawsuit.⁵⁰ If the lawsuit is successful, it would effectively end the tariffs on Chinese goods and the U.S. government should refund any duties paid by plaintiffs pursuant to List 3 and List 4. To date, the exact impacts of Phase One trade agreement and the ongoing Section 301 litigation on Alaska seafood companies and the Alaska-China trade relations remain

⁴⁵ This annual tariff adjustment plan did not affect the retaliatory tariffs on U.S. exports to China. For more information, see USDA FOREIGN AGRICULTURAL SERVICE, *Report: China Lowers Applied MFN Tariff Rates on Selected Agricultural Products*, CH 2019-0199, January 5, 2020, available at <https://www.fas.usda.gov/data/china-china-lowers-applied-mfn-tariff-rates-selected-agricultural-products-0>.

⁴⁶ See Alaska Seafood, *Alaska Seafood 2019 US/China Tariff Overview*, (Jan. 15, 2020), <https://uploads.alaskaseafood.org/2020/01/ASMI-Tariff-Overview-Jan-2020.pdf>.

⁴⁷ See, e.g., *supra* note 48.

⁴⁸ Kate McNulty, Christopher Adams & Erin Biel, *U.S. Trade Representative Previews New China Strategy*, GLOBAL POLICY WATCH (Oct. 7, 2021), <https://www.globalpolicywatch.com/2021/10/u-s-trade-representative-previews-new-china-strategy/>.

⁴⁹ See United States Court of International Trade, *In Re Section 301 Cases*, Slip Op 21-81, July 6, 2021, <https://www.cit.uscourts.gov/sites/cit/files/21-81.pdf>.

⁵⁰ In September 2020, HMTX Industries LLC, a U.S. importer that paid duties under List 3 and List 4A, brought the first of the Section 301 lawsuit to the CIT, seeking a refund of duties paid. *Id.*, at 7.

unclear and deserve further investigation.

Furthermore, China is also interested in oil, gas, other resource extraction and various infrastructure investments in Alaska, such as port, rail, and telecommunications projects. The Alaskan North Slope contains some of the country's largest oil and natural gas fields. Generally speaking, China's participation in the Arctic development has already been seen problematic, particularly in light of its use of government-linked trades, state-owned investments and loans to attract and influence Arctic actors.⁵¹ China's preferential treatment for state-owned enterprises (SOEs) has long been a hot button issue between the U.S. and China.⁵² In sum, any Chinese direct investment in Alaska would be subject to the scrutiny and review process of the Committee on Foreign Investment in the United States (CFIUS).

Overall, although there are significant frictions at the nation-to-nation level, the Alaska-China economic

relationships remain strong. Therefore, the conflicts of interests can arise between the U.S. federal government and the state of Alaska, especially regarding foreign commerce.⁵³ How much role that a state can play in foreign commerce under the federalism principles becomes a highly relevant question for Alaska in terms of promoting its economic relationship with China in the current context.⁵⁴

Conclusion

The fast-changing Arctic adds a new dimension to contemporary U.S.-China relations. Whereas tensions on some issues between the U.S. and China may be irreconcilable, meaningful and substantial dialogues would help manage them and prevent spillovers that hinder the rosy prospects for the U.S.-China cooperation in other areas such as the Arctic. As discussed in this note, there is a wide range of concrete, feasible opportunities for U.S.-China cooperation regarding the Arctic. Of course, shared interests and lofty intentions are no guarantee for

⁵¹ See, e.g., MARK E. ROSEN & CARA B. THURINGER, UNCONSTRAINED FOREIGN DIRECT INVESTMENT: AN EMERGING CHALLENGE TO ARCTIC SECURITY 51- 61 (2017).

⁵² See, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *U.S. Statement on the Trade Policy Review of China*, October 22, 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/us-statement-trade-policy-review-china>.

⁵³ See generally Sam Karson, *Caught Between Superpowers: Alaska's Economic Relationship with China amidst the New Cold War*, 36 (1) ALASKA L. REV. 47 (2019).

⁵⁴ *Id.*

collaboration. To facilitate the U.S.-China collaboration in the Arctic, some tentative policy recommendations are provided as follows:

- Increasing the awareness of the Arctic among policymakers in both the U.S. and China and placing the Arctic issues front and center when the two countries return to the negotiating tables. The truth is there are many “*Arctic opportunities*” for the two countries to develop trust and collaboration, particularly regarding climate change, scientific research, marine environmental protection and IUU fishing, international trade, and the development of Arctic international law.
- Using a *bottom-to-top* approach to promote the U.S.-China Arctic cooperation. Those individuals, companies, institutes, and agencies who are involved with the specifics of various Arctic issues have good chance to engage in or create bilateral cooperation programs and networks, which will in turn inform the relevant decision-making processes.
- Scholars, journalists, and diplomats are all ultimate agents for securing a peaceful and sustainable order of the Arctic. These individuals have international professional

responsibilities to link U.S.-China tensions on other issues with China’s participation in the Arctic in a constructive way. For instance, in a Congressional Research Service (CRS) report to Congress concerning the Arctic, the authors have kept suggesting the U.S. government to consider suspending China’s Observer status on the Arctic Council as a punitive cost-imposing measure for unwanted Chinese actions in the SCS.⁵⁵ Several U.S. military Arctic policies and reports have also linked China’s assertiveness in the SCS to its engagement in the Arctic, contending that China is a challenger to the rule-based order in the Arctic. These suggestions are neither feasible nor true. They are not helpful and constructive for fostering cooperation in the Arctic region, including the U.S.-China Arctic cooperation.

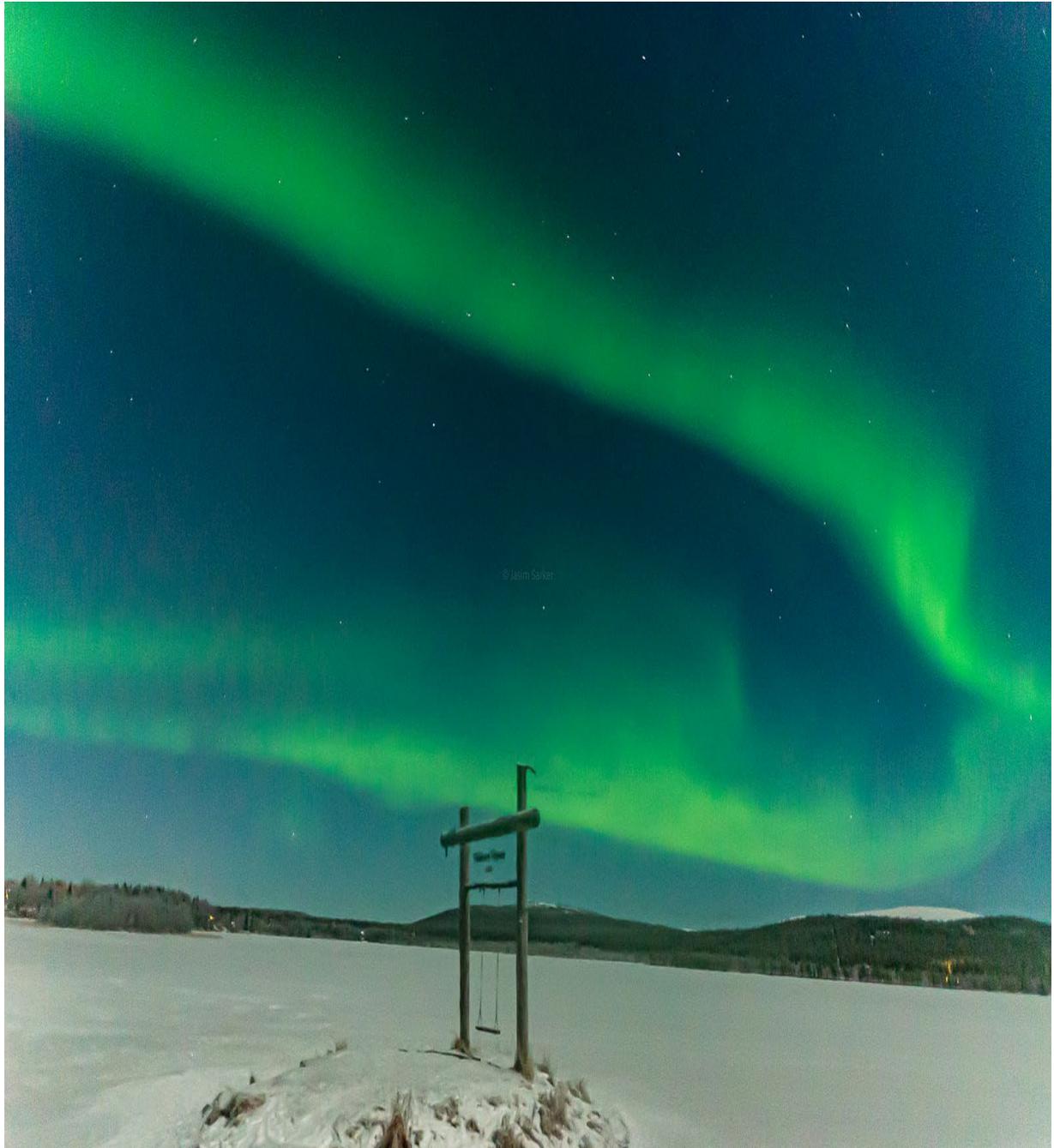
- Increasing the awareness of existing U.S.-China bilateral cooperation initiatives and programs⁵⁶ as well as the new effective Arctic agreements and arrangements among Arctic scientists and scholars in both countries. In China, this can be improved by producing and providing informative, timely reports and conference proceedings for a broader

⁵⁵ See *supra* note 9, at 38.

⁵⁶ For instance, *U.S.-China Dialogue on the Law of the Sea and Polar Issues* and biannual *U.S.-China Track II Dialogue on Maritime Affairs and International Law* have had limited participants and audience.

audience as well as encouraging meaningful interactions among Arctic natural scientists, social science scholars, industry practitioners, and policymakers in the related fields.

The author recommends: *“Increasing the awareness of the Arctic among policymakers in both the U.S. and China and placing the Arctic issues front and center when the two countries return to the negotiating tables.”*



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