

## NOTE

### FROZEN ASSETS: OWNERSHIP OF ARCTIC MINERAL RIGHTS MUST BE RESOLVED TO PREVENT THE *REALLY* COLD WAR

*Angelle C. Smith\**

#### I. INTRODUCTION

Forget the Cold War; the *really* cold war is lurking. The looming debate over the natural resources in the Arctic is primed to explode. The glacial Arctic waters that harbored U.S. and Soviet submarines during the Cold War<sup>1</sup> may prove to be a battleground again if nothing is done to determine who has jurisdiction over the vast mineral deposits in the Arctic. Allocation of mineral rights in the Arctic is becoming increasingly important as global warming eases access to the area, the global demand for energy continues to rise, and advances in technology make extraction of these minerals possible.<sup>2</sup> The harmonization of these three factors, coupled with competing international claims to the Arctic's continental shelf, may yield a dispute of epic proportions to conclusively determine which nation, or nations, has the best claim to the untapped natural resources beneath the Arctic seabed.

The Arctic region, specifically the North Pole, contains significant oil and gas reserves. Based on recent estimates, this area may contain close to twenty-five percent of the world's "undiscovered" oil and natural gas resources.<sup>3</sup>

Given the mineral potential of the area, the time to settle ownership of the Arctic seabed is now. And the countries with competing claims know this. The Russian Federation recently planted a flag

---

\* Associate, Covington & Burling L.L.P., Washington, D.C. J.D. 2009, *with high honors*, Order of the Coif, The George Washington University Law School; B.A. 2003, *cum laude*, Georgetown University. Ms. Smith would like to thank Jonathan Homer for his research assistance and Clifford Smith for inspiring her interest in mineral rights.

1. See James Graff, *Fight for the Top of the World*, TIME, Oct. 1, 2007, at 28, 30.
2. See discussion *infra* Part II.B.
3. Clifford Krauss, *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

on the North Pole,<sup>4</sup> Canada plans to build an Arctic military force,<sup>5</sup> and the other Arctic coastal states—Denmark (through Greenland<sup>6</sup>), Norway, and the United States—are all seeking to establish an Arctic presence.<sup>7</sup> As one commentator noted, the Arctic is “a perfect storm seeded with political opportunism, national pride, military muscle flexing, high energy prices and the arcane exigencies of international law.”<sup>8</sup>

Facially, it appears that the United Nations Convention on the Law of the Sea (UNCLOS), a comprehensive international maritime treaty establishing rights, responsibilities, and procedures for settling claims in the world’s oceans and seas, should be the proper mechanism to determine jurisdiction in the Arctic.<sup>9</sup> UNCLOS, however, is not a viable option because not all of the interested parties have ratified the treaty and the UNCLOS component that recommends limits of the continental shelf has not achieved the status of customary international law.<sup>10</sup> While the United Nations should take steps to address these shortfalls, it is highly unlikely that any amendment to the present regime will be proposed and accepted before anarchy on the high Arctic seas ensues. UNCLOS, therefore, is not the answer.

This Note analyzes the present issue in five parts. First, it examines the history of competing discovery and ownership claims to the North Pole and the surrounding area. Second, it assesses the current mineral and environmental situation in the Arctic. Third, it reviews the traditional mechanisms that are typically employed to settle maritime and seabed delimitations. Fourth, it examines

---

4. *Russia Plants Flag Under N Pole*, BBC NEWS (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

5. *See, e.g., Arctic Sovereignty Operation Nanook Set to Launch in Nunavut*, CBC NEWS (Aug. 2, 2007) [hereinafter *Operation Nanook*], <http://www.cbc.ca/canada/north/story/2007/08/02/north-nanook.html> (noting that the ten-day Operation Nanook is one of Canada’s “latest Arctic sovereignty exercise[s]”).

6. Greenland, once a Danish Colony, has responsibility for its own internal affairs, but the Kingdom of Denmark still controls Greenland’s foreign affairs, security, and financial policy. *See generally* U.S. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: GREENLAND* (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html>.

7. *See, e.g.*, discussion *infra* Part II.D.

8. Graff, *supra* note 1, at 31.

9. *See generally* U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA, *THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (A HISTORICAL PERSPECTIVE)* (1998) [hereinafter *A HISTORICAL PERSPECTIVE*], available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm).

10. *See* discussion *infra* Part III.A. Customary international law is the consistent practice of states. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

pending submissions to commissions created under UNCLOS in which interested countries seek to gain jurisdiction of disputed areas of the Arctic continental shelf. And, fifth, it analyzes the viability of UNCLOS to settle the Arctic boundary and resource disputes.

The role of UNCLOS in settling the mineral situation in the Arctic is far from certain, and this Note highlights the characteristics that make it ill-suited to address the problem. In its place, this Note proposes an alternative method to allocate jurisdiction of the continental shelf. This proposal seeks to create a new Arctic regime by combining elements from the International Court of Justice (ICJ), the mineral resource provisions in the Antarctic Treaty System (ATS), and the common heritage of mankind principles<sup>11</sup>. Unlike these systems, this new regime must be narrowly tailored in a manner that encourages all Arctic coastal states to agree to abide by the terms of the treaty. The ultimate goal of this regime is to allocate once unattainable resources in a fair and effective manner. Without such action, the currently contentious situation could lead to conflict very soon.

## II. BACKGROUND

### A. *A Brief History of the Arctic World*

The core issue in the Arctic is not control of a land mass or the surface of the high seas, but rather the natural resources, namely the minerals below the seabed. This Section discusses the opposing international claims to the Arctic's resources. These include competing discovery claims to the North Pole, the sector theory dividing the Arctic among Arctic coastal states, and modern ownership claims. Currently, no single authority is recognized as having jurisdiction over the North Pole.<sup>12</sup>

The Arctic is one of the least accessible places on Earth.<sup>13</sup> The United States was the first nation to lay claim to the North Pole, doing so in 1909. This claim, however, has been plagued with con-

---

11. The common heritage of mankind principles promote international cooperation and sharing of the management and benefits of the seabed's natural resources. See discussion *infra* Part III.C.

12. Barbara Rhodes, *Who "Owns" the North Pole?*, 90° NORTH, <http://90north.tripod.com/northpole.htm> (last visited Sept. 28, 2010). For information about the Arctic Council, which is an intergovernmental forum that promotes cooperation, coordination, and interaction among the Arctic states, see *About Arctic Council*, ARCTIC COUNCIL, <http://arctic-council.org/article/about> (last visited Sept. 28, 2010).

13. Eur. Space Agency, *Satellites Witness Lowest Arctic Ice Coverage in History*, EUR. SPACE AGENCY PORTAL (Sept. 14, 2007), [http://www.esa.int/esaCP/SEMYTC13J6F\\_index\\_2.html](http://www.esa.int/esaCP/SEMYTC13J6F_index_2.html).

troversy. While the U.S. Congress recognized the discovery, President William Howard Taft refused to do so.<sup>14</sup> Nearly four decades later, the Soviet Union asserted its own claim to the area, supposedly landing a plane on the ice drifting above the Pole. Though no internal dispute existed within the Soviet Union, the international community has determined this act is insufficient for conferring ownership of the territory on Russia.<sup>15</sup>

Currently, each of the four Arctic coastal states—Canada, Denmark, Russia, and the United States—propound a different theory of how ownership of the North Pole seabed and the surrounding area should be determined. Not surprisingly, each supports a solution where its claim will be given the greatest recognition.

Denmark's claim to the North Pole is based on geographic proximity; the seabed of the northern coast of Greenland is allegedly the nearest land to the North Pole.<sup>16</sup> The northernmost point of Greenland is 700 kilometers from the North Pole.<sup>17</sup> This claim, however, is not without controversy. Specifically, Canada's Ellesmere Island is also approximately 700 kilometers from the North Pole.<sup>18</sup> The debate over who has the best claim here arises because international law is unclear on whether island proximity and mainland proximity should be weighed equally when examining a claim of sovereignty.<sup>19</sup> So long as this argument exists, Denmark's claim will persist.

---

14. While the Naval Affairs Subcommittee of the U.S. House of Representatives voted in 1911 in favor of recognizing Robert E. Peary's claim of discovery of the North Pole, President Taft signed a bill that acknowledged only Peary's "Arctic exploration" and did not credit him with the discovery. *Topics in Chronicling America—The Race to the North Pole*, THE LIBRARY OF CONGRESS, <http://www.loc.gov/rr/news/topics/northpole.html> (last visited Sept. 28, 2010); see F.M. AUBURN, *ANTARCTIC LAW AND POLITICS* 188 (1982) (noting that courts have relied "on President Taft's refusal to acknowledge Peary's claim to the North Pole" in Arctic disputes).

15. Currently, both the United States and the Russian Federation claim sovereign ownership of the North Pole resulting from their respective "discoveries"; the international community, however, does not recognize either claim. See AUBURN, *supra* note 14, at 61-83. "[I]t is inappropriate from both a legal and political point of view to employ doctrines based upon discovery and possession to justify the administration of . . . resources during the post-World War II era." Douglas M. Zang, Note, *Frozen in Time: The Antarctic Mineral Resource Convention*, 76 CORNELL L. REV. 722, 758-59 (1991).

16. See generally Jack Phillips, *Visit to Greenland May Chill Hot Air Hoax*, AM. FREE PRESS, Dec. 26, 2005, available at [http://www.americanfreepress.net/html/visit\\_to\\_greenland.html](http://www.americanfreepress.net/html/visit_to_greenland.html).

17. *Facts and History*, OFFICIAL GREENLAND TRAVEL GUIDE, [http://www.greenland.com/content/english/press\\_agents/press/facts\\_and\\_history](http://www.greenland.com/content/english/press_agents/press/facts_and_history) (last visited Sept. 28, 2010).

18. See Rhodes, *supra* note 12 (Ellesmere Island is about 450 statute miles, or about 725 kilometers, from the North Pole).

19. See generally ROBIN CHURCHILL & GEIR ULFSTEIN, *MARINE MANAGEMENT IN DISPUTED AREAS: THE CASE OF THE BARENTS SEA* 59 (1992) (noting that while courts generally do not

Russia has presented two explanations for why it has the best claim to the North Pole and the surrounding area. One argument is based on historical right; specifically, it contends that Joseph Stalin seized the then-unclaimed territory in 1926 by Soviet decree.<sup>20</sup> State Duma Deputy Chairman Artur Chilingarov alleges the international community ignored Stalin's actions because it was ignorant of the mineral opportunities.<sup>21</sup> He states the following: "Stalin once just drew a line from Murmansk to the North Pole and then to Chukchi and said 'USSR Polar Region,' and nobody was worried about it . . . . But today, when the gas and oil fields were found on the shelf, of course, it has become a very important issue."<sup>22</sup>

Russia's other argument is based on physical presence. In a display of nationalistic pride reminiscent of the United States planting a flag on the moon, the Russians undertook a submarine journey to the Arctic Circle that culminated in successfully planting a Russian flag on the seabed of the North Pole on August 2, 2007.<sup>23</sup> In the face of international uproar, Chilingarov declared the expedition "stake[d] the place for Russia,"<sup>24</sup> while Anatoli Sagalevich, the Head of the Deepwater Submersibles Lab at the Russian Academy of Sciences, analogized the situation to the moon, stating, "[t]he Americans placed their flag on the moon, and it doesn't mean the moon became theirs."<sup>25</sup> Canadian Foreign Minister Peter MacKay quickly refuted any Russian claim to sovereignty from the exercise and retorted, "[t]his isn't the 15th Century . . . . You can't go around the world and just plant flags and say 'We're claiming this territory.'"<sup>26</sup>

Further confusing the situation is the fact that there is not any physical land at the North Pole; rather, the Pole's surface consists solely of ice.<sup>27</sup> As the Earth's temperature rises, this ice will melt, leaving only water. Even if the ice were not melting, however, the

---

allow "islands to have the same effect in determining the boundary as the mainland," this inquiry is one of several criteria in equitable delimitation).

20. See Ian Gjertz & Berit Mørkved, *Norwegian Arctic Expansionism, Victoria Island (Russia) and the Bratvaag Expedition*, 51 *ARCTIC* 330, 331 (1998).

21. See Andrew C. Revkin, *Russia's North Pole Obsession*, N.Y. TIMES NEWS BLOG (Aug. 2, 2007, 5:20 PM), <http://thelede.blogs.nytimes.com/2007/08/02/russias-north-pole-obsession>.

22. *Id.*

23. *Russia Plants Flag Under N Pole*, *supra* note 4.

24. Graff, *supra* note 1, at 34.

25. *Id.* at 30.

26. *Russia Plants Flag Under N Pole*, *supra* note 4.

27. See Characteristics: Arctic vs. Antarctic, NAT'L SNOW & ICE DATA CENTER, <http://nsidc.org/seoice/characteristics/difference.html> (last updated Feb. 9, 2009) ("The Arctic is a semi-enclosed ocean, almost completely surrounded by land.").

issue would still be contentious. The traditional tests for determining sovereignty apply to land masses and bodies of water, not ice.<sup>28</sup> Presently, there is no legal consensus as to whether states can even claim sovereignty over ice, especially the fast moving ice in the Arctic.<sup>29</sup> While claims have been made to stable ice areas in the Antarctic where there are permanent workstations, the constantly changing ice conditions in the Arctic are not comparably stable and permanent structures cannot be built.<sup>30</sup>

Given these inherent difficulties, other theories for determining ownership have surfaced. One approach, aptly named "the sector theory," was designed specifically for the Arctic's geological landscape. Under this theory, each Arctic country would control the triangular area emanating from its shoreline to the North Pole.<sup>31</sup> However, international tribunals have consistently decided not to apply the sector theory; stating that it "contradicts accepted means of acquisition of territory in international law."<sup>32</sup> While the theory may be useful for cartographers mapping the area, it is, apparently, never going to be a successful solution for assigning ownership in the Arctic Circle.<sup>33</sup>

Today, the international community is debating whether to grant jurisdiction to nations based on their prolonged continental shelves.<sup>34</sup> The continental shelf is the seabed and subsoil that extend from the coast to the slope and rise between a continent and the deep ocean.<sup>35</sup> Currently, no Arctic coastal state can simply declare that its seabed extends to the North Pole and demand

---

28. See AUBURN, *supra* note 14, at 33.

29. See *id.*

30. See Characteristics: Arctic vs. Antarctic, *supra* note 27 ("The Arctic is a semi-enclosed ocean, almost completely surrounded by land. . . . The Antarctic is almost a geographic opposite of the Arctic, because Antarctica is a land mass surrounded by an ocean.").

31. Zang, *supra* note 15, at 743-44.

32. AUBURN, *supra* note 14, at 25.

33. See generally *id.* at 27-28 (discussing the dilemmas and criticisms of using the sector theory in the Antarctic).

34. See discussion *infra* Part II.D.

35. United Nations Convention on the Law of the Sea art. 76(1), (3), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

The continental shelf of a coastal State 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.

*Id.* art. 76(1).

jurisdiction over the area.<sup>36</sup> Rather, any such determination would have to be made by the International Seabed Authority.<sup>37</sup> Any country that wishes to extend its boundaries into the Arctic region must first submit a claim to the Commission on the Limits of the Continental Shelf (CLCS), a body established under UNCLOS.<sup>38</sup> The CLCS can recommend a coastal state's sovereignty over the continental shelf be expanded to include a "natural prolongation" of a coastal state's land territory.<sup>39</sup> As will be discussed in greater detail below, though this option currently exists, it has yet to be used effectively to expand a nation's jurisdiction in the Arctic.<sup>40</sup> For example, the Lomonosov Ridge, an underwater ridge on the Arctic Ocean floor, is the type of "natural prolongation" of a coastal state's territory that would legitimize extending sovereignty of the continental shelf beyond 200 miles.<sup>41</sup> A significant factor in deciding the jurisdiction of the area may be ownership of the Lomonosov Ridge.<sup>42</sup>

### B. Minerals and the Arctic Environment

Rich mineral deposits and the Arctic's changing environmental conditions make the issue of seabed jurisdiction ripe. States want access to the Arctic's minerals, but the frozen landscape currently precludes access. Yet, global warming is melting the Arctic ice and accelerating access to the minerals.

While the Arctic and its seabed could be lucrative for numerous industries, including maritime transportation, fisheries, and tourism,<sup>43</sup> the industry that stands to benefit the most is oil and gas.<sup>44</sup> "With gas and oil prices near historic highs and with scant prospect of any decrease in world demand for energy, it is only prudent to get a sense of what resources lie below the newly accessible [Arctic]

---

36. See *Russia Plants Flag Under N Pole*, *supra* note 4.

37. See *id.*

38. See UNCLOS, *supra* note 35, art. 76(8).

39. *Id.* art. 76(1), (8).

40. See discussion *infra* Part II.D.

41. See UNCLOS, *supra* note 35, art. 76(1) (defining a "continental shelf"); Carolyn Gramling, *Cold Wars: Russia Claims Arctic Land*, *GEOTIMES*, Aug. 1, 2007, available at <http://www.geotimes.org/aug07/article.html?id=WebExtra080107.html>.

42. See discussion *infra* Part II.D.

43. The tourism industry would benefit in that as the ice melts, cruise ships would have greater access to the area. See Krauss, *supra* note 3, at A1. And while the ice is melting, there are still millions of square kilometers of ice, so there is a lot to see.

44. See *id.*

sea.”<sup>45</sup> Though researchers are working to find sustainable alternative fuels, the world’s oil and gas consumption is increasing.<sup>46</sup>

The need for energy is a global issue. As energy demands increase in the developing world—particularly in the People’s Republic of China and India—the demand and search for the world’s limited oil and gas supply intensifies; and more countries become interested in the Arctic’s resources.<sup>47</sup> Despite their distance from the Arctic, China and India are poised to become key players in the Arctic oil and gas regime, and not merely as consumers.<sup>48</sup> China, India, and other nations have already approached Norway in an effort to explore options in the Barents Sea to both secure their own energy needs and financially exploit the Arctic’s resources.<sup>49</sup>

In addition to national governments, private industries and entrepreneurs also want to exploit the Arctic’s abundant natural resources as global warming melts the Arctic’s natural environment. “It’s the positive side of global warming,” confessed a Canadian official.<sup>50</sup> *The New York Times* and BBC headlines hail the Arctic as the land of “Big-Dollar Deals,”<sup>51</sup> “The New Gold Rush,”<sup>52</sup> and “Dreams of Treasure.”<sup>53</sup> Put simply, there is money to be made in the Arctic.

Harsh weather conditions, notably thick ice, and the lack of technology to penetrate it, have limited access to the Arctic’s potentially lucrative minerals; however, environmental conditions, particularly global warming, are changing this situation. The prevailing scientific understanding is that global warming will affect the Arctic.<sup>54</sup> Under this theory, the question is not “if,” but “when”

---

45. Graff, *supra* note 1, at 33-34.

46. See Jad Mouawad, *Cuts Urged in China’s and India’s Energy Growth*, N.Y. TIMES, Nov. 7, 2007, at C3.

47. See Krauss, *supra* note 3, at A1.

48. See *id.* (noting that China has set up a research station in Norway and that India has contacted Norway to play a role in the exploration of the Barents Sea).

49. See *id.*

50. *Id.* (quoting Ron Lemieux, the Transportation Minister in Manitoba, Canada).

51. Jorn Madslie, *Big-Dollar Deals Tempt Arctic Firms*, BBC NEWS (Nov. 9, 2006), <http://news.bbc.co.uk/2/hi/business/6103384.stm>.

52. Paul Reynolds, *The Arctic’s New Gold Rush*, BBC NEWS (Oct. 25, 2005), <http://news.bbc.co.uk/2/hi/business/4354036.stm>.

53. Krauss, *supra* note 3, at A1.

54. A contentious debate surrounds the existence and effects of global warming; that discussion is outside the scope of this Note. This Note assumes global warming does exist and will affect the Arctic.

the ice in the Arctic will melt.<sup>55</sup> Minimizing carbon footprints, driving hybrid vehicles, and strictly adhering to the framework in the climate change-orientated Kyoto Protocol will not stop the effects of global warming from drastically altering the Arctic's frozen environment.<sup>56</sup> Tactics to mitigate global warming have "yielded to full-bore adaptation to its impact" in the Arctic.<sup>57</sup> Rather than trying to stop or mitigate the *effects* of global warming, the Arctic is adapting to the *impact* of global warming.

The changing conditions in the Arctic provide stark insight to "the most rapid and severe climate change on earth."<sup>58</sup> The Arctic Climate Impact Assessment calculates the temperature in the region will rise seven to thirteen degrees Fahrenheit by 2100.<sup>59</sup> The rising temperature in the ocean and the atmosphere, coupled with thinning Arctic ice and solar energy absorbed by the water, will accelerate the rate of melting and warming.<sup>60</sup> In the Noble Prize-winning film, *An Inconvenient Truth*, former U.S. Vice President Al Gore and many scientists predict the Arctic will be ice-free as early as 2055.<sup>61</sup> While this estimate may be aggressive, more conservative forecasts by groups such as the United Nation's Intergovernmental Panel on Climate Change, envisage an ice-free Arctic summer by 2070.<sup>62</sup>

As the accelerated effects of global warming melt the region's ice, access to the Arctic's diverse resources is readily apparent. Less ice yields more water, opening the door for greater access to the region. For the first time in recorded history, the Arctic's Northwest Passage was fully navigable during the summer of 2007.<sup>63</sup> Maritime routes through the fabled Northwest and Northeast Passages

---

55. See, e.g., Andrew C. Revkin, *No Escape: Thaw Gains Momentum*, N.Y. TIMES, Oct. 25, 2005, at F1, available at [www.nytimes.com/2005/10/25/science/earth/25arctic.html?\\_r=1&oref=slogin&pag](http://www.nytimes.com/2005/10/25/science/earth/25arctic.html?_r=1&oref=slogin&pag).

56. See Graff, *supra* note 1, at 33.

57. *Id.*

58. Press Release, Arctic Climate Impact Assessment, International Scientific Study Finds Arctic Warming Rapidly (Nov. 8, 2004), available at <http://www.america.gov/st/washfile-english/2004/November/20041108112405lcnirellep0.7016718.html>. The Arctic Council and the International Arctic Science Committee commissioned the Arctic Climate Impact Assessment (ACIA). *Id.*

59. *Id.* In Celsius, the temperature will rise four to seven degrees. *Id.*

60. See Krishna Ramanujan, *Dwindling Arctic Ice*, EARTH OBSERVATORY (Oct. 24, 2003), <http://earthobservatory.nasa.gov/Study/ArcticIce/printall.php>.

61. See *AN INCONVENIENT TRUTH* (Paramount Pictures 2006).

62. Eur. Space Agency, *supra* note 13.

63. *Id.* Monitoring of the Northwest Passage began in 1978. *Warming 'Opens Northwest Passage,'* BBC NEWS (Sept. 14, 2007), <http://news.bbc.co.uk/1/hi/world/americas/6995999.stm>.

of the Arctic could have a substantial effect on the shipping industry.<sup>64</sup> Currently, maritime travel from New York City to Tokyo traverses the Panama Canal, an 11,300 mile route.<sup>65</sup> In contrast, a route via the Northwest Passage would be only 8,700 miles.<sup>66</sup> While the Northwest Passage was open during the summer of 2007, the Northeast Passage remained partially blocked.<sup>67</sup> The effect of the Northeast Passage opening would be even more dramatic: a new maritime route through the Arctic would shave the distance between London and Tokyo via the Suez Canal from 13,000 miles to only 8,100 miles.<sup>68</sup>

While global warming will melt enough of the polar ice cap to make the extraction and transportation of undersea oil and gas more readily available by 2030-2040,<sup>69</sup> the Russians and Norwegians have demonstrated that drilling in the Arctic is already possible. Russia, facing harsh conditions such as temperatures as low as negative fifty degrees Celsius, is preparing to drill in Arctic offshore fields in the Barents and Kara Seas.<sup>70</sup> Meanwhile, the Norwegians have successfully inaugurated the offshore fields of the bitterly cold East Arctic.<sup>71</sup>

Ending speculation that harsh conditions and technological limitations would prevent drilling in the Arctic for many years to come, Norway's state-owned Statoil brought offshore gas facilities online in 2007.<sup>72</sup> After twenty-five years of "false starts, planning and construction," the Snohvit<sup>73</sup> facility is fully operational in the Barents Sea.<sup>74</sup> Statoil expects Snohvit to yield \$1.4 billion of liquefied natural gas (LNG) each year for the next twenty-five years.<sup>75</sup> Snohvit

---

64. See Graff, *supra* note 1, at 32-33.

65. *Id.* at 33.

66. *Id.* In kilometers from New York City to Tokyo, the Panama Canal route is 18,200 kilometers, and the Northwest Passage is only 14,000 kilometers. *Id.*

67. *Warming 'Opens Northwest Passage,' supra* note 63.

68. See Graff, *supra* note 1, at 33. From London to Tokyo, the Suez Canal route is 20,900 kilometers and the Northeast Passage is only 13,000 kilometers. *Id.*

69. Shamil Midkhatovich Yenikeeff & Timothy Fenton Krysiak, *The Battle for the Next Energy Frontier: The Russian Polar Expedition and the Future of Arctic Hydrocarbons*, OXFORD ENERGY COMMENT, Aug. 2007, available at [http://www.oxfordenergy.org/pdfs/comment\\_0807-3.pdf](http://www.oxfordenergy.org/pdfs/comment_0807-3.pdf).

70. Madslie, *supra* note 51.

71. See Graff, *supra* note 1, at 30.

72. See *id.*

73. Snohvit is a liquefied natural gas (LNG) facility in the Barents Sea. *Id.* In English, Snohvit means "Snow White." *Id.*

74. *Id.*

75. *Id.*

demonstrates Statoil's success developing the "skills and technology necessary to successfully drill in the Arctic."<sup>76</sup>

### C. *Tools to Determine Maritime Boundaries*

While UNCLOS is the authority that determines sovereignty of the continental shelf, it is not the only means by which an international dispute in the sea may be settled. Generally, there are two sources of rules for determining maritime boundaries: international treaties and customary international law.<sup>77</sup> For maritime boundary disputes, these two are not necessarily consistent. Specifically, the two key treaties, the Convention on the Continental Shelf (1958) and UNCLOS (1982), are not perfectly aligned with customary international law.<sup>78</sup> This section will examine some of these differences.

#### 1. International Treaties

##### a. UNCLOS

UNCLOS is a comprehensive international maritime treaty that regulates all aspects of sea and ocean resources, including: navigational rights, territorial sea limits, legal status of seabed resources, and marine environmental protection.<sup>79</sup> UNCLOS aims to settle "ownership, resource exploitation, and passage rights" issues on the high seas, as well as territorial and coastal areas.<sup>80</sup> One hundred sixty nations have signed and/or ratified the UNCLOS treaty, including most of the nations with claims to the Arctic Sea and its underlying seabed.<sup>81</sup> Canada, Denmark, Norway, and Russia are all parties to the treaty; there is, however, one notable holdout—the United States.<sup>82</sup>

---

76. Yenikeeff & Krysiak, *supra* note 69.

77. CHURCHILL & ULFSTEIN, *supra* note 19, at 56.

78. *See id.*

79. *See generally* A HISTORICAL PERSPECTIVE, *supra* note 9.

80. Jay M. Zitter, Annotation, *Construction and Application of United Nations Convention on the Law of the Sea—Global Cases*, 21 A.L.R. FED. 2d 109, 109 (2007).

81. *See* UNITED NATIONS, *United Nations Convention on the Law of the Sea*, in 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL ch. XXI, § 6, at 1-4 [hereinafter UNCLOS RATIFICATIONS], available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

82. *See id.* Among the reasons the United States has not ratified UNCLOS is its opposition to provisions that manage and share technology and royalties. *See* DAVID B. SANDALOW, BROOKINGS INST., *LAW OF THE SEA CONVENTION: SHOULD THE U.S. JOIN?* 2 (Policy Brief No. 137, 2004), available at [http://www.brookings.edu/~media/Files/rc/papers/2004/08energy\\_sandalow/pb137.pdf](http://www.brookings.edu/~media/Files/rc/papers/2004/08energy_sandalow/pb137.pdf).

Under UNCLOS, the continental shelf is defined as “the sea-bed and subsoil of the submarine areas that extend beyond [a state’s] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin.”<sup>83</sup> A state’s continental shelf also includes the twelve miles of territorial waters extending from its shoreline and includes the “200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>84</sup> These 200 nautical miles comprise an exclusive economic zone (EEZ) where “the coastal State [has] the right to exploit, develop, manage and conserve all resources—fish or oil, gas or gravel, nodules or sulphur—to be found in the waters, on the ocean floor and in the subsoil.”<sup>85</sup> Beyond the EEZ, a state may claim a continental shelf that is a “natural prolongation” of its territory for up to 350 nautical miles.<sup>86</sup>

The CLCS determines the validity of jurisdictional claims outside the limits of the continental shelf beyond a state’s EEZ.<sup>87</sup> Authorized by UNCLOS, the CLCS is an international commission that, upon petition from the coastal state, makes recommendations establishing the limits of the continental shelf of that state.<sup>88</sup> Though its opinions are termed “recommendations,” CLCS decisions are “final and binding” on the states that submit the petition.<sup>89</sup> That said, the recommendations are “without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”<sup>90</sup>

Each country has “sovereign rights for the purpose of exploring . . . and exploiting its natural resources” within its established continental shelf.<sup>91</sup> Exploring and exploiting natural resources includes the “exclusive right to authorize and regulate drilling on the continental shelf for all purposes.”<sup>92</sup> While a state has exclusive

---

83. UNCLOS, *supra* note 35, art. 76(1). The debate over mineral rights in the Arctic would be dictated by Part VI of UNCLOS, entitled the “Continental Shelf.” This section defines the boundaries, rights, and various procedures regulating a state’s claim to the outer limits of the continental shelf. *See id.* arts. 76-85.

84. *Id.* arts. 3, 76(1). A nautical mile is a special unit for measuring maritime distances. One nautical mile is approximately 1852 meters. BUREAU INT’L DES POIDS ET MESURES, THE INTERNATIONAL SYSTEM OF UNITS (SI) 127 (8th ed. 2006), *available at* [http://www.bipm.org/utls/common/pdf/si\\_brochure\\_8\\_en.pdf](http://www.bipm.org/utls/common/pdf/si_brochure_8_en.pdf).

85. A HISTORICAL PERSPECTIVE, *supra* note 9; *accord* UNCLOS, *supra* note 35, art. 56.

86. *See* UNCLOS, *supra* note 35, art. 76(1)-(6).

87. *Id.* art. 76(8).

88. *Id.*

89. *Id.*

90. *Id.* art. 76(10).

91. *Id.* art. 77(1).

92. *Id.* art. 81.

jurisdiction to explore and exploit resources beyond 200 nautical miles from its baseline, it does not have exclusive rights to royalties on the resources in this area.<sup>93</sup> In the sixth year of production beyond the EEZ, a producing state shall contribute “1 per cent of the value or volume of production” to a fund administered by the International Seabed Authority.<sup>94</sup> “The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter.”<sup>95</sup> These contributions are then disbursed among the signatories of UNCLOS “on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and the landlocked.”<sup>96</sup> Not all states are required to make this payment.<sup>97</sup> Developing states that are “net importer[s] of a mineral resource produced from its continental shelf [are] exempt.”<sup>98</sup>

States intent on extending the boundaries of their continental shelf beyond the 200 nautical mile EEZ must submit their petition to the CLCS “as soon as possible but in any case within 10 years of [their ratification of UNCLOS].”<sup>99</sup> At this time, Russia, Norway, and Denmark have submitted claims to CLCS; Canada has not,<sup>100</sup> but time remains for it to submit its claim.<sup>101</sup> Canada has until 2013 to do so.<sup>102</sup>

#### b. Convention on the Continental Shelf

The Convention on the Continental Shelf preceded UNCLOS as the United Nations’ authority for determining jurisdiction of coastal seabeds. When UNCLOS was adopted, it supplanted the Convention on the Continental Shelf for all the parties that adopted it.<sup>103</sup> As discussed previously, however, not all nations ratified UNCLOS. Some countries, notably the United States, have not signed the treaty. For these nations, the Convention on the Continental Shelf is still in effect provided the nations ratified the

---

93. See *id.* art. 82. Article 82, entitled “Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles,” governs royalties. *Id.*

94. *Id.* art. 82(2).

95. *Id.*

96. *Id.* art. 82(4). The royalty structure for mineral rights in UNCLOS is a reason the United States did not ratify UNCLOS. See SANDALOW, *supra* note 82, at 2.

97. See UNCLOS, *supra* note 35, art. 82(3).

98. *Id.*

99. *Id.* Annex II, art. 4.

100. See discussion *infra* Part II.D.

101. See *infra* notes 131, 139 and accompanying text.

102. See *infra* notes 131, 139 and accompanying text.

103. See UNCLOS, *supra* note 35, art. 311(1).

Convention on the Continental Shelf (the United States did so in 1961).<sup>104</sup> Therefore, the CLCS may be relevant in the looming debate over Arctic mineral rights.

To determine maritime boundaries under the Convention on the Continental Shelf, "states shall (1) first seek to agree on the boundary; (2) if they are not able to do so, the boundary is the median line unless (3) another line is justified by special circumstances."<sup>105</sup> Thus, equidistance principles are given significant weight when parties disagree.<sup>106</sup> In continental shelf disputes, the principle of equidistance refers to jurisdiction based on which party's coastline is nearest to the shelf.<sup>107</sup>

By contrast, UNCLOS does not give great weight to equidistance principles when states disagree. Rather, the treaty refers the disagreement to the ICJ "to achieve an equitable solution."<sup>108</sup> This divergence of approaches is the result of a compromise between the different schools of thought on the issue held by various states. While some states strongly advocate equidistance as a base for delimitation, others advocate equitable principles to resolve the dispute.<sup>109</sup>

## 2. Customary International Law

When states are unable to agree to maritime boundaries within the terms of the treaties, customary international law may be applied.<sup>110</sup> The ICJ and various arbitral tribunals are the primary bodies that interpret customary international law.<sup>111</sup> As noted above, the ICJ seeks equitable solutions to maritime boundary disputes.<sup>112</sup> "[D]elimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances."<sup>113</sup> To achieve equitable boundary resolu-

---

104. UNITED NATIONS, *Convention on the Continental Shelf*, in 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 81, ch. XXI, § 4, at 2 (listing the participants of the Convention on the Continental Shelf, including dates of signature and ratification).

105. CHURCHILL & ULFSTEIN, *supra* note 19, at 57; *accord* Convention on the Continental Shelf art. 6(1), Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

106. *See* CHURCHILL & ULFSTEIN, *supra* note 19, at 57.

107. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 53-54 (Feb. 20).

108. UNCLOS, *supra* note 35, art. 83(1).

109. CHURCHILL & ULFSTEIN, *supra* note 19, at 57.

110. *See id.* at 61.

111. *Id.* at 58.

112. *See* North Sea Continental Shelf, 1969 I.C.J. at 53-54.

113. *Id.* at 53.

tions, the ICJ considers several factors, including: configuration of relevant coastlines, proportionality between the length of the coastlines of the states concerned and the area resulting for each from the new boundary, and not allowing the boundary line to encroach on or cut off areas that more naturally belong to one of the states.<sup>114</sup>

There are, however, problems with applying customary international law. Most significantly, critics argue that it lacks consistency and precision and is primarily judge-made.<sup>115</sup> Those making these attacks often note that the presence of natural resources is a relevant factor used by the court to determine maritime boundaries. Though this factor has been considered previously, as in *The North Sea Continental Cases*, it is certainly not always controlling; subsequent ICJ decisions indicate the presence of natural resources in the disputed area is not a relevant factor.<sup>116</sup> Rather, the *North Sea Continental Shelf Cases* may be viewed as the exception, and not the rule. In these cases, the resources in the continental shelf were the principal factor in the dispute and need for a boundary resolution.<sup>117</sup> Still, some prefer to compromise, by arguing equitable principles are customary law; however, a certain amount of flexibility must be maintained for relevant circumstances.<sup>118</sup>

#### D. Pending UNCLOS/CLCS Submissions and Regional Responses

There are currently claims pending within the existing UNCLOS CLCS framework. Russia submitted the first petition to CLCS on December 20, 2001.<sup>119</sup> Russia seeks control over the continental shelf beyond its 200 nautical mile EEZ in four areas: the Barents Sea, the Bering Sea, the Sea of Okhotsk, and the Central Arctic

---

114. CHURCHILL & ULFSTEIN, *supra* note 19, at 59; see *North Sea Continental Shelf*, 1969 I.C.J. at 53-54.

115. *E.g.*, CHURCHILL & ULFSTEIN, *supra* note 19, at 58-59.

116. See, *e.g.*, *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 57 (June 3); *Continental Shelf (Tunis v. Libya)*, 1982 I.C.J. 18, 93 (Feb. 24).

117. See *North Sea Continental Shelf*, 1969 I.C.J. at 54 (noting that delimitation should take into consideration the natural resources of the continental shelf areas); CHURCHILL & ULFSTEIN, *supra* note 19, at 59-60.

118. See Barbara Kwiatkowska, *The Landmark 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction & Merits) Award*, 39 GEO. WASH. INT'L L. REV. 573, 601-04 (2007) (discussing the modern application of equitable maritime boundary delimitation).

119. U.N. Convention on the Law of the Sea [UNCLOS], Meeting of States Parties, Apr. 16-26, 2002, *Report of the Twelfth Meeting of States Parties*, ¶ 87, U.N. Doc. SPLOS/91 (June 13, 2002) [hereinafter *Report of the Twelfth Meeting*].

Ocean.<sup>120</sup> In response to Russia's submission, the remaining Arctic coastal states filed official diplomatic notes with the United Nations stating any determination of Russia's rights to the continental shelf beyond the already established EEZ should be "without prejudice" to the establishment of their respective boundaries with Russia.<sup>121</sup>

Well aware of the significance of this submission and its potential result, the CLCS stated that the commission would "serve the cause of maintaining stability in international relations"<sup>122</sup> and "appl[y] [its] expertise with complete independence and integrity."<sup>123</sup> After reviewing the submission, however, the CLCS chose to neither grant nor reject Russia's submission. Rather, it recommended Russia revise its submission and provide the commission with further, more detailed scientific evidence to support its claim.<sup>124</sup> This recommendation has led to an increase in Russia's Arctic activity. Most notably, the 2007 expedition that culminated with Russia planting its flag in the Arctic seabed was undertaken to gather more data that would demonstrate the Lomonosov Ridge is a natural prolongation of the Russian mainland.<sup>125</sup>

Though Russia was the first nation to file a submission, it is not the only one that has done so. On November 27, 2006, Norway filed a submission with CLCS to extend its jurisdiction over the continental shelf in the Arctic beyond its 200 nautical mile EEZ.<sup>126</sup> Norway's submission includes a claim to areas in the Barents Sea

---

120. U.N. Secretary-General, *Oceans and the Law of the Sea: Rep. of the Secretary-General*, ¶ 38, delivered to the General Assembly, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002) [hereinafter *Report of the Secretary-General*].

121. See Note Verbale from Norway to the U.N. Sec'y-Gen. (Mar. 20, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_\\_NORtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__NORtext.pdf); Note Verbale from the United States of America to the U.N. Sec'y-Gen. (Feb. 28, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_\\_USAtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf); Note Verbale from Denmark to the U.N. Sec'y-Gen. (Feb. 4, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_\\_DNKtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__DNKtext.pdf); Note Verbale from Canada to the U.N. Sec'y-Gen. (Jan. 18, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_\\_CANtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf).

122. Statement, Chairman of the Comm'n on the Limits of the Cont'l Shelf, Progress of Work in the Commission, ¶ 7, U.N. Doc. CLCS/34 (July 1, 2002) [hereinafter *Progress of Work in the Commission*].

123. *Id.* ¶ 10.

124. See *Report of the Secretary-General*, *supra* note 120, ¶¶ 39-41.

125. See *Russia Plants Flag Under N Pole*, *supra* note 4.

126. See EXECUTIVE SUMMARY OF THE CONTINENTAL SHELF SUBMISSION OF NORWAY (2006) [hereinafter *NORWEGIAN CLCS SUBMISSION*], available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_exec\\_sum.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf).

that were also included in Russia's 2001 submission.<sup>127</sup> Similar to the diplomatic notes filed with the United Nations in response to the 2001 Russian submission, Russia and Denmark filed notes with the United Nations specifying that the Norway CLCS recommendation "shall not prejudice" future maritime boundary disputes between the states.<sup>128</sup>

Denmark has not yet filed a submission to the CLCS; however, the Danish have begun to research their potential claims.<sup>129</sup> Like the Russian government, the Danish government has undertaken an expedition to prove that the Lomonosov Ridge is a natural prolongation of Greenland.<sup>130</sup> Because Denmark ratified the UNCLOS in 2004, it has until 2014 to file a submission with the CLCS.<sup>131</sup> In addition to civilian expeditions, Denmark is contemplating a show of military force to further demonstrate its presence and strength in the Arctic.<sup>132</sup> The extent of military force contemplated is unknown; however, the Danish have already sent destroyers and ice-breakers to the area.<sup>133</sup>

While Denmark continues to debate how best to prove its jurisdiction over the Arctic, Canada has moved quickly to cement its claim to the area. In Operation Nanook, a "sovereignty and security exercise" launched the same day Russia planted its flag in the Arctic seabed, Canada landed "more than 700 army, navy and air force members . . . along with 30 Canadian Inuit Rangers and members of the [Royal Canadian Mounted Police], coast guard and various government departments" in the disputed region.<sup>134</sup> Already having a strong presence in the Arctic, Canada also plans to build a military training facility in the Arctic, presumably to pro-

---

127. See Note Verbale from the Russian Federation to the U.N. Sec'y-Gen. (Feb. 21, 2007) [hereinafter Russian Note Verbale], available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/rus\\_07\\_00325.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf).

128. See Russian Note Verbale, *supra* note 127; Note Verbale from Denmark to the U.N. Sec'y-Gen. (Jan. 24, 2007), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/dnk07\\_00218.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/dnk07_00218.pdf).

129. See Yenikeeff & Krysiak, *supra* note 69.

130. *Id.*

131. Denmark ratified UNCLOS in November 2004. UNCLOS RATIFICATIONS, *supra* note 81, at 2. Under UNCLOS, Denmark has 10 years, or until 2014, to file a submission with CLCS. See UNCLOS, *supra* note 35, Annex II, art. 4.

132. See Yenikeeff & Krysiak, *supra* note 69.

133. See *id.*

134. Operation Nanook, *supra* note 5. The Canadian government defended this operation by explaining that it was merely a military exercise to simulate an oil spill and a counter-drug operation. *Id.*

tect Canada's potentially lucrative jurisdiction in areas along the Northwest Passage.<sup>135</sup>

Canada also claims the waters between the continental mainland and its Arctic Islands are internal, territorial waters, thereby moving Canada's territorial boundary and EEZ closer to the North Pole.<sup>136</sup> If accepted, this argument will extend Canada's 200 nautical mile EEZ, paving the way for the country to claim greater portions of the continental shelf in a CLCS submission.<sup>137</sup> Approval of this, or a similar submission, would greatly enhance Canada's position in the Arctic, and likely give it greater leverage and control over the Northwest Passage.<sup>138</sup> Having ratified UNCLOS in 2003, Canada must file any CLCS submissions by 2013.<sup>139</sup>

There are also pending maritime boundary disputes outside the provisions of UNCLOS. For example, both Canada and the United States purport to have jurisdiction over the same segment of the Beaufort Sea.<sup>140</sup> Despite diplomatic protests from Canada, the United States has already leased plots of the seabed in this area for exploration and potential exploitation of mineral resources.<sup>141</sup> Because the United States is not a signatory to UNCLOS, the treaty cannot be used to resolve the situation.<sup>142</sup> Situations such as these make clear that a new regime is needed.

### III. ANALYSIS

There are two primary reasons why UNCLOS is not a viable tool to resolve Arctic boundary and resource disputes. First, only some of the Arctic coastal states have ratified the treaty.<sup>143</sup> Second, there is a lack of accepted customary international law applying recommendations of the UNCLOS CLCS.<sup>144</sup> Given that this would be the mechanism for resolving disputes in this area, a new regime is nec-

---

135. See Graff, *supra* note 1, at 31.

136. See *id.* at 34-36.

137. See *id.* at 34.

138. See generally *id.*

139. Canada ratified UNCLOS in 2003. UNCLOS RATIFICATIONS, *supra* note 81, at 2. Under UNCLOS, Canada has 10 years, or until 2013, to file a submission with CLCS. See UNCLOS, *supra* note 35, Annex II, art. 4.

140. See U.S. DEP'T OF DEFENSE, MARITIME CLAIMS REFERENCE MANUAL, DoD 2005.1-M, at 654, 667 n.6, available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

141. See DIV. OF OIL & GAS, STATE OF ALASKA DEP'T OF NATURAL RES., BEAUFORT SEA AREA-WIDE 2006 TRACT MAP NO. 8 OF 8 (2006), available at <http://www.dog.dnr.state.ak.us/oil/products/publications/beaufortsea/bsaw2006/bsmap8.pdf>.

142. See UNCLOS RATIFICATIONS, *supra* note 81, at 1-4.

143. See *id.* (the United States is not a party to UNCLOS).

144. See discussion *infra* Part III.A.2.

essary. This new regime, as explained in greater detail below, should incorporate current mineral resource provisions and the common heritage of mankind principles. Without a new regime, international cooperation in the Arctic will not be sustained as the area becomes more accessible.

A. *UNCLOS Provides an Ineffective Framework for Resolving Arctic Boundary and Resource Disputes*

1. Not All Arctic States Have Ratified UNCLOS

To be effective, the regime governing the Arctic must include every nation with a claim to the area. UNCLOS does not meet this criteria—the United States has not signed the treaty.<sup>145</sup> Because of its status as a non-party to the treaty, if the CLCS or any other UNCLOS-sanctioned method of maritime boundary resolution were to decide an issue contrary to the interests of the United States, the United States simply could choose not to recognize it. Therefore, decisions under UNCLOS regarding rights to the minerals in the Arctic seabed would lack finality because the United States could refuse any terms it did not find beneficial.

One solution to this problem—perhaps the simplest solution—would be for the United States to ratify the treaty. While the United States does benefit in some ways from not being a party to UNCLOS, the nation's interests are compromised in other ways by this autonomy. “[T]he effect of a judicial or arbitral decision on perceptions of the law is not limited to parties to a case or even to parties to the Convention.”<sup>146</sup> States that ratify UNCLOS have a role in determining both which judges and which arbitrators will determine the outcome of disputes.<sup>147</sup> While agreeing to UNCLOS would require the United States to sacrifice a degree of independence, it would also create a system where the country could influence the litigation of seabed claims. Ratifying UNCLOS would give the United States the “right to nominate and participate in the election of judges to the International Tribunal for the Law of the Sea (ITLOS) . . . as well [sic] the right to add names to the lists from which arbitrators are selected.”<sup>148</sup> As the situation currently stands, the United States is the only Arctic coastal state with-

---

145. See UNCLOS RATIFICATIONS, *supra* note 81, at 1-4.

146. *U.N. Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2007) [hereinafter *Senate Hearing II*] (statement of Prof. Bernard H. Oxman).

147. *Id.*

148. *Id.*

out the ability to directly influence the nomination of judges determining international maritime boundary disputes.

The United States' ratification of UNCLOS would cure these deficiencies. Initially, the Reagan Administration opposed UNCLOS because of technology transfer and royalty issues related to seabed drilling; these specific concerns, however, were resolved by amendments to the treaty in 1994.<sup>149</sup> Still, the United States has not signed the document. Though not a signatory, the United States has openly followed UNCLOS policy.<sup>150</sup> President Reagan directed the United States government to follow many provisions of UNCLOS, accepting that the terms "reflect[ ] customary international law."<sup>151</sup> Reagan, however, intended reliance on customary international law to be a mere interim measure before U.S. ratification.<sup>152</sup>

Since 1983, every President of the United States has supported UNCLOS ratification, finding customary international law to be less effective than UNCLOS ratification because customary international law lacks certainty, carries less weight than binding treaties, and is subject to changes based on the practices of other states.<sup>153</sup> President George W. Bush named UNCLOS an urgent treaty in need of Senate ratification,<sup>154</sup> and President Barack Obama's Administration has signaled the importance of ratifying UNCLOS.<sup>155</sup> Some U.S. leaders view UNCLOS ratification as a necessary step to preserve the United States' interest in the Arctic's mineral resources.<sup>156</sup> "[E]nergy vulnerability exposes [the United States] to the machinations of oil-rich states, . . . constraining the opportunities of [U.S.] oil companies to explore beyond the 200-

---

149. See SANDALOW, *supra* note 82, at 2.

150. See *id.* ("President Reagan issued an Ocean Policy Statement announcing the United States's intention to act generally in accordance with the terms of the Convention."); President's Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983) [hereinafter United States Oceans Policy].

151. *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2007) [hereinafter *Senate Hearing I*] (testimony of Gordon England, Deputy Secretary of Defense); see United States Oceans Policy, *supra* note 150, at 378 (President Reagan stating that UNCLOS "generally confirm[s] existing maritime law and practice").

152. See *Senate Hearing I*, *supra* note 151.

153. See *id.*; *Senate Hearing II*, *supra* note 146 (statement of Sen. Richard Lugar, Ranking Minority Member, S. Comm. on Foreign Relations).

154. See *Senate Hearing II*, *supra* note 146 (statement of Prof. Bernard H. Oxman).

155. See *Nomination of Senator Hillary Clinton to be Secretary of State in the Obama Administration: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. (2009) [hereinafter *Hillary Clinton Nomination Hearing*] (statement of Sen. Hillary Clinton).

156. See SANDALOW, *supra* note 82, at 4-5.

mile limit, by perpetuating legal uncertainty that is likely to prevent the large-scale investments that are required.”<sup>157</sup>

Despite this support, the treaty has yet to reach a full vote in the U.S. Senate.<sup>158</sup> Senators who oppose the treaty and favor isolationist policy have held powerful positions where they have been able to wield influence to stall ratification.<sup>159</sup> Former Senator Jesse Helms, former Chairman of the Senate Foreign Relations Committee, consistently omitted UNCLOS ratification from the Committee on Foreign Relations’ agenda<sup>160</sup> and in the post-Helms era, former Senate Majority Leader Bill Frist refused to schedule a vote before the full Senate, despite a unanimous recommendation to do so from the Committee on Foreign Relations.<sup>161</sup> Yet, the UNCLOS tide in the Senate may be changing as both President Obama’s Administration and Senator John Kerry, Chairman of the Senate Committee on Foreign Relations, have signaled UNCLOS ratification is a priority.<sup>162</sup>

In the face of this Senate inaction, UNCLOS supporters are beginning to look at alternative methods to adopt the treaty in lieu of traditional Senate ratification.<sup>163</sup> One such non-traditional method would involve the use of a Congressional-Executive Agreement.<sup>164</sup> A Congressional-Executive Agreement is an alternative to treaty ratification where both the House and the Senate approve a treaty by a majority, rather than a two-thirds Senate approval.<sup>165</sup> While the constitutionality and feasibility of the Congressional-Executive Agreement to ratify a treaty are outside the scope of this Note, the argument demonstrates the seriousness of the lack of ratification.

---

157. *Senate Hearing II*, *supra* note 146 (statement of Sen. Richard Lugar, Ranking Minority Member, S. Comm. on Foreign Relations).

158. *Treaties Pending in the Senate*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/pending/index.htm> (last updated Mar. 16, 2009).

159. Opponents of UNCLOS prefer to call the Convention the Law of the Sea Treaty “LOST”, a play on the UNCLOS acronym. *See, e.g.*, Doug Bandow, *Sink the Law of the Sea Treaty*, WKLY. STANDARD, Mar. 15, 2004, at 16, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/831cqrlid.asp>.

160. *See* SANDALOW, *supra* note 82, at 2.

161. *See id.*; Andrew King, *Thawing a Frozen Treaty: Protecting United States Interests in the Arctic with a Congressional-Executive Agreement on the Law of the Sea*, 34 HASTINGS CONST. L.Q. 329, 329 (2007).

162. *Hillary Clinton Nomination Hearing*, *supra* note 155 (statements of Sen. Hillary Clinton and Sen. John Kerry, Chairman, S. Comm. on Foreign Relations).

163. *E.g.*, King, *supra* note 161, at 329-30.

164. *See id.*

165. *See* Jeanne J. Grimmer, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, Cong. Res. Serv. Rep. 97-896, at 1 (Apr. 5, 2002).

So long as the United States remains a non-party to UNCLOS, it will likely be the only Arctic coastal state not to submit a claim to the CLCS to significantly extend portions of its continental shelf beyond its 200 mile EEZ.<sup>166</sup> The inability to submit such a claim would make it impossible for the United States to protect its interests in seabed jurisdiction beyond its EEZ and deprive the country of a forum to challenge the pending CLCS recommendations. The CLCS implies that the United States, as a non-party to UNCLOS, will not have a forum to challenge any CLCS recommendations. Because the United States has no forum to challenge them, CLCS recommendations are effectively final and binding on the United States.<sup>167</sup> How the United States will react to these recommendations is unknown.

## 2. The CLCS is Not Accepted as Customary International Law

Ratified by 160 states, UNCLOS is accepted and followed around the world.<sup>168</sup> Even though the United States is not a party to the treaty, U.S. case law adopts and acquiesces to the provisions of UNCLOS and treats them as customary international law.<sup>169</sup> For example, in *United States v. Alaska*, the government noted that the United States “has not ratified [UNCLOS], but has recognized that its baseline provisions reflect customary international law.”<sup>170</sup> Given this apparent acceptance of UNCLOS principles, perhaps over time the United States will lose the ability to claim it is not a party to UNCLOS because of the power of acquiescence.<sup>171</sup>

While certain provisions in UNCLOS appear to have become customary international law,<sup>172</sup> there is a lack of history to support a claim that a CLCS recommendation is customary international law. While fifty-one submissions have been made to the CLCS, thirty-five of them were made in 2009.<sup>173</sup> Further, CLCS has only

---

166. Russia and Norway have already filed submissions to CLCS. See *Report of the Twelfth Meeting*, *supra* note 119, ¶ 87; NORWEGIAN CLCS SUBMISSION, *supra* note 126. Various factors discussed above, including the submission of notes verbales, demonstrate that other Arctic coastal states are likely to file submissions with CLCS. See discussion *supra* Part II.D.

167. See UNCLOS, *supra* note 35, art. 76(8); SANDALOW, *supra* note 82, at 5.

168. See UNCLOS RATIFICATIONS, *supra* note 81, at 1-4.

169. See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992).

170. *Id.*

171. See generally *The Paquete Habana*, 175 U.S. 677, 700 (1900) (adopting customary international law in the United States and noting “[i]nternational law is part of our law”).

172. See *supra* notes 168-171 and accompanying text.

173. See U.N. Div. for Ocean Affairs & the Law of the Sea, *Submissions to the CLCS, OCEANS AND LAW OF THE SEA*, [http://www.un.org/Depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/Depts/los/clcs_new/commission_submissions.htm) (last updated July 26, 2010).

made nine recommendations, all of which have been in the last decade.<sup>174</sup> General practice is the best indicator of when a treaty has become customary international law; failure to apply this section of UNCLOS proves that it has not achieved the status of customary international law.<sup>175</sup>

Furthermore, the UNCLOS provision that CLCS determinations are final and binding illustrates why CLCS provisions cannot be considered customary international law for the purposes of the present jurisdictional question in the Arctic. Specifically, CLCS “final and binding” recommendations cannot prejudice delimitation between states with opposite or adjacent coasts in other forums, such as the ICJ.<sup>176</sup> In the Arctic, the boundaries of all the coastal states are opposite or adjacent; the borders encircle the Arctic Ocean.<sup>177</sup> UNCLOS has never “adjudicated” such a multi-national boundary dispute where the entire “disputed territory” is encircled by the contesting states. The dispute over the Arctic seabed, therefore, presents a unique issue.

The ability to maintain delimitation in other forums, such as the ICJ, is important to the Arctic coastal states. As previously noted, when Russia and Norway submitted claims to the CLCS, each Arctic coastal state submitted accompanying diplomatic notes saying the decision would not prejudice their claims in future boundary disputes.<sup>178</sup> Though subtle, these diplomatic notes indicate that Arctic coastal states will not abide by CLCS suggestions if they offend that state’s claim to jurisdiction.<sup>179</sup>

Even if CLCS extensions were commonplace, customary international law may still not apply in the Arctic because of the Arctic’s unique geographical landscape.<sup>180</sup> Previous maritime boundary disputes have been settled under UNCLOS with a “formula” in effort to show legitimacy and predictability.<sup>181</sup> That will not be available here, however, because there is no history of UNCLOS resolving a multi-national jurisdiction dispute of an EEZ by states that encircle it.

---

174. *See id.*

175. *See The Paquete Habana*, 175 U.S. at 700 (finding that absent a treaty and a controlling executive, legislative, or judicial decision, courts should examine the “customs and usages of civilized nations” to determine international law).

176. *See* UNCLOS, *supra* note 35, art. 76(8), (10).

177. *See generally* Characteristics: Arctic vs. Antarctic, *supra* note 27 (“The Arctic is a semi-enclosed ocean, almost completely surrounded by land.”).

178. *See* sources cited *supra* note 121.

179. *See* sources cited *supra* note 121.

180. *See supra* notes 27-30.

181. *See* Kwiatkowska, *supra* note 118, at 601-04.

## B. *Alternative Methods to Settle Jurisdiction of Arctic Mineral Rights*

It is apparent that UNCLOS would be ineffective in settling mineral jurisdiction in the Arctic. Thus, a new solution is necessary. A new, hybrid agreement tailored to meet the unique situations in the Arctic should be derived from the principles behind UNCLOS and alternate proposed methods to settle jurisdiction of minerals in the seabed. There are currently a number of regimes in place that could potentially be effective in determining jurisdiction in the Arctic. This Section analyzes how the ICJ, ATS, and the concept of international parks could be applied to create a new regime in the Arctic.

### 1. The International Court of Justice (ICJ)

Historically, the ICJ has settled disputes regarding jurisdiction of the Arctic seabed, such as the *North Sea Continental Shelf Cases*.<sup>182</sup> But like UNCLOS, the ICJ is ineffective in settling disputes in this area because the United States only submits to ICJ jurisdiction on a case-by-case basis.<sup>183</sup> Even if the United States were to submit to the jurisdiction of the ICJ regarding maritime boundary disputes, “submitting to jurisdiction and agreeing to be bound are two different things.”<sup>184</sup> As the Supreme Court of the United States held in *Medellin v. Texas*, ICJ decisions are not binding upon the United States.<sup>185</sup> “The obligation . . . to comply with ICJ judgments derives . . . from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions.”<sup>186</sup> Article 94(1) provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”<sup>187</sup> In *Medellin*, the Court emphasized the phrase “undertakes to comply” and interpreted it to mean “an ICJ decision will [not] have immediate legal effect in the courts of [United Nations] members.”<sup>188</sup>

If a state does not comply with an ICJ decision, the action—or rather inaction—may be referred to the United Nations Security Council, which may “make recommendations or decide upon mea-

---

182. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

183. *See generally* *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that ICJ decisions are not binding in domestic courts, even by instruction of the President).

184. *Id.* at 507.

185. *See id.* at 504-14.

186. *Id.* at 508.

187. U.N. Charter art. 94, para. 1.

188. *Medellin*, 552 U.S. at 508.

asures to be taken to give effect to the judgment.”<sup>189</sup> As a permanent member of the Security Council,<sup>190</sup> the United States is not likely to be subject to an adverse Security Council Resolution because permanent members have veto power over Security Council resolutions.<sup>191</sup> A decision by the United States to ignore an ICJ decision, therefore, would come with essentially no repercussions. This is no mere accident: in signing the U.N. Charter, the United States was “undoubtedly aware” the “United States retained the unqualified right to exercise its veto of any Security Council resolution.”<sup>192</sup>

Despite the ICJ’s potential ineffectiveness in this context, the equity and customary international law principles applied by the court can be influential in the creation of a new Arctic regime. Notably, the current ICJ structure illustrates the need for any new Arctic regime to include a provision requiring states to abide by the equitable solutions that are reached.

## 2. The Antarctic Treaty System

The new Arctic regime should also include components borrowed from the ATS. The ATS is a series of treaties designed to address the “issues relating to claims to sovereignty” in Antarctica.<sup>193</sup> Specifically designed to deal with minerals claims, the ATS attempted to establish a separate mineral authority: the Convention on Regulation of Antarctic Mineral Resource Activities.<sup>194</sup> The “drafters intended to establish an administrative system to regulate the exploitation of mineral resources on the Antarctic Continent and adjacent continental shelf.”<sup>195</sup> The convention, however, never entered force because it was a necessary condition “that all states with claims to territorial sovereignty in Antarctica should be a party to it.”<sup>196</sup> Instead, minerals in Antarctica are regulated by the Protocol on Environmental Protection to the Antarctic

---

189. U.N. Charter art. 94, para. 2.

190. *Id.* art. 23, para. 1.

191. *See id.* art. 27, paras. 1-3.

192. *Medellin*, 552 U.S. at 509-10.

193. *Antarctic Treaty System*, ANTARCTIC TREATY SECRETARIAT, <http://www.ats.aq/e/ats.htm> (last visited Oct. 3, 2010).

194. *See* Convention on the Regulation of Antarctic Mineral Resource Activities art. 2, *opened for signature* June 2, 1988, 27 I.L.M. 868.

195. Zang, *supra* note 15, at 722.

196. U.S. DEP’T OF STATE, *HANDBOOK OF THE ANTARCTIC TREATY SYSTEM* 385 (9th ed. 2002).

Treaty,<sup>197</sup> which bans all mining and drilling activities in Antarctica for a minimum of fifty years.<sup>198</sup> “Any activity relating to mineral resources, other than scientific research, [is] prohibited.”<sup>199</sup> The protocol is a compromise between those who favor mineral extraction and those who favor a permanent moratorium: it allows minimal mineral prospecting for scientific research while protecting the Antarctic environment from large scale extraction until the technology to do so is improved.<sup>200</sup>

Differences between Antarctica and the Arctic preclude adopting a mirror ATS treaty in the Arctic. Most obviously, the minerals sought to be extracted from Antarctica exist on land while the debate over extraction in the Arctic focuses on the ocean and its seabed. Furthermore, there is currently no mineral extraction in the Antarctic.<sup>201</sup> Additionally, no single country has a genuine claim over jurisdiction of the continental shelf in Antarctica;<sup>202</sup> meanwhile, there are many genuine claims to continental shelf jurisdiction in the Arctic.<sup>203</sup> Finally, successful mineral extraction, such as Norway’s Snohvit operation in the Barents Sea,<sup>204</sup> is already occurring in the Arctic. Despite these differences, tactics used in Antarctica are applicable to the present situation in the Arctic. Most notably, the spirit of cooperation among countries, as well as between potential mineral extractors and environmentalists, should be employed in a new Arctic regime.

### 3. An International Park

Cooperation and environmental protection are also stressed in a proposal to create an “international park” to handle the Arctic’s jurisdictional problems.<sup>205</sup> This concept is analogous to Venezuela and Brazil’s cooperation regarding the Pico de Neblina Mountain Range and the United States’ and Canada’s joint efforts in creating and maintaining Glacier National Park and the adjacent Waterton

---

197. See *id.*; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1461 [hereinafter Antarctic Protocol].

198. Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL’Y REV. 1, 17-18 (2005).

199. Antarctic Protocol, *supra* note 197, art. 7.

200. See Philip Shabecoff, *U.S. Seeks Moratorium on Antarctic Minerals*, N.Y. TIMES, Nov. 14, 1990, at A10.

201. See Characteristics: Arctic vs. Antarctic, *supra* note 27.

202. See AUBURN, *supra* note 14, at 104-10.

203. See discussion *supra* Parts II.A, II.D.

204. See *supra* notes 72-76 and accompanying text.

205. See Dubner, *supra* note 198, at 11-12, 17-18.

Lakes National Park.<sup>206</sup> Like these international parks, the proposed creation of an “international park” to define jurisdiction in the Arctic focuses on protecting the Arctic’s environment.<sup>207</sup> As such, the “park” calls for all the Arctic coastal states to relinquish both sovereignty and all mineral rights in the Arctic.<sup>208</sup> This proposal is similar to provisions in the ATS where sovereignty and mineral rights are essentially relinquished presently.<sup>209</sup>

As this proposal does not support mineral extraction, it would eliminate—rather than settle—the dispute over the Arctic’s mineral resources. Such a solution would likely be unpopular. This concept, however, can be amended to create a regime that not only supports shared responsibility in maintaining the Arctic environment, but also shared responsibility, and benefit, from mining the minerals in the seabed.

### C. *A Hybrid Agreement: Embracing the Common Heritage of Mankind*

No single solution will effectively solve the current debate surrounding the Arctic; rather, the best solution to this problem is a hybrid of the other proposed solutions. UNCLOS, the ATS, and the proposal for an “international park” share a common element: the incorporation of the common heritage of mankind.<sup>210</sup> The common heritage of mankind, in the drilling context, “prohibits states from proclaiming sovereignty over any part of the deep seabed, and requires that states use it for peaceful purposes, sharing its management and the benefits of its exploitation.”<sup>211</sup>

The common heritage of mankind may seem like a utopian ideal. In *The Wealth of Nations*, Adam Smith espoused the theory that “what improves the circumstances of the greater part can never be regarded as an inconveniency to the whole. No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable.”<sup>212</sup> The concept is simple, and seemingly effective given the present dilemma; the problem, however, lies in its implementation.

206. *Id.* at 11-12.

207. *See id.*

208. *See id.* at 11-12, 18.

209. *See, e.g.*, Antarctic Protocol, *supra* note 197, art. 7 (“Any activity relating to mineral resources, other than scientific research, [is] prohibited.”).

210. *See supra* Part III.B.1-3.

211. Edward Guntrip, *The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?*, 4 MELB. J. INT’L L. 376, 377 (2003).

212. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 78-79 (Edwin Cannan ed., Modern Library 1937) (1776).

Application of the common heritage of mankind principle to the Arctic would not be unique; the international community has embraced this theory in other treaties, such as UNCLOS and the Agreement Governing the Activities on the Moon and Other Celestial Bodies (Moon Agreement).<sup>213</sup> In UNCLOS, "the sea-bed and ocean floor . . . beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole."<sup>214</sup> Likewise, in the Moon Agreement the natural resources of "outer space [are to] be used for the benefit of all mankind."<sup>215</sup> Other treaties that embrace the common heritage of mankind principle include the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies;<sup>216</sup> the 1972 Convention on International Liability for Damage Caused by Space Objects;<sup>217</sup> and the 1975 Convention on Registration of Objects Launched into Outer Space.<sup>218</sup>

There are several issues with relying on the common heritage of mankind principle to solve the Arctic problem; most notably, not every Arctic coastal state is a party to the treaties where it has been adopted in regard to the seas and oceans.<sup>219</sup> As previously discussed, the United States has not ratified UNCLOS,<sup>220</sup> but the United States did ratify a General Assembly Resolution stating that the seabed was the common heritage of mankind.<sup>221</sup> Further, none of the Arctic coastal states have ratified the Moon Agreement.<sup>222</sup> This should not limit the Arctic coastal states from adopting this principle in their governance of the Arctic; indeed, the

213. Zang, *supra* note 15, at 762-63; see UNCLOS, *supra* note 35, pmb.; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11(1), Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Agreement].

214. UNCLOS, *supra* note 35, pmb.

215. H.L. VAN TRAA-ENGELMAN, COMMERCIAL UTILIZATION OF OUTER SPACE 30 (1993).

216. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. I, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

217. Convention on International Liability for Damage Caused by Space Objects pmb., *opened for signature* Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

218. Convention on Registration of Objects Launched into Outer Space pmb., *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15.

219. See, e.g., UNCLOS RATIFICATIONS, *supra* note 81, at 1-4 (United States is not a party).

220. See *id.*

221. See G.A. Res. 2749 (XXV), ¶ 1, U.N. Doc. A/RES/25/2749 (Dec. 12, 1970).

222. See UNITED NATIONS, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, in 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 81, ch. XXIV, § 2, at 1 [hereinafter MOON RATIFICATIONS].

“failure” of the common heritage principle to be ratified by the United States in UNCLOS is the failure of “past attempts at implementation.”<sup>223</sup> It is not a condemnation of the “essential validity of the common heritage principle” itself.<sup>224</sup>

Though they are not signatories to the Moon Agreement, all Arctic coastal states, by virtue of their roles in the ATS, recognize the principle encompassed by the common heritage of mankind.<sup>225</sup> The ATS recognizes it is the “interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes.”<sup>226</sup> The emphasis on shared cooperation and “peaceful purposes only” clearly embraces the fundamentals of the common heritage of mankind.<sup>227</sup>

Though not formally adopted previously, the Arctic coastal states have accepted common heritage of mankind principles previously. For example, to avoid a sovereignty dispute in a United States criminal case that occurred on Arctic ice, Canada proposed that the United States and Canada consider an ice island in the Arctic as a ship or vessel.<sup>228</sup> If the ice were a vessel, there would be no dispute concerning jurisdiction.<sup>229</sup> Although this view was ultimately not adopted in the case, its mere contemplation demonstrates the complexity of these situations and the attendant benefits of international cooperation.<sup>230</sup> International cooperation is needed in the Arctic, or else its natural resources may remain beneath the Arctic seabed.

#### IV. CONCLUSION

There is disagreement on how to settle jurisdiction of the Arctic seabed. Whether the common heritage of mankind could be implemented successfully is debatable; however, the existing treaties, proposals, and theories discussed in this Note illuminate a possible trend. All Arctic coastal states have not ratified UNCLOS or

---

223. Zang, *supra* note 15, at 765.

224. *Id.*

225. See The Antarctic Treaty pmbl., Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; *Parties*, ANTARCTIC TREATY SECRETARIAT, [http://www.ats.aq/devAS/ats\\_parties.aspx?lang=e](http://www.ats.aq/devAS/ats_parties.aspx?lang=e) (last visited Oct. 3, 2010) [hereinafter *Parties*].

226. The Antarctic Treaty, *supra* note 225, pmbl.

227. See *id.* art. 1.

228. AUBURN, *supra* note 14, at 188.

229. See *id.* at 186-89.

230. See *United States v. Escamilla*, 467 F.2d 341, 343 (4th Cir. 1972) (affirming without discussion the district court’s acceptance of jurisdiction under the special maritime and territorial jurisdiction of the United States). The district court opinion gave no reasons for why jurisdiction existed. AUBURN, *supra* note 14, at 187.

the Moon Agreement.<sup>231</sup> UNCLOS and the Moon Agreement are both expansive. UNCLOS applies to seas worldwide and the Moon Agreement embodies a vast amount of celestial bodies, reaching the outer limits of space beyond the moon.<sup>232</sup> Conversely, all Arctic coastal states are parties to ATS and smaller international park arrangements.<sup>233</sup> Perhaps the United States—and all Arctic coastal states—will negotiate and sign a narrowly tailored common heritage of mankind inspired agreement limited to the Arctic seabed. The new regime could be a “micro-UNCLOS” that is only applicable in the Arctic.

An alternate authority tasked with the narrowly tailored mission to delimitate the Arctic seabed should be formed to settle the jurisdiction of mineral rights in the Arctic seabed. UNCLOS is not effective in resolving jurisdiction of the Arctic seabed.

While UNCLOS is currently ineffective in this context, it is not irrelevant. UNCLOS, and the CLCS in particular, can still play a key role in a final and binding decision. Thus, efforts should be made to cure the weaknesses identified in UNCLOS throughout this Note. Primarily, the United States should ratify UNCLOS. The “problem” of ambiguous customary international law is not easily cured because it is the very nature of the law. The argument that CLCS is customary international law, however, will be bolstered if the institution makes recommendations and if there is widespread recognition of and acquiescence to the recommendation.

Without a new regime for the coastal states to peacefully and effectively extract the Arctic’s minerals, chaos could ensue on the Arctic’s cold seas. It is not hard to envisage a world with vastly increasing energy demands where developed and developing nations are battling for access to oil and gas. Nuclear winter has been avoided before and a new Arctic regime may be necessary to prevent a permanent winter from enveloping the world again.

---

231. See UNCLOS RATIFICATIONS, *supra* note 81, at 1-4; MOON RATIFICATIONS, *supra* note 222, at 1.

232. See UNCLOS, *supra* note 35, pmb.; Moon Agreement, *supra* note 213, art. 1(1).

233. See *Parties*, *supra* note 225; *supra* note 205 and accompanying text.