

**WHO GETS THE OIL?:  
ARCTIC ENERGY EXPLORATION IN  
UNCERTAIN WATERS AND THE NEED FOR  
UNIVERSAL RATIFICATION OF THE  
UNITED NATIONS CONVENTION ON THE  
LAW OF THE SEA**

*Meagan P. Wilder\**

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\* Meagan P. Wilder graduated Pi Beta Kappa from the University of Texas in 2005 with a B.A. in Plan II Honors and Government. She will receive her J.D. from the University of Houston Law Center in 2010. Upon graduation, she will clerk for the Honorable Judge Lynn N. Hughes of the Southern District of Texas. Her Comment won the Marissa and Antroy Arreola writing award for an outstanding Comment on a topic in international law. She would like to thank her parents for their constant love and support. She would especially like to thank her dad for his invaluable insight and guidance during the writing of this Comment.

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**“International law in most important particulars never has been impartially just and never has been stable, but always has been and always will be a product of the interplay of national interests, prejudices and pressures, and therefore has been unstable, uncertain, and controversial.”<sup>1</sup>**

#### I. INTRODUCTION TO THE ARCTIC

Less than two weeks before President George W. Bush left the White House, the Bush Administration issued a Presidential Directive asserting that “[t]he United States is an Arctic [N]ation.”<sup>2</sup> Though this declaration might have seemed surprising, it was the Administration’s final attempt to position the United States to stake a claim in the Arctic—the last large piece of non-jurisdictional territory on Earth.<sup>3</sup>

Isolated on top of the planet, the North Pole and the vast Arctic region surrounding it contain valuable oil and natural gas deposits.<sup>4</sup> Despite the region’s valuable resources, until fairly recently, the international community has paid little attention to the Arctic.<sup>5</sup> As the Earth’s atmosphere has warmed and the

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1. Joseph Walter Bingham, *Proceedings*, 1940 AM. SOC’Y FOR INT’L L. 57–58.

2. National Security Presidential Directive and Homeland Security Presidential Directive, NSPD-66/HSPD-25, Part II (Jan. 9, 2009) [hereinafter NSPD-66].

3. Alex Shoumatoff, *The Arctic Oil Rush*, VANITY FAIR, May 2008, available at [http://www.vanityfair.com/politics/features/2008/05/arctic\\_oil200805](http://www.vanityfair.com/politics/features/2008/05/arctic_oil200805).

4. Steve Hargreaves, *The Arctic: Oil’s Last Frontier*, CNNMONEY.COM, Oct. 25, 2006, [http://money.cnn.com/2006/09/27/news/economy/arctic\\_drilling/index.htm](http://money.cnn.com/2006/09/27/news/economy/arctic_drilling/index.htm). Some consider the Arctic to be the last giant oil frontier on Earth. *Id.*

5. Press Release, Senator Lisa Murkowski, America’s Responsibility and

Polar Ice Cap has thawed, Arctic waters have become more navigable, causing fossil fuels in the Arctic to become more accessible.<sup>6</sup> The result has been a flurry of international competition.<sup>7</sup>

The Arctic has been international territory since 1997 when 152 nation-states ratified the United Nations Convention on the Law of the Sea (UNCLOS).<sup>8</sup> Today, UNCLOS governs territorial claims in the Arctic.<sup>9</sup> Under UNCLOS, each of the five nations bordering the Arctic—the United States, Russia, Canada, Denmark, and Norway—has limited jurisdiction extending up to 200 nautical miles from its respective coastal baseline.<sup>10</sup> Despite these limitations, UNCLOS also permits a country to extend its so-called offshore exclusive economic zone (EEZ) where it can

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Opportunity as an Arctic Nation (Jan. 31, 2009), available at [http://murkowski.senate.gov/public/index.cfm?p=OpEds&ContentRecord\\_id=2ce1d580-c183-5f3c-ca58-71f60e5dfaab](http://murkowski.senate.gov/public/index.cfm?p=OpEds&ContentRecord_id=2ce1d580-c183-5f3c-ca58-71f60e5dfaab).

6. See Michael W. Lore, *Preventing Disaster as the Arctic Seas Open for Business*, 8 SUSTAINABLE DEV. L. & POLY 36, 36 (2008) (explaining that the Northwest and Northeast Passages are now more accessible, causing nations to stake territorial claims in the Arctic for oil and gas exploration).

7. Jason Warren Howard, *Don't Be Left Out in the Cold: An Argument for Advancing American Interests in the Arctic Outside the Ambits of the United Nations Convention on the Law of the Sea*, 42 GA. L. REV. 833, 839 (2008).

8. Carolyn Gramling, *Cold Wars: Russia Claims Arctic Land*, Geotimes, Aug. 1, 2007, available at <http://www.geotimes.org/aug07/article.html?id=WebExtra080107.html>; see U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) [hereinafter UNCLOS].

9. Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 324–25 (2008); see UNCLOS, *supra* note 8.

10. Gramling, *supra* note 8; UNCLOS, *supra* note 8, art. 76. Pursuant to UNCLOS, a nation's "normal baseline" is its "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." UNCLOS, *supra* note 8, art. 5. An Arctic nation exercises sovereignty over its "territorial sea"—an "adjacent belt of sea" that "extends beyond its land territory and internal waters." *Id.* art. 2. A nation's territorial sea may not exceed twelve nautical miles measured from its "baseline." *Id.* art. 3. Additionally, an Arctic nation has limited jurisdiction over its "exclusive economic zone" (EEZ)—an area beyond and adjacent to its territorial sea. *Id.* arts. 55–56. An EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* art. 57. Each Arctic nation also has limited jurisdiction over its "continental shelf"—the area that "extend[s] beyond its territorial sea throughout the natural promulgation of its land territory to the outer edge of the continental margin, or to the distance of 200 nautical miles. . . ." *Id.* art. 76(1).

demonstrate “that the Arctic seafloor’s underwater ridges are not a separate feature, but a geological extension of the country’s own continental shelf.”<sup>11</sup>

This rather obscure clause in UNCLOS has sparked an international race to the Arctic, dubbed the “Cold Rush.”<sup>12</sup> Arctic nations now find themselves competing among one another for enormous wealth by submitting extended continental shelf claims to the United Nations.<sup>13</sup> These extended territorial claims have led to what some consider “the last big shift in ownership of territory in the history of the Earth.”<sup>14</sup> The resolution of these disputes will determine which nations own a piece of the Arctic, and answer the ultimate question: “Who gets the oil”?

This Comment will evaluate the effectiveness of UNCLOS at resolving Arctic territorial disputes. Part I will provide background information on Arctic geography and recent climate change in the region. Current Arctic territorial disputes under UNCLOS will be discussed in Part II, with a focus on Russia’s current extended continental shelf claim. Background information on early maritime law and the law of the sea will be provided in Part III, as well as an outline of the relevant provisions of UNCLOS. Part IV will recommend one option for resolving extended continental shelf claims under UNCLOS.

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11. Gramling, *supra* note 8; *see generally* UNCLOS, *supra* note 8, art. 76 (establishing the requirements to submit an extended continental shelf claim); *see also id.* (explaining the legal definition of “continental shelf” pursuant to UNCLOS). Currently, no Arctic nation’s continental shelf extends far enough to the North Pole to establish Arctic sovereignty. Gramling, *supra* note 8. Thus, no Arctic nation has established jurisdiction in the Arctic or ownership rights over Arctic resources. *See id.* (explaining that a country can extend its economic zone to the Arctic if it proves that the Arctic seafloor’s underwater ridges are a geological extension of the country’s own continental shelf).

12. Shoumatoff, *supra* note 3.

13. Jessa Gamble, *Drawing Lines in the Sea: Nations Stake Claims on Arctic Ocean Riches*, SCI. AM., Nov. 10, 2008, *available at* <http://www.scientificamerican.com/article.cfm?id=drawing-lines-in-the-sea>; Richard A. Lovett, *Ice, Cold, Ecological Risks May Hamper Arctic Oil Rush*, NAT’L GEOGRAPHIC NEWS, Aug. 24, 2007, *available at* <http://news.nationalgeographic.com/news/2007/08/070824-arctic-oil.html>.

14. Alister Doyle, *2009 Deadline for Claims on Riches of Ocean Deep*, ADVERTISER, Aug. 25, 2007, at 71, *available at* <http://www.minesandcommunities.org/article.php?a=1768>.

Specifically, Part V will argue for universal ratification of UNCLOS and posit that UNCLOS signatories amend Article 298 to permit binding resolution of boundary disputes pursuant to Article 287. Part VI will conclude this Comment, emphasizing the need for immediate action among Arctic nations to resolve current and future Arctic territorial disputes.

## II. OIL AND GAS IN THE ARCTIC AND THE IMPLICATIONS OF CLIMATE CHANGE

### A. Arctic Geography

“Arctic” refers to the region immediately surrounding the North Pole.<sup>15</sup> The region has been defined in numerous ways.<sup>16</sup> It is the region north of the Arctic Circle (66° 33’N), and the area with a 10° C (50° F) July isotherm.<sup>17</sup> Approximately half of the Arctic is “deep basin,” depressed area on the earth’s surface, mostly covered by ice.<sup>18</sup> The other half of the Arctic is “continental shelf,” “shallow extensions of the bordering countries’ land.”<sup>19</sup>

The Arctic Ocean is the world’s smallest ocean.<sup>20</sup> Spanning only fourteen million square-kilometers, it is less than twice the size of the United States.<sup>21</sup> For most of the year, a large Polar Ice Cap covers the surface of the Arctic Ocean.<sup>22</sup> The five “Arctic nations” that have territory within the Arctic Circle include the

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15. Polar Discovery: Arctic, The Frozen Ocean, <http://polardiscovery.whoi.edu/arctic/index.html> (last visited Jan. 30, 2010). The Arctic region surrounding the North Pole is opposite the Antarctic region surrounding the South Pole. Polar Discovery: Comparing the Poles, <http://polardiscovery.whoi.edu/poles/index.html> (last visited Jan. 30, 2010).

16. Smithsonian Nat’l Museum of Nat. Hist., About the Arctic, [http://www.forces.si.edu/arctic/02\\_01\\_00.html](http://www.forces.si.edu/arctic/02_01_00.html) (last visited Jan. 30, 2010).

17. *Id.*

18. Holmes, *supra* note 9, at 326; see RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 111 (2d ed. 1999) (defining the term “basin”).

19. *Id.*

20. Central Intelligence Agency, The World Factbook: Arctic Ocean, <https://www.cia.gov/library/publications/the-world-factbook/geos/xq.html> (last visited Jan. 30, 2010).

21. *Id.*

22. *See id.*

United States (via Alaska), Russia, Canada, Denmark (via Greenland), and Norway.<sup>23</sup>

*B. Oil in the Arctic*

In July 2008, the U.S. Geological Survey (USGS) released the first petroleum resource estimate of the entire Arctic region.<sup>24</sup> According to this study, the “area north of the Arctic Circle has an estimated 90 billion barrels of undiscovered, technically recoverable oil, 1,670 trillion cubic feet of recoverable natural gas, and 44 billion barrels of recoverable natural gas liquids in 25 geologically defined areas. . . .”<sup>25</sup> However, in updated findings released in May 2009, the USGS estimates the Arctic may hold twice the amount of oil previously thought.<sup>26</sup> As Donald Gautier, lead author of the survey states, “[b]ased on our study, there are 40 [billion] to 160 billion barrels of oil north of the Arctic Circle.”<sup>27</sup> Reports have confirmed that these resources account for an astonishing “30% of the world’s undiscovered gas and 13% of the world’s undiscovered oil . . . .”<sup>28</sup>

Exploration for petroleum in the Arctic has already led to the discovery of “more than 400 oil and gas fields north of the Arctic Circle,”<sup>29</sup> an area approximately ten times larger than Iraq.<sup>30</sup> These oil fields alone account for “approximately 40 billion barrels of oil, more than 1,100 trillion cubic feet of gas,

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23. Holmes, *supra* note 9, at 326.

24. U.S. DEP’T OF INTERIOR, U.S. GEOLOGICAL SURVEY, 90 BILLION BARRELS OF OIL AND 1,670 TRILLION CUBIC FEET OF NATURAL GAS ASSESSED IN THE ARCTIC (2008), <http://www.usgs.gov/newsroom/article.asp?ID=1980> [hereinafter USGS].

25. *Id.*

26. Azadeh Ansari, *Survey: Arctic May Hold Twice the Oil Previously Found There*, CNN NEWS, May 28, 2009, <http://www.cnn.com/2009/TECH/science/05/28/arctic.oil.gas.reserves/index.html>.

27. *Id.* The Energy Information Administration, a division of the Department of Energy, “estimates that the world currently uses 30 billion barrels of oil a year.” *Id.*

28. Donald L. Gautier et al., *Assessment of Undiscovered Oil and Gas in the Arctic*, SCIENCE MAGAZINE, May 2009, at 1175.

29. USGS, *supra* note 24.

30. U.S. Dep’t of State, Background Note: Iraq, <http://www.state.gov/r/pa/ei/bgn/6804.htm> (stating that Iraq’s land area approximates 437,072 sq. km.) (last visited Jan. 30, 2010).

and 8.5 billion barrels of natural gas liquids.”<sup>31</sup> With such great wealth at stake, Arctic countries have found expensive oil exploration to be increasingly worthwhile.<sup>32</sup>

### C. Scientific Projections on the Arctic

Scientific research suggests the Arctic climate is warming at a rapid pace.<sup>33</sup> Such warming has caused the Arctic to accelerate towards an ecological state that has not existed for more than one million years.<sup>34</sup> The U.N. General Assembly has repeatedly reported that the Arctic climate is warming rapidly.<sup>35</sup> In fact, the Arctic “has warmed nearly twice as fast as the remainder of the world over the past twenty years.”<sup>36</sup> Results of such warming include melting ice, thawing of permafrost, and shortening of the snow season.<sup>37</sup>

Western scientists have estimated that the Arctic Polar Ice Cap is melting at 3% a year.<sup>38</sup> As such, it is believed that the Arctic has lost approximately 10% of “its ice per decade since 1953.”<sup>39</sup> Accordingly, ice in the Arctic has receded approximately

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31. USGS, *supra* note 24.

32. See Ansari, *supra* note 26 (explaining that although offshore oil exploration in the Arctic is still “in its infancy . . . ExxonMobil and other oil companies already have staked their claim and started drilling in the Mackenzie Delta, the Barents Sea, the Sverdrup Basin, and offshore Alaska.”); see also Shoumatoff, *supra* note 3.

33. Mark Jarashow et al., *UNCLOS and the Arctic: The Path of Least Resistance*, 30 *FORDHAM INT’L L. J.* 1587, 1590–91 (2007).

34. J.T. Overpeck et al., *Arctic System on Trajectory to New, Seasonally Ice-Free State*, 86 *EOS* 309, 312–13 (2002).

35. The Secretary-General, *Oceans and Law of the Sea: Reports of the Secretary General*, at 41, *delivered to the General Assembly*, U.N. Doc. A/60/63 (Mar. 4, 2005). This report has been confirmed by subsequent General Assembly Reports. See, e.g., The Secretary-General, *Oceans and Law of the Sea: Reports of the Secretary General*, at 89, *delivered to the General Assembly*, U.N. Doc. A/63/63 (Mar. 10, 2008) (explaining that though atmospheric CO<sub>2</sub> is increasing, the ability of the oceans to absorb CO<sub>2</sub> is decreasing; thus, sea levels are rising faster than expected).

36. Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 *MO. ENVTL. L. & POLY REV.* 1, 3 (2005).

37. See *id.* (explaining the results of Arctic warming).

38. *Id.* at 1.

39. Shoumatoff, *supra* note 3.

40% since 1979.<sup>40</sup> Notably, in the summer of 2007, Arctic ice was at an all-time low.<sup>41</sup> A near-record ice low in the summer of 2008 followed.<sup>42</sup>

Concerning the future of the Arctic, “computer projections suggest that the average temperature in the Arctic could rise between 3°C and 9°C during the next century, twice as much as the average rise in the rest of the world.”<sup>43</sup> At that rate, according to a study sponsored by the U.S. National Science Foundation and NASA, the Arctic could have an entirely ice-free summer as early as 2037.<sup>44</sup> Although not all scientists and government officials agree that global warming is occurring,<sup>45</sup> policy makers of Arctic nations do, and are currently positioning their nations to take advantage of the new Arctic environment.<sup>46</sup>

As the Arctic continues to melt, the region has become “more navigable for commerce and more accessible for mining.”<sup>47</sup> Spurred by prospects of vast fossil fuel reserves beneath the Arctic seabed, Arctic nations have begun to explore the region to

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40. John Roach, *As Arctic Ice Melts, Rush Is on for Shipping Lanes, More*, NAT'L GEOGRAPHIC NEWS, Feb. 25, 2005, available at [http://news.nationalgeographic.com/news/2005/02/0225\\_050225\\_arctic\\_landrush.html](http://news.nationalgeographic.com/news/2005/02/0225_050225_arctic_landrush.html).

41. Howard, *supra* note 7, at 836.

42. Lauren Morello, *Polar Summers Could Be Ice Free in 30 Years-Study*, CLIMATE WIRE (Apr. 2, 2009), [http://jisao.washington.edu/print/news/eenewspm09\\_0402\\_climatepolarsummers.pdf](http://jisao.washington.edu/print/news/eenewspm09_0402_climatepolarsummers.pdf). In fact, the average global ocean temperature in July 2009 was 62.6 degrees—the “hottest since record-keeping began in 1880.” Seth Borenstein, *In Hot Water: World's Ocean Temps Warmest Record*, ASSOCIATED PRESS, Aug. 20, 2009, available at <http://images.usnews.com/science/articles/2009/08/20/in-hot-water-worlds-ocean-temps-warmest-recorded.html>.

43. Asociación Española de Marina Civil, <http://www.marinacivil.com/noticias/noticia.asp?idn=24804> (last visited Jan. 30, 2010). Other researchers estimate that summer ice could disappear as early as the year 2013. Jonathan Amos, *Arctic Summers Ice-Free 'By 2013'*, BBC NEWS, Dec. 12, 2007, available at <http://news.bbc.co.uk/2/hi/7139797.stm>.

44. See Morello, *supra* note 42.

45. See Jarashow et al., *supra* note 33, at 1590–91.

46. See, e.g., Paul Reynolds, *Russia Ahead in Arctic 'Gold Rush'*, BBC NEWS, Aug. 1, 2007, [http://news.bbc.co.uk/2/hi/in\\_depth/6925853.stm](http://news.bbc.co.uk/2/hi/in_depth/6925853.stm) (explaining how nations are acting to protect their interests in the Arctic).

47. Holmes, *supra* note 9, at 326.



assess what might be at stake.<sup>48</sup> Motivated by the availability of these untapped fossil fuels, the “Cold Rush” has begun.<sup>49</sup>

### III. EMERGING ARCTIC TERRITORIAL DISPUTES

In the race to the Arctic, Russia, already the largest country in the world, has taken the lead.<sup>50</sup> In August 2007, Russia sent two twenty-six foot-long submersibles, *Mir-1* and *Mir-2*, to the Arctic.<sup>51</sup> Antatoly Sagalevich, head of the Deep Manned Submersibles Laboratory at the Russian Academy of Science’s P.P. Shirshov Institute of Oceanology, was the arctonaut at the helm of *Mir-1*.<sup>52</sup> When the submersible reached the North Pole, Sagalevich used a robotic arm to plant a small titanium Russian flag at the bottom of the Arctic Ocean.<sup>53</sup> In doing so, Russia became the first country to literally plant a flag on the North Pole, symbolically claiming the land and all its resources as its own.<sup>54</sup> According to Artur Chilingarov, a member of the Russian parliament, the purpose of the flag-planting was to “stake the place for Russia.”<sup>55</sup> As Chilingarov expressly declared, “[t]he Arctic has always been Russian.”<sup>56</sup>

Strengthening its symbolic act, Russia has gathered evidence to suggest that its continental shelf extends to the Arctic.<sup>57</sup> Pursuant to UNCLOS, in order for Russia to establish a valid legal claim to any Arctic territory, Russia must establish

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48. Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor*, *Arctic Oil Rush*, NAT’L GEOGRAPHIC NEWS, Aug. 23, 2007, available at <http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>.

49. *Id.*

50. Gramling, *supra* note 8.

51. Shoumatoff, *supra* note 3.

52. *Id.* “The arctonauts returned to a hero’s welcome in Moscow not seen since Yuri Gagarin, the first cosmonaut, returned from outer space.” *Id.*

53. Lovett, *supra* note 48. Sagalevich planted the flag 2.5 miles beneath the North Pole. *Id.*

54. Matthew Padilla, *The Great Thaw: National Security at the Top of a Melting World*, 8 SUSTAINABLE DEV. L. & POL’Y 52, 52 (2008).

55. Howard, *supra* note 7, at 837.

56. Shoumatoff, *supra* note 3. Chilingarov is also the vice-speaker of the Duma (Russia’s parliament). *Id.*

57. Howard, *supra* note 7, at 840.

that its continental shelf connects to the North Pole.<sup>58</sup> To date, Russia has gathered substantial scientific evidence to suggest that the Lomonosov Ridge, an underwater mountain range along the Arctic Ocean, connects the North Pole to the Russian continental shelf on which Siberia is located.<sup>59</sup>

In December 2001, Russia submitted an extended continental shelf claim that included 1.2 million square kilometers of Arctic territory, including the North Pole (which is nearly half of the Arctic Ocean), to the U.N. Commission on the Limits of the Continental Shelf (CLCS).<sup>60</sup> Because the CLCS requested that Russia revise its submission, Russia is currently in the process of documenting its claim.<sup>61</sup> Notably, it has been reported that Russia is postponing submitting its claim to the CLCS until 2013 in order to wait until Canada and Denmark submit claims of their own.<sup>62</sup> Ultimately, if the CLCS concludes that Russia's claim is legitimate,<sup>63</sup> Russia could win the sole right to exploit resources beneath a significant part of the Arctic seabed, an area that holds an "estimated 10 billion metric tons of hydrocarbons."<sup>64</sup>

With so much wealth at stake, Russia is already preparing to tap its offshore Arctic reserves.<sup>65</sup> Gazprom, a Russian-controlled energy giant, is building a new *Prirazlomnaya* rig for

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58. See UNCLOS, *supra* note 8, art. 77 (defining the right of a coastal State over its continental shelf region); see also Gramling, *supra* note 8 (stating that UNCLOS allows a country to "extend its economic zone if it can prove that the Arctic seafloor's underwater ridges are not a separate feature, but a geological extension of the country's own continental shelf.").

59. Gramling, *supra* note 8, at 1.

60. Jarashow et al., *supra* note 33, at 1595.

61. *Id.*

62. Nathaniel Gronewold, *Oceans: Seabed Claims Mount, Swamping U.N. Commission*, GREENWIRE, May 14, 2009, available at <http://www.eenews.net/public/Greenwire/2009/05/14/3>. Although some officials claim Russia has "no real deadline" to submit its claim to the CLCS, Denmark has until 2012 and Canada has until 2013. *Id.*

63. Howard, *supra* note 7, at 839.

64. Gramling, *supra* note 8.

65. *Russia's Putin Tours New Rig in Arctic Oil Drive*, AFP, July 11, 2009, available at [http://www.energy-daily.com/reports/Russias\\_Putin\\_tours\\_new\\_rig\\_in\\_Arctic\\_oil\\_drive\\_999.html](http://www.energy-daily.com/reports/Russias_Putin_tours_new_rig_in_Arctic_oil_drive_999.html).

its oil field in the Arctic Ocean.<sup>66</sup> The rig, to be completed in 2010, is “the first in the world able to operate in temperatures as low as minus 50 degrees Celsius (minus 58 degrees Fahrenheit) and withstand the impact of pack ice.”<sup>67</sup> Russian Prime Minister Vladimir Putin has already toured the rig and has met with ministers and top oil executives to discuss developing more Arctic oil fields.<sup>68</sup>

Quick to negate Russia’s claim to extended Arctic territory, other Arctic nations have dismissed Russia’s flag planting act as reminiscent of the colonial period,<sup>69</sup> legally inconsequential. As Peter MacKay, Canada’s Foreign Prime Minister at the time opined, “You can’t go around the world these days, dropping a flag. This isn’t the 14th or 15th century.”<sup>70</sup> Likewise, the U.S. State Department mocked, “I’m not sure whether they’ve put a metal flag, a rubber flag[,] or a bed sheet on the ocean floor.”<sup>71</sup>

Despite such mocking, Arctic nations were quick to respond with territorial acts of their own.<sup>72</sup> Canadian Prime Minister Stephen Harper visited the Arctic<sup>73</sup> and reaffirmed a commitment to establish a Canadian military facility there and to refurbish a port on the Northwest Passage.<sup>74</sup> In addition, while addressing Russia in the summer of 2009, Canada’s Minister of Foreign Affairs, Lawrence Cannon, declared Canada “an energy ‘superpower,’” and boldly stated, “[l]et’s be perfectly clear. . . Canada will not be bullied.”<sup>75</sup>

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66. *Id.* “The base of the rig measures 126 by 126 metres (413 by 413 feet) and it can house up to 200 workers.” *Id.*

67. *Id.*

68. *Id.*

69. *Laying Claim to the Arctic*, IRISH TIMES, Aug. 13, 2007, at 17.

70. *Id.*

71. Douglas Birch, *Russian Sub Seeks Glory at North Pole*, WASH. POST, Aug. 2, 2007, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/08/02/AR2007080200378\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/08/02/AR2007080200378_2.html) (quoting Tom Casey, U.S. State Department spokesman).

72. Lovett, *supra* note 48.

73. Holmes, *supra* note 9, at 324.

74. James Graff, *Fight for the Top of the World*, TIME, Oct. 1, 2007, at 28, 31. The Northwest Passage is considered a “short-cut” between the Pacific and Atlantic Oceans, one that would save time for ships that normally travel through the Suez or Panama Canals. Howard, *supra* note 7, at 836.

75. Rick Rozoff, *Arctic: Canada Leads NATO Confrontation with Russia*, GLOBAL

Moreover, the Canadian Coast Guard icebreaker, *Louis S. St-Laurent*, and the U.S. Coast Guard icebreaker, *Healy*, will soon undertake a joint survey mission to map unexplored areas of the Arctic seabed.<sup>76</sup> Set to begin August 7, 2009, “the two vessels will travel from the Beaufort Sea north of Alaska to the Canada Archipelago, surveying an underwater mountain range, the Alpha-Mendelev Ridge, during the forty-one day mission.”<sup>77</sup> As explained by Jacob Verhoef, science director for Natural Resources Canada’s Law of the Sea program, the purpose of the mission is to collect “more data from the northern part of the Canadian basin.”<sup>78</sup>

This joint mapping mission is, notably, the fifth U.S. Arctic cruise since 2003.<sup>79</sup> In addition to this mission, the United States is considering whether it should construct “a new heavy polar icebreaker-class vessel” to travel through the Arctic.<sup>80</sup> In fact, the U.S. Senate recently passed “a \$42.9 billion Homeland Security spending measure . . . that includes \$32.5 million to enhance United States’ polar icebreaker capability.”<sup>81</sup>

Likewise, Denmark embarked on a \$25 million dollar project to establish that the North Pole is a natural extension of Greenland’s continental shelf.<sup>82</sup> Denmark also launched a month-long mission to the Arctic, sending scientists to map the

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RESEARCH, Aug. 5, 2009, available at <http://www.globalresearch.ca/index.php?context=va&aid=14657>.

76. Lauren Morello, *U.S. Pushes for Law of the Sea Ratification as New Arctic Mapping Project Begins*, N.Y. TIMES, July 29, 2009, available at <http://www.nytimes.com/cwire/2009/07/29/29climatewire-us-pushes-for-law-of-the-sea-ratification-as-89174.html>.

77. *Id.* “The *Healy* will use an instrument called an echo sounder to create a three-dimensional map of the seabed, while the *Louis S. St-Laurent* will collect seismic data to determine the thickness of sediment on the ocean floor.” *Id.* In addition, both vessels “will take turns breaking ice for each other as they travel through the Arctic.” *Id.*

78. *Id.*

79. *Id.*

80. Rob Stapleton, *Murkowski Seeks Funding for New Arctic Icebreakers*, ALA. J. OF COM., July 23, 2009, available at [http://www.alaskajournal.com/stories/072309/loc\\_3\\_014.shtml](http://www.alaskajournal.com/stories/072309/loc_3_014.shtml). *The Polar Sea*, the only heavy icebreaker currently operating, has seven years remaining in service. *Id.*

81. *Id.*

82. Jan M. Olsen, *Denmark Hopes to Claim North Pole*, BBC NEWS, Oct. 5, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3716178.stm>.

seabed north of Greenland.<sup>83</sup> Although they are competing for the same territory off Greenland, Denmark and Canada are cooperating with each other.<sup>84</sup> In addition, Denmark recently announced plans to establish “an all-service Arctic Command, an Arctic Response Force and a military buildup at the Thule airbase in Greenland. . . .”<sup>85</sup>

Norway has also filed a claim with the CLCS to extend its continental shelf into the Arctic Ocean.<sup>86</sup> In March 2009, the CLCS finished reviewing the claim and Norway became the first nation to win control of extended Arctic territory.<sup>87</sup> Accordingly, Norway recently relocated its Operational Command Headquarters into the Arctic Circle,<sup>88</sup> and rather ominously, purchased “48 Lockheed F-35 fighter jets ‘because of their suitability for Arctic patrols.’”<sup>89</sup>

#### IV. THE LANGUAGE AND HISTORY OF THE LAW OF THE SEA

##### A. *Legal Background on the Law of the Sea*

Maritime law has an extensive history, beginning with the Doctrine of Discovery. European and American explorers used the Doctrine of Discovery to justify their rights to newly-discovered lands, either declaring a “divine right” to empty land or declaring a “first-come, first-served” type of discovery.<sup>90</sup> In fact, most of the New World was originally claimed and populated under the Doctrine of Discovery, as countries routinely planted flags to claim uncharted territory.<sup>91</sup> Though Russia’s recent flag-planting act was reminiscent of such

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83. Graff, *supra* note 74, at 31; *see also* Holmes, *supra* note 9, at 324.

84. Gronewold, *supra* note 62.

85. Rozoff, *supra* note 75.

86. Continental Shelf – Submission to the Commission by Norway, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_nor.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm) (last visited Jan. 30, 2010); Gronewold, *supra* note 62.

87. *Id.*

88. Rozoff, *supra* note 75.

89. *Id.*

90. Robert J. Miller, ‘Finders Keepers’: *Doctrine of Discovery Still Reigns*, DESERET NEWS, Aug. 12, 2007, *available at* [http://findarticles.com/p/articles/mi\\_qn4188/is\\_20070812/ai\\_n19476925/?tag=content;coll](http://findarticles.com/p/articles/mi_qn4188/is_20070812/ai_n19476925/?tag=content;coll).

91. Howard, *supra* note 7, at 841.

territorial claims, the Doctrine of Discovery is currently recognized as a “legal fiction”: purely symbolic and holding no legal significance.<sup>92</sup>

Unlike the discredited Doctrine of Discovery, today the Freedom of the High Seas Doctrine is well established in customary international law.<sup>93</sup> “High seas” is a term commonly used to refer to the part of an ocean that extends beyond any national jurisdiction.<sup>94</sup> In 1608, Hugo Grotius published a treatise declaring “the world’s oceans constitute a common resource belonging to everyone.”<sup>95</sup> Grotius’ premise rested on the idea that the oceans cannot be demarcated or occupied.<sup>96</sup> Grotius also presumed that navigation was “nonrival.”<sup>97</sup> In other words, Grotius believed that one nation’s use of the high seas for navigation did not thwart another nation’s ability to navigate, and that fishing was inexhaustible.<sup>98</sup> Essentially, Grotius’ Freedom of the High Seas Doctrine rested on his belief “that no nation has jurisdiction over the ocean itself[.]”<sup>99</sup> Therefore, nations could only occupy a common place temporarily.<sup>100</sup> The doctrine also expressly limits national rights and jurisdiction over the oceans to a narrow strip of sea encircling a nation’s coastline, with the rest of the ocean “free to all and belonging to none.”<sup>101</sup>

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92. David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 278 (1998); Howard, *supra* note 7, at 842.

93. Howard, *supra* note 7, at 842.

94. Kathryn Surace-Smith, Note, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1036 (noting the establishment of the Freedom of the High Seas Doctrine in international law and judicial decisions).

95. Holmes, *supra* note 9, at 327.

96. Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 220 (2001).

<sup>97</sup> Holmes, *supra* note 9, at 327.

98. *Id.*

99. Howard, *supra* note 7, at 842.

100. *Id.*

101. *Id.* at 844 (quoting Jay M. Zitter, Annotation, *Construction and Application of United Nations Convention the Law of the Sea-Global Cases*, 21 A.L.R. Fed. 2d 109, § 2 (2007)).

It was not until the mid-twentieth century that nations adapted the oceans for uses other than navigation and fishing.<sup>102</sup> In the early twentieth century, industries began extracting resources from the oceans.<sup>103</sup> As availability of resources increased, offshore petroleum wells were drilled and mobile drilling barges built.<sup>104</sup> In fact, it was not until the late-nineteenth and early-twentieth centuries, when Arctic nations discovered the region's potential for commercial exploitation, that claims of sovereignty over Arctic territory commenced.<sup>105</sup>

In the midst of this commercial development, the United States blatantly deviated from the Freedom of the High Seas Doctrine.<sup>106</sup> In 1945, President Harry Truman proclaimed that the United States had "jurisdiction over all resources on its continental shelf."<sup>107</sup> The U.S. Supreme Court strengthened the Truman Proclamation in a series of rulings that affirmed the proposition that the United States' continental shelf was governed by federal jurisdiction.<sup>108</sup> Congress later codified the Proclamation as the Outer Continental Shelf Land Acts of 1953.<sup>109</sup>

By the 1970s, however, nations began acknowledging the oceans' vulnerability to exploitation, pollution, territorial disputes, and military rivalries.<sup>110</sup> In response to this "tragedy

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102. Holmes, *supra* note 9, at 327.

103. See WILLIAM R. FREUDENBURG & ROBERT GRAMLING, OIL IN TROUBLED WATERS: PERCEPTIONS, POLITICS, AND THE BATTLE OVER OFFSHORE DRILLING 17–19 (SUNY Press) (1994) (giving a short history of the industry of offshore drilling early in the twentieth century).

104. See *id.* (giving a short history of offshore drilling after World War II).

105. Richard J. Ansson, Jr., *The North American Agreement on Environmental Protection and the Arctic Council Agreement: Will These Multinational Agreements Adequately Protect the Environment?*, 29 CAL. W. INT'L L.J. 101, 113–14 (1998).

106. Holmes, *supra* note 9, at 328.

107. *Id.* See generally Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Procl. No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945) (also known as the Truman Proclamation).

108. FREUDENBURG & GRAMLING, *supra* note 103, at 20.

109. 43 U.S.C. §§ 1332 (2008). "The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter." *Id.*

110. Holmes, *supra* note 9, at 329–30.

of the commons,”<sup>111</sup> in 1967 Arvid Pardo, Malta’s Ambassador to the United Nations, publicly appealed for an international treaty to govern the oceans.<sup>112</sup> Pardo’s address motivated nations to make claims to expand their sovereignty over the sea surrounding their territory.<sup>113</sup> Such claims ultimately gave rise to UNCLOS.<sup>114</sup>

*B. The Content of the U.N. Convention on the Law of the Sea*

UNCLOS was enacted in 1994.<sup>115</sup> It has been described as “[t]he product of ‘the largest and most complex international negotiation ever held,’” representing “the culmination of thousands of years of international relations, conflict, and . . . nearly universal adherence to an enduring order for ocean space.”<sup>116</sup> As one of the most expansive international agreements, it is commonly referred to as “the constitution of the oceans.”<sup>117</sup>

The underlying philosophy of UNCLOS is that “problems of ocean space are closely interrelated and need to be considered as a whole.”<sup>118</sup> The Convention even refers to the sea as “part of

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111. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968) (explaining that the “tragedy of the commons” occurs when free access and unrestricted demand for a finite resource dooms the resource through over exploitation). The basic premise behind the “tragedy of the commons” is that, analogous to medieval villages that had to fence off common pastures for private use, nations should fence off “parts of the ocean for exclusive national use and control . . . .” ALEXANDRA MERLE POST, *DEEPSEA MINING AND THE LAW OF THE SEA* 66 (Shigeru Oda ed., Martinus Nijhoff Publishers 1983).

112. U.N. Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), 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) [hereinafter *Historical Perspective*].

113. Howard, *supra* note 7, at 844.

114. UNCLOS, *supra* note 8.

115. U.N. Division for Ocean Affairs and the Law of the Sea, *The Status of the Convention and of the Agreements*, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_agreements.htm](http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm) (last visited Jan. 30, 2010).

116. Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done About It)*, 42 TEX. INT’L L.J. 241, 243 (2007) (quoting William Wertenbaker, *I-The Law of the Sea*, NEW YORKER, Aug. 1, 1983, at 38).

117. Holmes, *supra* note 9, at 330.

118. UNCLOS, *supra* note 8, Preamble.



the ‘common heritage’ of mankind.”<sup>119</sup> UNCLOS governs almost all aspects of “maritime law, including sovereignty limits, navigation, seabed mining, and environmental protection of the world’s oceans.”<sup>120</sup> Moreover, UNCLOS establishes sovereign rights to approximately 20% of the world’s oceans.<sup>121</sup> The Convention also provides an international legal framework for resolving ocean-related disputes.<sup>122</sup> Specifically, it has created an international legal regime that governs the “exploring, exploiting, preserving, conserving, and managing the natural resources in an exclusive economic zone” beyond a nation’s coastline.<sup>123</sup>

At the time of its ratification, four nations voted against UNCLOS and seventeen nations abstained.<sup>124</sup> As of July 20, 2009, UNCLOS had been ratified by 159 nations.<sup>125</sup> All permanent members of the U.N. Security Council except, notably, the United States, have ratified it.<sup>126</sup> Four of the five Arctic nations are thus parties to UNCLOS.<sup>127</sup> Norway was the first Arctic nation to ratify the Convention in 1996, followed by Russia a year later, Canada in 2003, and Denmark in 2004.<sup>128</sup> The United States is the only Arctic nation that has not ratified UNCLOS.<sup>129</sup>

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119. *Id.* “The area of the sea-bed and ocean floor and the subsoil thereof, 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, irrespective of the geographical location of States.” *Id.*

120. Holmes, *supra* note 9, at 330–31.

121. Howard, *supra* note 7, at 844.

122. *See generally* UNCLOS, *supra* note 8, arts. 279–99 (establishing Part XV of UNCLOS regarding the settlement of disputes).

123. Candace L. Bates, Comment, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT’L L. & COM. REG. 745, 752 (2006).

124. Surace-Smith, *supra* note 94, at 1032.

125. U.N. Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 04 November 2009, *available at* [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) [hereinafter Ratifications].

126. *Id.*

127. *Id.*

128. *Id.*

129. Holmes, *supra* note 9, at 331 (explaining that U.S. Presidents have signed the

C. *Existing Legal Framework for Claims to Territory under UNCLOS*

1. *Sovereignty Definitions*

UNCLOS is regarded as a “world order treaty” and a “primary pillar of international law.”<sup>130</sup> Notably, UNCLOS governs the global oceans and the Arctic and provides a legal framework within which disputed claims to territory may be adjudicated.<sup>131</sup> Currently, no nation has exclusive jurisdiction over the Arctic.<sup>132</sup> Instead, UNCLOS provides the legal paradigm for establishing and settling claims regarding “[n]avigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits . . . [and] a binding procedure for settlement of disputes between States.”<sup>133</sup>

UNCLOS establishes international “*erga omnes* property rules for ocean space in which the bargained spatial delineations would be agreed to” and would be respected by international consensus.<sup>134</sup> The Convention defines a nation’s “territorial sea” as the area that extends twelve nautical miles from its coastal low-water mark or baseline.<sup>135</sup> This twelve-mile area essentially “functions as a continuation of the nation’s land territory,” regardless of the extension of the nation’s continental shelf.<sup>136</sup>

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treaty, but the U.S. Senate has never ratified it).

130. Prows, *supra* note 116, at 243 (quoting Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 194, 268–71 (1993)); David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 817 (2002) (describing the law of the sea as one of the “seven pillars” of international law).

131. Howard, *supra* note 7, at 845.

132. *Id.*

133. Historical Perspective, *supra* note 112.

134. Prows, *supra* note 116, at 266 (emphasis added). *Erga omnes* (in relation to everyone) refers to “treaty obligations [of] state[s] . . . toward the international community as a whole.” Michael J. Matheson, *The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT’L L. 407, 425 (2007).

135. Holmes, *supra* note 9, at 332–34; *see also supra* note 10 and accompanying text.

136. Holmes, *supra* note 9, at 333.

Accordingly, “nations may exercise complete sovereignty over the water, seabed, and air space” within the territorial sea.<sup>137</sup>

UNCLOS also defines a nation’s “contiguous zone” as an area adjacent to its territorial sea in which the nation may prevent and punish infringement of its customs or laws.<sup>138</sup> The contiguous zone may not extend beyond twenty-four nautical miles from a nation’s territorial sea baseline.<sup>139</sup> Lastly, the Convention defines a nation’s offshore exclusive economic zone (EEZ) as the area between twenty-four and up to no more than 200 nautical miles from a nation’s territorial sea baseline.<sup>140</sup> Pursuant to UNCLOS, a nation “may exercise sovereignty over the natural resources in, on, and below” the seabed in its EEZ and maintain “sole control over any other activities for the economic exploitation and exploration of the zone.”<sup>141</sup>

## 2. *Unilateral Claims to Territory*

An Arctic nation’s ability to extend its EEZ is limited in accordance with the extension of its “continental shelf,”<sup>142</sup> which is the underwater line that separates a nation’s exclusive jurisdiction (i.e., its territorial sea) from the “common heritage of mankind.”<sup>143</sup> Because approximately 25% of the Arctic seabed is potentially claimable as a continental shelf (and thereby potentially extending a nation’s EEZ), Arctic nations are currently racing to prepare and submit extended continental shelf claims to the United Nations<sup>144</sup>

Article 56 of UNCLOS provides that within the EEZ a nation has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters

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137. *Id.*

138. UNCLOS, *supra* note 8, art. 33.

139. *Id.* The twenty-four nautical miles are measured from “the baselines from which the breadth of the territorial sea is measured.” *Id.*

140. *Id.* art. 57; Holmes, *supra* note 9, at 333.

141. Holmes, *supra* note 9, at 333; *see* UNCLOS, *supra* note 8, arts. 56–57.

142. UNCLOS, *supra* note 8, arts. 55–56, 76.

143. Prows, *supra* note 116, at 270–71.

144. *See id.* at 270.

superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.<sup>145</sup>

Although article 56 limits the distance of a nation's continental shelf to no more than up to 200 nautical miles from its coastal baseline, the EEZ essentially allows a nation to claim territory surrounding its shores—regardless of how far its continental shelf extends.<sup>146</sup> For instance, even if a nation has no extended continental shelf, it may still explore and exploit the area's resources up to 200 nautical miles from its coastline.<sup>147</sup> Thus, pursuant to Article 76, if a nation can gather evidence and establish that there is a “natural prolongation” of its continental shelf beyond the 200 nautical mile limit, it can gain control over that extended territory.<sup>148</sup>

Article 76 of UNCLOS relies on scientific and geological determinations to legally define a continental shelf.<sup>149</sup> Article 76 is thus considered to be the “crucial nexus separating the extent of coastal State jurisdiction over seabed natural resources from the ‘common heritage’ beyond.”<sup>150</sup> Article 76 provides that

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

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145. UNCLOS, *supra* note 8, art. 56(1)(a).

146. Jarashow et al., *supra* note 33, at 1628–29.

147. Howard, *supra* note 7, at 846.

148. See UNCLOS, *supra* note 8, art. 76(1). “Natural prolongation” is defined as the “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 . . .” *Id.* See also Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

149. See Prows, *supra* note 116, at 272.

150. *Id.* at 247.

continental margin does not extend up to that distance.<sup>151</sup>

In other words, article 76 permits a nation to claim additional territory beyond the 200 nautical mile demarcation of its EEZ if it can scientifically prove that the landmass of its continental shelf connects below sea level to the claimed territory.<sup>152</sup> Specifically, if a nation can scientifically demonstrate that its continental margin extends more than 200 nautical miles, it may claim jurisdiction up to 350 miles from the baseline or 100 miles from the 2,500 meter depth, depending on certain criteria.<sup>153</sup> Even if a nation demonstrates that its continental shelf extends further, this 350 nautical mile limit is absolute.<sup>154</sup>

### 3. *The Commission on the Limits of the Continental Shelf*

In order for a nation to extend beyond its 200 nautical-mile EEZ, it must complete a four-part process: (1) UNCLOS ratification; (2) submission preparation; (3) CLCS review; and (4) delineation deposit.<sup>155</sup> First, in order to submit an extended continental shelf claim, a nation must ratify UNCLOS.<sup>156</sup>

Second, the nation must submit its claim to the CLCS pursuant to article 76 of UNCLOS.<sup>157</sup> Article 76 established the CLCS in 1982 to assess Arctic nations' territorial claims.<sup>158</sup> Pursuant to article 76, the CLCS evaluates the information submitted by the Arctic nation.<sup>159</sup> The burden is thus on the nation to map its seafloor and conduct the requisite scientific

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151. UNCLOS, *supra* note 8, art. 76(1).

152. Howard, *supra* note 7, at 846–48.

153. UNCLOS, *supra* note 8, art. 76(5).

154. *Id.* art. 76(6).

155. See Prows, *supra* note 116, at 273; Jacquelyn Coston, *What Lies Beneath: The CLCS and the Race to Lay Claim Over the Arctic Seabed*, 3 ENV'T'L & ENERGY L. & POL'Y J. 149, 151 (2008).

156. Coston, *supra* note 155, at 151.

157. Howard, *supra* note 7, at 848.

158. Coston, *supra* note 155, at 150.

159. UNCLOS, *supra* note 8, art. 76(8).

research before it can submit a continental shelf claim.<sup>160</sup> Such preparation takes years of work, expense, and expertise.<sup>161</sup>

Moreover, nations are under a strict deadline for preparing and submitting claims. When UNCLOS was ratified, the original submission deadline was 2004.<sup>162</sup> By party consensus, this deadline was extended to May 13, 2009 for nations who were a party to UNCLOS by 1999.<sup>163</sup> By the time this deadline passed, fifty nations had submitted claims to the CLCS—35 of which were submitted in 2009—twenty in the month of May alone.<sup>164</sup> Nations that did not ratify UNCLOS until after 1999 still have a ten-year due date to conduct research and submit extended continental shelf claims.<sup>165</sup>

Third, the CLCS reviews the data submitted to it by a potential claimant.<sup>166</sup> Composed of twenty-one members who serve five-year terms, the CLCS has been regarded as a “policeman,” a “watchdog,” and a “legitimator” of extended continental shelf claims.<sup>167</sup> The CLCS is not “an adversarial or adjudicatory body with competence to prescribe a binding bilateral boundary.”<sup>168</sup> Rather, it is a scientific body composed of “experts in the field of geology, geophysics or hydrography, elected by States Parties . . . from among their nationals, having due regard to the need to ensure equitable geographical representation.”<sup>169</sup>

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160. Howard, *supra* note 7, at 848.

161. Prows, *supra* note 116, at 273–74 (detailing the research gathering component of the continental shelf claim process).

162. *Id.* at 273.

163. *Id.*

164. Gronewold, *supra* note 62. In contrast, the first fifteen claims submitted to the CLCS “trickled in over the first eight years of the commission’s existence.” *Id.*

165. Michael A. Becker, *International Law of the Sea*, 41 INT’L LAW 671, 673 (2007) (explaining the CLCS process).

166. Prows, *supra* note 116, at 274.

167. *Id.* at 275.

168. Prows, *supra* note 116, at 275.

169. UNCLOS, *supra* note 8, Annex II, art. 2(1); *see also* CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE 6 (Peter J. Cook & Chris M. Carleton eds., Oxford University Press 2000) (describing the CLCS process as “dependent on the knowledge, the experience, and occasionally the bias of the scientist involved”).

Pursuant to article 76, section 8, the CLCS “shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.”<sup>170</sup> In essence, the CLCS recommends to a nation whether or not it may claim a larger area of the Arctic.<sup>171</sup> These recommendations establish the limits of continental shelf claims submitted by Arctic nations.<sup>172</sup>

Based on the CLCS’s recommendations, the submitting nation establishes the extension of its continental shelf.<sup>173</sup> Pursuant to Article 76, the “limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”<sup>174</sup> As previously mentioned, the CLCS does not have authority to establish a binding bilateral boundary.<sup>175</sup> Thus, the nation itself, not the CLCS, establishes the limit of its sovereign territory.<sup>176</sup>

#### 4. *Conflicting Claims to Arctic Territory*

Because limited parts of the Arctic have been surveyed, Arctic nations are currently organizing mapping expeditions to claim as much territory as they can.<sup>177</sup> With so many valuable resources at stake, conflicts and competing Arctic territorial claims will inevitably develop among the Arctic nations. When competing claims do arise, it is unclear how they will be resolved under UNCLOS.<sup>178</sup> In fact, the CLCS cannot issue a recommendation on territory that is claimed by more than one

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170. UNCLOS, *supra* note 8, art. 76(8).

171. Coston, *supra* note 155, at 149 (explaining that the CLCS assesses each Arctic nation’s territorial claims).

172. Howard, *supra* note 7, at 849.

173. *Id.*

174. UNCLOS, *supra* note 8, art. 76(8). To date, “only seven submissions have been made and no State has yet deposited its ‘final and binding’ extended continental shelf delineation with the Secretary-General.” Prows, *supra* note 116, at 275.

175. *See supra* note 168 and accompanying text.

176. Howard, *supra* note 7, at 849.

177. Krauss et al., *supra* note 148, at A11.

178. Howard, *supra* note 7, at 849–50 (explaining that the CLCS, as a non-legal body, is prevented from ruling on territory that is claimed by more than one state).

nation, as UNCLOS “does not provide for compulsory dispute settlement for Article 76 continental shelf issues.”<sup>179</sup>

UNCLOS does, however, contain remedial provisions for resolving territorial disputes.<sup>180</sup> UNCLOS denotes a preference for peaceful resolution of disputes.<sup>181</sup> In the case of conflict among Arctic nations regarding rights or jurisdiction within EEZs, “the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”<sup>182</sup>

Article 83 of UNCLOS instructs countries with conflicting claims to agree on a boundary.<sup>183</sup> This article also provides that the “delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution.”<sup>184</sup> Emphasizing the importance of a peaceful resolution, article 83 further provides that the nations “shall make every effort to enter into provisional arrangements of a practical nature and . . . not to jeopardize or hamper the reaching of the final agreement.”<sup>185</sup> If the nations cannot reach an agreement within a reasonable period of time, article 83 directs the nations to procedures provided in Part XV of UNCLOS.<sup>186</sup>

If nations are not able to settle a dispute informally on their own, Part XV of UNCLOS provides specific dispute resolution options.<sup>187</sup> Articles 279 and 280 provide that parties shall settle

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179. *Id.* at 850; *see also* UNCLOS, *supra* note 8, art. 76 (containing no mention of a dispute settlement method for determining incongruent continental shelf claims). *But see* UNCLOS, *supra* note 8, Part XV (containing a dispute settlement provision that makes no mention of continental shelf claims).

180. *See* UNCLOS, *supra* note 8, Part XV (outlining the settlement of disputes process in Articles 279–299).

181. *See* Holmes, *supra* note 9, at 336 (explaining that parties should first try to settle disputes informally through negotiation).

182. UNCLOS, *supra* note 8, art. 59.

183. *Id.* art. 83(1).

184. *Id.*

185. *Id.* art. 83(3).

186. *Id.* art. 83(2).

187. *Id.* part XV. Part XV of UNCLOS contains Articles 279–299. *Id.*



any dispute among them concerning the interpretation or application of UNCLOS “by any peaceful means of their own choice.”<sup>188</sup> If parties are unable to reach an agreement on their own, UNCLOS provides four methods of resolution: (1) the International Tribunal for the Law of the Sea (ITLOS); (2) the International Court of Justice (ICJ); (3) an arbitral tribunal constituted in accordance with Annex VII of UNCLOS; or (4) a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS.<sup>189</sup> When a nation ratifies UNCLOS, it chooses a forum for settling disputes that might arise under the Convention.<sup>190</sup> If a dispute arises between two nations that have selected different forums, unless the parties agree otherwise, UNCLOS instructs the parties to use arbitration.<sup>191</sup>

Although the Arctic nations have selected different forums for dispute resolution,<sup>192</sup> notably, Article 298 of UNCLOS allows each nation to decline to accept any method of resolution for various kinds of disputes.<sup>193</sup> Article 298 thus contains an exception that allows a nation to opt-out of binding dispute resolution under UNCLOS.<sup>194</sup> The exception to article 298 states:

When signing, ratifying, or acceding to this Convention or at any time thereafter, a State may . . . declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to . . . disputes concerning the interpretation or application of

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188. *Id.* arts. 279–80.

189. *Id.* art. 287. Article 3 of both Annex VII and Annex VIII explains the constitution of the arbitral tribunal and the special arbitral tribunal. *Id.* annex VII, art. 3; *id.* annex VIII, art. 3.

190. Holmes, *supra* note 9, at 336.

191. *Id.*

192. Canada chose to resolve disputes in the ICJ or by special arbitration under Annex VII. U.N. Division for Ocean Affairs and the Law of the Sea, *Declarations or Statements Upon UNCLOS Ratification*, Mar. 16, 2009, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm) [hereinafter *Declarations*]. Denmark and Norway selected the ICJ. *Id.* Russia selected arbitration under Annex VII for boundary disputes. *Id.*

193. *Id.*; see UNCLOS, *supra* note 8, art. 298 (establishing the article 298 opt-out exception).

194. UNCLOS, *supra* note 8, art. 298(1).

articles 15, 74[,] and 83 relating to sea boundary delimitations.<sup>195</sup>

Stated simply, nations can decline to accept any method of resolution for various types of disputes, including boundary disputes among Arctic nations with opposite or adjacent territorial seas, EEZs, or continental shelves.<sup>196</sup> Pursuant to article 298, all Arctic nations except Norway have opted out of the binding dispute resolution provisions that arise under article 83.<sup>197</sup> Thus, UNCLOS does not provide a binding forum for deciding Arctic boundary disputes.

As the Arctic has become more navigable and the race for its resources has intensified, boundary disputes are likely to arise over geologically uncertain areas in this region.<sup>198</sup> In fact, some scholars have begun to warn that increased access to the Arctic will cause the region to “erupt in an armed mad dash for its resources.”<sup>199</sup> Arctic boundary disputes will likely fall within the opt-out exception contained within article 298.<sup>200</sup>

UNCLOS provides a viable legal framework for settling Arctic territorial claims among its members. However, Norway is the only Arctic nation that is currently willing to submit its conflicting continental shelf claims to binding dispute resolution.<sup>201</sup> This Comment will conclude that UNCLOS signatories must amend article 298 in order to permit binding dispute resolution for Arctic territorial disputes in a forum pursuant to article 287.

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195. *Id.*

196. Holmes, *supra* note 9, at 336–37.

197. *Id.* at 340; *see Declarations, supra* note 192 (explaining the different forums Arctic nations have chosen for dispute resolution).

198. *See, e.g.,* Holmes, *supra* note 9, at 338–39 (explaining that such geologically uncertain areas include the Lomonosov Ridge, the Barents Sea Loop Hole, and the Western Nansen Basin).

199. Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 FOREIGN AFFAIRS 63, 65 (Mar./Apr. 2008), available at [http://www.foreignaffairs.com/articles/63222/scott-g\\_borgerson/arctic-meltdown](http://www.foreignaffairs.com/articles/63222/scott-g_borgerson/arctic-meltdown).

200. Holmes, *supra* note 9, at 337.

201. *Declarations, supra* note 192.

## V. ONE OPTION FOR RESOLVING ARCTIC TERRITORIAL DISPUTES UNDER UNCLOS

Today, UNCLOS governs territorial claims among its member nations. However, presently the Convention is inherently deficient in its ability to force member nations to resolve their Arctic territorial claims at the settlement table. Besides Norway, the other Arctic nations—Canada, Russia, and Denmark—have yet to accept binding dispute resolution,<sup>202</sup> while the United States has yet to ratify UNCLOS.<sup>203</sup>

This Comment will conclude that article 298 of UNCLOS must be amended to require all Arctic territorial disputes to be resolved by binding arbitration in an international court. This can be accomplished if member nations delete the opt-out exception contained in article 298 of UNCLOS and mandate a binding solution pursuant to one of the four options provided in article 297 of UNCLOS. Once UNCLOS is amended to provide for binding dispute resolution, ratification by all Arctic nations should be secured.

### A. *Abandoning UNCLOS Is Not Necessary*

As discussed in Part IV(C), UNCLOS presently provides a reasonable legal framework for settling Arctic territorial claims. Although some scholars argue the Arctic lacks comprehensive multilateral regulations because it was never expected to become an area of commercial development,<sup>204</sup> UNCLOS still remains a viable tool for member nation disputes. Pursuant to article 76, the CLCS relies upon the most recent scientific data gathered and submitted by Arctic nations and employs a pragmatic and precautionary approach to recommending whether or not a nation should gain more Arctic territory.<sup>205</sup> In

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202. *Id.*

203. Ratifications, *supra* note 125.

204. *See generally* Holmes, *supra* note 9, at 339–40 (arguing that UNCLOS is unsuitable for resolving Arctic territorial disputes).

205. *See generally* Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, Speech to the Press Meeting: Arctic Governance in a Global World: Is it Time for an Arctic Charter?, (May 7, 2008), *available at* [http://www.regjeringen.no/en/dep/ud/about\\_mfa/minister-of-foreign-affairs-jonas-gahr-s/Speeches-and-articles/2008/arctic\\_charter.html?id=511991](http://www.regjeringen.no/en/dep/ud/about_mfa/minister-of-foreign-affairs-jonas-gahr-s/Speeches-and-articles/2008/arctic_charter.html?id=511991) (speaking on Arctic Governance and the High North at

the words of the Norwegian Minister of Foreign Affairs, Jonas Gahr Støre, UNCLOS is the “comprehensive multilateral regime” that provides the “rules of the game” to be applied in the Arctic.<sup>206</sup>

Although some policy officials and scholars argue countries should abandon UNCLOS and implement a new legal regime,<sup>207</sup> such action would undermine the effectiveness of the existing legal norms provided by UNCLOS. Abandoning UNCLOS would only weaken current international Arctic law, create economic uncertainty, and pose potential security issues.<sup>208</sup> In addition, the formulation, adoption, and implementation of new international Arctic legislation would, at best, be a difficult, if not impossible, process.<sup>209</sup> Considering the enormous economic wealth at stake, coupled with the political power of today’s oil, abandoning UNCLOS might erroneously be interpreted by some as encouraging military solutions to Arctic territorial disputes.<sup>210</sup>

Without a solid legal foundation in place, current Arctic territorial disputes could possibly result in military conflicts, particularly with Russia. Tomorrow’s future can be predicted by looking at Russia’s current natural gas economic blackmail of Europe.<sup>211</sup> Such blackmail has been described as “undermining

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the European Parliament).

206. *Id.*

207. See Jarashow et al., *supra* note 33, at 1631–37 (recommending the submission of Arctic territorial disputes to the International Court of Justice (ICJ)). See generally Erika Lennon, *A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic*, 8 SUSTAINABLE DEV. L. & POL’Y 32 (2008) (arguing for the creation of an Arctic Treaty modeled after the Antarctic Treaty).

208. See generally JOSHUA W. BUSBY, COUNCIL ON FOREIGN RELATIONS, CLIMATE CHANGE AND NATIONAL SECURITY: AN AGENDA FOR ACTION (2007) (explaining the connections between climate change and national security and the potential security consequences of global warming).

209. The long and complicated process that resulted in UNCLOS should give cause for concern. UNCLOS took decades to become agreed upon and binding. See generally Prows, *supra* note 116 (detailing the development and ratification of UNCLOS).

210. See generally Busby, *supra* note 208 (arguing that in a world of climate change and new security challenges, the United States should strengthen its national security and reduce its vulnerabilities to climate change by supporting current international policies and securing and stabilizing important partners).

211. See generally Ariel Cohen & Owen Graham, *European Security and Russia’s*

European security.”<sup>212</sup> Some scholars have noted that, “Russia has not ceased its efforts to use energy as a weapon,”<sup>213</sup> and predict “Russia is likely to use its energy muscle to impose its geopolitical agenda on its neighbors, today and in the future.”<sup>214</sup>

In fact, Russia’s new national security strategy, released in May 2009, raises the prospect of military conflict over energy reserves in the Arctic.<sup>215</sup> Russia’s Security Council created the strategy to evaluate potential security threats to Russia over the next decade.<sup>216</sup> With tension mounting among Russia and other Arctic nations, the strategy provocatively explains, “[w]ith the ongoing competition for [Arctic] resources, attempts to use military force to solve emerging problems cannot be excluded—and this might destroy the balance of forces on Russia’s and its allies’ borders.”<sup>217</sup> A recently released Kremlin document on Arctic policy also “refers to the deployment of armed forces in the Arctic zone which are ‘capable of ensuring security under various military and political circumstances.’”<sup>218</sup>

Russia has staked its claim in the Arctic by symbolically planting a flag at the bottom of the North Pole and submitting an extended continental shelf claim to UNCLOS.<sup>219</sup> The Kremlin has also established Russia’s economic interest in the Arctic by

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*Natural Gas Supply Disruption*, 2194 HERITAGE FOUND. 1, 1, Jan. 8, 2009, available at <http://www.heritage.org/Research/RussiaandEurasia/wm2194.cfm> (describing Russia’s reduction of gas supplies to the Ukraine as a “crisis” that must be changed quickly in order to “prevent Europe from being taken hostage by Russia”).

212. *Id.* at 4.

213. *Id.* at 1. Some experts even characterize the current price war as “outright economic warfare” against the Ukraine. *Id.* at 2.

214. *Id.* at 4. Compare Paul Voosen, *Oil and Gas: Wary EU Girding for Supply Disruptions*, GREENWIRE, July 16, 2009, <http://www.eenews.net/public/Greenwire/2009/07/16/4> (describing Russia as “the big kid in the playground flexing its muscles”), with Gronewold, *supra* note 62 (explaining that “an orderly division of the area [Arctic]” is possible, as evidenced by Russia and Canada’s discussion of a joint Russian-Canadian-Danish submission to the (CLCS)).

215. Patrick Goodenough, *As UN Deadline Passes for Seabed Claims, Russia Gives Arctic Warning*, CNSNEWS, May 14, 2009, available at <http://www.cnsnews.com/public/content/article.aspx?RsrcID=48130>.

216. *Id.*

217. *Id.*

218. *Id.*

219. See *supra* Part III (explaining current Arctic territorial claims).

describing the Arctic as “capable in large part of fulfilling Russia’s needs for hydrocarbon resources, aqueous biological resources, and other forms of strategic raw material.”<sup>220</sup> Abandoning UNCLOS would only invite confrontation and possibly trigger Russian acts of aggression against other Arctic nations. Russia’s attack on Georgia in August 2008 illustrates this very real possibility.<sup>221</sup>

Tension between Russia and other Arctic nations will remain high as they continue to compete for Arctic territory. Maintaining UNCLOS as a viable legal framework for settling Arctic territorial claims should help avert potential confrontations between Russia and other UNCLOS members.<sup>222</sup> At least UNCLOS provides its members an alternative to Russia’s “newfound assertiveness and heavy-handed conduct,”<sup>223</sup> and should therefore remain firmly in place.

Finally, UNCLOS should not be abandoned in favor of creating an Arctic legal regime based on the Antarctic Treaty.<sup>224</sup> The Antarctic Treaty System (ATS) is a multilateral treaty that governs activities in the Antarctic and aims to: (1) preserve peace; (2) prevent military activity; and (3) promote scientific research in the Antarctic by preventing any territorial claims within the region for fifty years, until the year 2041.<sup>225</sup> In

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220. Goodenough, *supra* note 215.

221. *Russia Attacks Georgia on Two Fronts as Conflict Escalates*, TIMESONLINE, Aug. 11, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article4507293.ece>. In the midst of conflict between the two countries, Russia moved militarily against Georgia. *Id.*; *Georgia in Russian Attack Claim*, BBC NEWS, Aug. 7, 2007, available at <http://news.bbc.co.uk/2/hi/europe/6934354.stm>.

222. Abandoning UNCLOS might fuel resentment in Russia, as it has already submitted one continental shelf claim to CLCS and is currently gathering additional research in order to submit a second territorial claim. Jarashow et al., *supra* note 33, at 1595–97.

223. Dimitri K. Simes, *Losing Russia: The Costs of Renewed Confrontation*, 86 FOREIGN AFFAIRS 36, 36 (Nov./Dec. 2007), available at <http://www.foreignaffairs.org/20071101faessay86603/dimitri-k-simes/losing-russia.html>.

224. *Contra* Holmes, *supra* note 9, Section V (proposing a binding Arctic treaty based loosely on the Antarctic Treaty System); see also Dubner, *supra* note 36, at 11–12 (positing that one possible solution would be to create an international sector or international park system encircling the Arctic determined by the baselines of the surrounding Arctic nations).

225. Holmes, *supra* note 9, at 347.

contrast, several different treaties, including UNCLOS, govern the Arctic.<sup>226</sup>

The ATS is not a viable model for governing the Arctic partially due to the inherent differences between the two regions.<sup>227</sup> First, Antarctica is a large isolated continent surrounded by water; whereas the Arctic is comprised of the Arctic Ocean and the Polar Ice Cap and is surrounded by five nations.<sup>228</sup> Because Antarctica is a landmass, the ATS provides stringent environmental protection.<sup>229</sup> In contrast, the Arctic is an ocean—a region that nations want to access for navigation, fishing, drilling, and mining.<sup>230</sup> A significant difference between the two regions also involves the presence of a permanent population in the Arctic. While Antarctica has no permanent population, the Arctic is home to various people, including indigenous communities.<sup>231</sup> Secondly, the ATS only affords temporary solutions.<sup>232</sup> Instead of being a mechanism for providing solutions for present day territorial claims, the ATS forbids any territorial claims in Antarctica until the year 2041.<sup>233</sup> Although this delay might work for Antarctica, due to the vast economic wealth awaiting exploitation in the Arctic, Arctic territorial claims already have been, and will continue to be, submitted to the CLCS—thereby prohibiting any “wait-and-see” attitude.<sup>234</sup>

Emerging Arctic territorial claims only highlight the importance of a permanent solution to Arctic territorial disputes. UNCLOS is currently unable to resolve territorial disputes because of the opt-out exception in article 298, which allows a member nation to opt-out of binding territorial dispute

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226. Lennon, *supra* note 207, at 33; *see supra* Part IV (detailing how UNCLOS provides a legal framework for the Arctic region).

227. Notably, the Arctic and the Antarctic are located literally at opposite ends of the earth.

228. Lennon, *supra* note 207, at 32.

229. Holmes, *supra* note 9, at 348.

230. *Id.*

231. Lennon, *supra* note 207, at 32.

232. Holmes, *supra* note 9, at 348.

233. *Id.* at 347.

234. *Id.* at 349.

resolutions.<sup>235</sup> Rather than simply abandoning UNCLOS due to its inability to resolve territorial claims, UNCLOS signatories must amend UNCLOS and delete the article 289 exception.

### *B. Specific Recommendations*

In order to encourage a fair and equitable exploitation of Arctic territory, UNCLOS must provide a binding legal framework for resolving territorial claims. The most efficient and pragmatic way to accomplish this is to delete the exception in article 298 that permits member nations to opt out of binding arbitration of territorial claims.

#### *1. Member Nations Must Delete the Opt-Out Exception in Article 298 of UNCLOS*

UNCLOS currently provides one mechanism for governing territorial disputes in the Arctic. Member nations resolve conflicting territorial claims through nonbinding dispute resolution.<sup>236</sup> Such dispute resolution is not binding due to an “opting out exception” in article 298.<sup>237</sup> To better ensure a more efficient and effective resolution of Arctic territorial claims, UNCLOS member nations should not be able to opt out of binding territorial arbitration. Accordingly, the opt-out exception in article 298 must be deleted.

Although some Arctic nations might oppose binding arbitration, other treaties to which these nations are a party contain similar dispute resolution provisions.<sup>238</sup> Binding

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235. See *supra* Part IV, Section C(4) (explaining in detail the opt-out exception in article 298 of UNCLOS).

236. UNCLOS, *supra* note 8, art. 286, 298. Parties can elect one of four forums in which to arbitrate a dispute: (1) the International Tribunal for the Law of the Sea (ITLC); (2) the International Court of Justice (ICJ); (3) an arbitral tribunal constituted in accordance with Annex VII; or (4) a special arbitral tribunal constituted in accordance with Annex VIII. *Id.* art. 287(1).

237. *Id.* art. 298. Although Part XV, Section 2 of UNCLOS provides “Compulsory Procedures Entailing Binding Decisions,” the “Optional Exceptions to Applicability” in article 298 of UNCLOS allow any member nation to render dispute resolution of territorial disputes nonbinding. *Id.* part XV, § 2; *id.* art. 298.

238. Michael A. Becker, *International Law of the Sea*, 42 INT’L LAW. 797, 800 (2008). See, e.g., U.N. Charter art. 25; North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).



arbitration would allow Arctic members to gather their own evidence to support their extended continental shelf claims, submit that evidence to the CLCS, and should another nation dispute a territorial claim, allow both nations to present their respective claims, either to a neutral international court or to a board of arbitrators in a forum of their choice.

Cooperation among Arctic member nations regarding extended continental shelf claims has shown that the nations can cooperate with one another and agree upon a mutually acceptable forum in which to resolve conflicting territorial disputes.<sup>239</sup> Notably, Russia and Norway settled overlapping territorial claims regarding the Lomonosov mountain ridge that runs through the Arctic Ocean.<sup>240</sup> Although Russia and Norway submitted overlapping claims to the territory, the nations were able to negotiate and settle their differences over the dispute.<sup>241</sup> Because Russia and Norway resolved their differences, it seems likely that other Arctic nations will be able to do the same. If nothing else, Russia and Norway have established a workable precedent in this regard. At the very least, Arctic member nations should be willing to negotiate and agree on a mutually acceptable forum in which to submit their conflicting boundary disputes.

However, when Arctic member nations cannot mutually resolve their individual differences among themselves, the CLCS should be empowered to automatically submit unresolved disputes to the ICJ to be resolved through binding arbitration. The ICJ is an efficient and fair forum for deciding extended continental shelf claims. Since its creation in 1946, the ICJ has adjudicated three such claims: the *North Sea Continental Shelf*

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239. Holmes, *supra* note 9, at 337–39. The only Arctic nation that may act aggressively and possibly pose a threat to other nations is Russia. *See supra* Part V, Section A (describing Russia's economic warfare against Europe by reducing gas supplies to the Ukraine).

240. Holmes, *supra* note 9, at 337–40.

241. *Id.* Russia submitted an expansive 1.2 million square-kilometer claim in the Arctic; whereas, Norway submitted a much more modest claim (which the CLCS subsequently approved), even admitting that its continental shelf does not extend to the North Pole. *Id.* at 339.

cases, *Tunisia v. Libya*, and *Libya v. Malta*.<sup>242</sup> The ICJ adjudicated the *North Sea Continental Shelf* cases in 1969, prior to UNCLOS's existence.<sup>243</sup> In one particular case, the ICJ determined the delimitation of the continental shelf in the North Sea in a territorial dispute between the Federal Republic of Germany and Denmark.<sup>244</sup> The Court defined the continental shelf as a "three-dimensional geological province" and analyzed the delimitation of the shelf between the disputing parties.<sup>245</sup> *Tunisia v. Libya* and *Libya v. Malta* were both adjudicated subsequent to UNCLOS's enactment and applied UNCLOS as customary international law in these disputes.<sup>246</sup> In each case, the ICJ applied principles of international law to resolve overlapping continental shelf disputes.<sup>247</sup> Moreover, in 2007 the ICJ rendered final judgment in *Nicaragua v. Honduras*.<sup>248</sup> In that case, the ICJ analyzed both maritime and territorial disputes between Nicaragua and Honduras<sup>249</sup> and successfully resolved the disputed boundaries of the Caribbean Sea, the continental shelf, and the EEZ of each country in the territorial sea.<sup>250</sup>

Because the ICJ has previously adjudicated UNCLOS-type territorial disputes, the ICJ would be an appropriate forum for determining territorial claims among Arctic nations. Further, because the ICJ considers UNCLOS to be structured on customary international law,<sup>251</sup> UNCLOS would also provide

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242. *Id.* at 340–41.

243. See generally Donald K. Anton et al., *North Sea Continental Shelf Cases*, in INTERNATIONAL ENVIRONMENTAL LAW: CASES, MATERIALS, PROBLEMS 243–55 (2007) (analyzing the cases as customary international law).

244. *Id.*

245. Dubner, *supra* note 36, at 9–10.

246. See *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 107–14 (Feb. 24) (relying on UNCLOS to resolve disputes over definitions); *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 29–34 (June 3) (explaining that "some of its [UNCLOS] provisions constitute . . . the expression of customary law).

247. Holmes, *supra* note 9, at 340–41.

248. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, 2007 I.C.J. 120 (Oct. 8).

249. *Id.*

250. *Id.* at 93.

251. *Libya v. Malta*, 1985 I.C.J. at 29–34.

guidelines for the ICJ to follow when analyzing and resolving territorial disputes, thereby lending predictability through its rulings.

In sum, the ICJ would offer a more permanent solution for resolving Arctic boundary disputes, as opposed to simply allowing Arctic nations to opt-out of binding dispute resolution for such disputes. Although it is unlikely that either Canada or the United States would submit to the ICJ's jurisdiction,<sup>252</sup> amending article 298 of UNCLOS would allow Arctic member nations to choose from one of four forums to resolve Arctic territorial disputes. As previously discussed, the mutual resolution between Russia and Norway suggest that Arctic member nations can negotiate and agree upon a mutually acceptable forum. Such autonomy should encourage the United States, the only Arctic nation that is not a party to UNCLOS, to ratify UNCLOS—thus guaranteeing binding dispute resolution for all Arctic territorial disputes.

## 2. *It is Necessary that the United States Ratify UNCLOS*

UNCLOS must be universally ratified.<sup>253</sup> “[B]ecause currently any nonsignatory Arctic State, such as the United States, cannot take full advantage of the potential benefits in the region [Arctic] without ratification of UNCLOS,” universal ratification of UNCLOS would benefit all Arctic nations.<sup>254</sup>

### a. *History of the United States and UNCLOS*

When UNCLOS was initially conceived in 1982, President Reagan rejected the Convention because he did not agree with its provisions on deep seabed mining.<sup>255</sup> Subsequent negotiations amended UNCLOS and resolved the United States’

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252. Jarashow et al., *supra* note 33, at 1652 (explaining how the United States and Canada have not submitted to the jurisdiction of the ICJ).

253. Scott Borgerson, *An Ice Cold War*, N.Y. TIMES, Aug. 8, 2007, available at <http://www.nytimes.com/2007/08/08/opinion/08borgerson.html> (explaining that the United States should strengthen its presence in the Arctic by ratifying UNCLOS).

254. Jarashow et al., *supra* note 33, at 1652. *But see* Surace-Smith, *supra* note 94, at 1035 (explaining that UNCLOS arguably has become binding customary international law on the United States).

255. Howard, *supra* note 7, at 852.

problems with the Convention.<sup>256</sup> In 1994, President Clinton signed UNCLOS, but the Senate failed to ratify it; thus, the United States is not a party to the Convention.<sup>257</sup> In 1997, however, the U.S. Senate Foreign Relations Committee once again considered UNCLOS, and, by a seventeen to four vote, submitted the Convention to the entire Senate for ratification.<sup>258</sup> To date, the Senate has yet to ratify the Convention with a constitutionally required two-thirds vote.<sup>259</sup>

Now, however, under the Obama Administration, U.S. ratification of UNCLOS seems likely. First, in 2002 “President Bush designated UNCLOS as one of five treaties ‘in urgent need for Senate approval.’”<sup>260</sup> Also, Vice President Biden, then serving as Chairman of the U.S. Foreign Relations Committee, strongly supported UNCLOS’ ratification, stating UNCLOS was both “critical” to the national interest of the United States and that its ratification was “long overdue.”<sup>261</sup> Biden should use his Vice Presidency to influence key politicians and advocate for full Senate support of UNCLOS.

*b. The United States is Strategically Positioned to Ratify UNCLOS*

Because of the accelerated Polar Ice Cap melting, Arctic nations now have unprecedented access to vast wealth through their extended territorial claims. As explained by Senator Richard Lugar, an UNCLOS supporter, “the CLCS [w]ill soon begin making decisions on claims to continental shelf areas,” and if the United States does not ratify the Convention, the United States “will not be able to protect our national

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256. *Id.*

257. 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, 335–36 (2007).

258. American Bar Association, Section of International Law: Law of the Sea Committee, *The Drive Towards Ratification by the United States of the U.N. Convention on the Law of the Sea*, <http://www.abanet.org/dch/committee.cfm?com=IC965000> (last visited Jan. 30, 2010) (outlining recent U.S. Senate activity regarding UNCLOS).

259. King, *supra* note 257, at 336.

260. *Id.*

261. Graff, *supra* note 74, at 36.

interest.”<sup>262</sup> Critics of UNCLOS assert the Convention would permit other nations to intrude on the United States’ sovereignty, thereby undermining its national security interests.<sup>263</sup> Those arguing for UNCLOS’ ratification, however, postulate that ratification would strengthen U.S. sovereignty and security.<sup>264</sup> In fact, unless the United States ratifies UNCLOS, the United States will be less able to promote and protect its self-interest as it will be “left without a voice when the Arctic region is being divided amongst other nations.”<sup>265</sup> Specifically, the United States will not be able to participate in the extended continental shelf process pursuant to Article 76 when Russia and other Arctic nations submit their extended territorial claims to the CLCS.<sup>266</sup> This will not only put the United States at a significant disadvantage in the Arctic region, but will also undermine the current balance of socioeconomic power among the Arctic nations. For example, without UNCLOS ratification by the United States, Russia will be able “to pursue its [Arctic] claims without opposition from America” via UNCLOS.<sup>267</sup>

As previously discussed, less than two weeks before President George W. Bush left the White House, the Bush Administration issued a Presidential Directive asserting that “[t]he United States is an Arctic nation.”<sup>268</sup> The Directive declares that “[t]he United States has broad and fundamental national security interests in the Arctic region and is prepared to operate either independently or in conjunction with other states to safeguard these interests.”<sup>269</sup> In addition to asserting “lawful claims of United States sovereignty, sovereign rights,

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262. King, *supra* note 257, at 338.

263. Howard, *supra* note 7, at 854.

264. *Id.* at 853.

265. *Id.*

266. Bates, *supra* note 123, at 779. Bates also argues that the United States “must join” UNCLOS to maintain economic dominance in the international community. *Id.* at 792.

267. *Id.* at 779. Stated simply, the United States must chose to: (1) join UNCLOS and take its chances under article 276; or (2) not recognize UNCLOS and act independently in its own self-interest.

268. See NSPD-66, *supra* note 2 (establishing the U.S. interest in the Arctic).

269. *Id.*

and jurisdiction in the Arctic region,”<sup>270</sup> the Directive encourages U.S. agencies to “[t]ake all actions necessary to establish the outer limit of the continental shelf appertaining to the United States, in the Arctic and in other regions, to the fullest extent permitted under international law.”<sup>271</sup>

The terms of the Directive essentially instruct the United States to abide by UNCLOS and map the U.S. continental seabed in order to submit an extended continental shelf claim to the CLCS.<sup>272</sup> In fact, when President Bush issued the Directive, he expressly called on the U.S. Senate to ratify UNCLOS, explaining that UNCLOS offers “[t]he most effective way to achieve international recognition and legal certainty for our extended continental shelf.”<sup>273</sup> Succeeding Vice President Biden as Senate Foreign Relations Committee Chairman, Senator John Kerry also said he would advocate for ratification of UNCLOS<sup>274</sup> and would like to bring the Convention to a vote this year.<sup>275</sup> As explained by Kerry, “[i]n order to guarantee secure borders . . . and protect our marine resources, we must become full partners with the other Arctic nations and ratify the U.N. Convention on the Law of the Sea.”<sup>276</sup> Secretary of State Hillary Clinton also endorses the UNCLOS and stated during her confirmation hearings that ratifying the Convention would be a priority.<sup>277</sup>

President Bush’s policy Directive will remain in effect, unless the Obama Administration overturns it. With nonpartisan support from both political parties, the U.S. Chamber of Commerce, and the U.S. Navy,<sup>278</sup> it is unlikely that

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270. *Id.*

271. *Id.*; see also Steven Aftergood, *Bush Directive on Arctic Policy Stresses U.S. Sovereignty*, SECRECY NEWS, Jan. 14, 2009, available at [http://www.fas.org/blog/secretcy/2009/01/arctic\\_policy.html](http://www.fas.org/blog/secretcy/2009/01/arctic_policy.html).

272. NSPD-66, *supra* note 2.

273. *Id.*

274. Juliet Eilperin & Spencer S. Hsu, *White House Directive Guides Policy on Arctic*, WASH. POST, Jan. 19, 2009, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802085.html>.

275. Morello, *supra* note 76.

276. Eilperin & Hsu, *supra* note 274.

277. Goodenough, *supra* note 215.

278. JOINT OCEAN COMM’N INITIATIVE, CHANGING OCEANS, CHANGING WORLD:

President Obama will annul the Directive. In fact, in July 2009 Margaret Hayes, director of the State Department's Office of Ocean and Polar Affairs, recently stated "President Obama is strongly in favor of the United States becoming a party to the Law of the Sea Convention."<sup>279</sup> Hayes also confirmed that Obama and the Senate Foreign Relations Committee have been discussing when the Committee might hold a hearing on UNCLOS, and ultimately, when the Senate might proceed to a full vote.<sup>280</sup> Accordingly, the Obama Administration's National Security, released in May 2010, expressly calls for the United States Ratification of the UNCLOS.<sup>281</sup> Under a section entitled "Safeguarding the Global Commons," the strategy emphasizes that the United States must work with other nations to optimize use of the shared sea.<sup>282</sup> It concludes: "[a]s one key effort in the sea domain...[the United States] will pursue ratification of the United Nations Convention on the Law of the Sea."<sup>283</sup>

It is clear that Bush's Directive has strengthened the need for the United States to ratify UNCLOS—and hopefully, it has strengthened the nation's political will to do so. Universal ratification of UNCLOS will be the most efficient and effective way to resolve conflicting Arctic territorial claims, mitigate potential security risks posed by such disputes, and balance the interests of the Arctic nations.

## VI. CONCLUSION AND CALL TO ACTION

The so-called "Cold Rush" to the Arctic was ignited when Russia planted its flag on the bottom of the North Pole in 2001, claiming a vast piece of Arctic territory as its own. Since this symbolic act, international struggle among Arctic nations for territory and resources, mainly oil, have dramatically increased. As climate change continues to thaw the Arctic, making its

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OCEAN PRIORITIES FOR THE OBAMA ADMINISTRATION AND CONGRESS 20–21 (2009), available at <http://www.jointoceancommission.org/>.

279. Morello, *supra* note 76.

280. *Id.*

281. Press Release, *National Security Strategy*, May 2010, at 50, [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)

282. *Id.* at 49.

283. *Id.* at 50.

waters more navigable and access to its resources more manageable, Arctic territorial claims will likely increase—thereby increasing the possibility of Arctic territorial disputes.

UNCLOS currently provides a reasonable framework for governing Arctic territorial disputes. Although an exception in article 298 of UNCLOS allows member nations to opt-out of binding dispute resolution regarding conflicting territorial claims, UNCLOS should not be dismissed as an ineffective Convention. Due to uncertainty surrounding the Antarctic Treaty and international self-interest, Arctic nations should not look to the Antarctic Treaty for Arctic solutions. Instead, Arctic nations should amend Article 298 of UNCLOS in order to permit binding dispute resolution of territorial claims pursuant to an agreeable forum provided for in article 297. If the Arctic member nations cannot agree on an appropriate forum, the CLCS should automatically submit all disputed claims to the ICJ. Once so amended, the Arctic nations should universally ratify UNCLOS.

Because nations that actively seek Arctic resources stand to obtain strategic advantages, efficient and effective resolutions of Arctic boundary disputes are of vital importance. As the Polar Ice Cap continues to melt, Arctic nations will continue to compete for Arctic territory and accompanying natural resources. The efficient, effective, and peaceful resolution of Arctic territorial disputes will have a profound impact on geopolitics, property ownership, and international law—especially in an economic climate of escalating oil prices.<sup>284</sup> Although the international resolution of Arctic territorial disputes will require immediate and bold diplomatic action, as explained by scholar Bruce Jackson, “[t]he fact that the Arctic, more than any other populated region of the world, requires the collaboration of so many disciplines and points of view to be understood at all, is a benefit rather than a burden.”<sup>285</sup>

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284. See generally Keith Kohl, *\$100 Oil is Right Around the Corner*, June 15, 2009, available at <http://www.energyandcapital.com/articles/crude-oil-forecast/895> (arguing that oil prices will eventually rise into the triple digits).

285. Bruce Jackson, *The Lesson of the Arctic*, available at [http://transpolair.free.fr/sciences/cea/inuit\\_jackson.htm](http://transpolair.free.fr/sciences/cea/inuit_jackson.htm).