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AN ARCTIC TREATY: A SOLUTION TO THE INTERNATIONAL DISPUTE OVER THE POLAR REGION

*Molly Watson**

I. INTRODUCTION

The melting of the polar ice caps in the Arctic region has resulted in an international battle over Arctic territory and its vast natural resources. Five Arctic nations are claiming rights to overlapping territory and there is no evident legal resolution to their competing interests. Four of these five states have ratified the United Nations Convention on the Law of the Sea (UNCLOS) and are operating within its framework in their attempts to solidify their territorial claims. However, for some, their trust in that law seems limited, as evidenced by their more traditional approaches to claiming land. The fifth nation, the United States, has yet to ratify UNCLOS, thus excluding itself from the legal framework within which the other nations are operating. Yet, even were the United States to join the treaty, UNCLOS remains an imperfect framework for governance of the icy northern region. This Comment examines the jurisdictional claims made by each of the five Arctic States and the support for those claims. It then proposes an Arctic treaty, modeled in part after the Antarctic Treaty, as a resolution of the dispute in consideration of the objectives of each State and the Arctic's unique environment.

The remainder of Part I discusses the event triggering the international battle for the Arctic, the melting of the polar ice caps, and the consequent development of the region into one of increased global importance. Part II examines the perspectives of each State involved in the dispute, their factual and legal claims, and the policies underlying those claims. Finally, Part III offers suggestions for resolving the dispute through an Arctic treaty. The proposal of an Arctic treaty as the appropriate framework for governing the region has been debated among scholars, with some

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suggesting its vitalness¹ and others concluding it is either unnecessary, undesirable, or impracticable.² However, the debate has not yet led to an in-depth examination of what such a treaty must entail. After discussing the usefulness of the Antarctic Treaty as a model, this Comment proposes the necessary components of an Arctic treaty that meet the objectives of the States involved, while also addressing additional issues unique to this northernmost region.

A. *The Arctic Is Melting*

The Arctic is a vast region that encompasses over one-sixth of global landmass, and spans over thirty million square kilometers and twenty-four time zones.³ Its population of approximately four million people includes dozens of indigenous peoples and languages.⁴ Despite its substantial size, the Arctic has historically been largely ignored by the rest of the world due to its inaccessibility. In recent years, however, the global community has begun to take notice of this northern expanse as the warming temperatures melt the polar ice caps, making the region increasingly less remote.

Overall Arctic temperatures have been rising at almost twice the global rate.⁵ In the last three decades, the amount of Arctic sea ice present in September has declined by 8.9% per decade, and the amount in March has dropped by 2.5% per decade.⁶ Annual total loss from the Greenland Ice Sheet more than doubled in the last decade of the twentieth century, and may have doubled again by 2005.⁷ Since the 1950s, sea-ice thickness has been decreasing in parts of the Arctic, and both the extent and thickness of the ice are projected to continue to decline to the point that, according to some scholars, the Arctic Ocean may experience ice-free summers by 2100

1. Scott Borgerson, *An Ice-Cold War*, N.Y. TIMES, Aug. 8, 2007, at A19 [hereinafter Borgerson I]. See generally Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323 (2008).

2. John B. Bellinger, *Treaty on Ice*, INT'L HERALD TRIB., June 24, 2008, at 6; see also Mark Jarashow, Michael B. Runnels & Tait Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 FORDHAM INT'L L.J. 1587, 1650 (2007) (indicating that "[w]hile such a treaty would solve many of the environmental issues in the region, it might not have a strong enough effect").

3. The Arctic Council, <http://arctic-council.org/article/about> (last visited Dec. 30, 2008).

4. *Id.*

5. UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), GLOBAL OUTLOOK FOR ICE & SNOW 9 (UNEP/Grid-Arendal ed., 2007), available at http://www.unep.org/geo/geo_ice/PDF/full_report_LowRes.pdf.

6. *Id.* at 11.

7. *Id.* at 12.

or sooner.⁸ Other researchers forecast that the Arctic will be ice-free during the summer months as soon as 2050.⁹ An ice-free Arctic would mean the opening up of a sea that is almost five times the size of the Mediterranean.¹⁰ Experts suggest that this dramatic warming trend is a result of human-induced global warming coupled with the region's propensity for magnifying global environmental changes.¹¹

In the past, the ice covering the Arctic Ocean has presented a significant barrier to human use. One commentator asserts that, if not for the ice, "the Arctic Ocean would undoubtedly be one of the busiest seas in the history of civilization, rivaling the . . . Mediterranean."¹² Currently, only coastal regions can be navigated, and even then only by ice-breaker ships during certain times of the year, which leaves the remainder of the Arctic Ocean reachable only by submarine.¹³ However, as further advances are made in technology and in the development of ice-breaking equipment, these waterways may become accessible year-round.¹⁴ One result of an ice-free Arctic is the opening up of a new shipping route between Europe and Asia known historically as the Northwest Passage. Access to the Northwest Passage could cut five thousand miles—or up to a week of sailing time—off circumpolar sea voyages, as these ships must otherwise travel via the Panama Canal.¹⁵ It is important to consider, however, that though seasonal melting may make the region more accessible in some respects, such melting will also result in more icebergs, creating new hurdles to access.¹⁶

B. Value of the Arctic

While the Arctic region is certainly valued for its potential shipping routes, it is also coveted for its onshore and offshore oil and gas reserves,

8. *Id.* at 11.

9. Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL'Y REV. 1, 19 (2005).

10. Clifford Krauss et al., *The Big Melt: As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

11. Jarashow, Runnels & Svenson, *supra* note 2, at 1590.

12. Jon Jacobson, Remarks, *Legal Regimes of the Arctic*, 82 AM. SOC'Y INT'L L. PROC. 315, 322 (1988).

13. Frants Dalgaard-Knudsen, *The Greenlandic Offshore Area*, 5 N.Y. INT'L L. REV. 63, 68 (1992).

14. Mike Perry, *Rights of Passage: Canadian Sovereignty and International Law in the Arctic*, 74 U. DET. MERCY L. REV. 657, 660 (1997).

15. Christopher Mark Macneill, Note, *Gaining Command & Control of the Northwest Passage: Strait Talk on Sovereignty*, 34 TRANSP. L.J. 355, 360 (2007); Scott Borgerson, *Breaking the Ice Up North*, N.Y. TIMES, Oct. 19, 2005, at A21 [hereinafter Borgerson II].

16. Krauss et al., *supra* note 10, at A1.

as well as its large coal reserves.¹⁷ Historically, most of these reserves have been offshore under thick ice and deep water, making them either inaccessible or logistically “too costly and dangerous to extract.”¹⁸ The United States Geologic Survey has estimated that a quarter of the world’s undiscovered oil and gas resources are located in the Arctic.¹⁹ Access to these resources could dramatically change trade relations in the world, since “[r]ecoverable reserves of crude oil [in the Arctic] are estimated at . . . almost half the supply of OPEC nations . . . [and] inevitable shortages could make the North a world resource provider early in the [twenty-first] century.”²⁰ In effect, this may result in a shift in energy alliances, such that Russia in particular may be positioned as a “more effective counterbalance to OPEC.”²¹ Even before the polar ice caps began melting at such an exponential rate, Arctic nations had already begun reaching farther North in pursuit of these valuable natural resources in spite of the dangers.²²

In addition to opening shipping routes and access to natural resources, further benefits of the melting Arctic include access to commercial fisheries and new cruise ship destinations.²³ With warmer water temperatures, in just a few decades, waters that have historically been largely untouched could become profitable fishing grounds.²⁴ The dramatic increase in fish stocks in Arctic waters as species move farther north may bring an extensive commercial fishing operation to the region.²⁵ Additionally, with melting ice and increasingly navigable waters, the tourism industry stands to profit from Arctic warming. The number of cruise ships navigating Arctic waters has already begun to increase in recent years.²⁶ An area chiefly ignored by much of the world through most of history, the Arctic is now poised to become a significantly more active and developed region.

17. Dubner, *supra* note 9, at 6, 13.

18. Michael Piskur, *The Arctic and Future Energy Resources*, in POWER AND INTEREST NEWS REPORT (2006), available at http://www.pinr.com/report.php?ac=view_report&report_id=544&language_id=1.

19. Andrew King, Note, *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, 330 (2007).

20. Perry, *supra* note 14, at 660.

21. Krauss et al., *supra* note 10, at A1 (quoting Christopher Weafer, Energy Analyst with Alfa Bank in Moscow).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. E.J. Stewart et al., *Sea Ice in Canada’s Arctic: Implications for Cruise Tourism*, 60 ARCTIC 370, 372 (2007) (noting that the “2006 summer cruise season . . . recorded the highest number of cruise vessels (twenty-two) ever seen in Canadian Arctic waters”).

While it is clear that there are considerable economic gains to be made as a result of warmer temperatures in the Arctic, the Arctic's environment is also extremely valuable and may be at risk if the current melting pattern continues. The Arctic is "a very vulnerable and fragile ecosystem," rich not only in energy resources, but also in various forms of wildlife.²⁷ Thus, as the Arctic continues to melt and becomes increasingly developed, it will be important to balance any economic growth against protection of the Arctic's unique environment.

C. Status of International Law

Historically, there was legal uncertainty as to whether the icy Arctic region should be classified as ocean, and thus beyond the sovereignty and jurisdiction of the States, or whether it ought to be considered land.²⁸ This determination was largely unimportant in the past given that there was only minimal human activity within the region;²⁹ however, with growing human interest in the area, determining the legal classification of the icy region has grown more critical. The Arctic has come to be considered ocean under international law.³⁰ Yet the legal ramifications for the region are further complicated by the lack of a clear definition of the Arctic's boundaries. This uncertainty as to the region's limits has led to multiple approaches to defining the Arctic expanse, adding "further [to the] discourse amongst those vying for its resources."³¹ In addition to the specific claims of sovereignty made by certain Arctic States, segments of the Arctic, including the North Pole, have traditionally been considered international territory.³² This pronounced uncertainty over both the boundaries and the status of Arctic territory contribute significantly to the disagreement among the States involved in the dispute.

In response to this uncertainty, the international community has endorsed the UNCLOS, which represents its attempt "to regulate all aspects of the resources of the sea and uses of the ocean."³³ The most important

27. Dubner, *supra* note 9, at 12, 13.

28. Jacobson, *supra* note 12, at 319.

29. *Id.*

30. Christopher C. Joyner, *Ice-Covered Regions in International Law*, 31 NAT. RESOURCES J. 213, 217 (1991).

31. Dubner, *supra* note 9, at 13.

32. Piskur, *supra* note 18.

33. United Nations Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea: A Historical Perspective, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Apr. 2, 2009).

features of the UNCLOS treaty include: “[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, conservation and management of living marine resources, protection of the marine environment, . . . [and] a binding procedure for settlement of disputes between States”³⁴

The substantive range of the UNCLOS treaty is broader than any other lawmaking treaty, containing provisions on “defense and international security, trade and communications, management of living and nonliving resources, scientific research, preservation of cultural heritage, and human rights.”³⁵ Its primary function is to “lay down basic substantive principles and rules regarding the rights and duties of states concerning the sea.”³⁶

Under UNCLOS, the “sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea.”³⁷ UNCLOS gives each coastal State the sovereign rights to natural resources and certain economic activities in its exclusive economic zone, which comprises the area of sea extending as far as 200 nautical miles from the State’s coast.³⁸ Each State that wants to establish outer limits of its continental shelf beyond 200 nautical miles from its coast must make a submission to the Commission on the Limits of the Continental Shelf (CLCS), though the limits must still be within 350 nautical miles of its coast.³⁹ For a submission to be accepted, a State must essentially show that the territory it is claiming is a “natural prolongation of its continental shelf.”⁴⁰ A State must make its submission to the CLCS within ten years of ratifying UNCLOS. It is then reviewed by the CLCS’s twenty-one-member body of experts in geology, geophysics, and hydrography,⁴¹ who make final and binding recommendations to the coastal State as to the outer limits of its continental shelf.⁴²

States seeking to make a claim for the extension of their continental shelves into the Arctic region under UNCLOS Article 76 are in a unique

34. *Id.*

35. Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT’L L. 277, 278 (2001).

36. *Id.* at 279.

37. United Nations Convention on the Law of the Sea art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

38. *Id.* arts. 56, 57.

39. *Id.* art. 76.

40. Krauss et al., *supra* note 10, at A1.

41. UNCLOS, *supra* note 37, Annex II, art. 2(1).

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

situation, as much of the Arctic has never been surveyed.⁴³ This absence of scientific data has led many of the Arctic States in recent years to send teams of scientists and mapping expeditions to stake out whatever claims they can to Arctic territory.⁴⁴ Their objective is to provide the CLCS with as much raw data as they can obtain to support their claims.⁴⁵ Although UNCLOS currently stands as the prevailing legal authority controlling Arctic claims, as will be discussed in Part III, it falls short of providing the extent of authority needed to govern this distinctive region.

II. NATIONAL PERSPECTIVES AND LEGAL CLAIMS

There are eight Arctic States,⁴⁶ but only five have coastlines bordering the Arctic Ocean: Russia, the United States, Canada, Denmark, and Norway.⁴⁷ Each of these five States has staked legal claim to territory in the Arctic based on historical claims of discovery and use, effective occupation, national identity, geographic proximity, Native use, and scientific data. The nations' overlapping claims and varied legal positions support the need for a new legal framework under an Arctic treaty.

A. *The Russian Perspective*

Russia was the first State to make a submission under UNCLOS Article 76 to the CLCS, staking a claim to more than half the Arctic in December 2001.⁴⁸ Russia has had a long practice of exploration and extraction in the polar region and has had research stations on the Arctic ice since early Soviet times.⁴⁹ This lengthy, active presence in the region may explain Russia's ability to make such an early submission to the CLCS.⁵⁰ One of

43. Krauss et al., *supra* note 10, at A1.

44. *Id.*

45. *Id.*

46. The Arctic States are those nations that, in conjunction with Arctic indigenous populations, are members of the Arctic Council. The Arctic Council, established in 1996, is a "high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States . . . in particular issues of sustainable development and environmental protection in the Arctic." The Arctic Council, *supra* note 3.

47. The other three Arctic States are Iceland, Sweden, and Finland. *Id.*

48. Jarashow, Runnels & Svenson, *supra* note 2, at 1595. Russia claimed that 1.2 million square kilometers of the Arctic was Russian territory, including the North Pole. *Id.*

49. C.J. Chivers, *Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. TIMES, Aug. 3, 2007, at A8.

50. *Id.* Russia ratified UNCLOS in 1997, which means it made its 2001 submission to the CLCS six years before its 2007 deadline. UNCLOS was ratified by Norway in 1996,

Russia's central claims was that the Lomonosov and Mendeleev Ridges⁵¹ are extensions of the Eurasian continent.⁵² The CLCS neither rejected nor accepted Russia's submission, but rather recommended that Russia conduct further research and revise its submission.⁵³ Because submissions to the CLCS are confidential, the provisions invoked by Russia in its claim for the extension of its continental shelf under UNCLOS are unknown.⁵⁴

Since its 2001 submission, Russia has made further geological findings regarding the ridges for the Commission's consideration the next time it meets, which will be in 2009.⁵⁵ In August 2005, Russia dispatched the first ship to reach the North Pole without the aid of an icebreaker.⁵⁶ In September 2007, Russia's Natural Resources Ministry issued a statement that its scientists confirmed, after a preliminary assessment, that the crust of the Lomonosov Ridge is made up of the same rock as found on continental shelves, as opposed to that found in mid-ocean seabeds.⁵⁷ This finding, if substantiated, strengthens Russia's claim that the Ridge is part of the Russian continental shelf, rather than Danish or Canadian territory or the province of no State at all.⁵⁸

While Russia's submission to the CLCS is demonstrative of its policy of working within the UNCLOS legal framework, other actions taken by Russia suggest that it may resort to other measures if its submission proves unsuccessful. One such action transpired on August 2, 2007, when Russia planted its national flag on the Arctic seafloor not far from the North Pole. This act was described as a "symbolic move to enhance the [Russian] government's disputed claim to nearly half of the floor of the Arctic Ocean

Canada in 2003, Denmark in 2004, and has yet to be ratified by the United States. United Nations Division for Ocean Affairs and the Law of the Sea, Declarations and Statements, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Mar. 31, 2009).

51. The Lomonosov Ridge is an underwater structure that runs across the Arctic Ocean and passes under the North Pole. The Mendeleev Ridge is an underwater ridge extending from the Siberian Shelf to central areas of the Arctic Ocean.

52. Marc Benitah, *Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS*, 11 AM. SOC'Y OF INT'L L. INSIGHT, Nov. 2007, available at <http://www.asil.org/insight071108.cfm>.

53. *Id.*

54. *Id.* The CLCS's deliberations and recommendations are also confidential. *Id.*

55. *Id.*

56. Krauss et al., *supra* note 10, at A1.

57. Richard A. Lovett, *Russia's Arctic Claim Backed by Rocks, Officials Say*, NAT'L GEOGRAPHIC NEWS, Sept. 21, 2007, <http://news.nationalgeographic.com/news/2007/09/070921-arctic-russia.html>.

58. *Id.*

and potential oil or other resources there.”⁵⁹ Many described the act as reminiscent of the claims made by European and American explorers in the fifteenth through the twentieth centuries under the Doctrine of Discovery.⁶⁰ A member of Russia’s lower house of parliament present in one of the submarines that planted the flag stated, “[o]ur task is to remind the world that Russia is a great Arctic and scientific power.”⁶¹ Another question regarding Russia’s adherence to UNCLOS is whether it will adhere to the binding settlement dispute and arbitration clauses mandated by the treaty. When UNCLOS was ratified, Russia was still part of the Soviet Union, and the Soviet Union had a history of not accepting compulsory jurisdiction for arbitral or judicial settlement of disputes.⁶²

Furthermore, historically, Russia and Canada are the only two Arctic nations that have established legislation based on the “sector theory,” which divides the Arctic into sectors belonging to the Arctic States.⁶³ Under the sector theory, “polar [S]tates are entitled to exercise sovereignty between their mainland territory and the North Pole in an area of longitude running from their east and west coasts to the Pole.”⁶⁴ The sector theory “depends upon a characterization of the Arctic Ocean as exceptional and deserving treatment different from that applied to the rest of the world ocean.”⁶⁵ Though Russia (then the Soviet Union) “has never considered the limits of the Arctic sector as national boundaries,” its limits under the Soviet sector were used when negotiating with the United States and Norway regarding the eastern and western delimitation of its continental shelf and exclusive economic zones.⁶⁶ Thus, though Russia has ratified UNCLOS and is currently operating within its framework, should it be unsuccessful in gaining sovereignty over a satisfactory portion of the Arctic under UNCLOS, it is not clear what position Russia, as successor of the

59. Chivers, *supra* note 49, at A8.

60. Robert J. Miller, *Finders Keepers in the Arctic?*, L.A. TIMES, Aug. 6, 2007, at 19. Exercising the Doctrine of Discovery, nations would declare their divine right to empty land, or land inhabited by indigenous peoples, under the notion of “first-come, first-served discovery.” *Id.*; see also Jason Warren Howard, Note, *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, 841-42 (2008).

61. Chivers, *supra* note 49, at A8.

62. Kazimierz Grzybowski, Comment, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 205, 205 (1983).

63. Leonid Timtchenko, *The Russian Arctic Sectoral Concept: Past and Present*, 50 ARCTIC 29, 29 (1996).

64. Macneill, *supra* note 15, at 377.

65. Jacobson, *supra* note 12, at 320-21.

66. Timtchenko, *supra* note 63, at 34.

Soviet Union, will take regarding the sector theory, or whether it will resort to other methods of acquiring Arctic territory.⁶⁷

B. The American Perspective

Alaska's coastline bordering the Arctic Ocean gives the United States an interest in the Arctic region and its resources. American focus in the territorial dispute has centered on the Northwest Passage. The United States maintains that the Northwest Passage (the Passage) is not Canadian territory, as the Canadians claim, but rather that the Passage is international waters. The United States cites occasions where foreign ships and submarines have sailed through these waters without the Canadian Government's consent, or even knowledge, as support for its contention.⁶⁸ Thus, the United States has not asserted a rival claim to the Passage, but rather it maintains that the waterway should be open for international navigation.⁶⁹ Central to the position of the United States is the "fundamental law of the sea espousing 'freedom of the sea,' and the right of innocent passage through international waters and territorial seas."⁷⁰ The European Union has supported the American position that the Northwest Passage is an international strait, though it has qualified that support within the context of environmental concerns.⁷¹ Russia, on the other hand, supports Canada's claim of full sovereignty over the Passage.⁷²

While the United States was instrumental in implementing UNCLOS, President Reagan refused to sign the final treaty because of provisions relating to deep seabed mining that he described as contrary to the interests of the United States.⁷³ Though the United States rejected the treaty, in 1983 it issued an Ocean Policy Statement announcing its intent to generally

67. *Id.*

68. Natalia Loukacheva, Legal Challenges in the Arctic 3, Position Paper for the 4th NRF Open Assembly, Oct. 5-8, 2006 (e.g., the U.S. super-tanker, the S.S. Manhattan, in 1969 and 1970; the U.S. icebreaker, the Polar Sea, in 1986; and a U.S. nuclear submarine in 2005).

69. Donald Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331, 332 (1993).

70. Macneil, *supra* note 15, at 382.

71. *Id.* at 366.

72. *Id.* Russia's support of Canadian sovereignty over the Northwest Passage is likely due to the similarity between Canada's claim and Russia's claim over the Northeast Passage, which also links the Atlantic and Pacific, and is located in the Russian Arctic. Russia's interest in establishing its sovereignty over the Northeast Passage "is identical to Canada's interest in establishing sovereignty over the [Northwest Passage]." *Id.*

73. Statement on United States Ocean Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983), available at <http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm>.

abide by the terms of UNCLOS by “promot[ing] and protect[ing] the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.”⁷⁴ Despite the nation’s failure to adopt UNCLOS, the treaty has received widespread support in the United States. In fact, “[i]t is likely that no other treaty has ever been so widely supported and yet failed to be put to a vote in the Senate for such a long duration.”⁷⁵ The treaty’s ratification has been repeatedly blocked by Republican senators who maintain that ratification of the treaty would infringe on American sovereignty.⁷⁶

In May 2007, President Bush advocated for Congress to support American accession to UNCLOS, citing its benefits to national security interests, sovereign rights over marine areas with rights to their natural resources, promotion of American interests in the environmental health of the oceans, and to gain a “seat at the table when the rights that are vital to [American] interests are debated and interpreted.”⁷⁷ On November 5, 2007, the Senate Foreign Relations Committee voted to approve the UNCLOS treaty, which was a step toward American accession. The treaty now moves to the Senate, where it must receive two-thirds of the Senate vote before it can be formally ratified by the President.⁷⁸ The Departments of Defense, Homeland Security, Commerce, and the Interior all strongly support ratification by the United States. The State Department has cited the potential to “secure [American] sovereign rights over extensive offshore natural resources, including substantial oil and gas resources in the Arctic” as one of the benefits of American ratification. It further asserts that “[j]oining the Convention is the only viable means of protecting and maximizing [American] ocean-related interests.”⁷⁹

During the Senate Foreign Relations Committee hearing, Senator Richard Lugar differentiated UNCLOS from other international treaties that the United States has declined to join, in that “the Law of the Sea will continue to form the basis of maritime law regardless of whether the U.S.

74. *Id.*

75. David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, 11 AM. SOC’Y OF INT’L L. INSIGHTS, June 11, 2007, available at http://asil.org/insights/2007/06/insights070611.html#_edn1.

76. Krauss et al., *supra* note 10, at A1.

77. Press Release, President George W. Bush, President’s Statement on Advancing U.S. Interests in the World’s Oceans (May 15, 2007), available at <http://georgewebush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html>.

78. The Center for Oceans Law and Policy, Ratification Questions and Answers on LOS, <http://www.virginia.edu/colp/ratification.html> (last visited Dec. 30, 2008).

79. Press Release, U.S. Dep’t of State, Law of the Sea Convention (Nov. 5, 2007), available at <http://2001-2009.state.gov/r/pa/prs/ps/2007/nov/94622.htm>.

is a party.”⁸⁰ Senator Lugar cited not only the impediment to the United States in its ability to claim an extended part of the continental shelf off the Alaskan coast, but also the weak position the United States will be in to oppose excessive claims to Arctic territory by other nations, particularly Russia.⁸¹ Furthermore, if additional amendments are made to the treaty, member countries may adopt provisions that are opposed to American interests, with the United States powerless to contest them.⁸² One scholar suggests that American support for the treaty is aimed at using membership as “a leverage of influence, not for the sake of cooperation,” since it knows that CLCS decisions are not enforceable.⁸³

In 2001, when Russia made its submission to the CLCS claiming jurisdictional rights over the Lomonosov and Mendeleev Ridges, the United States took the position that the submission was critically flawed.⁸⁴ The American stance is that the Mendeleev Ridge System is a volcanic feature of oceanic origin formed on the oceanic crust, and thus “not part of any State’s continental shelf.”⁸⁵ While the United States has taken this position in opposition of the Russian claim, it cannot oppose the submission to the CLCS. In fact, even if the United States were a member of UNCLOS, the treaty makes no provisions for non-submitting States to contest another State’s submission.⁸⁶

If it ratifies UNCLOS, the United States seeks to gain “maximum freedom to navigate and operate off foreign coasts without interference,” for both security and economic purposes.⁸⁷ If the United States does not ratify UNCLOS, it may attempt to assert these freedoms under customary international law. However, its ability to do so is growing weaker, as when coastal States extend their exclusive economic zones, “customary

80. *The Convention on the Law of the Sea*, 110th Cong. (2007) (statement of Sen. Lugar, Member, S. Comm. on Foreign Relations).

81. *Id.*

82. Candace L. Bates, Comment, *U.S. Ratification of the U.N. Convention of the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT’L & COM. REG. 745, 767 (2006).

83. Vsevolod Gunitskiy, *On Thin Ice: Water Rights and Resource Disputes in the Arctic Ocean*, 61 J. INT’L AFFAIRS 261, 267 (2008).

84. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 956, 969 (2002).

85. *Id.* at 970 (quoting United States of America: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf Ref. No. CLCS.01.2001.LOS/USA (Mar. 18, 2002)).

86. Howard, *supra* note 60, at 854, 856.

87. *The Convention on the Law of the Sea, Before the S. Comm. On Foreign Relations*, 110th Cong. 3 (2007) (statement of Bernard H. Oxman, University of Miami School of Law Professor).

international law may . . . evolve[] in a way contrary to [American] [i]nterests.”⁸⁸ Customary law is “not universally accepted, evolves based on State practice, and does not provide access to the Convention’s procedural mechanisms, such as the continental shelf commission.”⁸⁹ The United States may make excessive maritime claims through customary international law or military operations, but either such approach is “less certain, more risky, and more costly” than working under the UNCLOS framework.⁹⁰

Despite it being the less favorable approach, the United Nations charter does recognize customary international law,⁹¹ which is defined as law resulting from “a general and consistent practice of states followed by them from a sense of legal obligation and is comprised of those clear and unambiguous rules by which states, or nations, universally abide or to which they acceded, out of a sense of legal obligation or mutual concern.”⁹² Therefore, it is not necessary for a State to sign a treaty for customary international law to apply. Customary international law is based on a theory of State consent, and if a State consistently objects to a rule of customary international law, it will not be bound by it.⁹³ Traditionally, there have been two elements required to confirm the existence of a customary international law: “(1) a general and consistent practice by states, and (2) *opinio juris*, a belief by the states that the practice in question is either required or permitted . . . by customary international law.”⁹⁴ However, in modern times, conventions are also being considered legitimate means of creating “customary rules of law that are binding on all states, including nonparties.”⁹⁵ In fact, conventions have become the

88. OceanLaw.org, The United States, Customary Law, and the LOS Convention, <http://www.oceanlaw.org/index.php?name=News&file=article&sid=33> (last visited Apr. 26, 2008) (quoting Sam Bateman, Letter to the Editor, NAVAL INST. PROCEEDINGS, Aug. 2007, at 6-7).

89. *The UN Convention on the Law of the Sea: Hearing on Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention Before the S. Comm. on Foreign Relations*, 110th Cong. 6 (2007) (written testimony of John D. Negroponte, Deputy Secretary of State).

90. David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, THE BROOKINGS INST., Aug. 2004, at 3-4, available at http://www.brookings.edu/papers/2004/08energy_sandalow.aspx.

91. Statute of the International Court of Justice, art. 38, para. 1(b), June 26, 1945, 3 Bevans 1179 (incorporated in U.N. Charter art. 92).

92. 48 C.J.S. *International Law* § 2 (2008).

93. William V. Dunlap, *Transit Passage in the Russian Arctic Straits*, in 1 MARITIME BRIEFING 11 (Peter Hocknell, ed., 1996).

94. *Id.*

95. Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT’L L.J. 405, 407-08 (2006).

prevailing source of customary international law.⁹⁶ The current status of international customary law in the Arctic is debatable, but some scholars have argued that, to a wide extent, UNCLOS represents customary international law.⁹⁷ Should this be the case, and should UNCLOS remain the framework of international governance of the Arctic, the United States may be left out of the Arctic entirely. However, if UNCLOS has not become customary international law, the United States will be free to contend that the Convention on the High Seas governs the dispute, allowing it, and other states, the freedom to mine the seabed and navigate the waters.⁹⁸

Even beyond its failure to ratify UNCLOS, the United States has not made the Arctic a high priority. Despite its continued presence in the region, it has spent relatively little on Arctic research and has failed to maintain ships capable of safely navigating through polar waters.⁹⁹ The United States could significantly increase its presence in the Arctic with “even a small increase in manpower and money.”¹⁰⁰

C. *The Canadian Perspective*

Canada is involved in two main territorial disputes: with the Danes over Hans Island,¹⁰¹ and with the United States over the Northwest Passage. Canada bases its claim to Hans Island on historic use by the Inuit populations of the Queen Elizabeth Islands, which it contends include Hans Island.¹⁰² However, Canada’s claim is weakened by the fact that no Canadian Inuit have ever hunted or routinely traveled in the Hans Island

96. *Id.* at 419.

97. *Id.* at 406.

98. Howard, *supra* note 60, at 860. The Convention on the High Seas codified the well-established doctrine that holds that no state has jurisdiction over the ocean. *Id.* at 842.

99. Krauss et al., *supra* note 10, at A1. The U.S. has only three ships capable of Arctic navigation, two of which are in disrepair, as compared to Russia’s eighteen icebreaker ships. Borgerson I, *supra* note 1, at A19.

100. Borgerson II, *supra* note 15, at A21.

101. Hans Island is a two-square-kilometer rock located in the middle of the Kennedy Channel, halfway between Ellesmere Island, Canada’s northernmost island, and Greenland, owned by Denmark. In 1973, when the border between Canada and Greenland was drawn, the two nations “agreed to interrupt the border at the low water mark at the south end of the island and recommence it at the low water mark at the north end of the island.” Kenn Harper, *Taissumani: A Day in Arctic History August 29, 1871—Hall Names Hans Island*, NUNATSIAQ NEWS (Iqaluit, Can.), Aug. 26, 2005, available at <http://www.nunatsiaq.com/archives/50826/opinionEditorial/columns.html> [hereinafter Harper I].

102. Loukacheva, *supra* note 68, at 3. The Queen Elizabeth Islands are the northernmost group of islands in the Canadian Arctic Archipelago.

area.¹⁰³ Furthermore, as an alternative basis for sovereignty, Canada claims that the island is Canadian territory because it was discovered by the British, but some scholars suggest that Hans Island was actually discovered by Americans.¹⁰⁴ Sovereignty over this small island is coveted not only for the potential oil reserves that may lie beneath it, but also for its location in the center of the Kennedy Channel, which may become an important shipping route in the future.¹⁰⁵

Canada has also made a claim of sovereignty over the Northwest Passage, maintaining that the Passage is historically internal waters.¹⁰⁶ In 1985, Canada drew straight baselines¹⁰⁷ around the Arctic islands, thereby enclosing the coastal waters in its jurisdiction. Canada maintains it did so for the sole purpose of defining the boundaries of its historical internal waters, and thus was not making any claim beyond what it contends has always belonged to Canada.¹⁰⁸ Canada's claim of sovereignty over the Passage hinges on the status of the Passage before Canada drew its straight baselines.¹⁰⁹ Accordingly, it must show that the Northwest Passage is not, and has never been, considered an international strait.¹¹⁰ Unfortunately, UNCLOS fails to specify the elements of an international strait, and neglects to describe the "amount of maritime traffic necessary to meet functionality requirements for international straits."¹¹¹

Canada claims that the Arctic Archipelago and the Northwest Passage are as significant to its national consciousness and as integral a part of its nationhood as the Canadian Rockies.¹¹² However, a potential barrier to its claim of control over the region may be the "significant American presence in the region[, whose] . . . influence pervades the North."¹¹³ The presence

103. Kenn Harper, *Hans' History*, CANADIAN GEOGRAPHIC, <http://www.canadiangeographic.ca/hansIsland/background.asp> (last visited Dec. 30, 2008) [hereinafter Harper II].

104. Harper I, *supra* note 101.

105. Jarashow, Runnels & Svenson, *supra* note 2, at 1593-94.

106. Internal waters are "waters on the landward side of the baseline of the territorial sea." UNCLOS, *supra* note 37, art. 8.

107. A straight baseline is the low-water line of a coast, "with exceptions made for naturally occurring deviations such as bays, harbours, and islands[,] . . . [that] connect[s] the outermost points of a coast." Perry, *supra* note 14, at 663 n.29. Guidelines for the drawing of straight baseline boundaries are detailed in Article 7 of UNCLOS.

108. Donat Pharand, Professor of L., Univ. of Ottawa, Legal Regimes of the Arctic, Remarks at the American Society of International Law Proceedings, (Apr. 22, 1988), in 82 AM. SOC'Y INT'L L. PROC. 315, 331-32 (1988).

109. Rothwell, *supra* note 69, at 360.

110. *Id.*

111. Jarashow, Runnels & Svenson, *supra* note 2, at 1609 n.112.

112. Perry, *supra* note 14, at 662.

113. *Id.* at 668.

of American submarines in the Arctic region is “a glaring affront to Canada’s ability to monitor and control the presence of foreign vessels in waters [over which] it claims dominion,” and thereby weakens Canada’s claim of control over the Arctic Archipelago.¹¹⁴ Though Canada has neither the financial resources nor the military capacity to maintain the necessary presence required to monitor and control the region,¹¹⁵ Canada has taken action to assert its sovereignty over the Northwest Passage by increasing its military presence in its waters.¹¹⁶

Though the Canadian military may be lacking a significant presence in the Northwest Passage, the Inuit, Canada’s native population, have a long history in the Passage and thus support Canada’s claim to the Passage. The Nunavut Land Claims Agreement pronounces Canada’s sovereignty over the waters of the Arctic Archipelago based on Inuit use and occupancy.¹¹⁷ An Inuit leader testifying before a Special Joint-Committee on Canada’s international relations affirmed Canada’s position: “Canadian Inuit have always used the waters and the ice in winter, thereby providing Canada with the case at international law required to secure Canadian rights.”¹¹⁸ In fact, archeological evidence suggests that the Inuit may have used the Arctic waters since prehistoric time.¹¹⁹ Hunting in the Arctic region is critical to the Inuit economy, and Canada’s claim to sovereignty may be strengthened by arguments that it is seeking control of the territory to ensure and protect the welfare of its Inuit population.¹²⁰ However, despite Inuit support of Canadian sovereignty over the passage, international law does not specify whether indigenous populations “have the ability to possess or transfer titles to land.”¹²¹

Simple geography provides additional support for Canada’s claim over the Arctic Archipelago and the Northwest Passage. The Arctic Archipelago

114. *Id.* at 668-69.

115. *Id.* at 671.

116. Loukacheva, *supra* note 68, at 4. To further this objective, the government plans to build a deep-water seaport in Nunavut, create a new military training center, improve surveillance, increase the number of Canadian rangers, and purchase three naval ice breakers. *Id.*

117. Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, Can.-Nun., art. 15.1.1, May 25, 1993. This agreement, known as the Nunavut Land Claims Agreement (NLCA), is an agreement between the Inuit of the Nunavut Settlement Area and Canada. The NLCA established a lands claim agreement whereby the “Inuit receive[d] defined rights and benefits in exchange for surrender of any claims, rights, title and interests based on their assertion of an aboriginal title.” *Id.* at pmb1.

118. Perry, *supra* note 14, at 673.

119. *Id.*

120. *Id.* at 675.

121. Jarashow, Runnels & Svenson, *supra* note 2, at 1621-22.

is an extension of the Canadian mainland—an archipelago of the Canadian continental shelf—rather than an independent chain of islands.¹²² The very location of the Passage and the islands that make up the Arctic Archipelago provide the most apparent support for Canadian sovereignty, and may prove to be among Canada’s strongest arguments for sovereignty.

In response to the United States’ failure to recognize Canada’s exclusive control over the Arctic Archipelago and the Northwest Passage, Canada has stated that it is “prepared to uphold its position of Arctic sovereignty in the World Court if necessary and to have the issue freely and fully judged there.”¹²³ Speaking in the House of Commons in 1985, the then Secretary of State stated,

Canada’s sovereignty in the Arctic is indivisible. It embraces land, sea, and ice. It extends without interruption to the seaward-facing coasts of the Arctic islands. These islands are joined and not divided by the waters between them. . . . The policy of this government is to maintain the natural unity of the Canadian Arctic archipelago [sic.], and to preserve Canada’s sovereignty over the land, sea, and ice undiminished and undivided. . . . Only full sovereignty protects the full range of Canada’s interests. This full sovereignty is vital to Canada’s security. It is vital to Canada’s Inuit people. And it is vital even to Canada’s nationhood.¹²⁴

Canada has expressed interest in cooperating with the United States and other Arctic States with regard to the Arctic Archipelago, but “only . . . on the basis of full respect for Canada’s sovereignty.”¹²⁵

While Canada has been firm in its claim to exclusive control over these waters, it has also indicated support for international shipping through the Passage, so long as other States comply with Canadian regulations.¹²⁶ However, the dispute over the Northwest Passage is not solely over use of the waters for shipping purposes. There are two further motivations for Canada to assert its sovereignty over the Northwest Passage: its “immense hydrocarbon reserves . . . [and] the central proximity of the Canadian Arctic Archipelago to the [former] Soviet Union and the United States, [which] makes [it] an area of vital strategic interest. Indeed, the shortest distance

122. Perry, *supra* note 14, at 677.

123. *Id.* at 661 (citing David K. Shieler, *U.S. and Canada Close Extradition Gap*, N.Y. TIMES, Jan. 12, 1988, at A2).

124. Canada: Statement Concerning Arctic Sovereignty, Sept. 19, 1985, 24 I.L.M. 1723, 1724-25.

125. *Id.* at 1726.

126. Macneill, *supra* note 15, at 372.

between the two super powers is across the Arctic Circle.”¹²⁷ Given the value of the Arctic Archipelago’s location, Canada may try to further its claim by making a legal argument relating to security. It may contend that if the Passage is determined to be international waters, other nations will have free reign over the Passage and could send terrorist warships or vessels carrying toxic cargo through the Passage without notification.¹²⁸ Thus, Canada has a range of support for its Arctic claims, most of which are nonscientific, and thus not likely to be useful in a submission to the CLCS under UNCLOS.

D. The Danish Perspective

The Danes are seeking to assert their sovereignty over two areas: Hans Island, and the Lomonosov Ridge and North Pole. The Danes have claimed Hans Island through “effective occupation,” by flying the Danish flag over the island for several years and making repeat visits to the island, but their claim is disputed by Canada.¹²⁹ Yet, unlike the Canadian Inuit, the native populations of Greenland¹³⁰ have historically hunted in the area, used it to monitor ice floes, and have their own name for the island.¹³¹

Denmark also argues that it has the right to the Lomonosov Ridge under UNCLOS, which would give it a claim to waters up to 370 kilometers from its baseline, and legally entitle it to exploit the shelf area for natural resources.¹³² Denmark contends that the Lomonosov Ridge is an extension of Greenland’s landmass.¹³³ If Denmark can show that the Ridge is Danish territory, it may have a claim to the North Pole as well.¹³⁴ Just ten days after the Russians planted their flag under the North Pole, Denmark dispatched a team of scientists to the region to look for evidence that the Lomonosov Ridge is attached to Greenland, which would make it a geological extension of the Arctic island.¹³⁵ Denmark has indicated that

127. *Id.* at 366 (citing Paul A. Kettunen, *The Status of the Northwest Passage Under International Law*, 1990 DET. C.L. REV. 929, 940 (1990)).

128. Loukacheva, *supra* note 68, at 4.

129. *Id.* at 3.

130. Denmark has owned Greenland since 1814.

131. Harper I, *supra* note 101. The Inughuit, natives of northwestern Greenland, call Hans Island “Tartupaluk,” which describes its kidney-like shape. *Id.*

132. Dubner, *supra* note 9, at 1, 10.

133. *Id.* at 1.

134. Krauss et al., *supra* note 10. The North Pole is approximately 420 miles from Greenland’s coast. Andrew C. Revkin, *The World: Jockeying for Pole Position*, N.Y. TIMES, Oct. 10, 2004, at 4.4.

135. *Denmark Maps Arctic Ridge in Race for Polar Sovereignty*, INT’L HERALD TRIB.,

its preliminary investigations have been “very promising” and suggestive that “Denmark could be given the North Pole.”¹³⁶

E. The Norwegian Perspective

Norway has deep physical and psychological roots in the Arctic.¹³⁷ The Norwegians consider exploration of the Arctic a significant part of their country’s history and influential in the formation of its national identity.¹³⁸ In 2006, Norway made a submission to the CLCS claiming that its continental shelf extends as far as eighty-four degrees, forty-one minutes north, which is not far enough to include the North Pole.¹³⁹ Other than Russia, Norway is the only Arctic State thus far to make a submission. Norway has stated its policy of working under the rules and legal norms of UNCLOS and its expectation that the other Arctic States will do the same.¹⁴⁰ Its submission to the CLCS within its ten-year deadline is evidence of its adherence to UNCLOS procedure. When Russia planted its flag at the North Pole, Norway rebuffed the Russian effort, calling it a “symbolic act of no legal or material consequence,” as such actions have no meaning under UNCLOS.¹⁴¹

Norway contends that the Arctic does not require a new legal regime, but rather a more effective application of existing international law.¹⁴² Despite its current stance, however, Norway has also indicated that it is “always . . . open to consider[ing] new mechanisms for cooperation.”¹⁴³ The nation has “emphasized the need to structure a long-term system of international governance for the polar region[]; [and] its scientists and researchers [have] call[ed] for cooperation rather than competition.”¹⁴⁴

Aug. 10, 2007, available at <http://www.ihl.com/articles/ap/2007/08/10/europe/EU-GEN-Denmark-Arctic-Claims.php>.

136. Ewen MacAskill, *Canada Uses Military Might in Arctic Scramble*, GUARDIAN (Manchester), Aug. 11, 2007, available at <http://www.guardian.co.uk/world/2007/aug/11/oil.arctic>.

137. Tom Hundley, *Arctic Claims are Poles Apart: Russian Flag-Planting a Signal of Global Race for Vast Oil, Gas Deposits*, CHI. TRIB., Aug. 24, 2007, at 12.

138. *Id.*

139. Press Release, Elisabeth Walaas, State Sec’y of Nor., Norway’s Policy in the High North – The Arctic Dimension (Jan. 21, 2008), available at http://www.Regjeringen.no/en/dep/ud/About-the-Ministry/Other-political-staff/elisabeth_walaas/Speeches-and-articles/2008/Norways-Policy-in-the-High-North--the-Ar.html?id=497558.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Hundley, *supra* note 137.

Norway has not only expressed its interest in collaborating with the other Arctic States to form a stronger legal governance, it has also made a commitment to preserving the Arctic ecosystems and environment while ensuring the use of the Arctic's natural resources.¹⁴⁵ Norway has become increasingly important to the United States in terms of American energy policy, and Norway "welcome[s] the heft of the United States in its negotiations with Russia."¹⁴⁶ Norway is eager to settle its territorial dispute with Russia so that it may apply its standards for exploration and control over the area.¹⁴⁷

III. AN ARCTIC TREATY: THE SOLUTION?

While others have concluded that State ratification of, and adherence to, UNCLOS poses the best solution to the conflicting claims over Arctic territory,¹⁴⁸ an Arctic treaty, if properly designed, could provide a more optimal resolution. An Arctic treaty has the potential to resolve not only the competing sovereignty claims, but also additional issues unique to the Arctic.

A. *The Antarctic Treaty as a Model?*

The existing dispute over the Arctic is similar to the one that transpired approximately fifty years ago over Antarctica. At that time, seven nations¹⁴⁹ were vying for Antarctic territory. These nations resolved their conflicting claims through the Antarctic Treaty, thereby establishing a legal framework of joint governance over the continent.¹⁵⁰ The Treaty went into effect in 1961 with the primary purpose of preserving Antarctica for cooperative scientific investigation and also to ensure that the region only

145. Press Release, Walaas, *supra* note 139.

146. Krauss et al., *supra* note 10.

147. *Id.*

148. Jarashow, Runnels & Svenson, *supra* note 2, at 1652; King, *supra* note 19, at 352-53. See Bates, *supra* note 82, at 790-92.

149. The seven nations were: Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom.

150. Borgerson I, *supra* note 1, at A19. There were twelve original signatories to the Antarctic Treaty: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, Russia (then the Soviet Union), South Africa, the United Kingdom, and the United States. In subsequent years, additional nations have ratified the treaty, bringing the total current number of signatories to forty-five, all of whom have agreed to suspend any past or new claims. Scientific Committee on Antarctic Research, Signatories to the Antarctic Treaty, <http://www.scar.org/treaty/signatories.html> (last visited Dec. 30, 2008).

be used for peaceful purposes.¹⁵¹ It gave Antarctica “a unique international status and provided for the creation of a distinctly regional structure of principles and institutions.”¹⁵² The Treaty did not settle the sovereignty disputes, but rather “froze” the claims, leaving them to be resolved at some later, unspecified date.¹⁵³ Thus, the signatories to the Treaty agreed to suspend their territorial claims in furtherance of the Treaty’s goals.¹⁵⁴ In addition to suspending existing claims, the Treaty further specified that no act taken while the Treaty is in place may constitute a basis for asserting or denying a claim of sovereignty.¹⁵⁵ At present, some nations believe that the claims should remain frozen permanently, and Antarctica should become a “global commons,” owned not by any one nation, but by all nations.¹⁵⁶ However, the Treaty members who have agreed to freeze sovereignty claims have repeatedly expressed steadfastness in retaining their claims.¹⁵⁷ Despite the uncertainty over the future status of Antarctica, the Treaty has thus far proved effective in governing the region, and a similar strategy may also be successful in resolving the present dispute over territory in Antarctica’s northern counterpart.

While there are many similar problems in the Arctic and Antarctic,¹⁵⁸ it is also critical to note the differences between the two polar regions. The most apparent distinction is that while Antarctica is its own continent, the Arctic is an ocean almost completely surrounded by land, making its boundaries more difficult to define. Also, Antarctica has had virtually no human activity, with the exception of scientific researchers, while the Arctic is home to many indigenous peoples.¹⁵⁹ The presence of these native populations in the Arctic means there are many more interested parties in the region than was the case with Antarctica. The polar regions also differ in that the Arctic plays a much greater role in processes beyond its realms, such that environmental changes in the North can have consequences

151. Scientific Committee on Antarctic Research, The Antarctic Treaty, http://www.scar.org/treaty/at_text.html (last visited Dec. 30, 2008).

152. Alan E. Boyle, Faculty of L., Queen Mary Col., Legal Regimes of the Arctic, Remarks at the American Society of International Law Proceedings, (Apr. 22, 1988), in 82 AM. SOC’Y INT’L L. PROC. 315, 324 (1988).

153. Borgerson I, *supra* note 1, at A19.

154. Jill Grob, Note, *Antarctica’s Frozen Territorial Claims: A Meltdown Proposal*, 30 B.C. INT’L & COMP. L. REV. 461, 462 (2007).

155. Antarctic Treaty art. IV, Dec. 1, 1959, 12 U.S.T. 794.

156. Grob, *supra* note 154, at 465.

157. *Id.* at 462.

158. Global warming has also had drastic effects in Antarctica, where annual temperatures have increased about two-and-a-half degrees in the last fifty years. Dubner, *supra* note 9, at 4.

159. Grob, *supra* note 154, at 461.

around the globe.¹⁶⁰ Additionally, “[i]n the Arctic, extraction of oil, gas and minerals, at sea and on land, is an important reality; in the Antarctic, it is only a conjecture.”¹⁶¹ The vast quantities of natural resources known to be in the Arctic present issues related not only to control over those resources, but also to the extent to which they should be extracted. The value of these resources may make States with strong claims to significant territory in the Arctic reluctant to enter into a treaty.

The Antarctic Treaty may prove less useful as a guide for an Arctic treaty with regard to issues facing the Arctic that are unrelated to state sovereignty. For example, though the Antarctic Treaty authorizes parties to the Treaty to negotiate measures “in furtherance of . . . preservation and conservation of living resources in Antarctica,” it does not explicitly state environmental protection as an objective of the Treaty.¹⁶² The preservation of the Arctic environment would likely play a more pivotal role in the formation of an Arctic treaty. In addition, governance of the exploitation of the natural resources of the Arctic and protection of the welfare of indigenous populations, neither of which is addressed in the Antarctic Treaty, will be important objectives of an Arctic treaty. Thus, while the Antarctic Treaty may certainly serve as a foundation for an Arctic Treaty, it is only a starting point.

B. An Arctic Treaty

The procedure prescribed by UNCLOS, the international legal framework under which most Arctic nations are currently operating, could potentially prove effective in resolving the present dispute over Arctic territory, but there are many more issues facing the region that call for a new international agreement. A comprehensive treaty would be a more effective means of resolving not just the jurisdictional controversy, but also further concerns unique to the Arctic, including the environment, national security, management and exploitation of natural resources, Inuit interests, and governance of waterway usage. The issues arising in the Arctic, due to its unique icy makeup, cannot all be addressed within the UNCLOS framework, whose principles and legal norms were developed for governance of open water, not glacial masses.¹⁶³

160. Dubner, *supra* note 9, at 5.

161. Boyle, *supra* note 152, at 324.

162. Antarctic Treaty, *supra* note 155, art. IX.

163. Joyner, *supra* note 30, at 242. Because of the distinct features and geophysical nature of ice, UNCLOS does not adequately address “its legal relationship with the rest of the earth’s environment.” *Id.*

[An Arctic treaty] could arrange for sustainable development of Arctic resources, do the seafloor mapping that's needed to sort out the conflicting territorial claims, develop shipping shortcuts through the northern passages, set technological standards for ships that navigate the icy waters and guard the welfare of the more than one million indigenous people living within the Arctic Circle.¹⁶⁴

A new international governance under an Arctic treaty could therefore be a first step in developing the newly accessible Arctic, while also preserving the environment and the welfare of its native populations.

With regard to claims of territorial sovereignty, an Arctic treaty might approach the issue in one of three ways: (1) divide the Arctic among the States based on some formula agreed upon by the States; (2) direct that the territorial division will be determined under UNCLOS procedure; or (3) like the Antarctic Treaty, freeze all State territorial claims. The first option for dividing the Arctic is improbable, as the current dispute exists for the very reason that the States cannot agree. The next option is also unlikely so long as the United States refuses to ratify the UNCLOS treaty. The United States is not apt to agree to an Arctic treaty that resolves the dispute through the UNCLOS process if it remains unable to participate within its framework. However, were the United States to ratify UNCLOS, such an approach may prove effective. Within this option, an Arctic treaty could indicate that UNCLOS is to govern the States' sovereignty claims while other provisions of the treaty could address the concerns unique to the Arctic not covered by UNCLOS. States, such as Russia, who have already begun working under the laws of UNCLOS, would likely favor this approach, as they will be able to continue in the UNCLOS process of submitting claims to the CLCS. By establishing UNCLOS as the governing law, the Arctic States will be bound by the determinations made by the CLCS, and left without alternatives under, for example, customary law. However, even were the United States to ratify UNCLOS, this approach is potentially problematic because the CLCS has no actual authority to settle disputes or enforce its recommendations. Thus, should more than one State claim the same territory, as will inevitably occur, it is unclear how the Commission will proceed.¹⁶⁵ Claims made by one State are subject to counter-claims by other States, and while the CLCS's recommendations are "binding," the body has no power to enforce them.¹⁶⁶

164. Borgerson I, *supra* note 1, at A19.

165. Howard, *supra* note 60, at 849-50.

166. Gunitskiy, *supra* note 83, at 262.

Thus, the most favorable approach is to freeze all claims to Arctic territory, at least until there has been more scientific study of the region. Under the terms of an Arctic treaty, the States could prescribe extensive mapping of the sea floor, which would likely resolve many of the conflicting territorial claims, as they exist largely due to a lack of scientific information on the region. A major benefit of this approach is that, as was the case with Antarctica, States would agree that scientific exploration, peace, and preservation of the fragile ecosystems of the Arctic region are more important than their claims to sovereignty.

An Arctic treaty should also address permissible activity within the region. It is essential that the treaty resolve the acceptable level of resource extraction, if allowed at all, in consideration of the consequences to the environment and native populations. While UNCLOS may be an effective alternative in determining the jurisdictional limits of the Arctic States, once those boundaries are delineated, it lacks the mechanisms to control what the States do within the realm of their respective territories. While “[e]xcluding others from exploitation of the shelf’s resources is an essential element of a State’s jurisdiction over conduct on the shelf,” it does not necessarily follow that a State should be able to develop the area within its bounds.¹⁶⁷ Though UNCLOS broadly calls on coastal States to protect the marine environment, it lacks any enforcement mechanism.¹⁶⁸ An Arctic treaty could establish limits to exploitation of the Arctic natural resources, and institute other environmental standards to preserve the natural landscape and indigenous populations that currently inhabit the region. Such provisions are critical, as the ecosystem of the Arctic has been described as “more finely tuned and acutely sensitive to environmental impact than . . . any other part of the globe.”¹⁶⁹ Because Arctic ecosystems are so fragile and have lengthy recovery periods, any pollution or contamination of the environment could have ruinous effects, especially given “the increased difficulty in cleaning-up the Arctic environment due to the frigid, icy weather conditions.”¹⁷⁰ Not only is accidental pollution, such as oil spills, a serious concern, but so is pollution caused by the constant routine passage

167. Dubner, *supra* note 9, at 10.

168. *Id.* at 12.

169. Melissa A. Verhaag, *It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment*, 15 GEO. INT’L ENVTL. L. REV. 555, 559 (2003) (quoting Jennifer McIver, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?*, 10 GEO. INT’L ENVTL. L. REV. 147, 148 (1997)).

170. Dubner, *supra* note 9, at 6, 14.

of ships through the region's waters.¹⁷¹ It is critical to the marine environment that the international community "regulate the [Arctic] environment by preventing oil spillage and other despoliation of the Arctic Ocean."¹⁷² Without such an agreement, a lack of oversight of a State's activities within its jurisdiction could lead to drastic consequences in the Arctic and worldwide. Furthermore, if the treaty is to allow some resource extraction, it also should address who profits from those resources. Not only do the Arctic States have an interest in profiting from the region's rich energy resources, but the indigenous Arctic populations have also indicated their desire to share in the proceeds if extraction is to be allowed.¹⁷³

While the prospect of attaining access to the Arctic's valuable natural resources may pose a challenge to an international agreement, past cooperation amongst the Arctic States provides hope that an Arctic treaty is attainable. The United States and Canada have already forged the Arctic Cooperation Agreement in acknowledgement of the need to "cooperate in advancing their shared interests in Arctic navigation, development and security," while remaining sensitive to the Arctic's unique environment and its native populations.¹⁷⁴ Likewise, in 2005, Canada and Denmark reached an agreement for managing Hans Island, while the two States continue to pursue their claims of the small land mass.¹⁷⁵ They have also undertaken a joint surveying project of the Arctic area near their coasts.¹⁷⁶ In 1996, the eight Arctic States established the Arctic Council, which was designed to promote cooperation among the Arctic States. While the Arctic Council is demonstrative of the States' ability to cooperate, it cannot serve the same function as an Arctic treaty since it has been delegated negligible power and its laws have no binding effect on the Arctic States.¹⁷⁷ To date, "the most the Arctic Council has been able to do . . . has been to adopt guidelines and recommendations on how the Arctic [S]tates should apply their [individual State] regulations in [Arctic] areas."¹⁷⁸ Thus, while States

171. Lee Clark, *Canada's Oversight of Arctic Shipping: The Need for Reform*, 33 TUL. MAR. L.J. 79, 84-85 (2008).

172. Dubner, *supra* note 9, at 11.

173. Delphine Touitou, *Indigenous Populations Call for Share of Arctic Profits*, AGENCE FR.-PRESSE, Jan. 23, 2008, at 02:12:00.

174. Canada-United States: Agreement on Arctic Cooperation and Exchange of Notes Concerning Transit of Northwest Passage, U.S.-Can., Jan. 11, 1988, 28 I.L.M. 141.

175. Loukacheva, *supra* note 68, at 3.

176. Krauss, *supra* note 10, at A1.

177. See Timo Koivurova, *Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn from Each Other?*, 33 INT'L J. LEGAL INFO. 204, 214 (2005).

178. *Id.*

have undertaken collaborative approaches to the Arctic, there continues to be a need for binding international law in the Arctic.

In addition to requiring the Arctic States to freeze, at least temporarily, their claims to Arctic territory, an Arctic treaty will also need to address use of Arctic waterways while claims are frozen. The Northwest Passage provides an obvious example. If the Canadian claim that the Passage is internal waters—and thus closed to foreign vessels—and the American claim that the Passage constitutes international waters—whereby foreign vessels are entitled to exercise normal freedoms of navigation—are both “frozen,” it is not readily apparent whether foreign vessels are to be permitted to use the strait.¹⁷⁹ One way an Arctic treaty could manage use of the Northwest Passage is to allow Canada to exercise sovereignty over the Passage while also permitting international navigation through the Passage. Thus, the treaty could allow Canada’s sovereignty claim to remain intact, while also allowing for navigation based on UNCLOS provisions regarding transit passage through international straits.¹⁸⁰ Accordingly, both States would be able to achieve their objectives in the short term while maintaining their contrary positions.

In addition to addressing conflicting territorial sovereignty claims and preservation of the Arctic environment, an Arctic treaty should also address security concerns. Like the Antarctic Treaty,¹⁸¹ a treaty in the Arctic should express that the Arctic shall be used exclusively for peaceful purposes. Additionally, it is critical that an Arctic treaty include: provisions for enforcement, penalties for signatories who breach its terms, and a provision for dispute resolution.¹⁸²

Thus, an Arctic treaty is the most optimal framework for Arctic governance, as it has the potential to address the wide range of issues that face this distinctive region, and assure future cooperation among the States. The rapidity with which the Arctic is melting and the approaching State deadlines imposed by UNCLOS for CLCS submissions demand that the States work on developing a treaty now. Representatives of the five Arctic States met most recently in Ilulissat, Greenland, in May 2008, at which time they issued a joint declaration acknowledging the changing conditions of the Arctic due to climate change.¹⁸³ The declaration also indicated an intention and commitment to continued Arctic governance under

179. Rothwell, *supra* note 69, at 368.

180. *Id.* at 369.

181. Antarctic Treaty, *supra* note 155, art. I.

182. Verhaag, *supra* note 169, at 577.

183. The Ilulissat Declaration, May 28, 2008, http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf (last visited Apr. 14, 2009)

UNCLOS.¹⁸⁴ In apparent response to the growing criticism of that approach, the declaration stressed the five States' commitment to cooperating with each other, and concluded, "We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean."¹⁸⁵ The Arctic States' adherence to the UNCLOS framework, however, is fraught with the potential for future conflict as issues arise for which the treaty has not provided. The time to develop an Arctic treaty is now, while the States are expressing a commitment to cooperation, and before any one State gains an advantage over the others by successfully securing sovereignty over a portion of the Arctic. Because of the uncertainty as to the strength of each State's claim, and the risk to each that sovereignty may be denied it in favor of another State, it would be in each State's best interest to enter into an Arctic treaty now to assure its continuing role in governance of the region.

IV. CONCLUSION

While the opening of shorter navigational routes and the increasing accessibility of natural resources, including oil, coal, and gas, may be advantageous to the economies of the Arctic States, the melting of the polar ice caps will also result in global and regional climate changes, increased sea levels worldwide, and detrimental consequences for the Arctic environment and its native marine populations, which are of vital significance to the rest of the world.¹⁸⁶ Much of the dispute over territory in the Arctic stems from uncertainty due to the lack of knowledge and scientific data regarding this long-overlooked region of the world. Each of the five Arctic States asserting claims to the region are doing so on a variety of bases, from historical claims to scientific claims, unsure of which will prove effective under international law. While UNCLOS has been the international legal framework utilized in the Arctic to date, it will be insufficient in addressing all the concerns that plague the Arctic, regardless of whether the United States ratifies the treaty. The Arctic requires its own system of governance that can address its unique features, as "[n]o one wins if the region remains a lawless frontier."¹⁸⁷ The Arctic is too valuable and too significant to processes throughout the world to allow it to remain unregulated. If the sovereignty dispute is somehow resolved through

184. *Id.*

185. *Id.*

186. See SUSAN JOY HASSOL, *IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 14* (Cambridge Univ. Press 2004), available at <http://amap.no/acia/>.

187. Borgerson I, *supra* note 1, at A1.

UNCLOS or some other process without an Arctic treaty in place, the entire world will be at the mercy of a few States. Whichever States gain sovereignty rights will be free to fully exploit the region with the rest of the world helpless to stop them. An Arctic treaty, however, can strike a balance between preserving the Arctic of yesterday and developing the Arctic of tomorrow.