

AN ARCTIC RACE: HOW THE UNITED STATES' FAILURE TO RATIFY THE LAW OF THE SEA CONVENTION COULD ADVERSELY AFFECT ITS INTERESTS IN THE ARCTIC

Marta Kolecz-Ryan *

INTRODUCTION

The Arctic's unfavorable weather and climate conditions have produced one of the most inhospitable environments on Earth, which led to a very limited presence of humans and an absence of sovereignty claims for centuries.¹ As global warming causes the polar icecaps to recede, potentially oil-rich seabeds are being uncovered beneath the Arctic Ocean in the rapidly navigable—and drillable—territory. According to the U.S. Geological Survey estimations, the Arctic Ocean's seabed may hold vast reserves of oil and natural gas—up to 25% of the world's undiscovered reserves.²

Not surprisingly, the recent discoveries sparked a new land rush of claims in the Arctic region—the division of which will be governed by the United Nations Convention on the Law of the Sea (“the Convention”).³ Under the Convention, five nations—Canada, the United States, Russia, Norway and Denmark—can claim the natural resources on, above, and beneath the Arctic Ocean floor up to 200 miles from their shorelines.⁴ They can also extend their claim up to 350 miles from shore for any area that is proven to be a part of their continental shelf.⁵

Determination of who owns the Arctic Ocean and any resources that might be found beneath those waters will have significant economic implications. The U.S. Department of Energy predicts a decline in

* Student Author.

¹ The Arctic “was the last habitable frontier of human coloni[z]ation.” G. Richard Scott et al., *Physical Anthropology of the Arctic*, in *THE ARCTIC: ENVIRONMENT, PEOPLE, POLICY* 339, 339 (Mark Nuttall & Terry V. Callaghan eds., 2000). The lack of human presence was due in part to the accessibility and in part due to harsh environmental conditions. *Id.*

² The U.S. Geological Survey, *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, (July 23, 2008), http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home. Some experts are calling the region the next Saudi Arabia. Richard A. Lovett, *Arctic Oil Rush Sparks Battles over Seafloor*, NATIONAL GEOGRAPHIC NEWS, Aug. 23, 2007, <http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>.

³ United Nations Convention on the Law of the Sea art. 137, Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS].

⁴ *Id.* art. 76, ¶¶ 1, 3.

⁵ *Id.* art. 76, ¶ 5.

petroleum reserves and, despite oil prices topping \$146 in June 2008, the demand for oil is growing.⁶ In addition to the vast mineral resources, the unpredictability of the Persian Gulf region makes the Arctic region even more attractive for exploitation. Russia and Norway have already submitted their claims to the Commission on the Limits of the Continental Shelf (“the Commission”), while Canada and Denmark are collecting evidence to prepare their submissions in the near future.⁷ All of these nations can gain considerable oil and gas resources as a result of the Convention.

However, one Arctic state has so far failed to join the race. Unlike the other Arctic nations, the United States has not ratified the Convention. Although the United States has complied voluntarily with the Convention, the failure to ratify the Convention could foreclose its ability to tap into potential energy resources. This failure could prevent significant contributions to American energy independence, and increase security threats. Thus, the best way to guarantee access to the Arctic’s resources and to protect other economic and non-economic interests is for the United States to become a party to the Convention.

This comment discusses the United States’ interests in the Arctic region and available methods of securing such interests. In part I, this comment provides background information on the geography of the Arctic. Part II reviews recent legal developments with respect to claims raised by countries bordering the Arctic. Part III examines the legal regime governing the use of the oceans and the relevant provisions of the Convention, including sovereignty limits, deep seabed mining, and methods of dispute resolution. Part IV evaluates the United States’ position with respect to Arctic sovereignty. First, this section explores the reasons for failing to ratify the Convention by the United States. Next, it analyzes the pros and cons of ratifying the Convention as well as the pros and cons of maintaining the status quo. It also analyzes whether customary law or a mini-treaty could secure American interests in the Arctic region. Finally, this comment concludes that diminishing natural resources and the high instability of

⁶ Michael Klare, *As U.S. Energy Sources Decline, Caspian Sea Oil Won't Solve Supply Problem*, FOREIGN POLICY IN FOCUS 1, Oct. 21, 2005, <http://www.fpif.org/pdf/gac/0510KlareTestimony.pdf> (“According to the U.S. Department of Energy (DoE), total energy use in the United States grew by 16% between 1990 and 2002, and is projected to grow by another 35 percent between 2002 and 2025. At the same time, many other countries, both developed and developing, have also experienced an increased need for energy, pushing total world energy use from 348 quadrillion BTUs in 1990 to a projected 645 quadrillion BTUs in 2025, an increase of 85 percent.”).

⁷ Commission on the Limits of the Continental Shelf (CLCS), *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Russian Federation*, http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus.htm (last visited Sept. 18, 2009) [hereinafter *Submission by Russia*]; Commission on the Limits of the Continental Shelf (CLCS), *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Kingdom of Norway*, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm (last visited Sept. 18, 2009) [hereinafter *Submission by Norway*].

regions where such resources are still present stimulate the need of the United States to ratify the Convention to preserve its right to influence the Arctic's future.

I. BACKGROUND

The Arctic is the region around the Earth's North Pole, opposite the Antarctic region around the South Pole.⁸ The Arctic includes the Arctic Ocean (which overlies the North Pole), parts of Canada, Greenland, Russia, the United States (Alaska), Iceland, Norway, Sweden, and Finland.⁹ The Arctic Ocean is where experts anticipate the most conflict.¹⁰ Only there do the borders of five nations—Russia, Canada, Denmark, Norway and the United States—meet. The three other Arctic nations, Iceland, Sweden and Finland, do not have coasts on the Arctic Ocean.

There is no single and consistent definition of the Arctic.¹¹ Often, the Arctic is defined as “the cold polar region comprised of islands, oceans, and land north of the Arctic Circle.”¹²

The size of the Arctic depends on its definition. According to the botanical definitions of Bliss and Matayeva, the Arctic comprises 7.6 million km².¹³ Most of the Arctic region consists of an ice-covered ocean surrounded by treeless permafrost, which in many areas is more than 500 meters (about 1,500 feet) thick.¹⁴ The Arctic ice masses inhabit about 2.1 million km² of the globe's ice covered area, which is about 14% of the worldwide total.¹⁵

A. Climate

The Arctic's climate is distinguished by cold winters and cool

⁸ CIA, *The World Factbook: Arctic Ocean*, <https://www.cia.gov/library/publications/the-world-factbook/geos/xq.html> (last visited Sept. 28, 2009).

⁹ Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1. The border line is generally considered to be “north of latitude 66.7° North where the sun does not set below the horizon at midnight on midsummer's night and does not rise above the horizon at mid-day on mid-winter's day.” Mark Nuttall & Terry V. Callaghan, *Introduction, in THE ARCTIC: ENVIRONMENT, PEOPLE, POLICY*, *supra* note 1, at xxix.

¹⁰ Krauss et al., *supra* note 9. The Arctic Ocean is less than 1.5 the size of the U.S. which makes it the smallest of the world's oceans. *The World Factbook*, *supra* note 8. “[T]he ocean floor is about 50% continental shelf (highest percentage of any ocean) with the remainder a central basin interrupted by three submarine ridges (Alpha Cordillera, Nansen Cordillera, and Lomonosov Ridge).” *Id.*

¹¹ Nuttall & Callaghan, *supra* note 9, at xxix.

¹² 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, 557-58 (2003).

¹³ Nuttall & Callaghan, *supra* note 9, at xxxi. According to the political definitions, arctic lands comprise 7.6 km² and the oceans 14 km². *Id.*

¹⁴ Verhaag, *supra* note 12, at 559 (describing the Arctic as “a region based around an ocean surrounded by continents”); Olav Orheim, *Challenges and Prospects in the Arctic*, 94 SCANDINAVIAN REVIEW 26, 26 (2006) (noting that the Arctic is a region that is characterized by permafrost on land).

¹⁵ Martin J. Siegert & Julian A. Dowdeswell, *Glaciology, in THE ARCTIC: ENVIRONMENT, PEOPLE, POLICY*, *supra* note 1, at 27.

summers. Winter (January) temperatures at the North Pole average -30°C (-22°F).¹⁶ Summer temperatures (from June until August) average around the freezing point 0°C (32°F).¹⁷

In recent years, the effects of a global warming have also been observed in the Arctic. Although the Arctic Ocean is now covered by the ice year round, scientists predict that by 2050 it will likely be ice-free during summer.¹⁸ Ironically, the global warming may have some positive implications: the opening of the Arctic. The seasonal melting of the polar cap could allow access to petroleum deposits and could cut sailing time from Germany to Alaska by 60%, going through Russia's Arctic instead of the Panama Canal.¹⁹ Furthermore, a revived Northern sea route could shorten the journey for cargo from Northeast Asia to Europe by 40%.²⁰

B. Natural Resources

According to the U.S. Geological Survey, the Arctic region is the largest unexplored prospective area for petroleum remaining on earth.²¹ The agency estimated that the Arctic may hold as much as ninety billion barrels of undiscovered oil reserves, and 1,670 trillion cubic feet of natural gas.²² This would amount to 13% of the world's total undiscovered oil and about 30% of the undiscovered natural gas. With an average consumption rate of eighty six million barrels per day, "the potential oil in the Arctic could meet global demand for almost three years."²³ The Arctic's potential natural gas resources are three times bigger, which is equal to Russia's gas reserves, which are the world's largest.²⁴

II. RECENT DEVELOPMENTS: TOPOGRAPHY OF THE CLAIMS

No country owns the North Pole or the region of the Arctic Ocean surrounding it.²⁵ The surrounding Arctic states, the United States, Canada, Russia, Norway and Denmark (via Greenland), are limited to a 370-

¹⁶ NOAA, Frequently Asked Questions about the Arctic, <http://www.arctic.noaa.gov/faq.html> (last visited Sept. 23, 2009).

¹⁷ NOAA, Daylight, Darkness and Changing of the Seasons at the North Pole, http://www.arctic.noaa.gov/gallery_np_seasons.html (last visited Sept. 30, 2009) (noting that the region faces six months of constant sunlight and six months of total darkness); Orheim, *supra* note 14, at 26.

¹⁸ See Barry H. 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). If the ice were to melt, the sea level would rise by approximately 6 meters. Seigert & Dowdeswell, *supra* note 15, at 28.

¹⁹ Doug Mellgren, *Technology, Climate Change Spark Race to Claim Arctic Resources*, USA TODAY, Mar. 24, 2007.

²⁰ Krauss et al., *supra* note 9.

²¹ The U.S. Geological Survey, *supra* note 2.

²² *Id.* The survey looked at "undiscovered, technically recoverable resources [,]" defined as resources that can be produced using current technology. *Id.*

²³ Jad Mouwad, *Oil Survey Says Arctic Has Riches*, N.Y. TIMES, July 24, 2008, at C1.

²⁴ *Id.*

²⁵ See Durham University: International Boundaries Research Unit, Maritime Jurisdiction and Boundaries in the Arctic Region, <http://www.dur.ac.uk/ibru/resources/arctic/> (last visited Sept. 28, 2009).

kilometer (200 nautical mile) economic zone around their coasts.²⁶ Upon ratification of the Convention, a country has ten years to make claims to extend its 200-mile zone.²⁷ Four out of the five Arctic nations have already ratified the Convention: Norway (1996), Russia (1997), Canada (2003), and Denmark (2004).²⁸ The following section describes each country's undertaking to establish claims that certain Arctic sectors should belong to its territories.

A. Russia

On December 20, 2001, Russia made a submission through the Secretary General to the Commission, in accordance with the Convention (article 76, paragraph 8), in which it proposed to establish new outer limits of its continental shelf beyond the previous 200 nautical mile zone.²⁹ In the submission, Russia claimed the Barents Sea, the Bering Sea, the Sea of Okhotsk, and the Central Arctic Ocean.³⁰ On October 8, 2002, the Commission considered Russia's submission and recommended the following: "As regards the Central Arctic Ocean . . . the Russian Federation [should] make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations."³¹

The failed attempt to extend its continental shelf in 2001 led to the 2007 expedition of two Russian mini-submersibles in search of more evidence that would support Russia's right to extend its Northern borders. The subs made an eight-hour dive beneath the North Pole, took water and soil samples, and planted a titanium Russian flag on the seabed.³² The expedition provoked a hostile reaction from other Arctic nations.³³ The expedition made acoustic scans of the Arctic seabed and alleged that they have found an underwater ridge linking Russia to the North Pole, the Lomonosov Ridge.³⁴ According

²⁶ UNCLOS, *supra* note 3, art. 76, ¶ 5.

²⁷ *Id.* annex II, art. 4.

²⁸ UN Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#. The United Nations Convention on the Law of the Sea (last visited Sept. 28, 2009) [hereinafter Lists].

²⁹ Submission by Russia, *supra* note 7.

³⁰ The Secretary-General, *Report of the Secretary-General on the Oceans and the Law of the Sea*, 9-10, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/276/17/PDF/N0227617.pdf?OpenElement> [hereinafter Report].

³¹ *Id.* at 10.

³² Paul Reynolds, *Trying to Head off an Arctic 'Gold Rush'*, May 29, 2008, http://news.bbc.co.uk/2/low/in_depth/7423787.stm. In response to the Russian expedition, Canada's Foreign Affairs Minister announced that "[t]hey're fooling themselves if they think dropping a flag on the ocean floor is going to change anything. There is no question over Canadian sovereignty in the Arctic You can't go around the world these days dropping a flag somewhere. This isn't the 14th or 15th century." *Id.*

³³ Shamil Midkhatovich Yenikeeff & Timothy Fenton Krysiak, *The Battle for the Next Energy Frontier: The Russian Polar Expedition and the Future of Arctic Hydrocarbons*, OXFORD INST. FOR ENERGY STUD., Aug. 2007, http://www.oxfordenergy.org/pdfs/comment_0807-3.pdf.

³⁴ Rebecca Billing, *Russia Prepares Claim to the Arctic Shelf*, THE MOSCOW NEWS, Oct. 7, 2008, <http://www.mnweekly.ru/business/20080710/55337256.html>.

to experts, the ridge has ten billion tons of gas and oil deposits and significant sources of diamonds, gold, tin, manganese, nickel, lead and platinum.³⁵

During a press conference on October 7, 2008, State Duma member Artur Chilingarov announced that based on the evidence from the 2007 expedition, Russia is preparing to submit a new application to extend its borders over 1.2 million km² of the Arctic waters.³⁶ The claim will be presented to the Commission during its next assembly in 2009. The claim, if successful, could give Russia the right to a projected ten billion metric tons of hydrocarbons buried under the Arctic Ocean seafloor.³⁷

B. Canada

Since 1925, Canada has claimed the portion of the Arctic between 60°W and 141°W longitude, extending to the North Pole, including all islands in this region as well as the territorial waters surrounding these islands.³⁸ In addition, Canada asserts control of the Northern Passage.³⁹ Canada claims that the Arctic waters of the Northern Passage constitute internal waters under historic title. The claim has been disputed by the European Union and the United States, which claim that the Northern Passage constitutes international waters.⁴⁰ Recently, Canada's prime minister moved to firm up control of disputed Arctic waters by announcing stricter registration requirements for ships sailing in the Northern Passage.⁴¹ Under the new regime, "all ships sailing into the Canadian Arctic will be required to report to NORDREG, the Canadian Coast Guard agency that tracks vessels on such journeys," a process which used to be voluntary.⁴²

Canada also seeks to extend the outer limits of its continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention, through the submission of its claim to the Commission by the end of 2013.⁴³

³⁵ Will Stewart, *Putin's Arctic Invasion: Fears as Russia Claims Undersea Oil Zone the Size of Five Britains*, DAILY MAIL, June 29, 2007, § 1, at 21.

³⁶ Billing, *supra* note 34.

³⁷ *Id.*

³⁸ National Resources Canada, *The Atlas of Canada*, <http://atlas.nrcan.gc.ca/site/english/maps/historical/territorialevolution/1927/1> (last visited Sept. 28, 2009).

³⁹ ROBERT DUFRESNE, LIBRARY OF PARLIAMENT, *CONTROVERSIAL CANADIAN CLAIMS OVER ARCTIC WATERS AND MARITIME ZONES*, PARLIAMENTARY INFO. & RES. SERVICE 1 (2008), <http://www.parl.gc.ca/information/library/PRBpubs/prb0747-e.pdf> (noting that "the Northwest Passage is unusual in the sense that it is not a fixed geographical location, but rather a water route. It connects the Davis Strait and Baffin Bay in the east to the Bering Strait in the west.").

⁴⁰ *Id.* at 5-6.

⁴¹ The Torch, *Strengthening Canada's Claim to Maritime Arctic Sovereignty*, <http://toyoufromfailinghands.blogspot.com/2008/08/strengthening-canadas-claim-to-maritime.html> (last visited Sept. 28, 2009).

⁴² *Id.*

⁴³ UNCLOS, *supra* note 3, art. 76, § 1; Eduard Gismatullin, *Canada Will Claim Arctic Shelf in 2013*, NAT'L POST, July 3, 2008, available at <http://www.nationalpost.com/news/canada/story.html?id=629710>.

In the eastern part of the Arctic, Canada joined forces with Denmark to conduct an expedition aimed at finding evidence establishing that the Lomonosov Ridge is an extension of Canada's and Denmark's continental shelf.⁴⁴

The early findings from a joint Canadian-Danish study of the Lomonosov Ridge are "very positive" for Canada's case, and according to the scientists, the seafloor at the pole could eventually be ruled part of Canada's territory.⁴⁵ Canada's claim includes an area of ocean floor stretching to the North Pole that would be the equivalent in size to the three Prairie Provinces combined.⁴⁶

C. Norway

The Convention entered into force in Norway on July 24, 1996.⁴⁷ On November 27, 2006, Norway made an official submission to the Commission to extend its continental shelf in three areas of the northeastern Atlantic and the Arctic: the Loop Hole in the Barents Sea, the Western Nansen Basin in the Arctic Ocean, and the Banana Hole in the Norwegian Sea.⁴⁸ The submission also states that an additional submission for continental shelf limits in other areas may be posted later.

During the 21st session, the Commission posed a series of questions to the delegation of Norway and "informed the delegation about its preliminary views with regard to certain areas of the submission and about its future programme [sic] of work."⁴⁹ Currently, the Commission still continues to analyze the data contained in Norway's submission.⁵⁰

D. Denmark

As noted above, Denmark ratified the Convention in 2004. It has yet to make a submission to the Commission to secure its jurisdiction over large swaths of the Arctic Ocean seafloor adjacent to its coastlines. In June 2006, Denmark and Canada conducted a joint surveying project of

⁴⁴ Gismatullin, *supra* note 43. In the western part of the Arctic, Canada is gathering data with a view to a future submission to the Commission. *Id.*

⁴⁵ Randy Boswell, *Study Bolsters Canada's Arctic Sea Claim*, CANWEST NEWS SERVICE, May 26, 2008, <http://www2.canada.com/calgaryherald/news/story.html?id=eeb8f3ca-d994-4e41-b19a-dbd30df9c165>. The challenge, according to Jacob Verhoef, Halifax-based director of the Geological Survey of Canada's Atlantic division, "is to first demonstrate 'whether the Lomonosov Ridge is attached' to the North American continent and then -- in followup studies to be completed by 2011 -- to determine how far north from the Canadian coast the attachment holds." *Id.*

⁴⁶ *Id.*

⁴⁷ Submissions by Norway, *supra* note 7.

⁴⁸ *Id.*

⁴⁹ U.N. Convention on the Law of the Sea, Commission on the Continental Shelf, *Statement of the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, ¶ 27, CLCS/58 (April 25, 2008). The proceedings of the Commission are confidential. *Id.* ¶ 36.

⁵⁰ *Id.* ¶ 4h. The 21st session was held from March 17 through April 18 of 2008. *Id.* ¶ 1.

unexplored parts of the Arctic Ocean near their coasts in search of scientific evidence proving the claimed undersea territories are linked geologically to their mainland or Arctic islands.⁵¹

Denmark is interested in proving that the Lomonosov Ridge is linked geologically to Greenland (a Danish autonomous province), which has the nearest coastline to the North Pole. The Danish claim is opposed by Russia, which claims that the Ridge is an extension of Siberia. If Denmark succeeds in establishing such a link it could extend its territory 350 nautical miles or further.⁵²

Because Canada, Russia, Norway, and Denmark have ratified the Convention, they can take advantage of procedural and substantive rights contained in the Convention (while the United States cannot take advantage of such rights until it ratifies the Convention). With countries competing for control of the Arctic, the applicable law governing the opposing claims is of great importance.

III. LEGAL FRAMEWORK

Throughout history humans have been long dependent on free access to the oceans and their resources.⁵³ Nations' competing claims to the oceans have led to the development of customary laws such as the "freedom of the seas" doctrine and most recently the Convention—a treaty regulating all matters related to the law of the sea.

A. The Old Law of the Seas

Since the early seventeenth century, a nation's right to resources contained in the sea waters was governed by the "freedom of the seas" doctrine.⁵⁴ According to the doctrine, a nation's rights and jurisdiction was limited to a narrow area of sea along the nation's shoreline.⁵⁵ What was left of the oceans was considered to be common property that belonged to everyone, and which could be used by anyone.

The United States was the first nation to deviate from the freedom

⁵¹ Stephen Leahy, *Arctic: Canada and Denmark Revive Sovereignty Claims*, INTER PRESS SERVICE, Apr. 22, 2006, available at <http://ipsnews.net/news.asp?idnews=32979>.

⁵² MINISTRY OF SCIENCE, TECH. AND INNOVATION, FIELDWORK DURING APRIL/MAY 2006 NORTH OF CAN./GREEN., http://a76.dk/expeditions_uk/lorita-1_uk/index.html (last visited Sept. 30, 2009) (Den.); Julian Coman, *Denmark Causes International Chill by Claiming North Pole*, TELEGRAPH, Oct. 17, 2004, <http://www.telegraph.co.uk/news/worldnews/1474377/Denmark-causes-international-chill-by-claiming-North-Pole.html> ("There is a chance that the North Pole could become Danish . . .").

⁵³ See SCOTT G. BORGERSON, COUNCIL ON FOREIGN RELATIONS, THE NATIONAL INTEREST AND THE LAW OF THE SEA, Council Spec. Rep. No. 46, at 14 (May 2009), http://www.cfr.org/content/publications/attachments/LawoftheSea_CSR46.pdf (discussing importance of oceans to U.S. interests).

⁵⁴ Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 327 (2008).

⁵⁵ Geology.com, *Who Owns the Arctic*, <http://geology.com/articles/who-owns-the-arctic.shtml> (last visited Oct. 5, 2009).

of the seas doctrine. In 1945, President Harry S. Truman announced that the United States assumed jurisdiction of all natural resources out to the edge of its continental shelf.⁵⁶ Quickly other nations followed with claims to seafloor resources, fishing grounds, and exclusive navigable zones.⁵⁷ Spreading water pollution, overfishing, competing demands to the resources, and territorial disputes dominated the second half of the twentieth century, “threatening to transform the oceans into another arena for conflict and instability.”⁵⁸ It became clear that the world was in need of a new treaty to bring order to the world’s oceans, their uses, and their resources.

In 1982, as a result of more than fourteen years of work and participation by more than 150 countries representing all regions of the world, the Convention known as “the Law of the Sea” was presented.⁵⁹ The Convention encompassed traditional rules governing “the uses of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns.”⁶⁰ The full text of the Convention consists of 320 articles and nine annexes, and addresses the following aspects of ocean territory: “delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters.”⁶¹

B. The Key Provisions of the Convention

Some of the key features of the Convention include the sovereignty provisions, which define areas of the oceans where coastal states may exercise sovereignty; the seabed mining provisions, which regulate the uses of the ocean floor; and the resolution of disputes provisions, which establish dispute and settlement methods.

The Convention was adopted as a “package” and “integral whole,” and therefore it must be accepted or rejected by its signatories in its

⁵⁶ Holmes, *supra* note 54, at 327.

⁵⁷ BORGERSON, *supra* note 53, at 7. Shortly after, Chile, Ecuador, and Peru, declared seaward extensions of their jurisdictions to two hundred miles encompassing fisheries for species such as tuna. *Id.* Such unilateral declaration caused “international conflict that continued into the mid-1970s in the form of the repeated seizure, particularly by Ecuador, of ships of the U.S. tuna fleet based in San Diego found within the declared two-hundred-mile limit but well outside the traditional three-mile territorial sea.” *Id.*

⁵⁸ UN Office of Legal Affairs, Div. 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#Historical%20Perspective (last visited Sept. 30, 2009) [hereinafter UNCLOS Historical Perspective].

⁵⁹ UN Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea of 10 December 1982 (Overview)*, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited Sept. 30, 2009) [hereinafter UNCLOS Overview].

⁶⁰ *Id.*

⁶¹ *Id.*

totality.⁶² “Ratification of, or accession to, the Convention expresses the consent of a State to be bound by its provisions” and includes an undertaking not to take any action that could defeat the Convention’s objectives and purposes.⁶³

1. The Sovereignty Provisions

The Convention established that “coastal States exercise sovereignty over their territorial sea . . . up to a limit not to exceed 12 nautical miles.”⁶⁴ However, foreign ships are allowed “innocent passage” through such territorial seas. In addition, the Convention provides that each country has “sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection.”⁶⁵ The Convention grants to other nations freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines. In addition, “land-locked and geographically disadvantaged States have the right to participate on an equitable basis in exploitation of an appropriate part of the surplus of the living resources of the EEZ’s of coastal States of the same region or sub-region.”⁶⁶

Furthermore, under article 76 a nation may expand its EEZ if it can convince the Commission⁶⁷ that there is a “natural prolongation” of its continental shelf beyond that limit.⁶⁸ The continental shelf is defined as “the seabed 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”⁶⁹ If the continental shelf extends beyond

⁶² Statement by Tommy T.B. Koh, A Constitution for the Oceans, *in* 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 11, 12 (Myron H. Nordquist ed., 1985); Hasjim Djalal, The Effects of the Law of the Sea Convention on the Norms That Now Govern Ocean Activities, *in* CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 50, 54 (Jon M. Van Dyke ed., 1985) [hereinafter CONSENSUS AND CONFRONTATION] (stating that in addition, the signatory states may choose not to grant specific rights or privileges in the Convention to non-signatory states).

⁶³ UNCLOS Historical Perspective, *supra* note 58.

⁶⁴ UNCLOS Overview, *supra* note 59.

⁶⁵ *Id.* Two hundred nautical miles equals 230 miles or 371 kilometers.

⁶⁶ *Id.*

⁶⁷ Annex II requires that the Commission is composed of 21 experts in the field of geology, geophysics, or hydrography, appointed by countries that ratified the treaty from among their nationals, “having due regard to the need to ensure equitable geographic representation” UNCLOS, *supra* note 3, annex II, art. 2, ¶ 1. The Commission has to provide the member states with scientific and technical advice on information gathering, and give recommendations on their territorial claims. UNCLOS, *supra* note 3, annex II, art. 3, ¶ 1.

⁶⁸ UNCLOS, *supra* note 3, art. 76, ¶ 1. “Coastal States share with the international community part of the revenue derived from exploiting resources from any part of their shelf beyond 200 miles.” UNCLOS Overview, *supra* note 59.

⁶⁹ UNCLOS, *supra* note 3, art. 76, ¶ 1. Usually, the shelf is a shallow extension of a landmass which drops into the oceanic abyss. But in many places, the drop-off is connected to long-submerged ridges that, if precisely mapped, might add thousands of square miles to a country’s exploitable seabed.

200 nautical miles, nations may claim jurisdiction up to 350 nautical miles from the baseline or 100 nautical miles from the 2,500 meter depth, depending on certain criteria such as the thickness of sedimentary deposits.⁷⁰ The limits of the shelf established by a country pursuant to recommendations of the Commission are final and binding upon other countries.⁷¹

2. The Seabed Mining Provisions

The Convention states that mineral resources beyond national jurisdiction are the “Common Heritage of Mankind.”⁷² These resources are managed by the International Seabed Authority (“ISA”). The ISA oversees the exploration and exploitation of the seabed minerals in accordance with Part XI of the Convention, its Annexes, and the 1994 Agreement of Implementation.⁷³ It has no other authority over uses of the oceans or over other resources in the oceans.

The ISA includes an Assembly open to all parties and a thirty-six member Council.⁷⁴ The Council is the primary decision-making body, with responsibility for giving practical effect to the requirement for non-discriminatory access to deep seabed minerals and for adopting rules for exploration and development.⁷⁵ The ISA operates by contracting with private and public corporations and other entities, authorizing them to explore, and eventually exploit, specified areas on the deep seabed for mineral resources. The Convention also established a body called the Enterprise which is to serve as the ISA’s own mining operator, but no concrete steps have been taken to implement this provision.⁷⁶

3. The Resolution of Disputes Provisions

Signatories of the Convention are required to resolve, by peaceful means, their disputes concerning the interpretation or application of the Convention.⁷⁷ Disputes can be submitted to the International Tribunal for the Law of the Sea established under the Convention, to the International

Office of Naval Research, *Ocean Regions: Ocean Floor - Continental Margin & Rise*, <http://www.onr.navy.mil/focus/ocean/regions/oceanfloor2.htm> (last visited Sept. 30, 2009).

⁷⁰ UNCLOS, *supra* note 3, art. 76, ¶ 5.

⁷¹ *Id.* ¶ 8.

⁷² *Id.* art. 136.

⁷³ See generally UN Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last visited Sept. 30, 2009).

⁷⁴ UNCLOS, *supra* note 3, arts. 159 ¶ 1, 161 ¶ 1.

⁷⁵ *Id.* arts. 152 ¶ 1, 162 ¶ 1.

⁷⁶ *Id.* art. 170, ¶ 2.

⁷⁷ *Id.* arts. 279-80.

Court of Justice, or to arbitration.⁷⁸ Conciliation is also available and, in certain circumstances, submission to it would be compulsory.⁷⁹ Article 287(3) provides that a state party that does not make a specific declaration is deemed to have accepted arbitration in accordance with Annex VII. In addition, nations may opt out of methods of resolution provided by the Convention for different categories of disputes, including disputes about boundaries and the continental shelf.⁸⁰

IV. FUTURE: SHOULD THE UNITED STATES RATIFY THE CONVENTION?

The Convention has been ratified by 159 countries and is widely accepted as a valid treaty controlling the use of the oceans.⁸¹ The United States is one of the countries that has failed so far to ratify the Convention. This section will analyze the United States' position in regards to the Convention. It examines the historical reasons for failing to ratify the Convention and the arguments raised by the opponents of U.S. accession. It also examines whether customary law or a mini-treaty could secure the American interest in the Arctic. Finally, this section considers how the Convention advances various American interests in the Arctic including economic interests, security interests, and peaceful resolution of disputes.

A. History: Why the United States Has Thus Far Failed to Ratify the Convention

Recognizing the need for “a comprehensive treaty that would clarify and bring certainty to the many ocean issues that had divided nations over the years,” the United States sent the largest delegation to negotiate the Convention.⁸² After the Convention became open for signature on December 10, 1982, President Reagan announced that the Convention articulates “traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.”⁸³ In addition, he declared that the United States would recognize the following principles expressed in the Convention:

1. The United States would “recognize the rights of other states in the waters off their coasts, as reflected in the convention”;
2. The United States would exercise “its navigation and

⁷⁸ UNCLOS, *supra* note 3, art. 287, ¶¶ 4-5. The Tribunal has exclusive jurisdiction over deep seabed mining disputes. *Id.* art. 288, ¶ 3.

⁷⁹ *Id.* art. 284, ¶ 1.

⁸⁰ *Id.* art. 298, ¶ 1. Canada, Denmark and Russia took advantage of article 298 and opted out of the dispute resolution procedures provided for under the Convention. Holmes, *supra* note 54, at 337.

⁸¹ See Lists, *supra* note 28.

⁸² CONSENSUS AND CONFRONTATION, *supra* note 62, at 1.

⁸³ United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983) [hereinafter Policy Statement].

overflight rights and freedoms . . . in a manner that is consistent with the balance of interests reflected in the convention”; and

3. The United States would “exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast” in accordance with the EEZ provisions.⁸⁴

Nevertheless, President Reagan refused to ratify the Convention because of the seabed mining provisions (Part XI). According to President Reagan, the seabed mining provisions in the Convention would have to be corrected to achieve a treaty that would assure access to seabed mineral resources, avoid monopolization of resources by the ISA, disallow amendments without parties’ approval, and eliminate the requirement of technology transfers to other nations.⁸⁵ Despite rejecting Part XI of the Convention, President Reagan nevertheless ordered government agencies to comply with the remaining provisions of the Convention, and as a result, each succeeding administration has complied with the laws prescribed by the Convention.⁸⁶

Subsequently, a group of negotiators led by the United States was able to bargain changes to the controversial deep seabed mining provisions.⁸⁷ After this agreement was reached, President Bill Clinton signed the Convention in 1994 and submitted it to the Senate for its ratification. However, a group of senators led by Jesse Helms managed to block the ratification of the Convention.⁸⁸

In February, 2002, President Bush designated the Convention as of one of the five treaties for which there was urgent need for Senate approval.⁸⁹ Under the new chairmanship of Senator Richard Lugar, the Senate Foreign Relations Committee finally held hearings on the Convention in 2003 and 2004.⁹⁰ President Bush and the Senate Foreign Relations Committee unanimously approved the Convention; however Senate Majority Leader Bill Frist refused to schedule a vote, claiming that there was an “inadequate understanding of what the Law of the Sea Treaty

⁸⁴ *Id.*

⁸⁵ Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982). The International Seabed Authority was described as “nothing less than a new Socialist international economic order” CONSENSUS AND CONFRONTATION, *supra* note 62, at 83.

⁸⁶ Policy Statement, *supra* note 83.

⁸⁷ David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, THE BROOKINGS INSTITUTION POL’Y BRIEF # 137, Aug. 2004, at 2, available at http://www.brookings.edu/papers/2004/08energy_sandalow.aspx.

⁸⁸ Don Kraus, *Time to Ratify the Law of the Sea*, FOREIGN POLICY IN FOCUS, June 6, 2007, <http://fpif.org/pdf/gac/0706sea.pdf>.

⁸⁹ Sandalow, *supra* note 87, at 8.

⁹⁰ *Id.* at 1-2.

actually is.”⁹¹

Recently, President Bush again publicly insisted on the Senate to “act favorably on U.S. accession” to the Convention.⁹² Shortly after the President’s recommendation, the Senate Foreign Relations Committee held hearings on the Convention.⁹³ During the hearings before the Committee, Deputy Secretary John D. Negroponte warned members of the Committee: “We must join the Law of the Sea Convention, and join it now, to take full advantage of the many benefits it offers the United States and to avoid the increasing cost of being a non-party.”⁹⁴ There was little doubt that if the Convention was put to a vote, the Senate would give its advice and consent to accession.⁹⁵ Once again, however, the full Senate did not get the opportunity to vote.⁹⁶ Adversaries were yet again successful in keeping it from reaching the Senate floor “by making it clear that a debate on U.S. accession would trigger every possible procedural maneuver and thereby take up maximum floor time.”⁹⁷ The Senate Majority Leader decided not to send the treaty forward under those circumstances, and “the treaty has languished [once again] on the Senate calendar”⁹⁸

In addition to the bipartisan support received from the past and current administration, the Convention is widely supported by diverse groups in the private sector including shipping, fishing, oil and natural gas, drilling contractors, ship builders, telecommunications companies, several important environmental organizations, and the oceanographic research

⁹¹ Robert B. Bluey, *Should Senate Ratify Law of the Sea Treaty?*, HUM. EVENTS, Feb. 7, 2005, at 3, available at http://findarticles.com/p/articles/mi_qa3827/is_200502/ai_n9521991.

⁹² Statement on the Advancement of United States Maritime Interests, 43 WEEKLY COMP. PRES. DOC. 635 (May 15, 2007) [hereinafter *Maritime Interests*].

⁹³ On October 31, 2007, the Senate Foreign Relations Committee overwhelmingly approved the Law of the Sea Convention, sending it to the full Senate for ratification. Richard G. Lugar, *Law of the Sea Clears Committee*, <http://lugar.senate.gov/sfrc/sea.html> (last visited Sept. 30, 2009). The vote was 17-4, without any amendments or new conditions. *Id.*

⁹⁴ *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 Senate Foreign Relations Committee 4* (2007) (written testimony of John D. Negroponte, Deputy Sec’y U.S. Dep’t of State), available at <http://www.foreign.senate.gov/testimony/2007/NegroponteTestimony070927.pdf>.

⁹⁵ “The Committee report recommended that the full Senate give its advice and consent to the treaty and set forth a set of declarations, understandings, and conditions that had been carefully worked out between the Committee and the Executive Branch.” John B. Bellinger III, Legal Advisor, U.S. Dept. of State, Remarks at the Berkley School of Law’s Law of the Sea Institute: The United States and The Law of the Sea Convention (Nov. 3, 2008), <http://ilreports.blogspot.com/2008/11/bellinger-united-states-and-law-of-sea.html>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* With last November’s elections, according to some scholars, the shift of the political powers makes the “prospects of Senate approval likely.” BORGESON, *supra* note 53, at 3. Additionally, the new administration including President Barack Obama and Vice President Joseph R. Biden Jr., who was chairman of the SFRC when the convention was last recommended for approval in 2007, strongly support the Convention. *Id.* at 3-4. Secretary of State Hillary Clinton considers getting the convention through the Senate to be her top priority for her State Department. *Id.* at 4.

community.⁹⁹

Although, the United States has acted for over twenty years in accordance with the Convention, “[d]ue to other important business, it has been easy to put consideration of the Convention off to the future.”¹⁰⁰ Given that the Convention has a wide and diverse group of supporters from the public sector to private industry, military, and environmental organizations, is there a persuasive argument why the United States should not ratify the Convention? The following section will analyze the accuracy of arguments that opponents of the Convention invoke to block the ratification of what they believe is a “LOST” Convention.¹⁰¹

B. The Perceived Flaws of the Convention

While the Convention appears to be a widely supported agreement, it has failed to receive consent of the Senate. The opposition has focused mainly on a few “primarily ideological, objections to the Convention so as to take advantage of several procedural customs within the Senate”¹⁰² The most often cited argument against ratifying the Convention involves the surrender of U.S. sovereignty. However, as noted in section III, the Convention actually expands the United States sovereignty rights. It grants the United States exclusive rights to a twelve-mile territorial sea, a 200-mile EEZ, and finally a possibility to extend its continental shelf up to 350 miles.¹⁰³ This brings an additional 4.1 million miles² of ocean under

⁹⁹ Senator Richard G. Lugar, Opening Statement at the United Nations Convention on the Law of the Sea (Sept. 27, 2007), *available at* <http://www.oceanlaw.org/downloads/Lugar-27Sep07.pdf>. Senator Richard Lugar noted that “every major ocean industry, including shipping, fishing, oil and natural gas, drilling contractors, ship builders, and telecommunication companies . . . supported U.S. accession to the Law of the Sea and lobbied in favor of it.” *Id.* Specifically, the Convention is supported by the following organizations: American Petroleum Institute, American Chemistry Council, International Association of Drilling Contractors, National Oceans Industries Association, National Marine Manufacturers Association, Chamber of Shipping of America, U.S. Tuna Foundation, Western Pacific Regional Fishery Management Council. The Convention is supported by the following environmental, legal, naval, and research organizations: Navy League of the United States, Naval Reserve Association, Transportation Institute, U.S. Commission on Ocean Policy, Pew Oceans Commission, The Ocean Conservancy Oceana, Center for International Environmental Law, IUCN/World Conservation Union, Natural Resources Defense Council, Scenic America Environmental Defense, National Environmental Trust, Physicians for Social Responsibility, U.S. Public Interest Research Group, League of Conservation Voters, World Wildlife Fund, Humane Society of the United States, American Bar Association, Maritime Law Association of the United States, Council on Ocean Law, U.S. Arctic Research Commission. S. EXEC. DOC. NO. 108-10, at 7 (2004); Citizens for Global Solutions, *The United States and the Law of the Sea: Time to Join*, http://www.globalsolutions.org/in_the_beltway/united_states_and_law_sea_time_join (last visited Sept. 28, 2009).

¹⁰⁰ David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, ASIL INSIGHTS (Am. Soc’y of Int’l L., D.C.) June 11, 2007, <http://www.asil.org/insights070611.cfm>.

¹⁰¹ Opponents refer to the Convention using the acronym “LOST” – Law of the Sea Treaty; proponents prefer to highlight the Convention’s many benefits by referring to it as “LOTS.” Bellinger, *supra* note 95.

¹⁰² Caron & Scheiber, *supra* note 100.

¹⁰³ See *supra* § III.

American jurisdiction.¹⁰⁴

In addition, critics of the Convention argue that by ratifying the Convention, the United States would set the wrong precedent by subjecting itself to the authority of international organizations created by the Convention, i.e., the ISA and the Commission.¹⁰⁵ Because the decision-making process in these organizations usually requires a majority vote, the United States would have to face “regional, economic, or political blocs that coordinate their votes to support outcomes counter to U.S. interests.”¹⁰⁶ However, if the United States ratifies the Convention, it would permit the United States to nominate members for such bodies. As a result, the United States would either have veto power or would have to get concurring votes to prevent an adverse decision.¹⁰⁷ Moreover, having American representation in the bodies created by the Convention would ensure that the Convention is interpreted and applied in a manner consistent with United States’ interests.

Furthermore, critics claim that the Convention creates “unaccountable international bureaucracies” susceptible to corruption.¹⁰⁸ The ISA “is particularly pertinent considering that the Authority could oversee significant resources through fees and charges on commercial activities within its authority and potentially create a system of royalties and

¹⁰⁴ *The United Nations Convention on the Law of the Sea: Hearing on the United Nations Convention on the Law of the Sea Before the U.S. S. Comm. on Foreign Relations*, 108th Cong. 28 (2003) (statement of Paul L. Kelly, Senior Vice President, Rowan Companies, Inc.), available at <http://foreign.senate.gov/testimony/2003/KellyTestimony031021.pdf>; see also BORGERSON, *supra* note 53, at 28 (arguing that “[b]y not joining, the United States is actually giving up sovereign rights—missing an opportunity for international recognition for a massive expansion of U.S. resources jurisdiction over as much as one million square kilometers of ocean, an area half the size of the Louisiana Purchase.”).

¹⁰⁵ CONSENSUS AND CONFRONTATION, *supra* note 62, at 97. In its argument against the Convention to Congress a representative of the American Mining noted the following:

It would create a government controlling an area that exceeds half the globe with legislative powers and a huge bureaucracy able to approve or deny access to seabed resources, dedicated to the principles of the New International Economic Order, in “which the voting arrangements would reduce the voices of the United States and other Western nations to bare whispers.

Id.

¹⁰⁶ Edwin Meese, III, et al., *The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits* 1, THE HERITAGE FOUNDATION, May 16, 2007, http://www.heritage.org/Research/InternationalOrganizations/upload/wm_1459.pdf (alleging that “[t]he bloc voting process is frequently driven by the same overtly anti-American agenda that is often apparent in the U.N. General Assembly.”).

¹⁰⁷ Part XI of UNCLOS states that, “[a]s a general rule, decision-making in the organs of the Authority should be by consensus [.]” in nearly all cases, decisions may be adopted by a majority or two-thirds vote of members present and voting “[i]f all efforts to reach a decision by consensus have been exhausted” UN Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last visited Oct. 1, 2009).

¹⁰⁸ Meese et al., *supra* note 106, at 2 (alleging that “[w]hen international bureaucracies are unaccountable they, like all unaccountable institutions, seek to insulate themselves from scrutiny and become prone to corruption.”).

profit sharing.”¹⁰⁹ Although it is true that American companies interested in the deep seabed mining beyond U.S. jurisdiction would have to pay an application fee for the administrative expenses of processing the application, any unused amount would be returned to them.¹¹⁰ Moreover, the United States would have an absolute veto over the distribution of all revenues by the Seabed Authority.¹¹¹

The opponents also challenge the alleged benefits that the American mining companies would receive by the United States’ participation in the Convention.¹¹² First, they argue that the Convention does not establish clear procedures regarding the extension of property rights. In addition, the Convention establishes that high seas are the “common heritage of mankind.” This provision “leaves mining companies to question the full extent of their property rights in the deep seabed areas.”¹¹³ To counter this argument, it is enough to say that all major American companies interested in deep seabed mining support the Convention.¹¹⁴

Finally, opponents of the Convention contend that accession is basically unnecessary for the United States to enjoy the benefits of the Convention: “[T]he United States remains free to define the parameters of its acceptance of jurisdictional assertions by others consistent with its legal rights and obligations, and is in a position to influence the development and definition of customary international law.”¹¹⁵ However, as the following section explores further, customary law is not universally accepted and is an inadequate basis on which to support the United States’ claims to the Arctic. In addition, most of the industrialized countries have joined the Convention, and therefore it seems unlikely that they would be interested in developing a customary law under United States leadership.¹¹⁶

C. The United States Does Not Have Viable Alternatives to the Convention Capable of Securing Its Interest in the Arctic

One of the major flaws in the opponents’ arguments against ratifying the Convention is the fact that they do not offer viable alternatives to the Convention. The following section will consider customary

¹⁰⁹ *Id.*

¹¹⁰ *Myths About the Law of the Sea Convention*, LAW OF THE SEA BRIEFING BOOK 15, <http://www.oceanlaw.org/downloads/LOS-Briefing-Book.pdf> (last visited Oct. 1, 2009).

¹¹¹ United Nations Convention on the Law of the Sea, S. Doc. No. 108-10, at 95 (2d Sess. 2004).

¹¹² Meese et al., *supra* note 103, at 2-3 (claiming that “[t]he marginal legal protections afforded to mining companies by U.S. participation in UNCLOS are unlikely to change their calculations.”).

¹¹³ *Id.* at 3.

¹¹⁴ *E.g.*, Telis Demos, *The Great Arctic Circle Oil Rush*, FORTUNE MAGAZINE, Aug. 20, 2007, at 11 (Exxon Mobil, Chevron, Conoco Philips).

¹¹⁵ CONSENSUS AND CONFRONTATION, *supra* note 62, at 40.

¹¹⁶ Libya, Iran, Syria & North Korea have not ratified the Convention. *Ratification Map*, LAW OF THE SEA BRIEFING BOOK 13, <http://www.oceanlaw.org/downloads/LOS-Briefing-Book.pdf> (last visited Oct. 1, 2009).

international law and a mini-treaty as alternatives to the Convention. It concludes that customary international law does not secure all the benefits of the Convention and does not provide for legal certainty to protect and assert United States national security and economic rights in the Arctic. It also concludes that calls for an Arctic mini-treaty are particularly misguided, as the legal and other aspects of these two regions are vastly different.

1. Customary Law Is Not as Effective as the Convention in Protecting the United States' Interests in the Arctic

International customary laws have developed out of “concordant practice by a number of states . . . over a considerable period of time,” when such practice is thought to be required by, or consistent with, the prevailing international law, and when such practice is generally accepted by other states.¹¹⁷ As mentioned in section III, the Convention itself is based in part on international customary laws. In addition, when an issue is not regulated by the Convention, the customary laws serve a gap-filling role, and because the Convention binds only its signatories, customary international law remains an important means of transacting with non-signatories of the Convention.¹¹⁸

However, the Convention expands the “existing norms to suit new developments where the existing norms are no longer sufficient,” creates new norms, and in some cases replaces old norms that are no longer appropriate.¹¹⁹ Thus, asserting customary international law will not secure all the benefits of the Convention for the United States because the signatories of the Convention do not have to extend specific rights established in the Convention, or those which are modifications of the existing rules, to non-signatories.¹²⁰ For example, Canada may choose not to grant the United States the right of scientific research in the EEZ or in the continental shelf.¹²¹

Furthermore, experts often disagree on the existing norms of international law.¹²² The ambiguity exists because the international customary law that applies to ocean activities is derived from numerous conventions, judicial decisions, state practice, and interpretations by international organizations. The customary law is not universally accepted,

¹¹⁷ CONSENSUS AND CONFRONTATION, *supra* note 62, at 104. Article 38(1)(b) of the Statute of the International Court of Justice refers to “international custom, as evidence of a general practice accepted as law . . .” U.N. Charter, Statute of the International Court of Justice art. 38, § 1(b) (1945).

¹¹⁸ *See generally* CONSENSUS AND CONFRONTATION, *supra* note 62, at 114.

¹¹⁹ *Id.* at 53.

¹²⁰ *Id.* at 54.

¹²¹ Also, as a non-party, the U.S. does not have access to the Commission which is created by the Convention not a customary law and cannot nominate nationals to sit on it. UNCLOS, *supra* note 3, annex II, art. 2.

¹²² CONSENSUS AND CONFRONTATION, *supra* note 62, at 51.

and it changes over time based on state practice.¹²³ To obtain financing and insurance and avoid litigation risk, “U.S. companies want the legal certainty that would be secured through the Convention’s procedures in order to engage in oil, gas, and mineral extraction on our extended continental shelf.”¹²⁴ Also, American companies may not use customary law to claim the right to seabed mining. There is no customary practice for dealing with seabed mining, and such practice is necessary for the formation of customary law.¹²⁵

Moreover, because it is so difficult to prove the extent of customary law, according to some experts, “[a]bsent express agreement, mandatory obedience to the decisions of international organizations or tribunals is for all practical purposes out of the question.”¹²⁶ The weaker the sense of legitimacy, the less restrained state practice is likely to be. There is a tendency among nations “to take treaty obligations more seriously than customary law obligations,” which leads to increased self-restraint.¹²⁷ As Admiral Mullen testified when he was Vice Chief of Naval Operations, “[i]t is too risky to continue relying upon unwritten customary international law as the primary legal basis to support U.S. military operations.”¹²⁸

2. A Mini-Treaty with Other Countries Is Unlikely

In addition to customary law, some scholars have proposed an Arctic treaty modeled on the Antarctic Treaty System as an alternative to the Convention.¹²⁹ Such a treaty would provide a binding legal framework for resolving overlapping continental shelf disputes in the Arctic.¹³⁰

However, one of the effects of accepting the Convention is the ban on the signatory states to “conclude or participate in any ‘mini-treaty’ with other states, particularly with nonparties, whose purpose is clearly to

¹²³ Bellinger, *supra* note 95.

¹²⁴ *Id.*

¹²⁵ CONSENSUS AND CONFRONTATION, *supra* note 62, at 55. Moreover, even if all countries would agree with President Reagan that deep seabed mining was a high seas freedom, it would not provide a better way than the Convention to secure investments. The application of a high seas freedom doctrine to the deep seabed mining would merely “grant to everyone the right to jump everyone else’s claim.” *Id.* at 99.

¹²⁶ *Id.* at 159.

¹²⁷ *Id.* at 151.

¹²⁸ S. EXEC. DOC. NO. 108-10, at 104 (2004).

¹²⁹ See Holmes, *supra* note 54, at 347. *But see* Bellinger, *supra* note 95 (arguing that calls for a new Arctic treaty along the lines of the Antarctic Treaty “are particularly misguided, as the legal, geographic, and other aspects of these two regions are vastly different.”). The Antarctic is a large, isolated land mass surrounded by water, whereas the Arctic is predominantly composed of the Arctic Ocean covered by an ice cap. Erika Lennon, Comment, *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, 32 (Spring 2008). More importantly, unlike Antarctica, where most of the world does not recognize the sovereignty claims and a treaty served to suspend the claims issue so as to permit scientific research, the land territory in the Arctic is almost entirely undisputed. Bellinger, *supra* note 95.

¹³⁰ Holmes, *supra* note 54, at 349.

conduct activities outside the scope of the Convention.”¹³¹ According to Article 311(3) of the Convention, “parties shall not take actions prejudicial to the implementation of the Convention as a whole.”¹³² Therefore, no party may participate in an agreement with another party or nonparty that would violate provisions of the Convention. Consequently, the United States may not enter into an agreement with other Arctic nations that would divide the Arctic Ocean because the Convention designates specific procedures that must be followed by its members who wish to expand its sovereignty over the Arctic Ocean.

Additionally, entering into a treaty with other countries in which each country would recognize each other’s claim relating to deep seabed development would be of dubious legal validity. Article 137(3) of the Convention provides that “no state or natural or judicial person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.”¹³³ Thus, entering into a treaty with other Arctic nations which have ratified the Convention and upon which the Convention is binding would not assure the United States access to mineral resources beneath the Arctic Ocean.¹³⁴

Finally, the idea of a mini-treaty is not supported by the governments of the five Arctic nations. Recently, representatives of the five Arctic nations stated in the Ilulissat Declaration that “[w]e . . . see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”¹³⁵

D. The Convention Is the Best Way to Protect United States’ Interests in the Arctic

The Convention has been described as the most comprehensive and

¹³¹ CONSENSUS AND CONFRONTATION, *supra* note 62, at 54.

¹³² *Id.*

¹³³ *Id.* at 101.

¹³⁴ According to one expert a license or permit issued outside the Convention “is a worthless piece of paper which no commercial, publicly owned bank could use as a basis for extending credit since such a license or permit would be in conflict with widely accepted international juridical proceedings.” *Id.* at 102. In 1984 some countries including the U.S. entered into an agreement that provided for procedures to overlapping deep seabed mining claims. Holmes, *supra* note 54, at 350. Quickly, the Seabed Authority rejected it on the grounds that it infringed in its exclusive authority to govern deep seabed mining. *Id.*

¹³⁵ Arctic Economics, *The Ilulissat Declaration*, May 28, 2008, http://benmuse.typepad.com/arctic_economics/2008/05/the-ilulissak-declaration.html. The Ilulissat Declaration was announced on May 28, 2008 by five Arctic nations during the Arctic Ocean Conference in Ilulissat. *Id.* The key attendees included Sergey Lavrov, Russian Minister for Foreign Affairs; Jonas Gahr Støre, Norwegian Minister for Foreign Affairs; Gary Lunn, Canadian Minister for Natural Resources; and John Negroponte, American Deputy Secretary of State; and Per Stig Møller, Danish Minister of Foreign Affairs. Ministry of Foreign Affairs of Denmark, *Denmark Hosts the Five Nations: Arctic Ocean Conference in Greenland*, May 28, 2008, <http://www.ambwashington.um.dk/en/menu/TheEmbassy/News/NewsArchive2008/DenmarkHoststheFiveNationsArcticOceanConferenceInGreenland.htm>.

progressive protection for the oceans of any modern international accord. According to President George Bush, the Convention

serve[s] the national security interests of the United States, including the maritime mobility of our Armed Forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.¹³⁶

As noted by John D. Negroponte during testimony before the Senate Committee, joining the Convention is “a win/win proposition” because the United States does not have to change its laws, give up any rights, and will only benefit in a variety of ways.¹³⁷

1. The Convention Protects United States’ Economic Interests in the Arctic

The Convention would codify the United States’ sovereignty rights over all the resources in the ocean, and on and under the ocean floor, in a 200-nautical mile EEZ off its coastline.¹³⁸ Because the United States has one of the longest coastlines and the largest EEZ of all the countries in the world, it could gain significantly from these provisions.¹³⁹

The Convention also gives the United States an opportunity to expand its sovereignty rights over resources on and under the ocean floor beyond 200 nautical miles to the end of its continental shelf, up to 350 nautical miles.¹⁴⁰ This mechanism is especially valuable to the United States as it would maximize legal certainty regarding the United States’ rights to energy resources in large offshore areas, including the areas of the Arctic Ocean. However, the United States must ratify the Convention for its claims to be internationally recognized.¹⁴¹ Not surprisingly, the American oil companies favor ratification, as it will allow them to explore oceans

¹³⁶ Maritime Interests, *supra* note 92.

¹³⁷ Negroponte, *supra* note 94, at 4.

¹³⁸ S. EXEC. DOC. NO. 108-10, at 117-18.

¹³⁹ *Id.* at 117. The Convention would bring an additional 4.1 million square miles of ocean under the United States jurisdiction; an area bigger than the United States land area. *Id.* at 118.

¹⁴⁰ *Id.* at 117. This “favors the U.S. as one of the few nations with broad continental margins, particularly in the North Atlantic, Gulf of Mexico, the Bering Sea and the Arctic Ocean. *Id.* at 118. The U.S. “extended continental shelf is estimated to be the size of two Californias.” Bellinger, *supra* note 95.

¹⁴¹ In the statement issued on March 10, 1983, President Reagan argued that seabed mining should be viewed as a freedom of the high seas and as such it shall be “open to all nations.” Policy Statement, *supra* note 83. In addition, the President noted that the U.S. “will continue to allow its firms to explore for and, when the market permits, exploit these resources.” *Id.* In response to Reagan’s statement, Tommy Koh (the second president of the third United Nations conference on the Law of the Sea) said that he will ensure that a challenge is brought to the International Court of Justice should U.S. attempt to exploit the seabed resources outside the Convention’s rule. CONSENSUS AND CONFRONTATION, *supra* note 62, at 24, 101.

beyond 200 miles off the coast, where evolving technologies now make oil and natural gas recoverable.¹⁴²

If the United States ratifies the Convention it could expand its areas for mineral exploration and production by more than 291,383 square miles.¹⁴³ The United States' claim under article 76 would add an area in the Arctic (Chukchi Cap) roughly equal to the area of West Virginia.¹⁴⁴ With a successful claim the United States would have the sole right to the exploitation of all the resources on and under the Arctic Ocean bottom. These potential energy resources could make significant contributions to United States energy independence. Because the Convention is the only means of assuring access to the mineral resources beneath the Arctic Ocean, American companies "wishing to engage in deep seabed mining operations will have no choice but to proceed under the flag of a country that has adhered to the treaty."¹⁴⁵

In addition, as discussed in section I, the Commission will soon begin making decisions on the claims to the continental shelf in the Arctic Ocean that could affect the United States' own claim. For example the United States is unable to comment on Russia's claim to the Arctic Ocean. In order to challenge the Commission's finding the United States must be a member of the Convention.¹⁴⁶

With the recent energy crisis, it is rather surprising that more Americans are not demanding that the United States join the Convention and catch up with the other Arctic nations in exploring and securing its extended continental shelf. Although the United States may decide to refrain from exploiting its continental shelf resources, it seems hard to imagine why it would not want to maximize its potential ability to do so by ratifying the Convention and by joining the other Arctic nations in pursuit of its own claim to the Arctic Ocean.

2. The Convention Protects the United States National Security Interest in the Arctic

The opening of the Arctic Ocean could become a source of new drilling, shipping, fishing, and other opportunities to the United States.

¹⁴² See *supra* note 114. Offshore oil and natural gas is the world's biggest marine industry; oil production can have value of more than 300 billion per year. See S. EXEC. DOC. NO. 108-10, at 118.

¹⁴³ S. EXEC. DOC. NO. 108-10, at 119.

¹⁴⁴ *Id.* at 162.

¹⁴⁵ CONSENSUS AND CONFRONTATION, *supra* note 62, at 103.

¹⁴⁶ Senator Lugar noted that the Commission will soon start making decisions on claims to continental shelf areas "that could impact the United States' own claims to the area and resources of our broad continental margin. Russia is already making excessive claims in the Arctic. Unless we are party to the Convention, we will not be able to protect our national interest in these discussions." Sen. Richard G. Lugar, *The Law of the Sea Convention: The Case for Senate Action*, THE BROOKINGS INSTITUTION, May 4, 2004, <http://www.brookings.edu/comm/events/20040504lugar.htm>.

However, with more open and accessible waters, the long and unprotected border in the Arctic could also become a potential terrorist and drug trafficking entry. In order to protect the United States' security interests in the Arctic and worldwide, the United States' armed forces must be able to navigate freely on, over, and under the oceans.

The Convention preserves key rights of navigation and overflight. According to Deputy Secretary of Defense John D. Negroponte, the Convention provides for a "legal framework . . . [which] is essential to the mission of the Department of Defense, and the Department of Homeland Security" ¹⁴⁷ The Convention grants American ships the right of innocent passage, allowing ships transit through the territorial seas of foreign countries without having to provide advance notice or request permission.

Moreover, the Convention establishes the right of transit passage through international straits such as the Straits of Singapore and Malacca or the Strait of Gibraltar. This right, which is absolutely critical to U.S. national security, may not be suspended, hampered, or infringed upon by coastal States. ¹⁴⁸ Also, the Convention creates the Archipelagic sea lanes passage that allows transit through routes in archipelagic states, such as Indonesia. ¹⁴⁹ Additionally, the provisions creating EEZ give the American military "the ability to position, patrol, and operate forces freely in, below, and above those littoral waters." ¹⁵⁰

Finally, the Convention secures the right of American warships to operate on the high seas, "which is a critically important element of maritime security operations, counter-narcotic operations, and anti-proliferation efforts." ¹⁵¹ The Convention's navigational rights led to its support by all branches of the military: Secretary Gates, the Joint Chiefs of Staff, the Military Department Secretaries, all of the Combatant Commanders, and the Commandant of the Coast Guard. ¹⁵²

¹⁴⁷ WRITTEN TESTIMONY OF DEPUTY SECRETARY OF DEFENSE GORDON ENGLAND BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE, ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND RATIFICATION OF THE 1994 AGREEMENT PART XI OF THE LAW OF THE SEA CONVENTION 1 (2007), <http://www.virginia.edu/colp/pdf/EnglandTestimony070927.pdf>.

¹⁴⁸ John D. Negroponte & Gordon England, *Reap the Bounty*, WASH. TIMES, June 13, 2007, at A17.

¹⁴⁹ Admiral Walsh noted that Innocent Passage, Transit Passage, and Archipelagic Se lanes Passage are "vital not just to our Navy, but also our Army, Air Force, Marine Corps, and Coast Guard" because they allow to "move vast quantities of war materiel [sic] through the Straits" STATEMENT OF ADMIRAL PATRICK M. WALSH, U.S. NAVY VICE CHIEF OF NAVAL OPERATIONS BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, HEARING ON THE LAW OF THE SEA CONVENTION 4 (2007), <http://www.foreign.senate.gov/testimony/2007/WalshTestimony070927.pdf>.

¹⁵⁰ As discussed in section II, coastal states enjoy resource rights within the EEZ, but they may not assert full sovereignty within the EEZ.

¹⁵¹ Negroponte, *supra* note 94, at 5.

¹⁵² Negroponte & England, *supra* note 146.

3. The Convention Could Help the United States to Enforce Its Rights in the Arctic Through Peaceful Dispute Settlement

Numerous legal experts believe that the U.S. interests in a clear and stable law of the sea are reinforced by “the comprehensive compulsory dispute settlement provisions in the Convention.”¹⁵³ When nations disagree on boundaries, mineral claims, or other aspects of the Convention, the Convention contains a unique dispute resolution mechanism that obligates nations to settle their differences peacefully through one of four methods.

The dispute mechanism is “flexible, in that Parties have options as to how and in what fora they will settle their disputes, and comprehensive, in that most of the Convention’s rules can be enforced through binding dispute resolution.”¹⁵⁴ For example, the Convention allows a member to choose arbitration tribunals and does not require any disputes to go to the International Court of Justice. Consequently, the United States, as part of its accession or anytime thereafter, would have the legal right to choose among the following adjudicating bodies:

The International Tribunal for The Law of the Sea, a standing tribunal of twenty-one judges, each from different nations, that serve nine year terms;

The International Court of Justice, a United Nations court of fifteen judges appointed by the General Assembly and Security Council;

A special arbitration tribunal under Annex VII made up of environmental, marine science, navigation, and fisheries experts, of which the United States would pick two to five arbitrators;

A special arbitration panel under Annex VII composed of five members of whom the United States would be allowed to choose one and be involved in the appointment of at least three others.¹⁵⁵

The Convention also allows the parties to exclude some of the sensitive categories of the disputes, such as military activities, from the binding dispute settlement procedures.¹⁵⁶

¹⁵³ Marjorie Ann Browne, *The Law of the Sea Convention and U.S. Policy*, CONG. RES. SERVICE, May 12, 2006, at 5, available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8927:1>.

¹⁵⁴ S. EXEC. DOC. NO. 108-10, at 69.

¹⁵⁵ Raphael Sagarin et al., *Balancing U.S. Interests in the UN Law of the Sea Convention*, NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS 5-6, Oct. 2007, <http://www.nicholas.duke.edu/institute/lawofsea.pdf>. The U.S. has indicated its preference for adjudicating conflicts under the last two options, using the third option for fisheries, environmental and navigational disputes, and the fourth option for other disputes. *Id.* at 6.

¹⁵⁶ *Id.* at 2-3, 6.

Finally, the Convention would provide the United States with a clear and internationally recognized pathway for making and disputing claims to Arctic resources. The United States could at last catch up with other Arctic nations and prepare its own claim to the Commission. Of course, the Convention's dispute settlement provisions do not guarantee that the United States would win every dispute, but "not joining the Convention presents a far greater risk: that the United States will be left without solid legal protections for its vital national security, economic, and environmental interests."¹⁵⁷

CONCLUSION

As the global climate is warming up rapidly, leading to ice-free summers in the Arctic Ocean, Arctic nations are confronting the prospect of new rights over the Arctic's vast natural resources. All Arctic nations—Canada, Denmark, Norway, Russia—except for the United States, ratified the Convention and have already submitted, or are preparing to submit, proposed limits for their extended continental shelves to the Commission. The submissions will enable these countries to obtain international recognition over their extended continental shelves in the Arctic, including exclusive rights over oil and gas reserves.

As a nation with an extensive coastline and a continental shelf with enormous oil and gas reserves, the United States has much more to gain than lose from joining the Convention. Furthermore, the uncertainties stemming from the customary law make it a less effective measure to protect American interests. Only a universal regime such as the Convention can adequately safeguard the United States' interest in the Arctic Ocean. The best way to guarantee access to the Arctic's resources is for the United States to become a party to the Convention.

¹⁵⁷ Bellinger, *supra* note 95.

