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HOOVER INSTITUTION ARCTIC SECURITY INITIATIVE

The Opportunity Costs of Ignoring the Law of Sea Convention in the Arctic

by James W. Houck

Arctic Security Initiative

www.hoover.org/taskforces/arctic-security

In 2008, the United States joined four other nations with Arctic coasts¹ in issuing the Ilulissat Declaration, which proclaimed that:

[T]he law of the sea provides for important rights and obligations. . . . We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. . . . This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.²

By invoking the “law of the sea,” the five Arctic nations were actually referring to the United Nations Convention on the Law of the Sea³ (UNCLOS).⁴ Russia, Canada, Denmark, and Norway have ratified the Convention. Although the United States has not ratified, it considers UNCLOS to generally reflect customary international law.⁵

The United States’ willingness to support UNCLOS as the governing legal framework in the Arctic is no surprise. Although the Ilulissat Declaration was signed during the Bush Administration, the Obama Administration’s National Strategy for the Arctic Region proclaims that:

Accession to the Convention would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and over flight through the Northwest

Passage and the Northern Sea Route. The United States is the only Arctic state that is not party to the Convention. Only by joining the Convention can we maximize legal certainty and best secure international recognition of our sovereign rights with respect to the U.S. extended continental shelf in the Arctic and elsewhere, which may hold vast oil, gas, and other resources.⁶

While chairing hearings in May 2012 as Chairman of the Senate Foreign Relations Committee, current Secretary of State John Kerry lamented that:

While we will sit on the sidelines, Russia and other countries are carving up the Arctic and laying claims to the oil and gas riches in that region. We, on the other hand, can't even access the treaty body that provides international legitimacy for these types of Arctic claims. Instead of taking every possible step to ensure our stake in this resource-rich area, we are watching others assert their claims and doing nothing about it because we have no legal recourse.⁷

U.S. industry representatives have echoed this view as well. Jack Gerard, Chief Executive Officer of the American Petroleum Institute, has noted that:

Establishing the continental margin beyond 200 miles is particularly important in the Arctic, where there are already a number of countries vying to expand their offshore jurisdictional claims. . . . The Convention will increase certainty in a significant manner and will in turn make it much easier to decide to invest billions of dollars in future operations.⁸

Despite this support, UNCLOS has endured a tortured journey within the United States. President Ronald Reagan recognized the treaty's national security value and directed the United States to operate in accord with UNCLOS, with the exception of the deep seabed mining provisions.⁹ President Reagan's objections to the deep seabed mining provisions were later resolved, leading President Bill Clinton to transmit the treaty to the Senate for advice and consent on October 7, 1994.¹⁰ And yet, the United States remains outside the convention. Although the Senate Foreign Relations Committee has twice voted UNCLOS favorably out of committee by wide margins, the convention has never received a full Senate vote.¹¹

The discontinuity between the national desire for an effective Arctic policy and the interminable and fractious UNCLOS debate raises a fundamental question: Does the United States' failure to join UNCLOS actually hurt U.S. interests in the Arctic? Is UNCLOS an essential foundation for U.S. Arctic policy or an unnecessary morass likely to erode U.S. sovereignty and drain vitality from U.S. investments? Moreover, given that the Arctic Council has adopted UNCLOS as its governing legal framework and that the United States is still able to participate fully in Arctic governance, would UNCLOS accession provide the United States any benefit not already available? If the United

States can do everything of importance in the Arctic without joining UNCLOS, why go to the trouble?

This paper addresses these questions. The paper begins by briefly surveying the extent to which the convention's provisions intersect with United States interests in the Arctic. Not surprisingly, there is extensive overlap. The paper then reviews arguments that UNCLOS is irrelevant or even antithetical to achieving these important U.S. interests. After critiquing the anti-UNCLOS arguments, the paper examines the case for UNCLOS. The paper focuses in particular on U.S. interests on the Arctic seafloor, arguing that these interests are extensive and that accession would help avert a wide range of potential political, legal, and regulatory challenges from foreign governments and corporations. The possibility of such challenges creates political and legal uncertainty as long as the United States remains outside the convention and provides a bona fide disincentive for U.S.-licensed corporations to undertake the type of exploration and development activities necessary to realize a host of offshore benefits. Moreover, by staying outside UNCLOS, the United States is forfeiting an opportunity to reinforce a favorable Arctic legal regime that could face pressure from non-Arctic nations in the future. The paper concludes by recommending that the U.S. accede to UNCLOS at the soonest opportunity.

The Intersection of U.S Arctic Interests and UNCLOS

UNCLOS establishes maritime zones with principles and rules relevant to the world's entire maritime domain, addressing topics ranging from suppression of piracy to conservation of fish stocks to construction of artificial islands at sea. With its seventeen parts, 320 articles, nine annexes, and a supplementary special agreement on deep seabed mining, UNCLOS touches nearly every conceivable U.S. maritime interest in the Arctic. Understanding this intersection is critical for evaluating the convention's potential as an instrument of U.S. Arctic policy.

Freedom of Navigation

As a nation with global maritime interests, the United States has consistently viewed the UNCLOS provisions on freedom of navigation on the high seas and in exclusive economic zones (EEZs), "transit passage" through straits used for international navigation, and "innocent passage" through territorial seas as the convention's essential core.¹² Although UNCLOS' navigation provisions were not designed with the Arctic in mind per se, the provisions are consistent with the United States' interest in freedom of navigation in and through the Arctic.¹³

Although experts differ on the imminence and extent of regular Arctic transits, some scientific studies suggest that increasing temperatures will result in a seasonally ice-free Arctic as early as the 2030s.¹⁴ As the ice recedes, many expect the opening of more expeditious travel routes,¹⁵ with consequences for international security and commercial activities.¹⁶ In particular, two trans-Arctic routes are expected to become increasingly critical: the Northwest Passage and the Northern Sea Route.¹⁷

The Northern Sea Route refers to the routes running along the northern coasts of Eurasia and Siberia between the Barents Sea and the Chukchi Sea.¹⁸ As of June 6, 2013, the Northern Sea Route Commission approved fifty-four vessels to use the Northern Sea Route during the 2013 summer.¹⁹ The number of vessels using the Northern Sea Route since 2010 has increased tenfold.²⁰ The Northwest Passage connects Baffin Bay and Davis Strait in the Atlantic to the Beaufort Sea in the Arctic and includes all routes along the northern coast of North America through the Canadian Arctic Archipelago.²¹ Both routes connect the Pacific and the Atlantic Oceans through the Bering Strait,²² and they have the potential to decrease the travel distance between Europe and Asia by up to 5,200 nautical miles.²³ Although the presence of seasonal ice limits the regular use of these navigational routes, both Arctic- and non-Arctic-states seek to use these waters more frequently.²⁴

The lucrative navigation potential of these routes must be balanced against environmental protection. Canada claims the waters that comprise the Northwest Passage as its internal waters.²⁵ Russia claims the waters of several straits along the Northern Sea Route as internal waters and applies Article 234, pertaining to ice-covered areas of the EEZ, to the rest of the route.²⁶ The United States, among other nations, has consistently disagreed with these claims,²⁷ arguing that these routes should be governed by the legal regime of transit passage through straits used for international navigation.²⁸

Both Canada and the Russian Federation have enacted regulations that the United States believes amount to unwarranted restrictions on the right of transit passage. Canada, for example, imposed a mandatory ship reporting and vessel traffic service system (NORDREG) that governs transit through the Northwest Passage.²⁹ NORDREG covers Canada's EEZ and the several Northwest Passage routes in the Canadian Arctic Archipelago.³⁰ Canada specifically cites UNCLOS Article 234 to justify NORDREG, asserting that the reporting requirements are to prevent and reduce marine pollution from vessels in the delicate Arctic waters.³¹ Similarly, the Russian Federation has historically limited transit passage in the Northern Sea Route,³² using UNCLOS Article 234 to justify the limitations,³³ and has recently implemented more extensive unilateral regulations to ensure shipping safety and environmental protection.³⁴ With receding amounts of ice for significant portions of the year, whether the Northwest Passage or the Northern Sea Route meets Article 234's climatic requirements for ice-covered areas is debatable.³⁵

Under UNCLOS, coastal states seeking to prescribe sea-lanes and traffic separation schemes in straits used for international navigation must receive approval by a "competent international organization" prior to adoption.³⁶ The International Maritime Organization (IMO) fills this role. The United States is working with other Arctic nations through the IMO to create a mandatory "Polar Code" that will cover all matters relevant to ships operating in both Arctic waters and the waters surrounding Antarctica.³⁷ The IMO recently announced that the Polar Code will be operational as

early as 2015 and will be implemented by 2016.³⁸ The extent to which the Polar Code reconciles Russian and Canadian interests in regulating the Northern Sea Route and Northwest Passage with freedom of navigation interests will be critical.

Environmental Protection

No nation, including the United States, disputes the moral and economic imperative to protect the Arctic's pristine environment. The United States understands the fragility of the region and the need to practice responsible stewardship while pursuing its Arctic interests.³⁹ UNCLOS plays a prominent but not exclusive role in this regard.

UNCLOS creates an obligation to “protect and preserve the marine environment.”⁴⁰ However, it avoids specific rules or standards in favor of creating zones of regulatory competence and providing a framework of principles designed to encourage the creation of more specific rules and standards through domestic regulation and separate international agreements.

UNCLOS provides states with exclusive, sovereign jurisdiction to regulate the environment within their territorial sea.⁴¹ States also have sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources . . . of the waters superjacent to the seabed and of the seabed and its subsoil,”⁴² and “jurisdiction . . . with regard to . . . the protection and preservation of the marine environment” in the exclusive economic zone (EEZ).⁴³ In exercising rights and performing duties in the EEZ, coastal states must do so with “due regard” for the rights and duties of other states,⁴⁴ not the least of which is freedom of navigation.

In addition to the IMO Polar Code discussed above, several international environmental agreements and guidelines augment UNCLOS. The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), a treaty implemented by the IMO (Marpol is short for marine pollution and 73/78 stands for the years 1973 and 1978), governs the regulation, reduction, and prevention of ship pollution caused by operational or accidental activities.⁴⁵ The Arctic Council ministers recently signed the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic that created a regional response plan to cooperatively address oil spills in the Arctic.⁴⁶ The Arctic Council has also created working groups, particularly the Protection of the Arctic Marine Environment Working Group (PAME), to research and create reports about environmental concerns unique to the Arctic.⁴⁷ PAME previously issued a report that studied the potential effects increased shipping will have on the Arctic, suggesting ways by which states could prevent environmental harm,⁴⁸ and provided advisory guidelines for offshore oil and gas production in the Arctic.⁴⁹ PAME's 2013–2015 agenda includes determining the adequacy of international and regional commitments concerning environmental protection and promoting their implementation and compliance.⁵⁰

Fishing

UNCLOS serves as the international foundation for fisheries management, giving coastal states sovereign rights over natural resources in their EEZs, a duty to conserve and the right to utilize fish stocks, and a duty to cooperate with other countries in the management of certain fish stocks.⁵¹ The 1995 United Nations Fish Stocks Agreement,⁵² to which the United States is a party, provides a precautionary approach to fisheries and encourages regional cooperation in management of fisheries in the high seas.⁵³ Although UNCLOS does not provide a detailed regime through which state parties must manage fisheries, it provides a broad framework that encourages multilateral approaches to sustainable development of fish stocks.⁵⁴

Several factors, including ice cover, cold water temperatures, and low primary production prevent the development of commercial fish stocks in the central Arctic Ocean.⁵⁵ The seas surrounding the Arctic Ocean, however, contain large, globally important fish stocks, constituting more than 10 percent of global marine fish catches by weight and equaling billions of dollars in economic value.⁵⁶ Compared to most major international commercial fisheries, Arctic fisheries are comparatively well-managed due to the extensive regime of fisheries regulations that affect the Arctic.⁵⁷ Four international or multilateral agreements, eight regional agreements, and four bilateral agreements each affect different areas of the Arctic, different types of fish, and different Arctic nations.⁵⁸ The Arctic Council's biodiversity working group released a report stating that the illegal, unregulated, and unreported (IUU) fisheries were a problem several years ago, but with UNCLOS and "substantial improvement in cooperation," IUU fishing has decreased in the oceans surrounding the Arctic.⁵⁹

Marine Scientific Research

As most of the Arctic Ocean has not been explored, one of the U.S. policy goals in the Arctic is to increase understanding through scientific research.⁶⁰ Currently, the foremost scientific research interest for the United States is to obtain data regarding the geologic composition of the continental margin. In addition, the United States is pursuing research in climate variability, Arctic marine ecosystems, oil spill effects, and unconventional energy and mineral resources.⁶¹ Marine Scientific Research (MSR) in Russian arctic waters, where Russia has the longest Arctic coastline, is hampered by Russian reluctance to permit U.S. researchers access to Russian waters.

The United States has long accepted the UNCLOS regime for marine scientific research. UNCLOS gives coastal states exclusive control over scientific research in the territorial sea.⁶² Coastal states also have extensive rights in the EEZ, including the right to reject a request by a foreign nation or company for access to its EEZ or continental shelf if the project is of direct significance for the exploration and exploitation of natural resources⁶³ or involves drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment.⁶⁴ The convention provides all states the right to conduct marine scientific

research in the high seas.⁶⁵ A state's ability to perform scientific research in the area is subject to the provisions of Part XI, the deep seabed mining regime.⁶⁶ Article 143 states that all member states can conduct marine scientific research in the area, but they must provide the results of their research and analysis to the international community through the International Seabed Authority.⁶⁷

Seafloor Resources

The United States has significant potential interests on the Arctic seafloor. In the Obama Administration's May 2013 National Strategy for the Arctic Region, the administration stated that energy security is a "core component of [U.S.] national security strategy" and by responsibly developing the Arctic's proved and potential oil and gas resources, the United States will reduce reliance on foreign oil.⁶⁸ UNCLOS provides detailed rules and procedures regulating activity on the seafloor.

UNCLOS and the Continental Shelf

UNCLOS provides that nations enjoy sovereign rights to the water column as well as the living and non-living resources of the ocean floor to a distance of 200 nautical miles from the coastal baseline.⁶⁹ The sovereign right to explore and develop resources in this area, known as the continental shelf, is also considered customary international law.⁷⁰ UNCLOS, however, introduced several important new elements that govern a state's ability to extend its exclusive sovereign rights to explore and develop its continental shelf resources.

The term "continental shelf" as used in UNCLOS refers to the geologic continental margin made up of the geologic shelf, the geologic slope, and the geologic rise.⁷¹ UNCLOS specifically defines the continental shelf as either "the natural prolongation of land territory to the outer edge of the continental margin" or 200 miles from a coastal state's baseline, whichever is greater.⁷² When a coastal state's continental margin extends farther than the 200-nautical mile limit imposed by customary international law, UNCLOS provides that a nation may exercise sovereign rights over the seabed floor beyond 200 nautical miles⁷³ in the area known as the "extended continental shelf."⁷⁴ The treaty includes two formulas to determine the outer limits of continental margins⁷⁵ and two methods to set constraint lines past which coastal states cannot claim sovereignty.⁷⁶

UNCLOS also provides a process through which coastal states can reduce the potential for dispute and uncertainty over their continental margins' limits. This is particularly important in the Arctic where the U.S. extended continental shelf likely overlaps with that of both the Russian Federation and Canada. Under UNCLOS Article 76, a coastal state may obtain international recognition for the outer limits of its claim to an extended continental shelf by submitting a claim to the Commission on the Limits of the Continental Shelf (CLCS).⁷⁷ The CLCS consists of twenty-one elected experts in geology, geophysics, or hydrography, and may only be nationals of UNCLOS State parties.⁷⁸ A coastal state must gather scientific and technical data

that describes the characteristics of the seabed and subsoil and submit its claim to the CLCS within ten years of becoming a party to UNCLOS.⁷⁹ A seven-member CLCS subcommittee then analyzes the data and prepares “recommendations” regarding the outer limits of the continental shelf.⁸⁰ The recommendations must be approved by a two-thirds majority of CLCS members.⁸¹ If the coastal state agrees to the approved recommendations, the limits are “final and binding” on the international community.⁸²

There have been sixty-six extended continental shelf submissions to the CLCS made by fifty-four member states to date.⁸³ This process takes several years to complete and it is anticipated that the CLCS will not render decisions on some submissions (for example, those submitted in 2010 or later) until as late as 2030.⁸⁴

Pursuant to Article 77.3, the coastal state is entitled to explore and develop the resources of its extended continental shelf, subject to the royalty provisions set forth in Article 82. Article 82.1 mandates that a state make annual payments with respect to its exploitation of non-living resources on its extended continental shelf. Beginning in the sixth year of production, payments are made starting at the rate of 1 percent of the total value of production at each site, increasing by 1 percent each year until the twelfth year when the payment plateaus at 7 percent of production value for every year thereafter.⁸⁵

Payments are submitted to the International Seabed Authority (ISA or “Authority”),⁸⁶ the UNCLOS-created body that regulates the exploration for and exploitation of the natural resources in the area.⁸⁷ The ISA distributes the royalties based on the needs and interests of UNCLOS member states, but has no other involvement in the extended continental shelf development process.⁸⁸

The potential implications of this extended continental shelf regime are profound. With one of the largest coastlines in the world, the United States is expected to have over 291,000 square miles of extended continental shelf.⁸⁹ The U.S. continental margin off the coast of Alaska alone may extend to a minimum of 600 miles from the Alaskan baseline.⁹⁰ Alaska’s extended continental shelf lies over the Arctic Alaska province, one of the many oil- and gas-rich basins in the Arctic.⁹¹ It is estimated that there may be almost 73 billion barrels of oil and oil-equivalent natural gas located in the Arctic Alaska province, the second highest estimated production capability of all Arctic provinces.⁹² The continental shelf within the 200-mile EEZ under the Beaufort and Chukchi Seas alone may have over 23 billion barrels of oil and 104 trillion cubic feet of natural gas.⁹³ Not only would development of these resources promote energy independence, a U.S. national security objective,⁹⁴ it would also create almost 55,000 jobs per year nationwide and generate over \$193 billion in federal, state, and local revenue over a fifty-year period.⁹⁵ Due to delays in Arctic oil and gas exploration in the Chukchi and Beaufort Seas, both within the U.S. 200-mile EEZ, the earliest estimated date of extraction is sometime after 2019.⁹⁶

Gaining exclusive sovereign rights over the full potential U.S. Arctic extended continental shelf will prove difficult, however, due to the close proximity among the United States, Russia, and Canada and the potential for overlapping claims to extended continental shelves. The Russian Federation was the first UNCLOS party to submit an extended continental shelf claim to the CLCS.⁹⁷ The CLCS rejected Russia's initial 2001 submission but permitted it to revise and resubmit its claim. Russia anticipates submitting its revised claim for its extended shelf in the Arctic by the end of the year.⁹⁸ Denmark, Iceland, and Norway also submitted claims to the CLCS⁹⁹ and Canada must do so by December 2013.¹⁰⁰ This will leave the United States as the only Arctic nation that has not formally claimed the outer limits of an extended continental shelf. Moreover, if Russia accepts the commission's recommendations, Russia's extended continental shelf boundaries are final and binding (although it is not clear who is so bound). If the United States accedes and eventually perfects a claim to the outer limit of its extended shelf with the CLCS, there is a chance that its extended continental shelf will overlap with Russia's. UNCLOS allows for two (or more) legitimate outer limit claims but leaves it to the parties to agree to terms that split the overlapping extended continental shelf between them. The United States has provided observations on submissions by two other states, but, as a non-party, it cannot submit a claim under Article 76.¹⁰¹

UNCLOS and the Deep Seabed UNCLOS provides that the seabed floor beyond the limits of a coastal state's continental shelf or extended continental shelf is beyond national jurisdiction and comprises, in UNCLOS parlance, the "Area."¹⁰² The Area is governed by its own legal regime designed to balance the interests of coastal states with commercial and scientific interests in the deep seabed beyond national jurisdiction with those of the entire international community. The Area has been set aside as the "common heritage of mankind."¹⁰³ UNCLOS Part XI and the subsequent Agreement Relating to the Implementation of Part XI of UNCLOS¹⁰⁴ ("Part XI Agreement") outline a U.S.-friendly deep seabed mining regime that permits member States to acquire legal title to non-living natural resources in the Area.

UNCLOS created the International Seabed Authority to implement the Part XI deep seabed mining regime. The ISA has three principle organs: the secretariat, the assembly, and the council.¹⁰⁵ The secretariat is made up of the secretary general, who is elected for four-year terms, and his small staff.¹⁰⁶ The assembly, comprised of all UNCLOS member states,¹⁰⁷ gives final approval to rules and regulations regarding the deep seabed mining regime, decides how to distribute the royalties received from extended continental shelf projects, and elects the council.¹⁰⁸

The council is the most important body within the authority and serves as the executive organ of the ISA.¹⁰⁹ It is made up of thirty-six member states¹¹⁰ and is responsible for *inter alia*, "exercis[ing] control over activities in the Area"¹¹¹ and for recommending to the assembly "rules, regulations, and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area

and the payments and contributions made pursuant to Article 82.¹¹² The assembly may not approve financial payments unless recommended by the Council.¹¹³ If the assembly disagrees with the council's recommendations, the issue will be returned to the council for further deliberations.¹¹⁴ If the United States accedes to UNCLOS, the United States would be the only state guaranteed a permanent seat on the council.¹¹⁵ Moreover, given UNCLOS-mandated voting procedures that are based on consensus,¹¹⁶ the United States would have the irrevocable ability to veto any ISA plan to distribute funds or financial assistance in a manner inconsistent with U.S. desires.¹¹⁷

Activities in the Area are permitted pursuant to a multi-step approval process detailed in UNCLOS Article 153, Annex III, and the Part XI Agreement. Interested parties may prospect¹¹⁸ without prior approval from the authority; however, they must inform the authority of their actions.¹¹⁹ Prospecting confers no legal rights over the resources.¹²⁰ To explore and exploit the Area's natural resources, state parties or entities sponsored by state parties must submit a comprehensive application to the authority¹²¹ along with a processing fee.¹²² The authority issues decisions on applications in the order it receives them. First, the Legal and Technical Commission (LTC) reviews applications and makes recommendations to the council on the approval of work plans.¹²³ If the LTC recommends approval of a plan, the Council must approve it within sixty days unless the Council decides by two-thirds majority to reject it.¹²⁴ The council also can approve a plan that the LTC otherwise rejects.¹²⁵

The ISA recognizes environmental protection of the Area to be of paramount importance as the prospect of deep seabed mining increases. UNCLOS requires the ISA Council to adopt rules, regulations, and procedures to ensure protection of the marine environment from the hazardous effects that may result from deep seabed mining activities.¹²⁶ Each application submitted to the authority must include a detailed Environmental Impact Statement "that provides full documentation of all environmental and social issues" and describes the effects mining in a particular area will have on the marine environment.¹²⁷ The council can disapprove of the exploitation of areas where there is a risk of serious harm from mining activities even if the mining activities have already begun.¹²⁸

There are a variety of deep seabed resources over which the United States could potentially exert control if it accedes to UNCLOS. The United States could have access to the mineral-rich deposits of polymetallic sulfides found near hydrothermal vents, including the Gakkel Ridge and other vents already found in the Arctic.¹²⁹ Hydrothermal vents are hosts to a myriad of marine species that make development environmentally hazardous; however, the potential to recover valuable minerals such as gold, copper, manganese, and others make it an attractive risk.¹³⁰ The ISA has announced it will begin issuing licenses for nodule production from hydrothermal vents as early as 2016.¹³¹

Once all Arctic nations establish the outer limits of their extended continental shelves, there will remain only a small portion of the Arctic that will qualify as the “common heritage of mankind.” At this point in time it is unclear what resources, if any, would remain for the common heritage of mankind in the Arctic. However, United States accession to UNCLOS would significantly advance its ability to stake an internationally recognized claim to these resources if any resources are discovered in the future. In the meantime, U.S. corporations interested in mining the deep seabed have been forced to establish subsidiaries in state parties, with an opportunity cost to the U.S. Treasury.¹³²

The Case against UNCLOS

As discussed in section 1, the United States has significant interests in the Arctic, all of which UNCLOS purports to regulate, at least to some degree. The nearly coterminous overlay of UNCLOS with U.S. Arctic interests leads to the fundamental policy question: how would U.S. interests in the Arctic be affected if the United States accedes to UNCLOS?

The Argument that UNCLOS Is Harmful

UNCLOS critics have long argued that any benefits the convention might provide are more than offset by its negative effects. Although this overarching argument is not focused on the Arctic *per se*, its supporting points have shown resiliency in the broader UNCLOS debate and have important Arctic implications.

One of the most prominent arguments is that the convention’s royalty provisions¹³³ have the potential to drain billions of dollars from the U.S. economy by “taxing” potential U.S. corporate profits. As claimed by Senator James M. Inhofe:

For the first time in U.S. history, [UNCLOS] will create an international body that can tax this country. . . . [Royalties] will go from the U.S. Treasury to an international group located in Kingston, Jamaica. . . . There could be billions, if not trillions, in resources in the Extended Continental Shelf (ECS). Using a conservative estimate of \$1 trillion, that would mean \$70 billion lost from the United States.¹³⁴

Opponents argue that U.S. royalty payments will go to an inefficient and corrupt “UN-style bureaucracy”¹³⁵ and that the United States will lose control over the money upon transfer to the ISA.¹³⁶ As former Senator Jim DeMint asked, “how is it in the interests of the United States to turn the royalties over to an unaccountable international bureaucracy [when the royalties] will be distributed to countries that may be our enemies, like Sudan.”¹³⁷

These arguments have proven a successful rallying point for UNCLOS opponents and a potential political millstone for senators who might otherwise be inclined to support the convention. The arguments have retained force despite the fact that the United

States itself originally conceived the royalty plan under the Nixon Administration, with the full support of U.S. industry—support that has remained consistent across nearly four decades. Royalties were proposed as a modest concession in return for agreement on the U.S.-sponsored extended continental shelf regime.¹³⁸ Indeed, most of the oil and gas that may be recovered would be in the first six years and thus would not ever be subject to royalty payments. The “UN-style bureaucracy” argument has also endured despite the fact that opponents have presented no evidence that the ISA is either inefficient, overstuffed, or corrupt at any time throughout the nearly 19 years since its founding in 1994.

The argument that the ISA could transfer U.S. contributions to terrorists and other anti-U.S. interests also has great emotional appeal. However, the assertion is not based on fact¹³⁹ and has been rebutted repeatedly.¹⁴⁰ UNCLOS opponents have suggested in direct contradiction of the convention’s express terms that the assembly might somehow be able to circumvent the express provisions preserving U.S. influence in the council. The argument is spurious but remains a pillar of opposition strategy. Fortunately, to date the ISA has not yet taken up implementation of Article 82. But only if the United States is a party can it ensure that payments would not go to terrorists or other anti-U.S. interests.

The Argument that UNCLOS Is Unnecessary

In addition to arguing that UNCLOS membership would hurt the United States, UNCLOS opponents argue that the convention is unnecessary in the first place. As Alaskan Senator Lisa Murkowski has noted:

There are some who do not see the point in joining the rest of the world in ratifying the treaty. They say the United States already enjoys the benefits . . . even though we are not a member, and that by not becoming a party to the treaty, we can pick and choose which sections we abide by, while not subjecting our actions to international review. I respectfully disagree.¹⁴¹

Although Senator Murkowski and other UNCLOS proponents may disagree, the argument that UNCLOS is unnecessary remains potent because it offers an easy resolution for an overburdened political system. If, as opponents argue, the United States can accomplish its objectives without joining UNCLOS, why invest premium political capital and legislative time on a treaty that has failed to energize a supportive electoral constituency?

In making the case that UNCLOS is unnecessary, opponents do not dispute that the convention provides certain benefits. Rather, opponents argue that the benefits are independently available through other means, such as customary international law, separate bilateral or multilateral international agreements, or the exercise of U.S. military power. Opponents consider the convention’s benefits gratuitous and not worth the alleged burdens of UNCLOS membership.

The ease by which the United States has been able to enjoy some UNCLOS benefits around the world has, in fact, helped reinforce opposition arguments that accession is unnecessary. While the United States' thirty-year practice of operating consistent with UNCLOS has contributed to a maritime environment advantageous to U.S. global interests, the very stability of the regime also allows UNCLOS opponents to claim that U.S. accession is unnecessary. As discussed below, UNCLOS opponents contend the United States may, in effect, have its cake and eat it too.

Unnecessary for Interests in the Ocean The primary and most obvious example of the argument above is made with respect to navigational freedoms. For decades, the United States has been a leading advocate of strict adherence to UNCLOS' navigation provisions, having lobbied aggressively for their inclusion during the convention's negotiation. Through three decades, successive U.S. presidents have directed—with the complete support of the U.S. armed forces—that the military operate in accord with UNCLOS provisions. Likewise, other departments and agencies have pursued pro-UNCLOS policies and complementary international agreements as well.

Indeed, the United States has also done more than comply with UNCLOS; it has asserted that UNCLOS' navigational provisions represent customary international law binding on the entire international community regardless of any state's failure to ratify the convention.¹⁴² Although there are exceptions, most UNCLOS member states comply with the navigation provisions or at least do not challenge U.S. vessels exercising UNCLOS-based navigational rights.¹⁴³

In the Arctic, UNCLOS' navigation provisions provide a useful paradigm for free navigation.¹⁴⁴ Both Russia and Canada have taken positions the U.S. maintains are inconsistent with UNCLOS' freedom of navigation norms in their respective efforts to maximize control over the Northern Sea Route and Northwest Passage.¹⁴⁵ Although the United States could reinforce UNCLOS' beneficial provisions of transit and innocent passage by joining the Convention, there is little evidence that U.S. accession would change Russian or Canadian positions or result in a dramatic shift in third country positions absent being induced to do so by an international tribunal. Likewise, to the extent free navigation norms are actually respected in the Arctic, it is difficult to imagine how the United States' failure to join UNCLOS will prevent the United States from enjoying these benefits, although how long that respect will continue is uncertain if it comes under increasing pressures to change the law of the sea regime. The same could be said of environmental protection, fishing, and marine scientific research benefits.

UNCLOS supporters naturally resist such arguments as shortsighted.¹⁴⁶ Supporters note, among other arguments, that as a non-party, the United States has no recourse to the dispute settlement procedures of Part XV to address issues in the aforementioned areas. The fact remains, however, that during the thirty years UNCLOS has been in force, the United States has, in many respects, successfully

played the role of “free rider,” enjoying benefits codified in, and sometimes introduced by, the convention. To UNCLOS opponents, this is as it should be: sovereign states should be able to enjoy UNCLOS benefits at will unless and until member states attempt to limit the benefits or modify the norms that favor U.S. interests today. Should such efforts arise, opponents insist that the United States should respond by using traditional means of state diplomatic, economic, or political power. However, the United States as a non-party will not be in a position to prevent any changes that will be contrary to U.S. interests in the benefits it now enjoys.

Unnecessary for Interests on the Ocean Floor UNCLOS opponents also argue that convention membership is unnecessary for the United States to achieve its interests on the seafloor. Opponents contend that the United States already has the domestic and international legal authority necessary to proceed with offshore exploration and exploitation as far from shore as desired, limited only by technology and profit margin. UNCLOS opponents argue that the 1945 Truman Proclamation, the 1953 Outer Continental Shelf Lands Act (OCSLA), the 1958 Continental Shelf Convention, and the 1980 Deep Seabed Hard Mineral Resources Act (DSHMRA) provide all necessary legal authority.¹⁴⁷ In light of these authorities, UNCLOS is said to be irrelevant.

Several scholars have demonstrated that the opponents’ argument for what is, in effect, an open seafloor is, in the words of John Norton Moore and John Norton Garrett, “false and a disservice to the Senate.”¹⁴⁸ Moore, Garrett, and others have convincingly refuted the argument that the United States currently has the legal authority necessary for unlimited exploitation of the non-living natural resources of the extended continental shelf and beyond. These scholars demonstrate that where U.S. statutes and the 1958 Convention on the Continental Shelf refer to the “continental shelf,” each is in fact referring to the U.S. “geologic shelf,” which extends no more than approximately 50 miles off the U.S. coast.¹⁴⁹ Thus, Ronald Reagan’s claim to a continental shelf of 200 miles, which is identical to what UNCLOS permits, stands as the most expansive claim in U.S. history.¹⁵⁰

The only circumstance in which UNCLOS opponents recognize a limit on the United States’ authority to exploit the seafloor is when a U.S. neighbor can also make a legitimate claim to a potential extended continental shelf that overlaps with the U.S. claim. In these cases, UNCLOS opponents suggest that the United States may enter bilateral agreements with its neighbors to resolve the potential conflict, and these agreements would be conclusive between the parties. Under this view, the international community has no right in the matter.¹⁵¹

The obvious—and only—example of such a U.S. bilateral agreement to date is the U.S.-Mexican agreement for an extended continental shelf boundary in the Gulf of Mexico’s Western Gap, a 6,600 square-mile area beyond the 200-mile limits of both the United States and Mexico’s respective continental shelves.¹⁵² However, because this “gap” outside the limits of each nation’s continental shelf encompassed the

overlapping territory of each nation's potential *extended* continental shelf, the two neighbors successfully negotiated a compromise. Subsequent to the agreement, the U.S. Department of the Interior, as of June 2012, had granted sixty-five licenses to nine companies.¹⁵³ Each of the licenses contains a proviso that the company will pay the equivalent of an UNCLOS royalty.¹⁵⁴ Further, the outer limits of Mexico's extended continental shelf in the Western Gap of the Gulf of Mexico has been blessed by the Commission on the Limits of the Continental Shelf, and Mexico has accepted those recommendations.¹⁵⁵ The internationally recognized outer limit thus is the Mexico-United States continental shelf boundary in the Western Gap.

The Western Gap agreement has clear implications for the Arctic, where the United States shares a potential extended continental shelf with both Russia and Canada. UNCLOS opponents suggest that questions regarding international legal title to the U.S. potential extended continental shelf in the Arctic will be resolved conclusively when the United States enters bilateral agreements with Russian and Canada respectively.¹⁵⁶ As simple and therefore attractive as this position may be, it begs several questions.

Under what legal authority would the Arctic neighbors have the right to divide and claim for themselves an area lying, at least in theory, beyond their respective national jurisdictions? Even assuming a legitimate legal basis to claim their extended continental shelves and delimit them bilaterally, what basis would the states have for desiring to and concluding their agreements outside the UNCLOS framework, including ignoring Article 82 royalty payments? Finally, even if Russia and Canada—both UNCLOS member states—choose to comply with UNCLOS on their respective sides of delimited shelves, might they object to the United States not doing so on its side, and, if so, would they pursue their objections? And how might the outer limits of the U.S. extended continental shelf in the Arctic be determined given the geographic differences from the Western Gap situation where there were only two geographically opposite states with no third state or area interests involved?

The simple answer is that only by acceding to the convention can the United States obtain its full continental shelf rights in the Arctic.

The Case for UNCLOS: The Need for Legal Certainty

As demonstrated above, the argument that the United States has legal authority to proceed outside UNCLOS with projects beyond the 200-mile continental shelf is flawed. U.S. industry has consistently said as much, arguing that UNCLOS membership is required to provide the “legal certainty” necessary for exploration and exploitation of the resources of the full extended continental shelf and beyond.¹⁵⁷

While its calls for “legal certainty” have been unequivocal and enthusiastic, industry has been less specific in articulating what the risks might be of proceeding without the desired certainty. Industry representatives may consider the risks obvious to

anyone with a basic understanding of large-scale capital investment. They may also believe that simple statements of support for UNCLOS should be sufficient to generate desired political outcomes. Whatever the reason, the minimalist explanations have allowed UNCLOS opponents to speculate that industry's advocacy may, in fact, have shallow roots.

UNCLOS opponent former U.S. Secretary of Defense Donald Rumsfeld has suggested that businesses constantly make cost-benefit analyses, and have simply decided, at least for the time being, that the time is not right for offshore investment.¹⁵⁸ In the meantime, "they want as much certainty as they can get."¹⁵⁹ To secure this legal certainty, Mr. Rumsfeld has offered an alternative to waiting for the United States to accede to the treaty, suggesting that U.S. companies pursue "joint ventures" with other UNCLOS member states to secure legal title to deep seabed mining.¹⁶⁰ In fact, at least one U.S. company has already pursued this route.¹⁶¹ Apart from the philosophical inconsistency in encouraging U.S. corporations to participate in a legal regime the United States rejects, there may be opportunity costs to encouraging U.S. companies to obtain security of tenure to drill in the deep seabed through licenses backed by other countries.¹⁶²

Informally, opponents have gone further, suggesting that industry representatives may be overstating the "certainty" argument out of ignorance, or even a desire to curry political favor with powerful pro-UNCLOS policymakers and legislators.¹⁶³ Given how central the "legal certainty" argument has become to industry support for UNCLOS, a more detailed analysis of the need for "legal certainty" is essential.

In making the case for UNCLOS, industry has consistently expressed the concern that someone might challenge legal title to a particular site or extracted resource not obtained through the UNCLOS process.¹⁶⁴ UNCLOS opponents have countered by predicting there will be little opposition if and when a corporation actually begins production pursuant to a U.S. license outside UNCLOS.¹⁶⁵ Much is made, for example, of the fact that no party to date has challenged licenses granted on the U.S. side of the U.S.-Mexican Western Gap. UNCLOS opponents imply that the absence of a challenge suggests that the international community is sanguine with U.S. licensing outside the UNCLOS process. However, the Western Gap example is isolated and inapplicable as demonstrated above, and in any case, hardly seems a rigorous test, given that no company has actually begun exploration in the Western Gap and all U.S. licensees have agreed to pay an UNCLOS royalty.¹⁶⁶

Because no industry is currently producing on a U.S.-licensed site, neither opponents nor supporters can predict with certainty how interested third parties might react when production begins and profits are taken. In the meantime, however, to suggest that no actor besides the United States' border-sharing neighbors will be concerned seems naïve. Given that UNCLOS member states have voluntarily created a seafloor regime in which rights and benefits are contingent on beneficiaries fulfilling significant

obligations,¹⁶⁷ member states, at a minimum, have an interest in preventing free-riding on, and circumvention of, this system. Others may have similar interests as well.

Potential Challengers

Who might see fit to challenge the actions of a seafloor free rider like the United States? To begin, UNCLOS member states have obvious interests in the integrity of the continental shelf and seabed regimes in which they invest. Potentially interested states fall into at least three categories. First are states that may have an interest in conducting commercial activity of their own in an area claimed by the U.S. but not ratified through the UNCLOS process. Second are states that might have no objection, *per se*, to U.S. activity, but wish to ensure the United States pays its fair share under UNCLOS for the privilege of conducting commercial activity. Third are states that stand to benefit from the Article 82 “equitable sharing” payments and seek to ensure such payments are maximized.

In addition to UNCLOS member states, corporations with commercial interests in the seabed floor may have an interest in ensuring that actual and potential competitors do not obtain an unfair competitive advantage by operating outside the UNCLOS system. Although Article 82 royalties are assessed to states, it seems reasonable to assume that corporations may be assessed extended continental shelf fees by their licensing-states. Likewise, if operating in the area, corporations required to abide by rules and regulations established to govern the area would presumably demand that their competitors be bound by the same rules.

Similarly, the ISA, created by UNCLOS to “organize and control activities in the Area” and to distribute economic assistance and Article 82 royalty payments, would have an interest in preserving the integrity of the system it was created to oversee. Importantly, the ISA has been vested with international legal personality, which includes the power to bring suit to enforce its interests.¹⁶⁸

Finally, enterprising NGOs might take a keen interest in whether a state and its licensees are profiting at the expense of developing and land-locked states protected by UNCLOS, or, whether states and licensees are complying with ISA regulations created to protect the marine environment in and around the common heritage of mankind. The most obvious targets for NGO disapproval and legal or political action would seem to be the states and corporations operating outside the economic assistance and environmental protection regimes created by UNCLOS.

Potential Legal Actions

Any of the actors noted above could be expected to take a critical view of U.S. attempts to avoid the UNCLOS seafloor regime. Obviously, international disapproval of particular U.S. policies is not new; however, disapproval takes on magnified importance if opponents are able to channel their grievances into meaningful legal challenges. Given that the public international law of the sea governs how

states and international organizations relate to each other in the maritime domain, the inquiry into potential legal rights and remedies logically begins with public international law.¹⁶⁹

International Law

Liability Public international law governs the relationships between states and, on occasion, the relationships of states to international organizations. Nations commonly assume obligations to each other through treaties; however, a state may be bound by a norm of customary international law notwithstanding its failure to enter a treaty. Customary international law is created in a variety of ways, including by treaty provisions adopted and followed by sufficiently large numbers of states as a matter of legal obligation. Customary international legal obligations also give rise to an array of international remedies. Thus, the fact that the United States has not ratified UNCLOS does not necessarily mean the United States is free—as a matter of international law—to ignore particular UNCLOS legal norms or processes. If, in fact, the United States is under an obligation to comply with an UNCLOS provision that has also become customary international law, failure to comply could give rise to international liability and subject the United States to international legal remedies.

There is a strong case to be made that the United States is obligated under international law to comply with UNCLOS' seafloor regime despite the fact that the United States has never ratified the convention. The most fundamental and compelling reason the United States is bound by UNCLOS' regime for the extended continental shelf is because, quite simply, the United States says it is bound.¹⁷⁰ Moreover, even though the United States has not ratified the convention, as a signatory to the revised deep seabed mining provisions, the United States has incurred an international legal obligation to not act contrary to the “object and purpose” of the treaty.¹⁷¹ In light of the prominent role given the deep seabed mining regime in the convention and its necessary and practically inseparable relationship to the extended continental shelf regime, the United States is arguably not permitted to act in any way that would undermine these central provisions.

Even if a future president were to disavow the U.S. signature of the deep seabed agreement, the U.S. government's current position, which reflects its long held view, would be used as evidence that the provisions have gained the status of customary international law binding on the United States. The U.S. failure to contest this proposition—indeed, the U.S. long agreement with the proposition—is reinforced by the fact that 85 percent of nation states, including all but fourteen littoral nations, have ratified UNCLOS.

Actual state practice also reinforces the legitimacy of the extended continental shelf regime in international law and its status as customary international law. To date, sixty-five nations have submitted claims to the CLCS, demonstrating widespread acceptance of this critical UNCLOS process.¹⁷²

Thus, it may well be that the United States is estopped from acting contrary to the convention as a result of the President's Ocean Policy Statement and subsequent vigorous compliance with it.

Forum and Remedy The fact that the United States could well be found liable under international law for failing to comply with the extended continental shelf regime does not end the inquiry. A state or international organization must obtain two separate types of jurisdiction over an opposing party. First, there must be jurisdiction to bring a claim in the first place; second, there must be jurisdiction to enforce any resulting judgment, which is commonly obtained by asserting control over assets of the defeated litigant.¹⁷³ Jurisdiction to bring a claim does not necessarily mean jurisdiction to enforce a judgment. Within international law, there are two primary forums in which the ISA or an UNCLOS member state might attempt to bring and enforce a legal action against the United States for acting contrary to UNCLOS.

One option would be to bring an action before the International Court of Justice (ICJ). The ICJ has jurisdiction in contentious cases only on the basis of consent of the parties—*i.e.*, a state cannot be sued at the ICJ unless both parties agree or the state being sued has already submitted to jurisdiction through a prior, binding, international agreement.¹⁷⁴ In all likelihood, neither circumstance would apply to the United States in the UNCLOS context. Presumably, the United States would not consent to a specific suit. In 1985, the United States withdrew a long-standing declaration recognizing the compulsory jurisdiction of the ICJ after the ICJ asserted jurisdiction in the landmark case of “Military and Paramilitary Activities In and Against Nicaragua.”¹⁷⁵ Although in intervening years the United States has agreed to participate in certain ICJ litigation, the circumstances of those cases are sufficiently distinct and make them unlikely precedents for UNCLOS litigation.¹⁷⁶ Accordingly, it is unlikely a state or international organization will be able to obtain jurisdiction over the United States for a contentious case at the ICJ.¹⁷⁷

The fact that a contentious UNCLOS suit before the ICJ is unlikely does not, however, render the ICJ irrelevant. Even without consent by the United States, the ICJ could issue an “advisory opinion.” The UN General Assembly or the UN Security Council may seek an advisory opinion “on any legal question” from the ICJ,¹⁷⁸ including disputes between states in which one has not consented to ICJ jurisdiction.¹⁷⁹ In addition, the assembly can authorize any other organ of the UN or any special agency to seek an advisory opinion “on legal questions arising within the scope of their activities.”¹⁸⁰ Although advisory opinions are not legally binding, they may, depending on the surrounding context, carry political weight. Moreover, such an opinion might also be employed as precedent in foreign domestic courts and international trade forums, or prove harmful to a corporation's international reputation, each of which is discussed below.

Another forum option could be the International Tribunal for the Law of the Sea (ITLOS), which was designed to resolve disputes between UNCLOS parties.¹⁸¹ As the United States is not an UNCLOS member state, it would presumably attempt to resist jurisdiction. However, given that ITLOS is empowered to decide its own jurisdiction¹⁸² and it has been assertive about doing so,¹⁸³ that the United States has stated UNCLOS represents customary international law, and that the United States has an obligation to not defeat the “object and purpose” of a treaty it has signed, it is at least worth considering whether there might be a circumstance in which ITLOS might find jurisdiction over the United States in a contentious case involving the extended continental shelf or deep seabed. Even if the answer is no, it seems entirely plausible that ITLOS’ Seabed Disputes Chamber could issue an advisory opinion on an issue involving the U.S.,¹⁸⁴ with effects similar to those outlined above for the ICJ.

Foreign Domestic Law A second potential means to compel compliance with UNCLOS regimes would be for a foreign state, corporation, or even an NGO to bring an action against the United States, or, perhaps more likely, a U.S.-licensed corporation in a foreign domestic jurisdiction. The enforcing party would be required to bring its action in a jurisdiction with domestic law incorporating UNCLOS obligations. Enforcement of UNCLOS in a foreign domestic court would depend on the relationship between treaties and the foreign nation’s domestic law.¹⁸⁵ Nations fall into two categories in how they implement treaties into their domestic law. Some states convert treaties into domestic law automatically¹⁸⁶ and in an UNCLOS member state taking such an approach, UNCLOS would be enforceable in a foreign domestic court without any further action required by the member state. In contrast, some nations require implementing legislation before a treaty is enforceable as domestic law.¹⁸⁷ In such a nation, UNCLOS would either need to be made self-executing upon ratification, or be implemented through separate legislation.¹⁸⁸

In either case, if a state is willing to incorporate UNCLOS provisions into its domestic law, it is foreseeable that the state might also insist that corporations conducting business within the state comply with UNCLOS. For example, state A might establish a rule that before corporation Z does business within A, Z must demonstrate that its international business is conducted consistent with UNCLOS. Further, if Z is already doing business within A and undertakes a new non-UNCLOS-compliant venture elsewhere, A might subject Z to penalties. Alternatively, A might allow private causes of action to be brought by third-party corporations or NGOs against Z as a way to compel UNCLOS compliance. Chevron, Exxon, and Coca-Cola are some of the U.S. corporations that have been forced to endure long and expensive litigation in a foreign domestic court for charges ranging from environmental pollution to human rights violations.¹⁸⁹

Today, several countries have statutes mandating UNCLOS compliance. For example, Australia has passed the Sea and Submerged Lands Act of 1973, which gives domestic effect to the provisions of UNCLOS.¹⁹⁰ This domestic legislation would

allow Australia to bring suit against the United States or a U.S.-licensed corporation in its domestic courts.

In addition to obtaining jurisdiction to bring the claim, a plaintiff hoping to obtain complete success must also obtain enforcement jurisdiction over the opposing party. This is easily accomplished if the corporation is doing business or has assets within the relevant jurisdiction; however, even if not, jurisdiction would not necessarily be foreclosed under international extraterritoriality principles. Jurisdiction might exist if the United States or a U.S.-licensed corporation was harming the vital economic interests of the plaintiff, taking action deemed to have a harmful effect within the foreign state's territory, or potentially affecting the interests of the international community as a whole.¹⁹¹

To prevail against the United States, the plaintiff would need to overcome the presumption that the United States, as a sovereign state, is immune from civil jurisdiction.¹⁹² Although the law varies among states, this might be accomplished by relying on the commercial nature of exploration and development on the extended continental shelf and deep seabed. Typically, to determine if something is commercial, one must look to the nature of the conduct rather than to the purpose. The economic development of new waters backed with modern technology and investment is certainly commercial in nature.

International Reputation

The survey above suggests a variety of legal means through which the United States or a U.S.-licensed corporation might be challenged for operations on the seafloor outside the UNCLOS system. To date, such challenges are speculative; however, the variety of potential challengers and forums should lay bare the notion that the only thing corporations have to fear is fear itself.¹⁹³

Corporate reluctance to proceed on the seafloor may also arise from the perception that a more immediate non-legal risk looms larger. The most threatening prospect for prospective seafloor operators today—other than a foreign navy or coast guard vessel arriving to forcibly eject them from an offshore site—may be the potential loss of reputation that would result from undertaking a “rogue” operation outside the UNCLOS regime.¹⁹⁴ Companies with global operations and markets rely on political support from foreign governments, financial support from foreign investors, and market support from foreign consumers. Companies may be loath to jeopardize success abroad by taking action that might antagonize these pillars of a favorable business climate.¹⁹⁵

The Case for Political Stability

As this paper has attempted to demonstrate, UNCLOS supports a variety of important U.S. interests in the Arctic. The U.S. decision to support UNCLOS as the Arctic's governing legal framework was, and remains, sound policy.

To be sure, the UNCLOS framework is not a panacea. Arctic Council members do not always share the same interpretations of specific convention provisions. While this introduces complexity, it should not overshadow the fact that agreement on a common legal framework reduces a significant potential barrier to progress. Moreover, lest anyone be overly focused on UNCLOS' gaps or ambiguities, UNCLOS skeptics would do well to realize the United States could do much worse.

The Arctic Council's May 2013 decision to grant observer status to China, India, South Korea, Singapore, and Italy underscores the obvious: important international actors outside the Arctic are intensely concerned with the region's future.¹⁹⁶ Currently, the new Arctic Council observer states have no votes and their formal participation in Arctic governance is limited to non-voting roles in working groups.¹⁹⁷ Going forward, however, it seems reasonable to ask whether China will be content to continue with a tangential role in Arctic decision-making. As one observer has noted:

The mantra that the Arctic and its natural resource wealth belong to no one country or group of countries but constitute the common heritage of all humankind is virtually *de rigueur* in recent Chinese public commentary on Arctic affairs. There are also indications that China sees itself at the vanguard of the rest of humanity and the international community in this regard.¹⁹⁸

Although it is clear that the vast Arctic resources are attractive to China,¹⁹⁹ predictions about China's political intentions in the Arctic should be made cautiously. Official government statements have been limited and writing originating from the Chinese academic community is not always a reliable indicator of future state behavior. With this caveat in mind, however, there is evidence that at least some Chinese may be disenchanted with China's near-term access to Arctic resources. In 2010, a Chinese admiral claimed that since China has 20 percent of the world's population, it should have 20 percent of the Arctic's resources.²⁰⁰ While this may not reflect official Chinese policy, it may reflect a sense of moral entitlement to Arctic sea routes and resources.²⁰¹ As one Chinese scholar sees it:

Arctic littoral states . . . all want to dip their cups into the rich stew of oil and natural gas in the Arctic Ocean. [China should play a role] in the formulation of international law . . . and jurisdiction over resources and sea routes and do its utmost in the Arctic to make its own voice heard and strengthen its right to speak up. Only those who become owners of resources will be able to obtain their rightful value.²⁰²

Other Chinese scholars have suggested that UNCLOS does not entirely safeguard China's perceived Arctic interests, noting correctly that if Arctic states exercise their extended continental shelf rights under UNCLOS, China's opportunity to partake of the "common heritage" in the Arctic will be greatly diminished.²⁰³

To be fair, it would be a mistake to ignore evidence that China currently seems to support UNCLOS as the governing legal regime for the Arctic.²⁰⁴ This is logical, given UNCLOS' protection of navigational freedoms and China's interest in the potential for shorter sea routes through the Northern Sea Route and Northwest Passage. Support for UNCLOS' free navigation provisions, however, does not require support for UNCLOS' seafloor provisions. In fact, one can easily conceive China bringing its influence to bear in support of an Arctic treaty and accompanying legal regime "uniquely tailored" for the "special needs of the Arctic and the international community."

China, the European Union, or other member states could also attempt to amend UNCLOS in ways that could change the favorable extended continental shelf and deep seabed mining regimes, or give coastal states more control beyond their territorial seas and potentially obstruct the freedoms to navigate and to lay and maintain international cables. Without access to UNCLOS procedures, the United States loses the force of its objections and risks being a bystander as Member States effectively amend customary international law through UNCLOS amendments.²⁰⁵

In the years to come, will China continue to support a legal regime in the Arctic that excludes China from the vast majority of the Arctic's seafloor resources? And if China finds the UNCLOS seafloor regime constricting and employs its considerable influence and financial strength to lobby for offshore investment or for a new approach, will other states without Arctic coastlines follow suit? Calls for an Arctic treaty are not new,²⁰⁶ and given China's interests, such an effort would hardly be surprising.²⁰⁷ If such a movement were to arise, it is difficult to argue that the United States would be in a stronger position to resist change as an uncommitted outsider rather than a full-fledged member state.

Summary

This paper has examined the question of whether the United States' failure to join UNCLOS helps or hurts U.S. interests in the Arctic. After reviewing the range of U.S. interests and UNCLOS application thereto, as well as the objections of UNCLOS opponents, there is little reason to conclude that joining UNCLOS could hurt U.S. interests. Indeed, in many ways, UNCLOS accession would benefit the United States. Going forward, the precise extent to which accession would help U.S. objectives will depend in large measure on the importance policymakers attach to resources on and below the seafloor more than 200 miles from Alaska's coast. If the United States wishes to maintain maximum flexibility to develop its potential resources in this domain, the U.S. should accede to UNCLOS at the soonest earliest opportunity. Failure to do so increases the likelihood that the "package deal" so favorable to U.S. interests will not endure to the detriment of U.S. interests.

Representatives of major U.S. corporations with potential interests on the seafloor have rightly expressed concern about making necessary investments and proceeding with seafloor projects as long as the United States remains outside UNCLOS. As long as the United States remains outside UNCLOS, any U.S.-licensed activity on the U.S. extended continental shelf will be legally suspect and vulnerable to challenge. Given these risks, as well as concerns about international reputation, important U.S. industries will likely remain unwilling to proceed. In the meantime, UNCLOS member states continue to queue up to perfect their own outer limits of the extended continental shelf before the CLCS. If the United States were to accede to the convention today and submit a proposal to the CLCS tomorrow, the CLCS will not likely consider the petition until at least 2030. This time frame will continue to expand until the United States joins the queue, which it cannot do from outside the convention.

The forfeiture of UNCLOS benefits, on the seafloor or elsewhere, is particularly troubling given that the benefits are available at minimal cost. As discussed within, opposition arguments suggesting otherwise suffer from important legal defects as well as flawed policy assumptions. Given that many of these arguments have played a prominent role in the current UNCLOS stalemate, Arctic policymakers must consider whether there may be new, more effective ways to persuade undecided senators to confront the specifics of opposition arguments.

Arctic policymakers must also overcome the inertia arising from the fact that near-term prospects for industry action on the Arctic extended continental shelf and beyond seem remote. *Potential* Arctic benefits, no matter how lucrative, provide little political incentive for immediate action. Incentive is further reduced by the ease with which the United States has been able to enjoy many UNCLOS benefits without joining the convention. While this has contributed to a more stable maritime legal regime conducive to U.S. global interests, it has also led UNCLOS opponents to claim successfully—albeit unwisely, and, in some instances incorrectly—that the United States can continue to exploit all UNCLOS benefits without paying the minimal costs of UNCLOS membership. Application of this fallacy to the Arctic could be costly.

The United States should join UNCLOS to fully preserve U.S. Arctic interests. Although some of the convention's most important advantages in the Arctic may not be immediately available, UNCLOS would allow the United States to preserve maximum flexibility today for developing offshore energy resources tomorrow. In addition, accession would reinforce a legal regime favorable to other important U.S. Arctic interests as well, and deter prospects for the UNCLOS to collapse or be revised to the detriment of U.S. interests.

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Notes

1 Canada, Denmark, Norway, and the Russian Federation.

2 The Ilulissat Declaration, May 28, 2008, *available at* http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

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

4 The Ilulissat Declaration does not directly reference UNCLOS because the United States is not a party to the convention. Hans Corell, *The Arctic: An Opportunity to Cooperate and Demonstrate Sportsmanship*, 42 VAND. J. TRANSNAT'L L. 1065, 1067 (2009).

5 NATIONAL STRATEGY FOR THE ARCTIC REGION 10 (2013) [hereinafter U.S. ARCTIC STRATEGY 2013], *available at* http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

6 *Id.* at 9.

7 *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of Sen. John Kerry, Chairman, S. Comm. on Foreign Affairs), *available at* <http://1.usa.gov/10i4jda>.

8 *The Law of the Sea Convention (Treaty Doc. 103-39): Perspectives from Business and Industry: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 6 (2012) (statement of Jack N. Gerard, President & Chief Exec. Officer, Am. Petroleum Inst.), *available at* <http://1.usa.gov/ZOJXWY>.

9 United States Oceans Policy 1983, 19 WEEKLY COMP. PRES. Doc. 383, 866 (Mar. 10, 1983).

10 S. Treaty Doc. No. 103-39, at III–IV (1994). For a comprehensive assessment of President Reagan's views on UNCLOS, see J. ASHLEY ROACH & ROBERT W. SMITH, PUBLICATIONS ON OCEANS DEVELOPMENT: EXCESSIVE MARITIME CLAIMS 815, 817 (3d ed. 2012) ("President Reagan pointed solely to certain deep seabed mining provisions of the Convention as flawed. He considered that those provisions could be fixed and specifically identified the elements in need of revision.").

11 Scott G. Borgerson, *The National Interest and the Law of the Sea*, COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT No. 46, at 12–13 (May 2009), *available at* <http://on.cfr.org/18Gj39p>.

12 See UNCLOS, *supra* note 3, arts. 17, 38, 53, 58, 87, at 30, 37, 42–43, 44, 57.

13 See U.S. ARCTIC STRATEGY 2013, *supra* note 5, at 6 ("Preserve Arctic Region Freedom of the Seas—The United States has a national interest in preserving all of the rights, freedoms, and uses of sea and airspace recognized under international law.") (Emphasis in original).

14 DEP'T OF INTERIOR, MANAGING FOR THE FUTURE IN A RAPIDLY CHANGING ARCTIC: A REPORT TO THE PRESIDENT 11 (2013) [hereinafter RAPIDLY CHANGING ARCTIC], *available at* <http://1.usa.gov/11kMOUS>.

15 ROACH & SMITH, *supra* note 10, at 477.

16 See, e.g., RAPIDLY CHANGING ARCTIC, *supra* note 14, at 17 (discussing the continued growth of commercial shipping as sea ice diminishes over time); ARCTIC COUNCIL, ARCTIC BIODIVERSITY ASSESSMENT: STATUS & TRENDS IN ARCTIC BIODIVERSITY 505 (2013) [hereinafter ARCTIC BIODIVERSITY ASSESSMENT] (discussing how increased tourism via cruises has resulted in the Arctic and continues to grow as the Arctic Ocean and surrounding seas become more consistently accessible); J. Ashley Roach, *International Law and the Arctic: A Guide to Understanding the Issues*, 15 SW. J. INT'L L. 301, 312 (2009) (noting that the potential for an ice-free Arctic Ocean provides the United States more space to conduct military exercises pursuant to UNCLOS' navigational freedom provisions).

17 Malte Humpert & Andreas Raspotnik, *The Future of Arctic Shipping Along the Transpolar Sea Route*, ARCTIC YEARBOOK 281, 282 (2012), available at <http://bit.ly/120pgmT>. The Transpolar Sea Route (TSR) is a third trans-Arctic navigational route that will become available once the Arctic sea ice diminishes completely. *Id.* Because the TSR remains unavailable for the foreseeable future, it will be excluded from the discussion of U.S. navigational interests. For a more in-depth discussion of the TSR as a potential international shipping route, see *id.*

18 See, e.g., Claudia Cinelli, *The Law of the Sea and the Arctic*, 2 ARCTIC REV. ON L. & POL. 4, 11 n.22 (2011); ROACH & SMITH, *supra* note 10, at 312.

19 *Northern Sea Route 2013 Queue Longest Yet*, MARINELINK.COM (June 6, 2013), <http://bit.ly/1b7JSz3>.

20 *Id.*

21 ROACH & SMITH, *supra* note 10, at 318.

22 Cinelli, *supra* note 18, at 11 n.22.

23 See RAPIDLY CHANGING ARCTIC, *supra* note 14, at 17.

24 There has been a 118 percent increase in maritime transit through the Bering Strait from 2008 to 2013. U.S. COAST GUARD, UNITED STATES COAST GUARD ARCTIC STRATEGY 5 (2013), available at <http://bit.ly/13FRTHx>. China sent an ice-breaker through the Northern Sea Route for the first time in 2012, and its first commercial voyage through the Northern Sea Route is expected to take place during the summer of 2013. Trude Petterson, *China Starts Commercial Use of Northern Sea Route*, *Barents Observer* (Mar. 14, 2013), <http://bit.ly/15OuGX4>.

25 See ROACH & SMITH, *supra* note 10, at 318–28 (describing the history of U.S.-Canadian relations regarding the Northwest Passage).

26 See *id.* at 312–18 (describing the history of U.S.-Russian relations regarding the straits that comprise the Northern Sea Route).

27 See Press Release, U.S. DEP'T OF STATE, Press Release No. 121 (Apr. 15, 1970), quoted in Michael Byers & Suzanne Lalonde, *Who Controls the Northwest Passage?*, 42 VAND J. TRANSNAT'L L. 1133, 1151 (2009) (explaining that the U.S. responded to Canada's claim that the Northwest Passage constituted internal waters with a diplomatic note entitled "U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction"). Cf. ROACH & SMITH, *supra* note 10, at 495–96 (noting that the shipping regulations Russia has imposed in the Northern Sea Route do not conform with various international agreements, including UNCLOS, IMO Conventions and Codes, and potentially the mandatory Polar Code). See generally Michael Byers, *Toward a Canada-Russia Axis in the Arctic*, GLOBAL BRIEF (Feb. 6, 2012), <http://bit.ly/18iO9nv> (discussing U.S. objections to Russian and Canadian claims of internal waters).

28 Such straits are “used for international navigation between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone.” UNCLOS, *supra* note 3, art. 37, at 36.

29 Ted L. McDorman, *Nat'l Measures for the Safety of Navigation in Arctic Waters: NORDREG, Article 234, and Canada*, in CTR. FOR OCEANS LAW & POLICY, THE LAW OF THE SEA CONVENTION: U.S. ACCESSION AND GLOBALIZATION 411 (Myron Nordquist et al. eds. 2012).

30 ROACH & SMITH, *supra* note 10, at 494.

31 Article 234 states:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.
UNCLOS, *supra* note 3, art. 234, at 115–16.

32 For an explanation of U.S.-Russian Federation disagreements regarding the legal status of the Northern Sea Route, *see generally* ROACH & SMITH, *supra* note 10, at 312–18.

33 *Legislation*, N. SEA ROUTE INFO. OFFICE, http://www.arctic-lio.com/nsr_legislation (last visited July 13, 2013).

34 Alexander V. Mednikov, *Shipping & Transport—Russia: New Regulations for the Northern Sea Route*, INT'L LAW OFFICE (Apr. 10, 2013), <http://bit.ly/153ZtfH>. *Cf.* Balazs Koranyi, *Ice Levels, Rule Changes to Boost Arctic Northern Sea Route*, REUTERS (May 29, 2013), <http://reut.rs/18yi1sH> (noting how Russia intends to increase the use of the Northern Sea Route by commercial vessels)

35 ROACH & SMITH, *supra* note 10, at 494.

36 UNCLOS, *supra* note 3, art. 41.4, at 38.

37 *Shipping in Polar Waters*, INT'L MAR. ORG., <http://bit.ly/16DdAtq> (last visited July 14, 2013) (explaining that the IMO is developing the Polar Code that will “cover the full range of design, construction, equipment, operational, training, search and rescue, and environmental protection matters relevant to ships operating in the inhospitable waters surrounding the two poles”). *See generally* Heike Deggim, *Ensuring Safe, Secure and Reliable Shipping in the Arctic Ocean*, INT'L MAR. ORG. (2010), available at <http://bit.ly/1beW5qe> (discussing the current regulatory framework for shipping in the Arctic).

38 *Arctic to Implement Arctic Shipping Code by 2016*, PORT TECH. INT'L (June 7, 2013), <http://bit.ly/120pWJ6>.

39 U.S. ARCTIC STRATEGY 2013, *supra* note 5, at 7.

40 UNCLOS, *supra* note 3, arts. 21.1(f), at 31–32; *Id.* art. 192, at 100.

41 *Id.* art. 211.4, at 106.

42 *Id.* art. 56.1(a), at 43.

43 *Id.* art. 56.1(b)(iii), at 43–44.

44 *Id.* art. 56.2, at 44.

45 *International Convention for the Prevention of Pollution from Ships (MARPOL)*, INT'L MAR. ORG., <http://bit.ly/n2Z5RR> (last visited June 13, 2013).

46 *Binding Oil Spill Agreement Signed*, BARENTS OBSERVER (May 15, 2013), <http://bit.ly/YYEjmr>.

47 PAME: PROTECTION OF THE ARCTIC MARINE ENVIRONMENT, <http://www.pame.is> (last visited June 9, 2013).

48 *See generally* ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 169-70 (2009), available at <http://1.usa.gov/153CGkg>.

49 *See generally* ARCTIC COUNCIL, ARCTIC OFFSHORE OIL AND GAS GUIDELINES (2009), available at <http://bit.ly/11ALzQj>.

50 ARCTIC COUNCIL, PAME WORK PLAN 2013–2015, at 9 (2013), available at <http://bit.ly/13wuZFc>.

51 *See generally* UNCLOS, *supra* note 3, arts. 61–67, at 45–49.

52 *See* U.N. Agreement for the Implementation of Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88.

53 *See generally id.*

54 John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AM. J. OF INT'L L. 488, 497–98 (1994). *See generally id.*; Kathryn Isted, Comment, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 J. TRANSNAT'L L. & POL'Y 343, 374–75 (2009) (acknowledging that UNCLOS cannot, by itself, address all of the fisheries issues in the Arctic and advocating for the Arctic Council to create another working group to do so).

55 ARCTIC BIODIVERSITY ASSESSMENT, *supra* note 16, at 32.

56 *Id.* (including the Bering Sea and Aleutian Islands, the Northwest Atlantic between Canada and Greenland, the waters surrounding Greenland and Iceland, the Norwegian Sea, and the Barents Sea).

57 *Id.* at 493.

58 *See* Arctic Circle Chart of Arctic Fisheries Agreements, <http://bit.ly/13OAdLt> (last visited June 18, 2013).

59 ARCTIC BIODIVERSITY ASSESSMENT, *supra* note 16, at 494.

60 U.S. ARCTIC STRATEGY 2013, *supra* note 5, at 8.

61 *See About the Extended Continental Shelf Project*, EXTENDED CONT'L SHELF PROJECT, <http://continentalshef.gov/about.html> (last visited June 18, 2013).

62 UNCLOS, *supra* note 3, art. 145, at 118.

63 This includes living or non-living resources, unless the research is to be conducted on the continental shelf more than 200 nautical miles from the baselines. UNCLOS, *supra* note 3, art. 246.5(a), at 119.

64 *Id.* art. 246.5(b), at 119. However, the U.S. does not require its permission to conduct MSR in the U.S. EEZ except in six specific circumstances. *See* ROACH & SMITH, *supra* note 10, at 427.

65 UNCLOS, *supra* note 3, art. 257, at 123.

66 See *Id.* art. 143, at 72.

67 *Id.*

68 U.S. ARCTIC STRATEGY 2013, *supra* note 5, at 7.

69 UNCLOS, *supra* note 3, art. 77.1, at 54.

70 *Defining the Limits of the Continental Shelf*, U.S. DEP'T OF STATE, <http://www.state.gov/e/oes/continentalshelf> (last visited June 9, 2013).

71 UNCLOS, *supra* note 3, art. 76.3, at 53.

72 *Id.* art. 76.1, at 53.

73 *Id.* art. 76.4, at 53.

74 *Defining the Limits of the Continental Shelf*, U.S. DEP'T OF STATE, <http://www.state.gov/e/oes/continentalshelf> (last visited June 9, 2013).

75 UNCLOS, *supra* note 3, art. 76.4(a)(i)–(ii), at 53.

76 *Id.* art. 76.5, at 53.

77 *Id.* art. 76.8, at 54.

78 *Id.* Annex II, art. 2, at 145–46. The twenty-one members of the CLCS are elected when they receive a two-thirds majority vote from the state parties. *Id.* They serve five-year terms and can be re-elected. *Id.*

79 *Id.* Annex II, art. 4, at 146.

80 *Id.* Annex II, art. 5, at 146–47.

81 UNCLOS, *supra* note 3, Annex II, art. 6, at 147.

82 *Id.* art. 76.8, at 54. If the coastal state disagrees with the recommendations, it “shall” submit revised or new claims to the CLCS in a reasonable amount of time. *Id.* Annex II, art. 8, at 147.

83 *Submissions to the CLCS*, UNITED NATIONS DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA [hereinafter *CLCS Submissions*], <http://bit.ly/6OJRV> (last visited July 15, 2013).

84 Paul L. Kelly, *Panel II: Energy and Economic Development*, in CTR. FOR OCEANS LAW & POLICY, *THE LAW OF THE SEA CONVENTION: U.S. ACCESSION AND GLOBALIZATION* 65 (Myron Nordquist et al. eds., 2012).

85 UNCLOS, *supra* note 3, art. 82.2, at 55. This formula, negotiated by U.S. oil company executives, ensures that most of the production will not be subject to the royalty provisions. Letter from John N. Moore & John N. Garrett to former U.S. Senator John Kerry, at 12–13 (July 26, 2012) [hereinafter Moore & Garrett].

86 UNCLOS, *supra* note 3, art. 82.4, at 55–56. For a more detailed discussion of the ISA's governing structure, see *infra*, notes 102–28 and accompanying text.

87 *About Us*, INT'L SEABED AUTH., <http://www.isa.org.jm/en/about> (last visited June 6, 2013).

88 UNCLOS, *supra* note 3, art. 82.4, at 55–56.

89 *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of Sen. Richard Lugar, Mem., S. Comm. on Foreign Affairs), available at <http://1.usa.gov/16iNPRm>. Alaska alone has more coastline than all of the lower 48 United States combined. Scott G. Borgerson, *The Coming Arctic Boom: As the Ice Melts, the Region Heats Up*, FOREIGN AFFAIRS (2013), available at <http://fam.ag/11Uzbim>.

90 Moore & Garrett, *supra* note 85, at 10. However, if the U.S. acceded to UNCLOS, it would not be able to develop the full 600-mile continental margin; UNCLOS limits a coastal state's extended continental shelf to either 100 nautical miles from the 2,500 meter isobath or 350 nautical miles from a coastal state's baseline. UNCLOS, *supra* note 3, art. 76.5, at 53.

91 U.S. GEOLOGICAL SURVEY, CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE 4 (2008), available at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

92 *Id.*

93 BUREAU OF OCEAN ENERGY & MGMT, ASSESSMENT OF UNDISCOVERED TECHNICALLY RECOVERABLE OIL AND GAS RESOURCES OF THE NATION'S OUTER CONTINENTAL SHELF 3 (2011), available at <http://1.usa.gov/tT9Kb6>.

94 See *supra* note 68 and accompanying text.

95 Nick Snow, *Study Lists Alaska Arctic OCS Development's Potential Benefits*, OIL & GAS J. (Feb. 24, 2011), <http://bit.ly/1aJatYt>. See N. ECON., INC. & INST. OF SOC. & ECON. RESEARCH, POTENTIAL NATIONAL-LEVEL BENEFITS OF OIL AND GAS DEVELOPMENT IN THE BEAUFORT SEA AND CHUKCHI SEA 15, 18 (2011), available at <http://bit.ly/hpz8xM>.

96 N. ECON., INC. & INST. OF SOC. & ECON. RESEARCH, ECONOMIC REPORT OVERVIEW: POTENTIAL NATIONAL-LEVEL BENEFITS OF OIL AND GAS DEVELOPMENT IN THE BEAUFORT SEA AND CHUKCHI SEA 2 (2011), available at <http://bit.ly/KZSUYN>. A 2009 study anticipated that oil and gas production would occur in 2019 and 2029, respectively, in the Beaufort Sea, and in 2022 and 2036, respectively, in the Chukchi Sea, but because exploration in the region has slowed, these dates have been delayed. *Id.*

97 *CLCS Submissions*, *supra* note 83.

98 Trude Petterson, *Russia to Submit Arctic Claim by Year's End*, BARENTS OBSERVER (Jan. 24, 2013), <http://bit.ly/YOw0la>.

99 *CLCS Submissions*, *supra* note 83.

100 Because the Convention entered into force for Canada on December 6, 2003, Canada must submit its claim to the CLCS before December 6, 2013. See FOREIGN AFFAIRS AND INT'L TRADE CAN., CANADA'S EXTENDED CONTINENTAL SHELF PROGRAM: FINAL REPORT 2 (2011), available at <http://bit.ly/12HFnpY>. To date, Canada has not submitted a claim to the CLCS. See *CLCS Submissions*, *supra* note 83. See also *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, UNITED NATIONS DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA (Jan. 23, 2013), <http://bit.ly/14oHkwm>.

101 RONALD O'ROURKE, CONG. RESEARCH SERV., R41153, CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS 15 (2013), available at <http://bit.ly/d1zjWX>.

102 UNCLOS, *supra* note 3, art.1, at 26.

103 *Id.* art. 136, at 70. Although the "common heritage" concept is often cited derisively by UNCLOS opponents, see, e.g., Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea*, BACKGROUNDER NO. 2746, 1 (2012), available at <http://bit.ly/10i91HO>, the United States has long supported the concept as a way to preempt global competition and potential militarization of the deep

ocean areas. See, e.g., *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, U.S. DEP'T OF STATE (Feb. 1995) (noting that President John Adams stated that "the oceans and its treasures are the common property of all men[,]"; and President Lyndon Johnson declared that "we must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings."); President Richard Nixon, *United States Policy for the Seabed*, 62 DEP'T OF STATE BULL. 737 (June 1970) (proposing that all nations adopt "a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind"). See generally Lt. Martin A. Harry, JAGC, USNR, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?*, 40 NAV. L. R. 207, 209–16 (1992) (explaining the history of the "common heritage of mankind" concept).

104 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982, July 28, 1994, 1836 U.N.T.S. 3 [hereinafter Part XI Agreement], available at <http://bit.ly/14okhla>.

105 UNCLOS, *supra* note 3, art. 158, at 81.

106 *Id.* arts. 166–69, at 92–93.

107 All UNCLOS member states are thereby members of the authority. *Id.* art. 156.2, at 81; *id.* art. 159.1, at 82.

108 *Id.* arts. 159–60, at 82–84.

109 *Id.* art. 162.1, at 86. See *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, U.S. DEP'T OF STATE (Feb. 1995).

110 UNCLOS, *supra* note 3, art. 161, at 85.

111 *Id.* art. 162.1, at 86.

112 *Id.* art. 160.2(f)(i), at 83.

113 Part XI Agreement, *supra* note 104, Annex, Section 3.4.

114 *Id.*

115 The Part XI Agreement states that the council's consumer chamber must include the state that has the largest gross domestic product when the convention enters into force. *Id.* Annex, Section 3.15. The U.S. has held this distinction continuously before and since UNCLOS' entry into force. See Moore & Garrett, *supra* note 85, at 14 n.16.

116 UNCLOS, *supra* note 3, art. 161.8(d), at 86; see also *id.* art. 162.2(o), at 88.

117 The council must adopt rules and regulations regarding deep seabed mining activities and determine the distribution of funds obtained from active mining leases by consensus, UNCLOS, *supra* note 3, art. 161.8(d), at 86, which is defined as "the absence of any formal objection," by the Council's rules of procedure. *Rules of Procedure of the Council of the International Seabed Authority*, INT'L SEABED AUTH., Rule 59, Aug. 16, 1996, available at <http://bit.ly/16JufOj>; see also JAMES HARRISON, MAKING THE LAW OF THE SEA: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 125 (2011). Thus, because the U.S. has a permanent seat on the council, it follows that the U.S. would have the ability to veto any decision relating to financial decisions and deep seabed mining rules and regulations. See *id.* at 126.

118 "[P]rospecting' means the search for deposits of polymetallic nodules in the Area, including estimation of the composition, sizes and distributions of polymetallic nodule deposits and their economic values, without any

exclusive rights[.]” *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, INT’L SEABED AUTH., Regulation 1, para. 3(e), at 2, July 13, 2010, [hereinafter *Int’l Seabed Auth. Prospecting Regulations*], available at <http://bit.ly/12C7vuV>.

119 See UNCLOS, *supra* note 3, Annex III, art. 2, at 147–48; see also *Int’l Seabed Auth. Prospecting Regulations*, *supra* note 118, Regulations 2–4, at 2–4.

120 *Int’l Seabed Auth. Prospecting Regulations*, *supra* note 118, Regulation 2, para. 4, at 3.

121 This includes an application fee, see Part XI Agreement, *supra* note 104, Annex Section 8(3); a written plan of work, e.g., UNCLOS *supra* note 3, art. 153, at 78–79; *id.* Annex III, art. 3, at 148; and an Environmental Impact Statement (EIS). Part XI Agreement, *supra* note 104, Annex Section 1(7). See generally *Int’l Seabed Auth. Prospecting Regulations*, *supra* note 118, Regulations 10–18, at 6–11 (detailing what the International Seabed Authority requires entities to include in their applications for approval of a plan of work for exploration in the Area).

122 The authority requires all applicants to submit a \$250,000 processing fee with every application, and it will return the difference if the administrative costs incurred are less than the fixed amount. *Int’l Seabed Auth. Prospecting Regulations*, *supra* note 118, Regulation 19, at 11–12.

123 UNCLOS, *supra* note 3, art. 165.2, at 91–92.

124 Part XI Agreement, *supra* note 104, Annex Section 3(1).

125 See *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, U.S. DEP’T OF STATE (Feb. 1995).

126 UNCLOS, *supra* note 3, art. 145, at 73; *id.* Annex III, art. 17, at 162–65.

127 INT’L SEABED AUTH., ISA TECHNICAL STUDY: NO. 10, ENVIRONMENTAL MANAGEMENT NEEDS FOR EXPLORATION AND EXPLOITATION OF DEEP SEA MINERALS 16 (2011), <http://bit.ly/LkuYOU>. Each EIS must provide data and analysis that responds to 12 pages of questions. *Id.* at 17–28.

128 UNCLOS, *supra* note 3, art. 162.2(x), at 89.

129 See, e.g., *Hydrothermal Vents Found in Arctic Ocean*, NAT’L GEOGRAPHIC NEWS (Jan. 23, 2003), <http://bit.ly/11ANtR2>; Meg Tivey, *Characterization of Seafloor Massive Sulfides Recovered from the Ultraslow-Spreading Gakkel Ridge*, WOODS HOLE OCEANOGRAPHIC INST. (2008), <http://bit.ly/1bhlfDm>.

130 David Shukman, *Deep Sea Mining ‘Gold Rush’ Moves Closer*, BBC NEWS (May 17, 2013), <http://bbc.in/13uruwo>.

131 *Id.*

132 See *infra* notes 160–62 and accompanying text (discussing the option that U.S. companies have to go through other nations that are parties to UNCLOS to legally obtain deep seabed mining licenses from the ISA).

133 See UNCLOS, *supra* note 3, art. 82, at 55–56.

134 *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing on the Law of the Sea Convention Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of S. James M. Inhofe, Mem., S. Comm. on Foreign Relations).

135 *U.N. Convention on the Law of the Sea: It’s Still a Bad Idea*, THE HERITAGE FOUND. (July 7, 2011), <http://herit.ag/oJYA1N>.

136 See Steven Groves, *U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf*, BACKGROUNDER NO. 2561, 11–12 (2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/bg2561.pdf.

137 *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing on the Law of the Sea Convention Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of S. Jim DeMint, Mem., S. Comm. on Foreign Relations).

138 Moore & Garrett, *supra* note 85, at 2.

139 See generally *supra* notes 109–117 and accompanying text (explaining how the United States could veto any financial disbursements of the funds received pursuant to Article 82 if the United States acceded to the convention).

140 See, e.g., Moore & Garrett, *supra* note 85, at 14 (“[W]hen the U.S. joins the convention we will be the only nation in the world with a permanent blocking ability over distribution” of the funds obtained from Article 82); see also *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of Hillary Rodham Clinton, former U.S. Sec’y of State) (“[W]ere we actually in the convention, [we] would have a permanent veto power over how the funds are distributed and we could prevent them from going anywhere we did not want them to go.”).

141 Lisa Murkowski, *U.S. Interests in Prompt Adherence to the Law of the Sea Convention*, in CTR. FOR OCEANS LAW & POLICY, *THE LAW OF THE SEA CONVENTION: U.S. ACCESSION AND GLOBALIZATION 22* (Myron Nordquist et al. eds., 2012). See generally Lisa Murkowski, *Go North, America—to the Arctic*, ALASKA DISPATCH (June 28, 2013), <http://bit.ly/10JidD8> (discussing, *inter alia*, the international attention the Arctic continues to receive as the area becomes more accessible, how joining UNCLOS could advance U.S. interests in the Arctic, and the need for a greater, more robust U.S. presence in the Arctic).

142 See U.S. COAST GUARD, UNITED STATES COAST GUARD ARCTIC STRATEGY 14 (2013), available at <http://bit.ly/13FRTHx>.

143 *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (statement of former Sec’y of State Hillary R. Clinton) (noting that so far the United States has been “fortunate” in that no country has challenged the U.S. navigational rights). See also *id.* (statement of Gen. Martin E. Dempsey, Chairman, Joint Chiefs of Staff) (“But right now our freedoms of navigation, right now the description of maritime zones and the freedoms of navigation, or the rights of navigation, are codified in international customary law.”).

144 See *supra* notes 12–13 and accompanying text.

145 See *supra* notes 25–35 and accompanying text.

146 For a variation of this argument, see, e.g., *infra* section 4: The Case for Political Stability.

147 See generally, e.g., Steven Groves, *U.S. Accession to U.N. Convention on the Law of the Sea Unnecessary to Develop Oil and Gas Resources*, BACKGROUNDER NO. 2688 (2012), available at <http://herit.ag/J5wOfM>.

148 Moore & Garrett, *supra* note 85, at 7.

149 *Id.* at 4–10.

150 See *id.*

151 See, e.g., Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea*, BACKGROUND NO. 2746, 2–4 (2012).

152 S. Exec. Rep. No. 106-19, at 2 (2000).

153 *The Law of the Sea Convention (Treaty Doc. 103-39) Before the S. Foreign Relations Comm.*, 112th Cong. (2012) (statement of Steven Groves, Bernard and Barbara Lomas Fellow, The Heritage Found.), available at <http://1.usa.gov/12TtZys>.

154 Kelly, *supra* note 84, at 65–66 (explaining that as of 2010, the Mineral Management Service had informed all operators of leases located very close to the 200-mile limit that they may be subject to a payment of royalty fees to the ISA).

155 Chairman of the Comm'n on the Limits of the Cont'l Shelf, *Statement of the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, ¶¶ 22–26, 23d Sess., CLCS/62 (Apr. 20, 2009), available at <http://bit.ly/17UtFkY>.

156 Steven Groves, *U.S. Accession to U.N. Convention on the Law of the Sea Unnecessary to Develop Oil and Gas Resources*, BACKGROUND NO. 2688, 8–14, 16 (2012).

157 See *Statements of Support for Treaty Ratification*, THE AM. SOVEREIGNTY CAMPAIGN [hereinafter *Statements of Support for Treaty Ratification*], <http://bit.ly/14gYnyr> (last visited June 18, 2013).

158 *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Foreign Relations Comm.*, 112th Cong. (2012) (statement of Donald Rumsfeld, former U.S. Sec'y of Def.).

159 *Id.*

160 *The Law of the Sea Convention (Treaty Doc. 103-39): Perspectives from Former Government Officials: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 32–33 (2012) (statement of Donald H. Rumsfeld, former Sec'y of Def.), available at <http://bit.ly/1aSGU60>.

161 See Thomas Biesheuvel & Robert Wall, *Lockheed to Use Soviet Submarine Hunt Data in Sea Mine Plan*, BLOOMBERG BUS. WK. (Mar. 14, 2013), <http://buswk.co/15fhWrw> (discussing how Lockheed Martin obtained a license from the International Seabed Authority through a subsidiary of its British arm, UK Seabed Resources, to prospect for polymetallic nodules in the Clarion-Clipperton Zone located in the Pacific Ocean).

162 See also John Norton Moore, *Conservatives and the Law of the Sea Time Warp*, WALL ST. J. (July 8, 2012), <http://on.wsj.com/RMoHuJ> (noting that Secretary Rumsfeld's theory "implicitly understand[s] that U.S. non-adherence can in no way alter the international regime now in force for 161 countries, and that our [U.S.] firms would still operate under the treaty regime"); *id.* (asserting that Mr. Rumsfeld's theory "needlessly throws away U.S. jobs, Treasury tax receipts, and critical U.S. access to strategic minerals[,] along with any potential control the U.S. could exert over the distribution of revenues by the Authority, amendments to UNCLOS Part XI, or rules and regulations governing deep seabed mining).

163 See Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea*, THE HERITAGE FOUND., at 7 (2012).

164 See *Statements of Support for Treaty Ratification*, *supra* note 157.

165 See Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea*, THE HERITAGE FOUND., at 7 (2012) ("In sum, acting under the authority of DSHMRA [Deep Seabed Hard Mineral Resources Act, 30 U.S.C.A. §§ 1411–28 (West 2013)], customary international law, and multilateral agreements with foreign countries and companies, the United States has successfully claimed and maintained security of tenure over vast tracts of the deep seabed.").

166 See generally *Treaty for the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles*, U.S.-Mex., Jun. 9, 2000, 2143 U.N.T.S. 417, available at <http://bit.ly/1apVTCy>.

167 UNCLOS, *supra* note 3, arts. 156–85, at 81–97.

168 *Id.* art. 176, at 95.

169 There is the potential for U.S. companies to be sued under the Alien Tort Statute (ATS), which gives federal district courts original jurisdiction to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C.A. § 1350 (West 2013). However, after the Supreme Court recently decided *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)—concluding that the presumption against application of U.S. statutes to conduct in the territory of another sovereign prevents courts from interfering in foreign policy matters; nothing in the ATS rebuts the presumption against extraterritoriality; and even when claims under the ATS “touch and concern” U.S. territory, the claims must do so with “sufficient force to displace the presumption”—the prospect for a successful ATS suit against a U.S. company acting abroad appears dramatically circumscribed. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

170 See *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, U.S. DEP’T OF STATE (Feb. 1995).

171 See UNCLOS, *supra* note 3, arts. 138–39, at 70–71. See also Part XI Agreement, *supra* note 104; CURRY L. HAGERTY, CONG. RESEARCH SERV., R41132, OUTER CONTINENTAL SHELF MORATORIA ON OIL AND GAS DEVELOPMENT 12–13 (2011), available at <http://fpc.state.gov/documents/organization/161353.pdf> (“UNCLOS is broadly viewed as the international standard by which to govern joint development in [outer continental shelf] areas in the North Atlantic, in the Arctic Region, and in the Gulf of Mexico.”).

172 CLCS Submissions, *supra* note 83.

173 See *Ecuador Lawsuit: Facts about Chevron and Texaco in Ecuador*, CHEVRON CORP., available at <http://www.chevron.com/ecuador> (last visited July 15, 2013).

174 Statute of the International Court of Justice art. 36.

175 See Letter from George P. Shultz, Secretary of State of the United States of America, to Javier Perez de Cuellar, Secretary-General of the United Nations (Oct. 7, 1985), in 24 I.L.M. 1742 (1985).

176 See LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 110-21 (Lori F. Damrosch & David J. Scheffer eds., 1991).

177 U.N. Charter art. 36; see also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 1986) (outlining the United States’ motions to dismiss the case for lack of jurisdiction and admissibility).

178 U.N. Charter art. 96, para. 1.

179 The ICJ has issued five advisory opinions dealing with legal questions in ongoing disputes between UN member states: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 221 (Mar. 30); *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21); *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 2 (July 9); *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403 (July 22). The ICJ has ruled that consent is not necessary when the opinion is advisory. See, e.g., *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30). In

addition, the ICJ has stated that UN member states have already consented to ICJ jurisdiction to issue advisory opinions by joining the UN Charter. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 23–24 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 23–24 (Oct. 16).

180 U.N. Charter art. 96, para. 2. Currently five organs of the UN (including the General Assembly and the Security Council), and sixteen special agencies are authorized to seek advisory opinions from the ICJ. For the complete list, see *Jurisdiction*, INT'L COURT OF JUSTICE, <http://bit.ly/11kXwe5> (last visited June 13, 2013).

181 See Statute of the International Tribunal for the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 561. The International Tribunal for the Law of the Sea (ITLOS) is an intergovernmental organization based in Hamburg, Germany. See *General Information*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <http://bit.ly/14iG2RI> (last visited June 19, 2013). It was created by UNCLOS in 1982 and took effect in 1994. *Id.* The Court is composed of twenty-one judges from a variety of state parties. *Id.* It has jurisdiction over cases relating to all ocean space, uses, and resources. *Id.* Similar to the ICJ, jurisdiction is based on consent. UNCLOS, *supra* note 3, art. 287.1, at 131. As of 2005, 26 states had chosen ITLOS as their means for settlement of disputes. MOM Ravin, *ITLOS and Dispute Settlement Mechanisms of the United Nations Law of the Sea*, UNITED NATIONS, at 3 (2005), available at <http://bit.ly/12VI8wg>. ITLOS also has claimed the authority to issue advisory opinions relating to legal questions. *General Information*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <http://bit.ly/14iG2RI> (last visited June 19, 2013).

182 UNCLOS, *supra* note 3, art. 288.4, at 132.

183 ITLOS “aggressively assert[ed] its jurisdiction” in *Myanmar v. Bangladesh* to decide a complicated maritime dispute. Mark E. Rosen, *Myanmar v. Bangladesh: The Implications of the Case for the Bay of Bengal and Elsewhere*, CNA CORP. (2013), at 13, available at <http://bit.ly/18gdMSw>; see also Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Case No. 16, Order of Mar. 14, 2012, 16 ITLOS Rep., available at <http://bit.ly/13dgirs>. ITLOS decided the continental shelf dispute between the two nations, thus bypassing the CLCS process despite each country having already submitted claims to the CLCS; it asserted its jurisdiction over the questions relating to the delimitation of the continental shelf beyond 200 nautical miles against Myanmar’s objections; it established a legal standard for delimitation of adjacent continental shelf areas beyond 200 nautical miles, a means that is not specifically discussed in UNCLOS; and without using the formal scientific studies to corroborate its legal findings, ITLOS made findings to the geological and geomorphic features of the continental shelf areas of both countries. Rosen, *supra* note 183, at 13.

184 The ITLOS Rules of Procedures state that the Seabed Disputes Chamber is the only subsidiary body of ITLOS that has jurisdiction to conduct advisory proceedings. See INT'L TRIBUNAL FOR THE LAW OF THE SEA, RULES OF THE TRIBUNAL 50, art. 130, ITLOS/8 (Mar. 17, 2009), available at <http://bit.ly/1d9Om9y>; UNCLOS, *supra* note 3, art. 191, at 100 (stating that the Seabed Disputes Chamber has jurisdiction to issue advisory opinions on questions certified to it by the Council and Assembly of the International Seabed Authority). See also *id.* art. 187, at 98 (listing the activities in the area over which the Seabed Disputes Chamber has jurisdiction to issue binding and advisory opinions).

185 See David Sloss, *Non-Self Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 9–10 (2002).

186 *Id.* at 9.

187 *Id.*

188 See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111 cmt. H (1987).

189 See *Ecuador Lawsuit: Facts about Chevron and Texaco in Ecuador*, CHEVRON CORP., available at <http://www.chevron.com/ecuador> (last visited July 15, 2013) (explaining that a court in Ecuador ruled against

Chevron for billions of dollars but Chevron has refused to pay the judgment. Currently the plaintiffs are seeking a different country as a forum to enforce the judgment and Canada has already declined to take the case). See also *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252 (11th Cir. 2009) (plaintiffs' case was dismissed but they then sparked a global boycott of Coca-Cola, which has become popular among several European political parties); *John Doe VII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (seven locals from Indonesia brought suit against Exxon for human rights violations and the 11th Circuit reversed the district court's dismissal of the case; the case is still ongoing and may be heard by the Supreme Court of the United States).

190 Seas and Submerged Lands Act 1973, No. 161, 1973 Austl. Acts P. 763, available at <http://bit.ly/198qymk>.

191 See *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. No. 10; see also I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 183–212 (11th ed. 1994).

192 A foreign sovereign is presumed to be immune from suit in another country's domestic court for its official acts. There are, however, several exceptions, including the commercial activities exception. See, e.g., 28 U.S.C.A. § 1603(d) (West 2012); 28 U.S.C.A. § 1605(a)(2) (West 2012) (requiring the courts to look to the nature of the conduct rather than to the foreign state's purpose in determining if the conduct falls within the commercial activity exception).

193 Cf. CHATHAM HOUSE, *ARCTIC OPENING: OPPORTUNITY AND RISK IN THE HIGH NORTH* 35–47 (2012) (discussing the variety of considerable risks involved in exploitation of shipping and natural resource interests in the Arctic). Aside from the extensive environmental, operational, political, and reputational risk involved for an entity that wishes to pursue the vast resources the Arctic has to offer when that entity secure legal title to those resources, *id.*, for an entity to pursue resources to which it has no security of legal title (*i.e.*, if the United States or a U.S. company explored for and extracted oil or gas from the U.S. extended continental shelf without first receiving approval from the CLCS) would significantly increase the already burdensome risk.

194 Interviews by the author with industry representatives on Mar. 15, 2013, Mar. 19, 2013, Apr. 16, 2013, and Apr. 19, 2013.

195 For example, a Colombian trade union leader brought suit against Coca-Cola for human rights violations and several political and social groups led a Coca-Cola boycott. See *Coke Sued Over Death Squad Claims*, BBC NEWS (July 20, 2001), <http://bbc.in/obp30D>.

196 Kiruna Declaration, May 15, 2013, available at <http://bit.ly/16zej3z>. An application for observer status from the European Union is currently pending.

197 ARCTIC COUNCIL, *ARCTIC COUNCIL OBSERVER MANUAL FOR SUBSIDIARY BODIES* 3 (2013).

198 David Curtis Wright, *The Dragon Eyes the Top of the World: The Arctic Policy Debate and Discussion in China*, CHINA MAR. STUDY NO. 8, at 7 (2011), available at <http://bit.ly/NyJGD8>.

199 See generally Stephen Blank, *China's Arctic Strategy*, THE DIPLOMAT (June 20, 2013), <http://bit.ly/19UYu8T> (discussing the steps the Chinese government has taken to secure access to its mineral resource interests in the Arctic since granted observer status in the Arctic Council on May 15, 2013).

200 Wright, *supra* note 198, at 7 (citing Brian Lilley, *Canadian Jets Repel Russian Bombers*, CNEWS (July 30, 2010), available at <http://bit.ly/10uKorM>).

201 *Id.*

202 *Id.* at 15 (citing Li Zhenfu, *Chinese Participation in International Arctic Route Mechanisms*, 32 ZHONGGUO HANGHAI 98, 99 (2009) and Li Zhenfu, *Chinese Strategic Analysis of the Arctic Route*, 1 ZHONGGUO RUANKEXUE 1, 6 (2009)) (internal footnotes omitted).

203 Guo Peiqing estimates that “the high seas area will shrink by two-thirds if all the outer-continental shelf claims by Arctic states were to be approved.” Linda Jakobson & Jinchao Peng, *China’s Arctic Aspirations*, SIPRI POLICY PAPER NO. 34, 18 (2012) (citing interview by Linda Jakobson & Jinchao Peng with Guo Peiqing, professor, Ocean University of China in Qingdao (June 25, 2009)), *available at* <http://bit.ly/RfpW9y>. In addition, Gui Jing of a State-Oceanographic-Agency-affiliated agency asserts: “If the Arctic states succeed in their claims to extend their outer continental shelves, the international community’s and China’s right to fairly benefit from Arctic resources will be weakened.” Linda Jakobson & Jinchao Peng, *China’s Arctic Aspirations*, SIPRI POLICY PAPER NO. 34, 18 (2012) (citing Gui Jing, *Uncertain Factors in the Delimitation of the Outer Continental Shelf and its International Practice in the Arctic*, 1 CHINA OCEANS L. REV. 101, 116 (2010)).

204 See Jakobson & Peng, *supra* note 202, at 16. See also Liu Zhenmin, *China’s View on Arctic Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (July 7, 2010), <http://bit.ly/100FJvd>.

205 See generally James W. Houck, *Alone on a Wide Wide Sea: A National Security Rationale for Joining the Law of the Sea Convention*, 1 PENN. ST. J.L. & INT’L AFF. 1, 14–18 (2012) (discussing the international legal system’s response to change and the implications UNCLOS amendments would have on customary international law).

206 See, e.g., Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENV’T. L. & POL’Y REV. 1, 17 (2005); Angelle C. Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 GEO. WASH. INT’L L. REV. 651, 674–79 (2010); Scott Borgerson, Op-Ed., *An Ice Cold War*, N.Y. TIMES (Aug. 8, 2007), <http://nyti.ms/1apOzH7>.

207 Cf. LEV VORONKOV, *The Arctic for Eight: Evolution of NATO’s Role in the Arctic*, RUSSIA IN GLOBAL AFFAIRS, June 30, 2013, <http://eng.globalaffairs.ru/number/The-Arctic-for-Eight-16058> (noting that representatives of some non-Arctic countries are advocating for the establishment of an international Arctic governance system). Some Chinese scholars argue that for the time being, pursuing an Arctic treaty, modeled after the Antarctic treaty, would be too difficult. They instead urge China to cooperate under existing regimes “until the time is right for a uniform Arctic treaty.” Wright, *supra* note 198, at 24 (citing Mei Hong & Wang Zengzhen, *Dispute over the Legal Status of Arctic Territorial Waters and Its Solution*, 1 J. OCEAN U. CHINA 26, 26–27 (2010)).

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