The International Legal Framework for Resolving Disputes Over the Rights to Natural Resources in the Arctic Continental Shelf: The Beaufort Sea Maritime Conflict and Beyond

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I. Introduction

Recent technological developments in surveying have allowed States to make greater claims to the natural resource rights of the continental shelf. This, coupled with receding ice caps and new exploration and exploitation technologies, have allowed the previously unattainable natural gas and oil reserves of the arctic to be developed. This is of great international environmental concern, because the Arctic environment is both uniquely key to global ecology and especially susceptible to environmental degradation. Because of this disputes over natural resource rights to the continental shelf, such as the Beaufort Sea Maritime Dispute, are a newly emerging and hotly debated topic in international law.

II. Emerging Conflicts Over Coastal Shelf Natural resource Rights and the Arctic

A. Legal Basis for Territorial Claims to the Continental Shelf

Exclusive national claims to natural resources found on the continental shelf have their basis in the U.N. 1958 Convention on the Continental Shelf.[1] Before this convention, legal claims to

[1] Convention on the Continental Shelf 1958, art. 2, *available at* untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf

exclusive rights were largely ignored unless reinforced by the threat of coercive force, such as military action or trade sanctions. This state of affairs was acceptable to most because, until the 20th century, technology had not progressed sufficiently to allow natural resources beyond a state's territorial waters to be exploited. As technology progressed and the opportunity for armed conflict grew, the need for an international consensus on the legality of such claims became manifest. The Convention, which was widely attended and ratified, created exclusive claims over natural resources for coastal states beyond that state's territorial waters (12 miles from coast), up to "where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas[.]"[2] The Convention evolved through several forms until it found its current structure in 1982 with the United Nation's Convention on the Law of the Sea (UNCLOS).

UNCLOS allows exclusive territorial claims over the continental shelf up to 200 nautical miles from a state's coastline.[3] A state may extend this claim up to the outer edge of the continental margin, but in order to do so it must use a specific methodology and its findings must be accepted and approved by the Commission on the Limits of the Continental Shelf, set up under Annex II of UNCLOS.[4] While the decisions of this Commission are binding, and the methods for creating claims to the continental shelf are technically detailed, disagreements over such claims, especially between adjacent states, have been known to happen.[5]

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[2] id. art. 1.

[3] United Nations Convention on the Law of the Sea, art. 76, par. 1, *available at* www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm

[4] id. art. 76, par. 1-9.

[5] id. par. 8.

B. The Beaufort Sea Maritime Dispute

The Beaufort Sea is an outlying sea of the Arctic Ocean, sitting off the Northern coasts of the U.S. state of Alaska and the Canadian Yukon and North West Territories.[6] Since 1977 the U.S. and Canada have had competing claims over 200 miles of this Sea, a wedge of territory that encompasses 21,000 sq km of open ocean.[7] Canada's claim is based on the 1825 Treaty which fixed the border between the Russia and Great Britain.[8] The U.S. claim is based upon the equidistance method, which states that, for reasons of certainty and practicality, sea borders should be divided by an equidistant line that stretches between the two nations' coasts.[9]

The justification for Canada's claim revolves around the established legal principal that one cannot sell (Russia to U.S.) property rights that do not belong to them. The claim is also based on the international legal theory of Uti Possidetis, which says that new states inherit the previous territorial boundaries of their original colonial state (U.K. to Canada). These principals are still considered legally sound today. However, there does exist an argument that treaties created in the 19th Century, before the 1958 Convention on the Continental Shelf, do not envision national boundaries beyond a state's territorial waters.

[6] Worldatlas.com *available at* www.worldatlas.com/aatlas/infopage/beaufortsea.htm

[7] Sian Griffiths, BBCnews, August 2, 2010: Image: Flickr, August 1, 2009, *available at* www.offshoreenergytoday.com/canada-and-usa-start-joint-beaufort-sea-survey/

[8] id.

[9] id.

The U.S. equidistance method, on the other hand, is based in the 1958 U.N. Convention on the Continental Shelf.[10] While this method has been generally upheld for use in territorial waters, it has been soundly rejected by the U.N.'s International Court of Justice (ICJ) when applied to territorial disputes over the continental shelf, due to inequities caused by distortions in the continental shelf as related to a nation's coastline.[11] In other words, the ICJ felt that territorial claims to the continental shelf based on coastlines that may be concave or convex would lead to injustices and inequitable apportionments. The certainty and ease that the equidistance method provided, in their opinion, was simply not a great enough concern to overshadow the need for equitable solutions to conflicts of this nature. Also going against the U.S. claim is the fact that UNCLOS specifically replaced the reference to the equidistance method with "on the basis of international law … in order to achieve an equitable solution."[12]

In an ironic turn of events, modern science has created a new incentive for an amicable resolution to this conflict outside of an arbitrative body. As modern surveying methods have extended the Beaufort Sea Continental Shelf to greater limits from the coastline, the two nations have found themselves in the humorous situation of having their opponent's method of drawing the boundary become the one that confers to them the most territory.[13] As the boundary of the continental shelf is extended northward Canada's Bank Island, as well as other Canadian Islands in the Arctic, push the line created by the equidistance method westward and confers more

[10] Convention on the Continental Shelf, supra note 1, art. 6, par. 2.

[11] *North Sea Continental shelf Cases* (1969), pages 73-75 *available at* www.icj-cij.org/docket/files/51/5537.pdf

[12] UNCLOS, supra note 3, art. 83, par. 1.

[13] Sian Griffiths, supra note 7

territory to Canada. As a result, in the summer of 2010, the two nations underwent a joint survey of the continental shelf in the Beaufort Sea.[14] Resolution is expected soon in order to allow the two nations to make claims for extensions of their territories over these oil and natural gas rich waters.[15]

Still, this fortuitous turn of events cannot be counted on for the resolution of other, similar conflicts and highlights a glaring deficiency in international law. While UNCLOS sets up a specific process for dealing with such disputes, there are major roadblocks to their use, including a lack of ratification of UNCLOS by the U.S. Senate and a general inability to enforce decisions of international judicial bodies against non-complying states. If one wishes to escape the possibility of armed conflict, this state of affairs is unacceptable. It is even more unacceptable when one considers the global environmental impact such decisions may have, particularly when these conflicts arise in areas of special environmental concern such as the Arctic.

C. Why such Conflicts Over Arctic Territory are of Special International Concern

The Arctic contains some of the world's richest reserves of both oil and natural gas, containing billions of barrels of oil and even greater quantities of gas.[16] The receding of the arctic ice cap and new technologies in seabed resource extraction make it possible to develop these once unattainable reserves. Combine this with new surveying techniques that allow nations

[14] id.

[15] id.

[16] *AMAP Assessment Report: Arctic Pollution Issues.* Arctic Monitoring and Assessment Programme (AMAP), 2007, Ch. 10.2, *available at* www.amap.no/

to claim ever greater areas as within their continental shelf territories, and one can easily envision an international race to claim and develop as much territory as possible in the Arctic. This phenomenon should be of special concern to the international community.

While in principal the arctic environment should suffer similar risks associated with the development of petroleum and gas reserves (oil spills and leaks, pollution due to increased human activity, etc.), special circumstances associated with arctic ecology would increase the environmental impact of such activities.[17] For instance, the harshness of the arctic environment has lead to low levels of species diversity.[18] With such low levels, the loss of any single species has far greater impact on the ecosphere as a whole. The short growing season experienced due to extremely long winters causes arctic fauna to have relatively low reproductive rates and long life cycles.[19] This in turn makes each individual organism more important to its species as a whole and causes populations to recover far less quickly from the loss of life associated with manmade pollutions. These long life spans also result in bioaccumulation, in which pollutants stored in fatty tissues increase over time.[20] So the arctic environment is one in which the loss of any single species could have a devastating effect, while each individual species is more susceptible to pollutants over time and less able to recover from the loss of any single individual organism. Thus the Arctic is an environment uniquely susceptible to the harms associated with the development of natural resources.

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[17] id. Ch. 10.1.

[18] id. Ch 4.3.4.

[19] id. Ch 4.3.1.

[20] id. Ch 4.3.2.

In point of fact, the arctic ecosystem is already one that has been largely impacted by human activity. In the last 30 years, 386,000 square miles of arctic sea ice have melted away due to global warming (greater than the area of Texas and Arizona combined).[21] This loss of sea ice habitat has had devastatingly adverse effects on many species, including the polar bear which is a keystone species.[22] Global warming has been widely accepted as the cause for this. The harmful effects of global warming have also effected arctic vegetation, which in turn injures arctic animal life.[23] Thus we can see that the arctic environment is already heavily damaged and distinctly unable to cope with further degradation.

Harms to the arctic environment are also likely to have a global impact. Many arctic species, including whales and birds, are migratory.[24] Thus, a disruption of the Arctic ecosystem could impact ecosystems across the globe. Also, the large amounts of fresh water that melting ice caps release into the Arctic Ocean has a desalinizing effect that would change ocean currents, adversely affect eco-systems, and create unprecedented weather conditions globally.[25] This is aside from the rise of sea levels that is associated with the melting of the ice caps, a phenomenon that would greatly reduce continental land mass and the number of habitable islands.[26] Both

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[21] *Melting Arctic Circle Ice Drives Polar Bears Closer to Extinction*, U.S. House of Representatives Select Committee on energy independence and Global Warming, *available at* globalwarming.house.gov/impactzones/arctic

[22] id.

[23] id.

[24] *AMAP Assessment Report*, supra note 16, Ch 4.3.3.

[25] *Melting Arctic Circle Ice Drives Polar Bears Closer to Extinction*, supra note 21

[26] Jeffery Chanton, *Global Warming & Rising Oceans*, Actionbioscience.org, 2002, *available at* www.actionbioscience.org/environment/chanton.html

global warming and harms to migratory species that are part of the Arctic ecosystem create the direct economic impact of decreasing fish populations and thereby decreasing the sustainability of world fisheries.[27] For all of these reasons, the Arctic environment is of special concern to the international community at large.

Beyond a general sense of concern for the arctic environment, the outcome of international territorial disputes over the right to develop natural resources in the continental shelf should be of particular worry internationally. While harms such as bioaccumulation and global warming are general harms created by a wide range of global activities, the development of subsoil natural resources (most greatly petroleum) has a local, immediate, and greatly disproportionate negative environmental impact on the arctic when compared to any other specific instance of human activity. In fact, every step in the development of these resources is associated with a negative environmental impact.[28] Considering the migratory nature of many arctic species and the strong current that flows through the Arctic Ocean, these environmental concerns are unlikely to remain a local problem.

Even more disconcerting, of the eight recognized nations with possible territorial claims in the Arctic (U.S., Russia, Denmark, Iceland, Norway, Finland, Sweden, and Canada), three (U.S., Canada, and Russia) are listed by the U.S. Department of Energy as being top world polluters.[29]

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[27] *Global Warming and the World's Fisheries*, World Wildlife Federation, 2005, *available at* assets.panda.org/downloads/fisherie_web_final.pdf

[28] *AMAP Assessment Report: Arctic Pollution Issues*, supra note 16, page 663

[29] *Top 10 polluting Countries*, Action For Our Planet, 2010, *available at* www.actionforourplanet.com/#/top-10-polluting-countries/4541684868; *2008 World Oil Consumption*, U.S. Energy Information Administration, 2008, *available at* tonto.eia.doe.gov/country/index.cfm?view=consumption

While this measurement is based on national carbon footprint rather than oil safety records, it is easy to infer that these nations' great thirst for oil coupled with their poor environmental records concerning carbon dioxide emissions will lead to a generally lower regard for environmental impacts when measured against the benefits of oil exploration. Russia in particular is of great concern. Until the mid-1980's this nation had dumped radioactive waste into the Arctic Ocean, and studies show that drilling into the continental shelf here may disinterre radioactive material from the sea floor and spread it along at least a quarter of the arctic coastline.[30] Due to the Arctic Current, this radioactive contamination is also likely to affect the global community.[31]

Thus, the answer to the question of how the continental shelf in the Arctic Ocean is delineated is of specific concern to international law and requires an answer that is international in scope. For this reason we must first examine, and then use, the tools that international law provides.

III. Legal Theories About International Territory Disputes

Traditionally, international law comes from three sources: (1)Treaties, (2)Customs, and (3)General Principals of International Law.[32] Treaties are the most important of the three as they not only create binding legal obligations on the parties that create and ratify them, but also heavily influence the creation of the other two sources of law.[33] Legal custom is the second most

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[30] Charles Digges, *Arctic oil drilling threatens international radioactive contamination from old Soviet nuclear dump-sites*, 2008, *available at* www.bellona.org/articles/articles_2008/Kara_study

[31] id.

[32] David Hunter, James Salzman, Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (third edition), pages 290, 313, 318 (Foundation Press, 2007)

[33] id. page 290

powerful source of international law, but it is considerably harder to use than a treaty because it requires a user to both articulate a rule of law and then prove that this rule is accepted by a State through showing that the rule is followed because *the state considers itself bound by law*.[34] The final and least powerful of the three sources are the general principals of international law. These principals are normally difficult to prove and are generally only used to fill gaps in international law.[35] When evaluating the international legal doctrines that may be applied to the question of how to settle territorial disputes over the continental shelf in the Arctic Ocean, it is necessary to consider how the justifications of those doctrines will be seen from the viewpoint of these traditional sources.

A. The Doctrine of Discovery and *Terra Nullius*: Colonial Justifications for Territorial Claims

The Doctrine of Discovery, whose development began in 1240, was the one of the earliest legal doctrines developed exclusively in international law.[36] This Doctrine was the main legal justification for early European Colonial expansion. Originally the Doctrine was created in order to deal with the legal questions over property rights that arose from the seizure of pagan lands during the Crusades. [37] Early on the Doctrine was seen as giving Pagans rights under natural law,

[34] id. pages 313, 314

[35] id., pages 318, 319.

[36] In 1240 Pope Innocent IV stated that non-Christian's natural law rights to elect their own leaders and hold property were qualified by the papacy's divine mandate. Robert A. Williams, Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST, page 13 (Oxford university Press, 1990)

[37] Robert J. Miller, THE DOCTRINE OF DISCOVERY IN AMERICAN INDIAN LAW, pages 7-8 (2005), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=721631

such as sovereignty and property rights, subject only to the intervention of the Catholic Church.[38] In 1436 with the papal bull *Romanus Pontifex*, however, this doctrine evolved into its' modern form, where Christian claims on pagan land were based on the need to safeguard heathen natives from outside oppression and to spread the Christian faith.[39] As a result, Christian legal claims (the only ones recognized under Papal Law) to heathen lands already conquered by other Christian nations were said to lack legal merit.[40] In this manner, the Doctrine of Discovery became the first international legal doctrine that regulated the discovery of new lands by contemporary and competing sovereign nations.

While many may wish to dismiss this doctrine as being antiquated and based on transparently Euro/Christian-centric legal theories, this doctrine is still in use today. The United States currently basis its' Native American Law upon this Doctrine, with Native Americans Tribes having "just claim to retain possession [of tribal lands]... but their rights to complete sovereignty, as independent nations,... necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased,... denied[.]"[41] While the *Johnson* decision, from where this quote is taken, was decided in 1823, the U.S., Canada, Australia, and at least 2 other nations have specifically referred to it in judicial justifications for current policies of denying sovereignty to aboriginal populations.[42]

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[38] id.

[39] id. page 9

[40] id. page 9

[41] *Johnson v. McIntosh*, 21 U.S. 543 page 574

[42] *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 page 203.; *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights,* U.N. Economic and Social Council, Permanent Forum on

Still, the application of this Doctrine to contemporary territorial disputes in the Arctic is probably of a very limited nature. *Romanus Pontifex* is now considered to have little if any international legal effect. The U.N., many NGO's, and various governmental bodies have criticized the Doctrine of Discovery as one that is not based on sound principals of Justice or Equity.[43] *Johnson* itself arguably limits the application of this Doctrine to lands already conquered by early European colonial powers when it based the justification for upholding the Doctrine solely on the conquest of a parent nation and refused to discuss "abstract" principals of law that it inferred would contradict this doctrine.[44] Due to the modern lack of recognition for the document that created it as having international legal effect, the self-limiting language of the various judicial decisions that create the legal custom of adhering to this doctrine, and the wide distain for the Euro/Christian-centric legal and philosophical justifications upon which this doctrine is based, it is highly unlikely that the Doctrine of Discovery will ever again receive enough international acceptance to be considered valid.

The doctrine of *Terra Nullius* is closely associated to the Doctrine of Discovery. It too was based largely on the idea that the rights of aboriginal nations were less deserving of legal consideration than those of European nations. The meaning of the *Terra Nullius* is un-owned land, and its justification is based on the view that an aboriginal culture's lack of transferable and enforceable property rights belonging to an individual citizen meant that land upon which these

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Indigenous Issues, Ninth Session, April 19-30 2010, page 32 *available at* www.un.org/esa/socdev/unpfii/.../E%20C. 19%202010%2013.DOC

[43] Id. - *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights,* DOCTRINE OF DISCOVERY & TERRA NULLIUS, The General Synod of the Anglican Church of Canada (2001) *available at* www.anglican.ca/gs2001/rr/presentations/terranullius.html

[44] *Johnson*, supra note 41, pages 588-589

cultures dwelled was un-owned and claimable.[45] While *Terra Nullius* was based more on perceived deficiencies in native uses of land rather than a lack of adherence to the Christian faith, the general justifications still revolved around the idea that non-European rights were inherently less worthy of legal consideration than European ones. This is evidenced by the fact that non-inhabited tracks of land in Europe were not considered to be un-owned.[46] Judicial decisions that upheld this doctrine (mainly in Australia) mostly based their justifications on the fact that the majority of the nation's property rights were based upon it.[47] As such, this doctrine is unlikely to be used for the very same reasons as the Doctrine of Discovery; There is no internationally accepted legally binding document upon which *Terra Nullius* is based, the judicial decisions that would create it as an international custom are self-limiting to previously claimed lands, and the principals upon which the doctrine is based are not widely accepted by the international community.

Since the legal doctrines that historically settled international territorial disputes have been widely discredited and are considered inapplicable in modern international law, we must look to modern methods for the resolution of our problem.

B. UNCLOS: The Modern Legal Basis for Resolving Territorial Disputes Over the Seas

Since UNCLOS is the legal basis for present day territorial claims to the continental shelf, it makes sense that one would look to this document in order to resolve conflicts arising from competing claims. Article 83 of UNCLOS mandates that disputes over the continental shelf be

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[45]Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, Law and History Review Vol. 23 No. 1, Spring 2005, pages 2, 33, *available at* www.historycooperative.org/journals/lhr/23.1/banner.html

[46] id.

[47] id. pages 60, 66.

negotiated in good faith and on the basis of international law as set out in Article 38 of the Statute of the International Court of Justice.[48] Any agreement predicated on Article 83 is legally binding as a matter of international law.[49] While this Article is based on the widely accepted notion that agreements between opposing parties that are willingly entered into are far more effective in resolving disputes than those agreements whose acceptance is coerced, UNCLOS does not depend solely upon good will when resolving territorial disputes.

Should an agreement fail to be made in a reasonable amount of time, nations are to refer to Part XV.[50] While Section 1 of this part reiterates that the preferred method for the resolution of such disputes is a peaceful voluntary agreement between the two parties, Section 2 sets out a method for the compulsory resolution of these disputes. Article 287 designates four legal bodies that are authorized to resolve conflicts over the continental shelf: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. The decisions of these bodies are binding, and deferral to their right to adjudicate may become compulsory in certain instances.[51] While UNCLOS may at first appear to

[48] Article 38 of the Statute of the International Court of Justice states: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[49] UNCLOS, supra note 3, art. 83, par. 4.

[50] id. art. 83, par. 2.

[51] id. art. 296, 297

be a clear treaty which resolves the issue of how to decide international territorial disputes over the continental shelf, appearances can be deceiving.

The most glaring problem with a UNCLOS resolution over Arctic territorial disputes is that the U.S. legislature has never ratified it. Though the U.S. has been widely considered to have adopted UNCLOS through its participation in the formation and continual evolution of the document, without ratification the U.S. has merely agreed "to refrain from acts 'which would defeat the object purpose of the treaty[.]'"[52] This lack of ratification is a surprise to many because, by and large, the U.S. was considered to be a "winner" in terms of the negotiations which formed this treaty.[53] However, upon closer examination, one finds reasons why the U.S. may *never* ratify UNCLOS.

The adoption of UNCLOS has been associated by many U.S. scholars and politicians with the adoption of the E.U. Precautionary Principal.[54] In general, this principal states that when there is doubt as to the environmental impact of an activity, one errs on the side of caution and finds for the protection of the environment.[55] The theory that U.S. ratification of UNCLOS will force the U.S. to adopt the Precautionary Principal is based largely on Ch 17 of Agenda 21 of the Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) which is "the fundamental programme of action for achieving sustainable

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[52] David Hunter, supra note 32, page 306

[53] Harry N. Scheiber, *Introduction: Perspectives on the History of U.S. Non-Ratification of the U.N. Convention on the Law of the Sea, and on the Prospects for an Early Reversal*, *THE HISTORY OF U.S. NON-RATIFICATION OF UNCLOS*, vol. 1 art. 1(2009) *available at* www.boalt.org/bjil/docs/Publicist01-Scheiber.pdf

[54] Lawrence A. Kogan, What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law, *SANTA CLARA JOURNAL OF INTERNATIONAL LAW* 1 (2009)

[55] id. page 4.

development in respect of oceans and seas."[56] The overall goal of Agenda 21 "is to develop 'new approaches to marine and coastal areas management and development, at the national, sub regional, regional, and global levels. . .that are integrated in content and are precautionary and anticipatory in ambit' — i.e., to transform countries' use of oceans and seas into a precautionary approach."[57] Thus, it is likely that ratification of UNCLOS will lead to the acceptance of the Precautionary Principal in U.S. law. When considering the many obligations created by UNCLOS to protect the marine environment, this could be a heavy burden indeed.[58] But this is not, as some would have you believe, necessarily a bad thing.

Objections to the Precautionary Principal mainly revolve around the perception that it creates a legal environment in which one is guilty until proven innocent, with a burden shift that turns the current system, in which one must prove an adverse environmental impact in order to obstruct an activity, into one where one must prove a lack of adverse environmental impact in order to engage in an activity.[59] This perception is largely true. Yet, however we may wish to cling to axioms of criminal law when it comes to industrial activities; in environmentally sensitive areas such as the Arctic the stakes are too high. Considering the devastating global environmental impacts that a manmade disaster could have, we should view this situation less as a case over civil liberties and more along the lines of the Nuclear Non-proliferation Act.

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[56] id. page 26.

[57] Robin Kundis Craig, *Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio*, *1992,* pages 10191, 10192.

[58] UNCLOS, supra note 3, art. 61-67, 117-120, Part XII

[59] Lawrence A. Kogan, supra note 54, page 4.

Regardless of whether a nation state has previously used or created nuclear weapons, it is foolish to allow any nation to create weapons grade plutonium. The risks are simply too great. Likewise, regardless of whether or not the use of a new technology has previously resulted in a natural disaster, we should not use it until it has proven to be acceptably environmentally safe. Once again the risks, especially in the context of continental shelf mining, are simply too great. This is but the natural result of our ever increasing technological power over our environment, and social/legal policies will have to developmentally keep up in order to maintain control over this new power. Yet this view, while slowly gaining popular acceptance by the U.S. majority as a result of the obvious harmful environmental impacts human activities are currently having on the environment, is still in the minority in the U.S.. Considering the environmental impact that U.S. oil exploration could have on the Arctic, no system for safeguarding the environment from such harms can be considered comprehensive without being legally binding on the U.S.. As such, the use of UNCLOS to resolve continental shelf disputes in the Arctic will have to find a different justification than that the U.S. is legally bound to uphold its provisions through ratification.

Although the U.S. has not ratified UNCLOS, it has accepted it as a reflection of international customary law.[60] This, along with the fact that decisions made by the Arbitrative bodies designated in UNCLOS Article 287 are binding and compulsory in nature, should allow UNCLOS to be the seminal body of law in relation to these disputes. This, however, ignores a fundamental practical reality of international law; the U.N. cannot enforce the decisions of its'

[60] Ralph J. Gillis, NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS, page 150

judicial bodies.[61] The U.N. has no military force of its' own, and therefore must rely on the militaries of other nations to enforce its decisions.[62] Outside of humanitarian contexts, such as the prevention of war crimes and/or genocide, nations are extremely reluctant to do this. While trade sanctions are a possibility, once again the U.N. must rely on popular acclaim in order to enforce its sanctions. As such, the decisions of the U.N.'s judicial bodies such as the ICJ can be, and often are, ignored with impunity.[63] The U.S. Supreme Court has even justified this disregard when it held, "[t]he U.N. Charter's provision of an express diplomatic-that is, nonjudicial-remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts."[64] This is all besides the fact that the U.S. is a permanent member of the Security Council.[65] This status confers upon the U.S. the right to veto any action of the U.N. or its' arbitrative bodies, and the U.S. has not proven shy in exercising that right. [66]

Of course, this is not to say that there is no consequence to ignoring the legal decisions of the U.N. and its arbitrative bodies. While breaking treaties and ignoring international law may have no direct adverse physical or possibly even monetary effect, there is certainly a political one.

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[61] David Malone, THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21st CENTURY, pages 45, 46, *available at* books.google.com/books?id=iww8h3E8MBMC&pg=PA46&lpg=PA46&dq=un+inability+enforcement&source=bl&ots=0mtqelNTsV&sig=K1AjhrEp-oBQrx708IfO8vklICg&hl=en&ei=B4TqTOWzN4L68AaQnIXbDA&sa=X&oi=book_result&ct=result&resnum=3&sqi=2&ved=0CCEQ6AEwAg#v=onepage&q=un inability enforcement&f=false

[62] id. page 46.

[63] Andrew Srulevitch, *Non-Compliance with the ICJ: A Review*, 2004, *available at* www.conferenceofpresidents.org/ICJ%20Noncompliance%20Executive%20Summary%20Upload.doc

[64] *Jose Medellin v. Texas*, 552 U.S. 491, page 509

[65] Membership in 2010, UN Security Council, *available at* www.un.org/sc/members.asp

[66] Security Council – Introduction, United Nations Documentation: Research Guide (2010), *available at* www.un.org/Depts/dhl/resguide/scsess.htm

Nations who ignore U.N. mandates and/or treaties they are associated with are usually vilified in the press and pay a price in international esteem and political goodwill. A Nation that consistently ignored its international obligations would soon find itself without allies, a pariah of the international community. Arguably even the U.S. Supreme Court is in the same predicament as the ICJ, as it is dependent upon the executive branch for the enforcement of its' decisions. The executive branch, in turn, has only the impetus of political backlash to cause it to comply with the mandates of the Court. Of course, many people are far more apt to believe in the legal validity of the decisions of their own national courts than those decisions made by a body not directly (or indirectly) politically accountable to them.[67] Also, it is unlikely that a national court will reach a decision that is detrimental to its own State's interest; the same cannot be said of an international court. As such, the political motivation to enforce a State's own judicial decisions will always be greater than the motivation to enforce international ones.

So, while UNCLOS does create a substantial legal framework for the resolution of territorial disputes over the continental shelf, the U.S.'s lack of ratification hampers its ability to be an effective treaty and it is doubtful that this will change any time soon. It is a valid body of international law as far as legal custom goes, but a nation that disagrees with the result of an arbitrative body is, while not legally, *practically* free to do a cost benefit analysis and determine if its interests in a different outcome to the conflict outweigh the loss of political capital that ignoring the decision would create. The same is true if UNCLOS is viewed as a source of international principals of law. Still, as UNCLOS is as effective as any source of international law is likely be without a coercive body to enforce decisions, it behooves us to figure out what

[67] Lawrence A. Kogan, supra note 54, page 4.

those principals are as they relate to disputes over exclusive natural resource rights in the Arctic Ocean.

Resolution of these disputes is to be done in accordance with ICJ principals of equity[68] Also, while several arbitrative bodies are designated as having a valid judicial ability to resolve such disputes, only the ICJ is a permanent body with its own body of law.[69] As such, it is the ICJ that designates the equitable factors for the resolution. The ICJ has rejected the equidistance method as being inequitable and has instead replaced it with a balancing test. [70] The factors to be considered in this teat are: (1) the configuration of the conflicting parties' coastlines, including any special or unusual features; (2) the physical and geological structure, as well as natural resources of the continental shelf areas involved; (3) reasonable proportionality between the extent of the continental shelf areas and the length and direction of each State's coastline in consideration of the effects of continental shelf delimitations in the same region.[71] These considerations, while a sound basis for an equitable result, do little to safeguard international environmental interests in the Arctic. No consideration is given for the interests of outside parties, nor is any deference given to the environmental concerns that are paramount in such a deliberation.

While the delineation of the continental shelf is done without regard to the environmental impacts of that decision, UNCLOS does create many environmental responsibilities for its'

[68] UNCLOS, supra note 3, art. 83 par. 1.

[69] id. art. 287 par. 1

[70] *North Sea Continental Shelf Cases*, supra note 11, pages 73-75

[71] id. page 75

signatories, especially in regards to the protection of marine life.[72] These protections are quite extensive, and create a plethora of obligations for signatory states to protect the marine environment from adverse environmental impacts caused by their own activities. They do not, however, inform upon the decision of which State has claim to the continental shelf.

IV. Conclusions and Suggestions

The fragility and global ecologic importance of the arctic environment make emerging territorial disputes over the development of the natural resources found in the continental shelf extremely pertinent to the global community. A legal method to resolve these conflicts, especially in the arctic setting, must be found. Such a method should be solidly based in the three traditional sources of international law, be enforceable, and consider the environmental impact of its decision. Colonial bases for the resolution of territorial disputes are no longer legally justifiable under modern international law. The more contemporary method for resolving these disputes is based on UNCLOS and is legally sound in regards to the sources of international law, with the sole exception of the lack of ratification of UNCLOS by the U.S.. However, this method is largely unenforceable and depends a great deal upon popular opinion and public image to motivate compliance with its decisions. Ratification of UNCLOS does create several obligations to protect the marine environment, including the application of the Precautionary Principal when making policy decisions. It does not, however, take environmental factors into account when deciding territorial disputes and relies solely on principals of equity. As such, UNCLOS is insufficient in its' current form to deal with conflicts over non-renewable resources in the Arctic Ocean.

[72] UNCLOS, supra note 3, art. 61-67, 117-120, Part XII

UNCLOS is still by far the most promising method for resolving these disputes in an internationally favorable way, and its deficiencies can be easily rectified with the incorporation of several suggestions. Firstly, territorial claims to the continental shelf, which are based exclusively upon rights conferred by UNCLOS and its' predecessors, should be conditioned upon the ratification of the treaty. It is inequitable that the U.S. takes commercial advantage of these rights while side stepping the environmental responsibilities that are associated with them (tragedy of the commons). This commercial motivation will most probably cause the U.S., which is the world's second largest consumer of oil, to ratify UNCLOS in order to gain internationally recognized exclusive rights in arctic petroleum reserves. As non-ratifying parties will not have internationally recognized rights in the continental shelf, when such disputes are between a ratifying and non-ratifying party the State with the greatest legal obligation to the global environment will be the victor. Thus the development of natural resources on the continental shelf will be automatically given to the nation that is most likely to develop it in an ecologically responsible manner, which will benefit the international community as a whole.

Secondly, enforcement of the obligations of UNCLOS should also be tied to the commercial rights provided by this treaty. Violations and failures to meet ones' responsibilities under the treaty, other than due to good-faith mistakes or acts of god, will result in moratoriums on access to the resources found in the continental shelf. States will be economically liable to private parties to whom they have leased these rights. Failure to comply with these penalties will result in a loss of standing in international courts and, therefore, the possible loss of future exclusivity rights. As this problem is largely one created by a tragedy of the commons, it is unlikely that any nation will attempt to enforce exclusive rights outside of the international legal framework

because the massive international political ill will such actions would cause will have devastating effects on that nation's ability to trade in global markets.

Finally, the ICJ should consider a State's history in the development of continental shelf resources, as well as existing plans for future development, when considering equitable factors for deciding continental shelf disputes. These two added factors should reflect the equity of the risks of such development to the international community, with each factors importance being directly tied to the threat such development posses to the nonlocal environment. In these three ways the weaknesses and holes in UNCLOS can be mended, with the final result being a functioning international harmony on the Law of the Sea.