http://www.elizabethburleson.com/Mineral%20Right%20Disputes%20in%20the%20Arctic%20by%20Ryan%20Fingerhut.pdf
http://www.elizabethburleson.com/StudentPaperSeries.html

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

By Ryan Fingerhut

Pace Law School Student Working Paper Series
Public International Law, Human Rights and Environment

(2010)

... 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.

... **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 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, subregional, 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.

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' 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

...While breaking treaties and ignoring international law may have no direct adverse physical or possibly even monetary effect, there is certainly a political one. 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.

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.

56 id. page 26.

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

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