



Final Thesis

- LL.M. in Natural Resources Law and International Environmental Law –

The United States, UNCLOS, and the "Race to the Arctic"

The Persistent Resistance of the United States to the United Nations Law of the Sea Convention and its Potential Effects on the Future of the Arctic

By:

Cade Carmichael

Supervisors:

Pétur Dam Leifsson

Friðrik Árni Friðriksson Hirst

May 2018



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Abstract

The Arctic is one of the most rapidly changing and fiercely debated regions in the era of climate change-related disputes and regulations. As a result of these changes and controversies, a “Race to the Arctic” has begun among a contingency of the world’s most powerful nations. The goal of this “race” is both to acquire Arctic resources and to make territorial claims in order to extend a given nation’s power. In many aspects, this “race” is as much legal as it is ideological or political. As such, a newfound legal regime is beginning to form around the inherent complexities of the Arctic. This regime is comparatively young and as such is multi-faceted in its approach to the “Race to the Arctic.” However, one of the most critical instruments of this burgeoning Arctic law regime is the United Nations Convention on the Law of the Sea (“UNCLOS”). While UNCLOS’s present formulation can be traced to 1982 and thus predates the “Race to the Arctic” in a contemporary sense, the Convention contains articles and legal bodies which are highly applicable to the Arctic. It is through this convention that many believe the future of the Arctic will be shaped.

The glaring issue with this hypothesis is that the United States, an Arctic nation and one of the most militarily and economically powerful countries on Earth, has yet to ratify UNCLOS. This is a perplexing situation as the United States was not only involved in the formulation of UNCLOS, it would also stand to benefit in a large variety of ways by becoming a party to it. However, long-lasting notions of sovereignty and reliance on customary international law have stalled United States ratification and have subsequently hindered not only United States foreign policy efforts in the Arctic, but arguably the entirety of UNCLOS as a legal regime. This thesis seeks to explain why the United States has failed to ratify UNCLOS over the course of nearly thirty years, and further, to explain what it’s non-party status means for UNCLOS, it’s tribunals, and the future of the Arctic itself. This thesis will argue that political partisanship, complex legal and regulatory requirements, and ideological firewalls have all contributed to the current status of the relationship between the United States and UNCLOS. This thesis will further argue that despite these setbacks, and even with ongoing conflicts over the limits of the continental shelf in the Arctic, the not so distant future may well see the United States ratify UNCLOS, and that the Arctic legal regime will benefit as a result.

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I would first like to thank my supervisors, Pétur Dam Leifsson and Friðrik Árni Friðriksson Hirst, for their insight and guidance on both the Law of the Sea Convention and the multitude of legal, political, and ideological issues currently engulfing the Arctic. I am especially thankful for their assistance in narrowing down and focusing my research on the areas of law and policy discussed herein. I am also thankful for the various professors, instructors, and guest lecturers who discussed the law of the sea during my studies at the University of Iceland. Without that background I would have been unable to carry out the detailed analysis required in order to examine the United States' complicated legal and political relationship with the Law of the Sea Convention and the Arctic in general.

I also extend my warm thanks and sincere appreciation to my wife Kelly, who put up with me during the “final rush” to finish this thesis after a shift in the U.S. Presidential administration necessitated reworking a sizeable portion of the thesis with new information and research. I'd also be remiss if I didn't thank my mother, Selena, who has always supported me at every stage of my academic career, regardless of whether she was in the next room or across the world. Finally, I'd like to thank Tristen, Valentino, and Pig for their constant support and for being the best study and writing companions a person could ask for.

Abbreviations

AEPSA	1991 Arctic Environmental Protection Strategy Agreement
C.I.A.	[United States] Central Intelligence Agency
CLCS	Commission on the Limits of the Continental Shelf
CO₂	Carbon Dioxide
COTCS	1964 Convention on the Continental Shelf
CSTF	[United States] Extended Continental Shelf Project Task Force
DHHS	[United States] Department of Health and Human Services
DOA	[United States] Department of Agriculture
DOC	[United States] Department of Commerce
DOE	[United States] Department of Energy
DOHS	[United States] Department of Homeland Security
DOI	[United States] Department of the Interior
DOS	[United States] Department of State
DOT	[United States] Department of Transportation
ECSP	[United States] Extended Continental Shelf Project
EPA	[United States] Environmental Protection Agency
EEZ	Exclusive Economic Zone
EU	European Union
IMO	International Maritime Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
JAG	[United States] Navy Judge Advocate General's Corps
MARPOL	International Convention for the Prevention of Pollution from Ships
NASA	[United States] National Aeronautics and Space Administration
NGO	Non-Governmental Organization
NOAA	[United States] National Oceanic and Atmospheric Administration
NORAD	North American Aerospace Defense Command
SCOTUS	Supreme Court of the United States
SOLAS	International Convention for the Safety of Life at Sea
U.S.	United States
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	The Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1. - Introduction

Recent years have seen a surge in references to the Arctic in popular discourse, legal disputes, and scientific research. Much of this seemingly newfound interest can understandably be linked with the simultaneous growth in climate change-related media coverage.¹ Indeed, even just a quick overview of recent discussions involving climate change will reveal a specialized concern surrounding the Arctic, with the region appearing almost as frequently as the discussion of coastal city flooding.² However, as with most complex issues that overlap science, politics, and the law, the issue of the Arctic as it relates to the current geopolitical climate is a nuanced one. While it may be tempting to regulate the Arctic to the periphery of the larger “climate change discussion” the truth is that what’s actually happening in the Arctic, both climatologically and legally, is intrinsically related to the larger field of international law. In turn, it becomes quite difficult to consider the Arctic as a purely scientific, or a purely sociopolitical problem. This stems from the fact that the Arctic is in many ways, a “final frontier” which – while theoretically covered by existent legal instruments – is still largely a region prone to unprecedented legal, environmental, and political challenges.³

In light of this comparatively unique status, any examination of the Arctic must take several factors into consideration. For instance, if one were to focus on sea ice deterioration rates with the goal of suggesting proactive measures, then one would also need to consider the potential international instruments by which such measures could actually be accomplished.⁴ It is one thing to engage in a purely data-driven analysis of the Arctic, but another thing entirely to undertake such an endeavor with the goal of effectuating actual change. This makes the profound importance of the legal and geopolitical discourse around the Arctic even more foundational to any Arctic-focused projects moving forward. Simply put, even the best of intentions insofar as the Arctic is concerned, are merely theoretical mutterings in the wind if they lack a proper instrument – and even more importantly – the backing of a global

¹ As just one recent example among countless others, see Bob Weber, *Small Arctic climate changes make big difference in ecosystem: study*, NATIONAL OBSERVER, 3 April, 2018.

² See e.g., Alister Doyle, *Last three years hottest on record, severe weather hits 2018 – U.N.*, REUTERS, March 22, 2018.

³ Lincoln P. Bloomfield, *The Arctic: Last Unmanaged Frontier*, FOREIGN AFFAIRS, Vol. 60, No. 1, 87 (1981).

⁴ Quite a few rallying cries have already occurred in relation to this very issue as it concerns the Arctic, with individuals ranging from citizen activists to politicians urging some sort of “real” action insofar as it relates to the environmental crisis building in the Arctic. This discourse is made even more tricky by the prevalence of “East” versus “West” mentalities. See Bruce C. Forbes & Florian Stammer, *Arctic climate change discourse: the contrasting politics of research agendas in the West and Russia*, POLAR RESEARCH, 28 – 42 (2009).

“geopolitical powerhouse.”⁵ While there is an entire discussion to be had about whether or not the current geopolitical climate is too biased towards these powerhouses, the practical reality of the conversation is that the Arctic is no exception to the general rule that without the necessary backing, there can be no substantive development one way or the other. Making matters worse, is that when disputes arise between these powerhouses – a common occurrence – then the discussion can easily be subverted by extraneous geopolitical issues.⁶

In order to focus this multitude of efforts, and in truth to allow more voices at the table, international instruments are often used to begin tackling the issue. This can be easily be seen in many sectors with topical areas as broad as trade and nuclear armament.⁷ When discussing the Arctic there are several such instruments with varying degrees of influence and relatability to the Arctic itself. A few notable examples are the Arctic Council, the International Maritime Organization’s (“IMO”) International Convention for the Prevention of Pollution from Ships (“MARPOL”), their International Convention for the Safety of Life at Sea (“SOLAS”), and more directly related, the IMO’s Polar Code – which is an appendix for MARPOL and SOLAS and which more specifically relates to ships navigating within the Arctic. However, there is another instrument which has the potential for even further-reaching impacts on the Arctic and which creates a vast area of maritime requirements over a complex and intricate series of aquatic jurisdictions: The United Nations Convention on the Law of the Sea (“UNCLOS”).

While each of these instruments is notable for its contribution to the legal discourse surrounding the Arctic, it is UNCLOS which arguably has the most complicated contemporary status, multilayered history, and future regulatory potential. It may, therefore, be of great surprise to learn that one of the most critical geopolitical powerhouses – the United States (“U.S.”) – is not a party to UNCLOS, a status which has greatly complicated matters in issues not only related to the Arctic, but on a global scale. The lack of U.S. ratification is a deeply debated topic and, more importantly, is one which is now beginning to become even more critical as the “Race to Arctic” begins to gain steam. This has left many wondering, at best, what can be done in the current regulatory and geopolitical climate, and, at worst, what will happen if the status quo is indefinitely maintained? Unfortunately, the answers to these

⁵ For a discussion of just what it means to be a “geopolitical powerhouse” in the context of an environmental dispute, see e.g., Amy Scott, *Twenty-First-Century Sublime Nature and culture entangled*, BOOM: A JOURNAL OF CALIFORNIA, Vol. 4, No. 3, 28 – 35 (2014).

⁶ Rasmus Bertelsen & Vincent Gallucci, *The return of China, post-Cold War Russia, and the Arctic: Changes on land and at sea*, MARINE POLICY, Vol. 72, 240 – 245 (2016).

⁷ See e.g., WTO, Marrakesh Declaration of 15 April 1994; Treaty on the Non-Proliferation of Nuclear Weapons (1968).

questions are neither straightforward nor guaranteed, however, with the proper level of analysis one can begin to better understand the U.S.’ complex regulatory relationship with the Arctic and the crucial effects of that legal status on the Arctic from both the environmental and geopolitical perspectives.

This thesis will seek to engage in such an analysis. The overarching goal of this thesis is therefore to examine the complex relationship between the United States, UNCLOS, and the Arctic. The central objective within this larger goal will be to explain why the situation – that is, a lack of U.S. ratification – came to be and then to directly relate the contemporary U.S. position to the issues surrounding the Arctic. In carrying out this task, the thesis will essentially work within the structures of three prime directives, the U.S., the “Race to the Arctic,” and the interplay of the U.S. and UNCLOS. Within these three frameworks, the thesis will seek to answer the following research questions:

- Why hasn’t the United States ratified UNCLOS?
- How does the lack of United States ratification affect the “Race to the Arctic?”
- Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?

While each of these questions will generate appropriate sub-questions, it is the three concerns above that will form the central body of the thesis.

Here it is important to note a few delimitations that exist within the structure and goal of this thesis. First, this thesis does not intend to be a detailed treatise on UNCLOS itself. Indeed, a basic knowledge of UNCLOS is presumed when digesting the following sections.⁸ For ease of reference, a high-level overview of the Maritime Zones and continental shelf definitions established by UNCLOS is provided in the Appendix.⁹ While the thesis will refer to, and explain, the particularly relevant portions of UNCLOS where necessary, the thesis will not provide a broad overview of what UNCLOS is or is not. Second, while the topical area of the thesis is predominantly focused on the Arctic, this thesis does not seek nor purport to be an exhaustive analysis of all Arctic regulation. While the thesis will consider other international instruments where necessary, the primary focus of the thesis will remain within the framework

⁸ If needed, one particularly useful UNCLOS primer is offered by the United Nations itself. *See* United Nations, Division for Ocean Affairs and the Law of the Sea, “United Nations Convention on the Law of the Sea of 10 December 1982 Overview,” 2018.

⁹ *See* Appendix – Section A – Overview of UNCLOS Zones and The Continental Shelf.

of UNCLOS and its various sub-instruments.¹⁰ Third, while this thesis is written with a focus on the U.S., the goal of the thesis and the crux of the thesis's three primary research questions revolve around issues of international law. Thus, in conducting its intended analysis the thesis will refer to both U.S. domestic law and policy and international law and policy – both inclusive of and extending beyond UNCLOS – where needed. This thesis presumes a basic understanding of international law and does seek nor purport to be a primer on international legal structures. However, the thesis will explain U.S. domestic law where necessary as the legal and political perspectives of the U.S. frequently do not properly align with the international instruments that the U.S. is, or is not, a part of. For ease of reference, a basic primer on the structure of the U.S. governmental system is provided in the Appendix.¹¹

Fourth, and finally, this thesis lies predominantly within the field of legal research. It does not seek nor purport to be a scientific research paper into the exact climatological, biological, or anthropological causes and conditions of the changing Arctic climate. While this thesis does presume at least a basic understanding of terms such as “climate change” or “global warming,”¹² the thesis will provide needed scientific information – distilled down to the necessary level – where needed. For example, foundational knowledge such as “the Arctic sea is melting at a rate unprecedented in at least 1,500 years” and other high-level information about the Arctic climate can be found in the Appendix.¹³ Beyond the necessary scientific analysis, this thesis will focus on the more practical legal and geopolitical implications of said scientific considerations. This includes such factors as opening sea trade routes due to diminished ice and the disputes that may arise given the U.S.’ perspective on the Arctic.

With these delimitations outlined, it is important discuss the manner in which this thesis will analyze and answer its central questions. The thesis will primarily employ a normative approach to the subject matter. While a more traditionally dogmatic approach will be utilized when examining specific pieces of regulation or case-law, a normative approach is far more

¹⁰ Particularly of note is the Commission on the Limits of the Continental Shelf. While this commission will be discussed in more detail in Section 2.1, a worthwhile overview of the commission can be found within the United Nation's public documentation. *See* United Nations, Division for Ocean Affairs and the Law of the Sea, “Commission on the Limits of the Continental Shelf (CLCS) Purpose, functions and sessions,” 2018.

¹¹ *See* Appendix – Section B – Overview of the U.S. Governmental Structure.

¹² A quick and easily digested explanation of these terms is provided by the United States National Aeronautics and Space Administration. *See* National Aeronautics and Space Administration, “What’s in a name? Weather, global warming and climate change,” 2018.

¹³ *See* Appendix – Section C – Overview of Melting Sea Ice and the Arctic Climate; *see also* Tom Di Liberto, *2017 Arctic Report Card: Sea ice melting unprecedented in at least 1,500 years*, NOAA – CLIMATE, 12 December, 2017.

useful when examining larger geopolitical questions.¹⁴ For the purposes of this thesis, the normative approach may best be defined as being concerned with the ends and justifications of a given legal or political approach as viewed from a particular demographic (or, more accurately in this instance, a particular nation). This is contrasted against the more traditionally dogmatic approach which focuses more on the objective text of a given instrument. The thesis employs a predominately normative approach to its research questions precisely because the answers largely lie within the geopolitical sphere. While one could vigorously debate the precise verbiage of a given legal article, the truth of the matter is that sociological and political perspectives are frequently a better focal point when addressing inquiries such as “Why didn’t the United States do XYZ?”¹⁵ Still, as mentioned, the thesis will employ a more traditional dogmatic approach to the law when discussing specific aspects of a given instrument, as such an analysis is useful and necessary when examining legal tools independently of broader geopolitical concerns.¹⁶

In carrying out this normative analysis the thesis will rely on a broad array of sources and materials. The thesis will pull information not only from critical international instruments such as UNCLOS, but also secondary frameworks such as the Arctic Council. Additionally, the thesis will heavily rely not only on U.S. domestic law, but also U.S. domestic policy. This stems from the geopolitical nature of the analysis and serves as a useful comparative point against the policies of other nations. The thesis will also make use of U.S. domestic case-law and international case-law where directly or indirectly applicable. Further, as the core questions of this thesis are equally as legal as they are geopolitical, the thesis will extensively rely on legal, political, and scientific articles as it seeks to answer its primary research questions. Finally, as the topic of the Arctic and international relations can scarcely be separated from

¹⁴ For a comparative discussion of the benefits and drawbacks of engaging in a normative legal analysis, see Robin West, *The Contested Value of Normative Legal Scholarship*, GEORGETOWN JOURNAL OF LEGAL EDUCATION, Vol. 66, 6 – 17 (2016). Conversely, for the role that traditional dogmatic research can play within a broader normative approach such as that which will be undertaken by this thesis, see Rob van Gestel, Hans-W. Micklitz, & Edward L. Rubin, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, 207 – 228 (2017).

¹⁵ Indeed, this is a common criticism in matters relating to international law, and UNCLOS is no exception with particular criticisms of this nature dating back to at least 1983. See E. D. Brown, *Deep-Sea Mining: The Consequences of Failure to Agree at UNCLOS III*, NATURAL RESOURCES FORUM: A UNITED NATIONS SUSTAINABLE DEVELOPMENT JOURNAL, 55 – 70 (1983).

¹⁶ As a comparative example on which this thesis partially modelled its own analytical structure, see James Bacchus, *A Few Thoughts on Legitimacy, Democracy, And The WTO*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, Vol. 7, No. 3, 667 – 673 (2004).

popular discourse,¹⁷ the thesis will make use of news media from verified and respectable sources where appropriate.

In order to address the central research questions more effectively, the thesis has had its main body – Section 2 – divided into four distinct parts. These sections are meant to be read sequentially as each subsequent section assumes the presence of knowledge and data which was examined in the previous section. Section 2.1 and its subsections are devoted to a generalized background of UNCLOS as it relates to the Arctic. This section will provide an introductory analysis of UNCLOS’s ability to affect the Arctic and which sub-instruments, such as the Commission on the Limits of the Continental Shelf (“CLSC”), will be particularly applicable to the discussion. This section will also provide a more in-depth examination of the problems faced by the Arctic and how they relate to the U.S. and UNCLOS. Section 2.2 will build upon the information contained in Section 2.1 and will shift the focus to the U.S. Here the first research question of “Why hasn’t the United States ratified UNCLOS?” will be discussed, as well as the necessary subtopics such as the U.S.’ broad views towards international treaties in general and its ongoing administrative shifts. This section will also discuss the current legal status of UNCLOS in the U.S. and how this relates to the CLCS.

Section 2.3 continues by engaging the second question of “How does the lack of United States’ ratification affect the ‘Race to the Arctic?’” Here the U.S.’ Arctic perspective will be analyzed, as well as the impacts of the lack of U.S. ratification on not only Arctic development, but also on the U.S. itself. Section 2.4. will combine the information from Sections 2.1 – 2.3 into a more future-oriented discussion of the final question, “Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?” This section will provide a continued discussion of the merits of ratification, but will do so with a particular eye towards contemporary events and challenges within the U.S. and the broader international community. This section will, in a meta sense, provide commentary on the confusion surrounding the U.S. perspective on UNCLOS and the Arctic, as shifts occurred in the U.S. even during the midst of this thesis’s research process.¹⁸ Finally, in Section 3 the thesis will conclude based on the answers to the primary research questions and sub-topics presented herein.

¹⁷ See Kjersti Fløttum & Øyvind Gjerstad, *Narratives in climate change discourse*, WIREs CLIMATE CHANGE, Vol. 8, No. 1, 429 (2017).

¹⁸ Most notably the U.S. Secretary of State was fired during the later stages of this thesis’s research process, an administrative shift which complicated not only the central questions of this thesis, but also highlighted the U.S.’ complex relationship with international treaties. Peter Baker, Gardiner Harris, & Mark Lander, *Trump Fires Rex Tillerson and Will Replace Him With C.I.A. Chief Pompeo*, THE NEW YORK TIMES, 13 March, 2018.

2. - The United States, UNCLOS, and the “Race to the Arctic”

2.1 – Background

Any discussion of U.S. international relationships and policies can quickly become complex in and of itself. When additional considerations such as the fragile state of the Arctic are added into the discourse it becomes even easier to lose oneself in a mire of U.S. domestic law and varied (and arguably inconsistent) U.S. perspectives on international law. It is therefore useful to consider the general background of the U.S.’ relationship with the Arctic and Arctic-relevant legal instruments as being distinct from UNCLOS itself. While the U.S.-UNCLOS relationship and its effect on the Arctic is indeed central to this thesis’s analysis, it is better to first address the two frameworks independently in order for a later co-analysis to better reveal the interplay between U.S. domestic issues and broader international themes and instruments. In order to effectively conduct such an analysis, the thesis will next approach the issue of which portions of UNCLOS are most applicable to the Arctic. This examination will occur in two parts, with the first relaying general, yet specifically-applicable, issues surrounding UNCLOS, and the second extending those issues to the Arctic, most notably in regard to continental shelf rights.

2.1.1 - General Issues Regarding UNCLOS and the Continental Shelf

When UNCLOS was signed on 10 December, 1982 it would be difficult to imagine that the signatories were aware of just how prolific concerns over the Arctic might become not just within the sphere of international relations, but within the realm of popular discourse.¹⁹ Now, however, scientific data has revealed an Arctic which is rapidly transitioning towards a state which has not existed in over one million years,²⁰ and where summer sea-ice may well be completely nonexistent within a century.²¹ Further, these drastic environmental changes are becoming difficult for governments to ignore, with widely distributed nonfiction works gaining

¹⁹ See Mark Jarashow, Michael B. Runnels, & Tait Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, FORDHAM INTERNATIONAL LAW JOURNAL, Vol. 30, No. 5, 1592 (2007).

²⁰ J. T. Overpeck, et al., *Arctic System on Trajectory to New, Seasonally Ice-Free State*, EOS, Vol. 86, No. 34, 309 – 313 (2005).

²¹ Andrew C. Revkin, *In a Melting Trend, Less Arctic Ice to Go Around*, THE NEW YORK TIMES, 29 September, 2005.

popularity while more rigorous scientific studies have simultaneously seen an uptick in activity and readership in the past decade.²² Yet, despite the comparative recency of at least the loudest sociopolitical and scientific concerns over the Arctic, UNCLOS remains quite relevant. This is not to say that UNCLOS is the proverbial end all, be all to the Arctic dilemma – as most of UNCLOS has little specific relevance to the Arctic itself. However, those portions of UNCLOS which are applicable to the Arctic have massive potential for sharpening the future of our interaction with the Arctic.²³

While UNCLOS's multitude of articles are worthy of discussion, for the purposes of this thesis the first two elements that need to be considered are Article 234, Ice-covered Areas, and Article 76 as well as Annex II which establish the CLCS.²⁴ Beginning with Article 234, as the article name implies this portion of UNCLOS deals with ice-covered areas and is the sole article within Section 8 of UNCLOS.²⁵ Perhaps surprisingly, Article 234's importance has been recognized since the dawn of UNCLOS itself, with some legal scholars and practitioners acknowledging its potential effects on jurisdiction from the outset.²⁶ As with many legal articles it is best to first examine the text itself before considering the implications, and with that in mind the text of Article 234 is as follows:

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.

Particularly noteworthy within the text of the article is the fact that it gives coastal states the right to regulate against environmental harm within ice-covered areas of their exclusive economic zone (EEZ). A state's exclusive economic zone is the area beyond and adjacent to

²² See e.g., Al Gore, *An Inconvenient Truth: The Planetary Emergency of Global Warming and What We Can Do About It* (2006); Terry D. Prowse, et al., *Climate Change Effects on Hydroecology of Arctic Freshwater Ecosystems*, *AMBIO: JOURNAL OF THE HUMAN ENVIRONMENT*, Vol. 35, No. 7, 347 – 358 (2006).

²³ Kristen Bartenstein, *The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?*, *OCEAN DEVELOPMENT & INTERNATIONAL LAW*, Vol. 42, No. 1, 22 – 52 (2011).

²⁴ UNCLOS, Articles 76 "Definition of the Continental Shelf," 234 "Ice-covered Areas"; UNCLOS Annex II Commission on the Limits of the Continental Shelf, Articles 1 – 9.

²⁵ See UNCLOS §8 Ice-Covered Areas.

²⁶ See D.M. McRae & D. J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, *UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW*, Vol. 16, No. 2, 197 – 228 (1982).

the territorial sea which extends 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.²⁷ Of course it is also pertinent to consider that Article 234, often referred to as the “Arctic Exception” or the “Canadian clause” was originally created in order to placate the Canadian government which was attempting to bolster their claims over the Northwest Passage.²⁸

Still, in spite of the Article 234’s largely political origin it is easy in reading the article to focus on its seemingly forward-thinking environmental conscientiousness, however it’s also important to keep in mind that the article also remains quite conditional. For instance, from the outset it’s limited to “coastal states,”²⁹ further to their EEZ, and even further to those areas in which the “presence of ice covering such areas for most of the year create[s] obstructions or exceptional hazards to navigation,” and where “pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.” Yet, even in spite of these conditions, Article 234’s importance for issues pertaining to the Arctic cannot be understated. It effectively allows coastal states an additional tier of control over those ice-covered areas, which, while not a verbatim reference to the Arctic, includes it by implication. Naturally, however, as the discourse shifts towards the increased absence of sea-ice in the Arctic one must also consider just how long Article 234 which actually remain applicable.³⁰ Yet, while these concerns are certainly valid, in the present construction of not only the legal framework but the environment itself, Article 234 is a central aspect of the bridge between UNCLOS and the Arctic.

While Article 234 and its “Arctic exception” might be described as a more “generalized” and comparatively straightforward Article within UNCLOS insofar as the Arctic is concerned, matters become much more complicated and indeed, much more political, when the discussion moves to the continental shelf.³¹ Part of this complication arises from the fact that disputes over the continental shelf spread far beyond the confines of the Arctic and are by

²⁷ UNCLOS, Articles 55 “Specific legal regime of the exclusive economic zone,” 57 “Breadth of the exclusive economic zone.”; *see also* Appendix – Section A – Overview of UNCLOS Zones and The Continental Shelf.

²⁸ Rob Huebert, “Article 234 and Marine Pollution Jurisdiction in the Arctic,” in Alex G. Oude Elferink & Rothwell, *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, 249 (2001).

²⁹ For a discussion on the ramifications of “coastal state” reliance that, while applicable to the Arctic, goes beyond the scope of this thesis, *see* David M. Dzidzornu, *Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis*, COLORADO JOURNAL OF ENVIRONMENTAL LAW AND POLICY, Vol. 8, No. 2, 283 – 322 (1997).

³⁰ *See* Lawson W. Brigham, U.S. Naval Institute, *The Fast-Changing Maritime Arctic*, 54 – 59 (2010).

³¹ Douglas M. Johnston, *The Future of the Arctic Ocean: Competing Domains of International Public Policy*, OCEAN YEARBOOK, Vol. 17, No. 1, 596 – 624 (2003).

no means a recent phenomenon.³² In fact, despite its lack of UNCLOS ratification, the United States has a lengthy history of continental shelf disputes, including multiple disputes within the Arctic itself.³³ While the nuances of these disputes and how they involved the United States will be discussed in detail in subsequent sections of this thesis, for now it is simply of importance to note that those issues surrounding the continental shelf are pervasive, ongoing, and are by no means isolated to Arctic.

While not necessarily ubiquitous with continental shelf disputes, UNCLOS does thematically address the issue via several internal constructs, namely those found in Article 76 and Annex II. The crux of these portions of UNCLOS is the establishment of the CLCS. As evident in the title, “Commission on the Limits of the Continental Shelf,” CLCS primarily functions as a body that considers data and disputes involving the outer limits of a given continental shelf. While CLCS has subsequently established its own internal regulatory structure,³⁴ UNCLOS does lay out its basic functions as follows:

1. The functions of the Commission shall be:
 - (a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted ... by [UNCLOS];
 - (b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).
2. The Commission may cooperate, to the extent considered necessary and useful, with ... competent international organizations with a view to exchanging scientific and technical information which might be of assistance in discharging the Commission's responsibilities.³⁵

As made evident by these instructions, CLCS is to be a primarily data driven body, with a heavy reliance on scientific and technological information as well as the ability to work in tandem with other data-driven bodies in order to make the proper recommendations.³⁶

³² See e.g., Leo Gros, *The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 71, No. 1, 31 -59 (1977).

³³ Karin L. Lawson, *Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary*, VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 22, No. 19, 221 – 246 (1981).

³⁴ United Nations Convention on the Law of the Sea, Commission on the Limits of the Continental Shelf, “Rules of Procedure of the Commission on the Limits of the Continental Shelf,” 17 April, 2008.

³⁵ UNCLOS, Annex II, Article 3, §§ 1 – 2.

³⁶ For an overview of how these requirements have been expanded into the general operating policies and rules of procedure for the CLCS, see United Nations, Division for Ocean Affairs and the Law of the Sea, Commission

However, even this mandate for a data-driven approach has not spared the CLCS from controversy, with some opponents claiming that there is an inherent lack of transparency within the CLCS regime – to the point that it contradicts the requirements of Article 76, Section 8.³⁷ This, in turn, only adds fuel to the debate over what is already an overtly political dispute, even if the framework within UNCLOS attempted to diminish the political aspects of delimitation.³⁸ Thus, when considering the ongoing issues in the Arctic, coupled with its potential and present value to a coastal state, it is no surprise that the CLCS has geopolitical implications (intentional or not) that push UNCLOS and other Arctic-regulating instruments into unprecedented territory.

Here it is important to note that while the CLCS is now well established there are, as suggested by the claims of a lack of transparency, many lingering questions as to the actual limits and duties of the commission.³⁹ As a result, conversations surrounding the continental shelf in the Arctic specifically often include more bodies and instruments than just the CLCS. Indeed, there are other legal instruments to consider such as MARPOL, SOLAS, and the Polar Code. However, insofar as the growing conflict over the Arctic relates to the continental shelf it is the aforementioned instruments of UNCLOS Article 76, 234, and Annex II that are most pivotal to this thesis's analysis. As such, the thesis will next focus on how UNCLOS and CLCS most directly relate to the "Race to the Arctic" and the scramble for continental shelf rights therein.

2.1.2 - Issues Regarding the Race for Continental Shelf Rights within the Arctic

In order to best examine the relationship between UNCLOS, CLCS, and the Arctic, it is first necessary to define what exactly is meant by the phrase, "Race to the Arctic." When invoking such a phrase it's easy to get caught up in the symbolism behind it, and indeed some have considered the "race" in "Race to the Arctic" to be an extension of preexisting tensions

on the Limits of the Continental Shelf (CLCS), Document CLCS/40/Rev.1 (2018) (laying out the day-to-day operations of the CLCS).

³⁷ Ron Macnab, *The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 35, No. 1, 1 – 17 (2010).

³⁸ See Ted L. McDorman, *The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean*, JOURNAL OF TRANSNATIONAL LAW & POLICY, Vol. 18, No. 2, 155 – 194 (2009).

³⁹ Alex G. Oude Elferink, *Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective*, THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW, Vol. 21, No. 3, 276 (2006).

between the United States and Russia.⁴⁰ However, the phrase needn't been limited to these classically opposed nations, as even Canada and China have frequently been associated with it.⁴¹ Given the breadth of the phrase, it is difficult to pin down any singular point in which the phrase "Race to the Arctic" first appeared. For example, references to such a race exist within scientific literature as far back as the 1960s,⁴² whereas the phrase gained a more geopolitical (if not legal) status in the 1980s.⁴³ As the phrase progressed into more frequent usage some of its finer nuances changed, however the central idea was still one centered around resources.⁴⁴ Thus, the "Race to the Arctic" might accurately be defined as one centered around "resources,"⁴⁵ rather than "environment," and where those with "power" call the shots.⁴⁶ This "power" requirement – or, if not requirement, reality – is important to consider as it directly plays into why UNCLOS and the CLCS are relevant when considering the power vacuum created by the absence of a superpower such as the U.S. at the negotiating table.

As discussed, Article 234 and the CLCS-creating portions of UNCLOS are especially relevant to the Arctic. However, as the U.S. has not ratified UNCLOS this creates a complicated situation in which delimitations, claims, and baselines are made even more difficult to establish and recognize. This, when considered alongside the already difficult situation in the Arctic has led some to perhaps ironically refer to the situation as a "meltdown."⁴⁷ While the U.S.' particular qualms with Arctic mapping will be discussed later in the thesis, for now the most important point to consider is that the lack of a U.S. presence in many aspects of Arctic-based deliberations, or, perhaps more accurately, the lack of a ratified U.S. presence, makes matters quite difficult. Thus, while UNCLOS most certainly applies to the Arctic, the legal regime is greatly hindered by the absence of what many would argue is objectively the largest seafaring

⁴⁰ Meagan P. Wilder, *Who Gets the Oil?: Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, HOUSTON JOURNAL OF INTERNATIONAL LAW, Vol. 32, No. 2, 505 – 544 (2010).

⁴¹ See Ken S. Coates, et al., *Arctic Front; Defending Canada in the Far North*, 261 (2008); Bryron Ruby, *Conflict or Cooperation? Arctic Geopolitics and Climate Change*, BERKELEY UNDERGRADUATE JOURNAL, Vol. 25, No. 1, 85 – 116 (2012).

⁴² Albert W. Johnson & John G. Packer, "Distribution, Ecology, and Cytology of the Ogotrouk Creek Flora and the History of Beringia," in David Moody Hopkins, *The Bering Land Bridge*, 245 (1967).

⁴³ Leo R. Zrudlo, *A climatic approach to town planning in the Arctic*, ENERGY AND BUILDINGS, Vol. 11, No. 2, 41 – 63 (1988).

⁴⁴ See e.g., Sara J. Dresser, *Safeguarding the Arctic from Accidental Oil Pollution: The Need for a Binding, Region-Specific Shipping Regime*, SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW, Vol. 15, No. 2, 509 (2010).

⁴⁵ For example, oil and gas. See Jeremy Bender & Michael B. Kelley, *Militaries Know that the Arctic is Melting – Here's How They're Taking Advantage*, BUSINESS INSIDER, 3 June, 2014.

⁴⁶ Eric Posner, *The New Race of the Arctic*, THE WALL STREET JOURNAL, 3 August, 2007.

⁴⁷ Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFFAIRS, Vol. 87, No. 2, 63 – 77 (2008).

power in the world.⁴⁸ While there are some caveats to this that will be further discussed in later sections, the fact remains that the system isn't working as efficiently or completely as it could, and arguably should, be.

It is also pertinent to note that while continental shelf delimitations are certainly one aspect which is exasperated by the present state of affairs, they are hardly the only dispute which has had, or continues to have, impacts on the debated Arctic. A few examples among many are the lingering concerns over Russia's behavior in the Arctic, other nations' disputed sovereignty, the ownership of Hans Island,⁴⁹ the trade-altering effects of an ice-free Northwest Passage, varied and contrasting secondary seabed claims, and even indigenous peoples-facing controversies which have had real-time impacts on Inuit societies.⁵⁰ Indeed, it is often difficult to delineate any singular issue within the Arctic that isn't effected by broadly-painted regulations such as UNCLOS, as the issues of the continental shelf are reflected in conflicts such as those above, which in turn tie into secondary issues such as environmental and ecological protections,⁵¹ even if those considerations aren't core to the contemporary construction of the "Race to the Arctic."

With these concerns in mind, the overarching issue to be mindful of as this thesis begins to transition into a more U.S.-centric focus is that the lack of U.S. UNCLOS ratification is a multilayered dilemma that cannot easily be confined to even an issue as broad the continental shelf.⁵² Further, to understand why the U.S. has yet to ratify UNCLOS and what this lack of ratification entails for the "on the ground" efforts in the Arctic requires an in-depth discussion of U.S. law, politics, and even popular culture. In the next section this thesis will conduct such an analysis and will relate the U.S. perspective back to the information provided in this section.

⁴⁸ See Robert Huebert, *United States Arctic Policy: The Reluctant Arctic Power*, UNIVERSITY OF CALGARY PUBLICATIONS SERIES, Vol. 2, No. 2, 1 – 27 (2009).

⁴⁹ Hans Island is a small disputed knoll located within both the territorial waters of Canada and Denmark. For a more in-depth discussion of the Hans Island dispute and how it exemplifies ongoing issues in the Arctic, see Christopher Stevenson, *Hans Off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, Vol. 30, No. 1, 263 – 275 (2007).

⁵⁰ See generally Michael Byers, *Who Owns the Arctic?: Understanding Sovereignty Disputes in the North* (2010).

⁵¹ Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, ECOLOGY LAW QUARTERLY, Vol. 21, No. 1, 1 – 78 (1994).

⁵² For instance, beyond the geopolitical aspects of the Arctic, there is a real concern over basic resources rights which risk dire consequences to indigenous populations – a population segment who are at real risk of being forgotten amidst the struggles of superpowers. See Vsevolod Gunitskiy, *On Thin Ice: Water Rights and Resource Disputes in the Arctic Ocean*, JOURNAL OF INTERNATIONAL AFFAIRS, Vol. 61, No. 2, 261 – 271 (2008).

2.2 - The United States and UNCLOS

It may be easy when considering the Arctic to simply dismiss legal instruments such as Article 234 or international bodies such as the CLCS as irrelevant given the U.S.' non-party status to UNCLOS. However, not only is this an overly U.S.-centric and a relatively "defeatist" perspective, it also avoids the necessary discussion around answering the questions of "Why hasn't the United States ratified UNCLOS?," "How does the lack of United States ratification affect the 'Race to the Arctic?,'" and "Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?" Naturally, the answers to these questions aren't necessarily definitive, and in order to even attempt to analyze any Arctic future with a UNCLOS-ratified U.S. first requires understanding why the U.S. has taken its current stance towards the Convention. That many people have asked this very question, both internationally and domestically, is revealing.⁵³ Yet, with a proper examination there are clear trends and decisions which reveal not only the U.S.' perspective towards UNCLOS, but also towards the CLCS and the Arctic itself. Thus, this thesis will next address a question which has lingered for decades: just why hasn't the U.S. ratified UNCLOS?

2.2.1 - Why Hasn't the United States Ratified UNCLOS?

While the question of U.S. ratification might at first glance seem like one of the more straightforward queries presented by this thesis, the truth is that the question may well be the most complicated aspect of the thesis's analysis.⁵⁴ As with many aspects of U.S. foreign policy there is no one single answer, and in fact the answer to why the U.S. hasn't ratified has, in all likelihood, changed over time. Thus, in many ways, the best one can hope to do when examining such a question is to consider the broader U.S. perspectives and, from that data, determine with more specificity why the U.S. has taken any particular action. Naturally, some

⁵³ William Gallo, *Why Hasn't the US Signed the Law of the Sea Treaty?*, VOA NEWS, 6 June, 2016.

⁵⁴ While this statement is of course subjective, the sheer volume of scholarship which has been generated around the confusing landscape of U.S. foreign policy is indicative of the inherent complexities in such a question. That the Arctic only adds additional layers of intricacy to the analysis, especially as it taps into classical "United States versus Russia" considerations, only makes the question all the more nuanced. For a generalized discussion on why U.S. foreign policy can be so difficult to predict, see Robert M. Entman, *Projections of Power: Framing News, Public Opinion, and U.S. Foreign Policy* (2004). For a similar perspective which predates many of the UNCLOS and Arctic disputes, but which provides a similar analysis regarding the difficulty of answering "why" the U.S. engaged in any given foreign policy, even when considering economics, see Harry Magdoff, *The Age of Imperialism: The Economics of U.S. Foreign Policy* (1969).

U.S. actions are easily discernible and can be traced to one point in time, unfortunately the U.S. relationship with UNCLOS is not one of these examples, and in fact the relationship between the U.S. and the Convention has become so complicated that not only have U.S. legal scholars been left scratching their heads,⁵⁵ even some U.S. federal employees struggle to justify or explain the U.S. perspective.⁵⁶ In light of this confusion as it relates to the question of why there has been no U.S. ratification, it is perhaps best to briefly recount the U.S.’ tumultuous history with UNCLOS.

With contemporary calls for U.S. ratification,⁵⁷ and when faced with the 168 countries and the EU who have ratified UNCLOS,⁵⁸ it might seem logical to assume that the U.S. had washed its hands of UNCLOS from the outset. The truth, however, is – much like the questions this thesis seeks to answer – much more complicated. In actuality, the U.S. was extensively involved in the formation of UNCLOS, to the point that UNCLOS has been called the “imperative” of the U.S.⁵⁹ Yet, despite that history the U.S. has most certainly not ratified UNCLOS and has maintained its non-party status in the following decades, even when it appeared from that outset that it may be woefully counterintuitive to do so.⁶⁰ Much of this initial resistance to UNCLOS can be traced to the U.S.’ objections to Part XI of UNCLOS, particularly in regard to the deep seabed and mining operations therein.⁶¹ In response to this, several rounds of negotiations were carried out which saw the U.S. eventually come to – at least partially – see the regulations around deep seabed minerals as international law.⁶² However, despite these efforts, the U.S. stopped at signing UNCLOS in 1994 and has never subsequently ratified it.⁶³ In the decades since UNCLOS has remained a debated subject in the U.S. government, with constantly shifting positions and arguments,⁶⁴ though insofar as any

⁵⁵ See e.g., Mark J. Valencia, *Introduction*, MARINE POLICY, Vol. 28, No. 1, 3 – 5 (2004).

⁵⁶ See Andrew Burt, *Why U.S. Senate should ratify Law of the Sea Treaty*, THE HILL, 25 May, 2012.

⁵⁷ Ben Cardin, *The South China Sea is the Reason the United States Must Ratify UNCLOS*, FOREIGN POLICY, 13 July, 2016.

⁵⁸ United Nations, Division for Ocean Affairs and the Law of the Sea, “The United Nations Convention on the Law of the Sea (A historical perspective),” 2012; see also United Nations, United Nations Treaty Series, “United Nations Convention on the Law of the Sea,” 2013.

⁵⁹ Shelagh D. Grant, *Polar Imperative: A History of Arctic Sovereignty in North America*, 305 (2011).

⁶⁰ See Jonathan I. Charney, *The United States and the Law of the Sea After UNCLOS III – The Impact of General International Law*, LAW AND CONTEMPORARY PROBLEMS, Vol. 46, No. 2, 37 – 54 (1983).

⁶¹ Roger Rufe, President of the Ocean Conservancy, Statement before the Senate Committee on Foreign Relations, “The United States and Deep Seabed Mining Operations,” 21 October, 2003.

⁶² *Id.*

⁶³ Hank Johnson, *Why the US Needs to Ratify UNCLOS*, THE DIPLOMAT, 18 April, 2016.

⁶⁴ Kevin Drawbaugh, *U.S. Senate Panel backs Law of the Sea treaty*, REUTERS, 31 October, 2007.

actual ratification process is concerned, the U.S.’ stance seems to have remained firmly in the “protectionist” camp.

It is this “protectionist” mentality that is core to understanding the U.S.’ relationship with UNCLOS, even in those areas that extend beyond mineral rights. When viewed in isolation it may seem as though the U.S.’ lingering doubts around UNCLOS simply revolve around a few disputed aspects of the Convention. While this may be true, the fact that the U.S.’ took that stance in the first place is indicative of the nation’s larger view towards international law and policy. While the current U.S. administration’s slogan of “America First,” may seem to be a relatively recent motto, it is in fact reflective of much older – though perhaps more placid – U.S. policy of retaining as much sovereignty as possible while still engaging in the international arena.⁶⁵ If one were to trace the course of U.S. views towards treaties in general, even going as far back as the U.S.’ first foreign treaty in 1778,⁶⁶ it would become quite obvious that the U.S. favors “recognizing” but not legally ratifying international arrangements. This is in effect the U.S.’ way of ensuring that it has a seat at the table while also maintaining its ability to leave the room whenever it feels the desire to do so.⁶⁷ This is, understandably, a position which can be frustrating to other sovereigns – but, as this thesis is well aware – the practical reality of negotiating with a superpower is that the scales are simply imbalanced.⁶⁸

With this perspective in mind it becomes easier to understand why the U.S. has refrained from ratifying UNCLOS. However, to reiterate an earlier point that this foreign policy strategy extends far beyond UNCLOS, one only needs to consider the other treaties and international bodies that the U.S. has failed to ratify. As a few examples – some of which cause frequent shock in popular discourse⁶⁹ – the U.S. has refused to ratify: the Rome Statute of the

⁶⁵ Although “America First” has seen a resurgence in popular discourse since the 2017 Inauguration of U.S. President Donald Trump, the phrase has much earlier origins in the U.S. Presidential Election of 1916 where it was used by Incumbent Democratic nominee Woodrow Wilson. Gareth Davies & Julian E. Zelizer, *America at the Ballot Box: Elections and Political History*, 119 (2015).

⁶⁶ Treaty of Amity and Commerce Between the United States and France, February 6, 1778.

⁶⁷ This viewpoint is so engrained in U.S. sociopolitical culture that it has led some to non-satirically ask if the U.S. even needs foreign policy in the first place. See Henry Kissinger, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* (2002).

⁶⁸ This of course raises a multitude of issues that extend far beyond the confines of UNCLOS and the Arctic. However, to examine this thesis’s questions without a practical acknowledgement of this superpower-based reality would be a disservice to the inquiry. For a discussion of how the U.S. came to successfully formulate this strategy during the Cold War and how it has maintained it even after the collapse of the Soviet Union, see generally Raymond L. Garthoff, *The Great Transition: American-Soviet Relations and the End of the Cold War* (2000).

⁶⁹ Unsurprisingly, the lack of U.S. ratification of the United Nations Convention on the Rights of the Child generates an ample amount of media concern. See e.g., Amy Rothschild, *Is American Holding Out on Protecting Children’s Rights?*, THE ATLANTIC, 2 May, 2017.

International Criminal Court (International Criminal Court Statute), the Kyoto Protocol, the United Nations Convention on the Rights of the Child, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty), the Comprehensive Nuclear-Test-Ban Treaty (CTBT), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty), and perhaps most famously – the historic League of Nations.⁷⁰ When considering that U.S. ratification resistance extends from child's rights, to landmines, to the surface of the moon itself, it becomes slightly less surprising that the U.S. has continued to avoid UNCLOS ratification.

There is, however, still much to be said for the U.S.-UNCLOS relationship. Just as the U.S. has more specific reasons for refusing to ratify instruments such as the Kyoto Protocol,⁷¹ the U.S. has concerns with UNCLOS that extend beyond its general treaty-based hesitations. Intriguingly though, the U.S.' specific resistances to UNCLOS have muddled – as opposed to clarified – over time. One might assume that as the timespan of non-ratification by the U.S. increased, that the U.S. position would be more cemented, if not ideologically problematic. In contrast to this otherwise sound presumption, the U.S.' issues with UNCLOS seem more and more difficult to properly discern. For instance, in the earlier phases of non-ratification the U.S. had line-item concerns with UNCLOS.⁷² Now, however, when addressing the status of UNCLOS the U.S. Department of State – the agency which represents the country in international affairs and foreign policy issues – provides far less direct or concise answers.⁷³ Other times, the Department simply provides no answer at all.⁷⁴ Making the incoherence more evident is that UNCLOS is one of the few areas where environmental advocates and industry representatives find themselves agreeing that ratification would be a good thing.⁷⁵ Perhaps even

⁷⁰ Kevin Robillard, *10 Treaties the U.S. hasn't ratified*, POLITICO, 24 July, 2012. For a discussion that envelopes each of these treaties and bodies, and also why the U.S. has taken its given stance on each of them, see generally Nicholas J. Spykman, *America's Strategy in World Politics: The United States and the Balance of Power* (2007).

⁷¹ See Paul G. Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL, Vol. 7, No. 2, 27 – 48 (1999).

⁷² See Rufe, Statement before the Senate Committee, *supra* note 61.

⁷³ See Elmer Plischke, *U.S. Department of State: A Reference History*, 585 (1999).

⁷⁴ U.S. Department of State, Under Secretary for Economic Growth, Energy, and the Environment, Bureau of Oceans and International Environmental and Scientific Affairs, "Law of the Sea Convention," 2018.

⁷⁵ David J. Bederman, *The Old Isolationism and the New Law of the Sea: Reflections on Advice and Consent for UNCLOS*, HARVARD INTERNATIONAL LAW JOURNAL ONLINE, Vol. 49, 21 – 27 (2008).

more astounding when considering the present state of partisanship in U.S. domestic politics is that Republicans and Democrats have, by and large, come to agree that the time for UNCLOS ratification is long overdue.⁷⁶

Despite the apparent “olive branch” status of UNCLOS within U.S. domestic discourse, at least one segment of power is still resistant to UNCLOS ratification: a contingency of the so-called “Old Guard” of the Republican Party.⁷⁷ Now, just what this highly-conservative contingent has against UNCLOS is difficult to discern, a status which is likely unsurprising at this point given the U.S.’ seemingly incongruent stances on UNCLOS. The common talking points which are used in arguments against UNCLOS are largely ideological, ranging from its status as customary international law (a status which will be discussed further in the next section) and fears of the International Seabed Authority (“ISA”) as some “unaccountable supranational bureaucracy that will defy U.S. wishes and redistribute undersea wealth to developing countries.”⁷⁸ When pressed for more specific concerns, or even for potential compromises, this Republican contingent has frequently done little more than repeat itself or simply remain quiet.⁷⁹ Here it must be said that this contingent is a minority of the larger Republican party, however, even with their minority numbers this anti-UNCLOS establishment heralds sufficient seats to block any attempts at UNCLOS ratification under the present makeup of the U.S. Senate.⁸⁰ Per the United States Constitution, a two-thirds majority is required within the Senate for a treaty to be ratified⁸¹ – a threshold which proves difficult even with substantial backing on both sides of the political aisle. An overview of this ratification process can be found in the Appendix.⁸²

The longevity of this Republican “holdout” against UNCLOS within the U.S. Senate is surprising, especially when considering the general motives of similar “Old Guard” groups with the U.S. government. For instance, contingencies such as the anti-UNCLOS establishment frequently rely on traditional values such as the protection of U.S. sovereignty and upholding

⁷⁶ Stewart M. Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC, 10 June, 2012.

⁷⁷ See e.g., Thomas Wright, *Outlaw of the Sea: The Senate Republicans’ UNCLOS Blunder*, BROOKINGS, 7 August, 2012.

⁷⁸ Patrick, *The U.S. Should Ratify*, *supra* note 76.

⁷⁹ See Matt Cover, *GOP Senators Sink Law of the Sea Treaty: ‘This Threat to Sovereignty’*, CNS NEWS, 16 July, 2012.

⁸⁰ Stewart M. Patrick, *More Treaty Gridlock: Another Impact of GOP Senate Takeover*, COUNCIL ON FOREIGN RELATIONS, 10 November, 2014.

⁸¹ United States Constitution, Article II, §2.

⁸² See Appendix – Section B – Overview of the U.S. Governmental Structure.

the power of, and respect for, the U.S. military.⁸³ This might make more sense if not for the fact that the U.S. military has overtly and repeatedly expressed its support for UNCLOS ratification, especially in regard to the Arctic.⁸⁴ In fact, the U.S. Navy's legal branch, the U.S. Navy Judge Advocate General's Corps (JAG), has frequently pushed for UNCLOS ratification in order to "to preserve the Navy's ability to move forces on, over, and under the world's oceans, whenever and wherever needed," and JAG also considers UNCLOS to be a "important asset in the modern maritime environment."⁸⁵ JAG has further put forth arguments for ratifying UNCLOS based on national security and economic interests, with specific mentions of the Arctic and the continental shelf.⁸⁶ Yet even with JAG's support for UNCLOS, the anti-UNCLOS contingency within the U.S. Senate still relies on its tried-and-true (yet now wholly inaccurate) tactic of claiming to be "looking out" for U.S. military personnel, a strategy which allows them to maintain popular support within their jurisdictions despite its direct conflict with the wishes of actual soldiers and sailors.⁸⁷

Given the massive emphasis that the U.S. places on its military – especially its Navy⁸⁸ – it might seem shocking to consider the lasting impact this anti-UNCLOS "Old Guard" has had within U.S. politics. If environmental advocates, industry representatives, bipartisan politicians, and even the U.S. military all support UNCLOS, how has such a relatively small contingency managed to maintain its powerbase even with the two-thirds majority constitutional requirement? The answer lies in the ever-shifting administrations of the U.S. government. While the current Executive administration of President Trump may well be the most historic insofar as policy clashes are concerned,⁸⁹ the more mundane truth of the matter

⁸³ See generally Colin Dueck, *Hard Line: The Republican Party and U.S. Foreign Policy Since World War II*, 92 – 97 (2010).

⁸⁴ See e.g., Melissa Renee Pegna, *U.S. Arctic Policy: The Need to Ratify a Modified UNCLOS and Secure a Military Presence in the Arctic*, JOURNAL OF MARITIME LAW AND COMMERCE, Vol. 44, No. 2, 169 – 194 (2013).

⁸⁵ U.S. Navy Judge Advocate General's Corps, "The Convention on the Law of the Sea," 2016.

⁸⁶ See Office of Naval Research, Naval Ice Center, Oceanographer of the Navy and the Arctic Research Commission, "Naval Operations in an Ice-free Arctic," 17 April, 2001; see also Raul Pedrozo, *Arctic Climate Change and U.S. Accession to the United Nations Convention on the Law of the Sea*, INTERNATIONAL LAW STUDIES, Vol. 89, 757 – 775 (2013).

⁸⁷ This military-centric political strategy is by no means limited to anti-UNCLOS efforts, but rather it is systematically employed to ensure that a disconnect remains between facts and ideologies within U.S. politics and policy. See Adam J. Berinsky, *Assuming the Costs of War: Events, Elites, and American Public Support for Military Conflict*, THE JOURNAL OF POLITICS, Vol. 69, No. 4, 975 – 997 (2007); see also Barry R. Posen, *Command of the Commons: The Military Foundation of U.S. Hegemony*, INTERNATIONAL SECURITY, Vol. 28, No. 1, 5 – 46 (2003).

⁸⁸ For reference, the U.S. Navy will account for nearly 40% of the U.S.' defense spending in 2019. United States Department of Defense, Defense Budget Materials - FY2019, Department of the Navy Summary, "The Bottom Line," 2018.

⁸⁹ See e.g., Max Boot, *After the State of the Union, Trump's foreign policy is still a mystery*, THE WASHINGTON POST, 31 January, 2018.

is that U.S. foreign policy has almost always shifted with the passing of the torch from one administration to the next.⁹⁰ Given the electoral system within the U.S., this shift is also frequently a manifestation of contemporary public opinion, a belief system which is itself prone to mood shifts and tone changes, even within a single administration.⁹¹ It is therefore no surprise that coalitions within the legislative branch such as the anti-UNCLOS Republican contingency are able to survive by quietly riding these administrative shifts through the utilization of popular discourse and partisan rhetoric that keeps their seats within the Senate, even in the face of an opposed Executive branch.⁹² Further – given the makeup of the U.S. political system which heavily relies on Executive agencies – when one President steps in to take the place of another, they gain substantial influence over U.S. policy, even if their political party lacks majority control within the legislative branch.⁹³

As a recent example of how this can play out, one need only consider the shift from the Obama Administration to the Trump Administration, a shift which was so drastic some have called it unprecedented.⁹⁴ Quite possibly the best example of this within the field of environmental law and policy is the Trump Administration's nearly immediate backtracking on the Paris Climate Accord – a decision which faced nearly unanimous criticism,⁹⁵ and which was in direct contrast to the stance of the outgoing Obama administration.⁹⁶ That such a shift could occur so rapidly, even at the risk of alienating a large portion of the public,⁹⁷ reveals the sheer policy-centric power of the Executive branch within U.S. political system. This, in turn,

⁹⁰ See generally James M. McCormick, *The Domestic Sources of American Foreign Policy: Insights and Evidence* (2012).

⁹¹ Ole R. Holsti, *Public Opinion and American Foreign Policy, Revised Edition*, 163 (2004).

⁹² This isn't restricted to the Republican side of the fence either. For instance, the current Trump Administration has seen nearly all of its major efforts thwarted by a minority group of Democrats who are able to keep vote counts below the required thresholds for major legislation to pass. See e.g., Lea Millis, *House Democratic leader flexes muscle in opposing U.S. budget deal*, REUTERS, 8 February, 2018.

⁹³ President Obama accomplished something very similar after the Democratic party lost their majority in Congress in 2014. As one example, Obama was able to make substantial budgetary strides in the post-2014 political arena, despite lacking majority support (by number of seats) in Congress. See Sarah Binder, "Polarized We Govern?," in Alan S. Gerber & Eric Shickler, *Governing in a Polarized Age: Elections, Parties, and Political Representation in America*, 9 (2017).

⁹⁴ Mark Murray, *Analysis: Contrast Between Obama and Trump is 'Unprecedented'*, NBC NEWS, 19 January, 2017.

⁹⁵ Perhaps most surprising was that Trump's primary backers – industry – were also largely opposed to the U.S.' withdraw from the accord. See e.g., Darrell Etherington, *Elon Musk leaving trump advisory councils following Paris agreement withdrawal*, TECH CRUNCH, 1 June, 2017; Pablo Monsivais, *In exiting Paris accord, President Trump squanders time and degrees*, DETROIT FREE PRESS, 1 June 2017; Max Greenwood, *GE head fires back at Trump: 'Climate change is real'*, THE HILL, 1 June, 2017.

⁹⁶ Barack Obama, *The irreversible momentum of clean energy*, SCIENCE, Vol. 355, No. 6321, 126 – 129 (2017).

⁹⁷ Jennifer Marlon, Eric Fine, & Anthony Leiserowitz, *Majorities of Americans in Every State Support Participation in the Paris Agreement*, Yale University, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (2017).

also highlights the geopolitical aspects of understanding why the U.S. has not ratified UNCLOS. When such ratification requires Congressional (Senate) action, but that action is closely tied to Executive (Presidential) perspectives and is subject to the vote-withholding of contingents within the Senate (e.g., the anti-UNCLOS “Old Guard”), it becomes easier to claim that the lack of ratification is solely an issue of legal doctrine but is instead also tied directly into geopolitical beliefs and disputes.

This geopolitical “lag” can be used to explain the U.S. resistance to UNCLOS from its outset. To consider the earlier examples of the U.S.’ original issues with the deep seabed and mining,⁹⁸ while it’s true that these issues were based around particularities – they were also largely the reflection of then President Ronald Reagan’s overarching foreign policy goals.⁹⁹ Oddly enough, Reagan is frequently invoked by contemporary resisters of UNCLOS ratification,¹⁰⁰ a stance which points both to the stagnation of anti-UNCLOS argumentation while simultaneously highlighting the inherent difficulties in ratifying such vast conventions within the U.S. legislative system. Given the above discussion regarding the large amount of sway that the Executive has within U.S. foreign policy it is useful to see, in the words of then President Reagan himself, what some of these initial concerns surrounding the deep seabed and mining were. Per a statement by President Reagan on 29 January, 1982 the treaty was to be renegotiated so that it:

Would not deter development of any deep seabed mineral resources to meet national and world demand; would assure national access to these resources by current and qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the [ISA], and to promote the economic development of the resources; would provide a decision-making role in the deep seabed regime that fairly reflected and effectively protected the political and economic interests and financial contributions of participating states; would not allow for amendments to come into force without the approval of the participating states, including in our [U.S.] case the advice and consent of the Senate; would not set other undesirable precedents for international organizations; and would be likely to receive the advice and consent of the Senate. In this regard the Convention should not contain provisions for the mandatory transfer of private technology and participation by, and funding for, national liberation movements.¹⁰¹

⁹⁸ See Roger Rufe, Statement, *supra* note 61.

⁹⁹ David L. Larson, *The Reagan administration and the law of the sea*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 11, No. 4, 292 – 320 (2009).

¹⁰⁰ Baker Spring, Steven Groves, & Brett Schaefer, *The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea*, THE HERITAGE FOUNDATION, 25 September, 2007.

¹⁰¹ Statement by the President, Weekly Compiled Press Document, No. 18, 94 (29 January, 1982).

Somewhat unsurprisingly, given the breadth of these demands, President Reagan publicly declared just six months later that the U.S. would not sign, nor substantively participate any further in the ongoing design process of UNCLOS.¹⁰² The President provided the following reasoning for the U.S. decision:

[The U.S. will not accept] Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries; A decision-making process that would not give the United States or others a role that fairly reflects and protects their interests; Provisions that would allow amendments to enter into force for the United States without its approval; this is clearly incompatible with the U.S. approach to such treaties; Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; [and] The absence of assured access for future qualified deep seabed miners to promote the development of these resources.¹⁰³

The President's statement was met with widespread acclaim both within his party and within the U.S. industrial sector.¹⁰⁴

Interestingly enough, despite these fairly specific reservations, contemporary invocations of the Reagan administration tend to be largely ideological and devoid of such particularized concerns.¹⁰⁵ Yet, as discussed above, UNCLOS remains to be ratified – and in that regard, irrespective of one's personal standpoint on the matter, it is a confusing situation in that broad ideologies seem to be overriding the outspoken proponents of UNCLOS. For instance, nearly the entirety of those entities and parties that President Reagan cited as being anti-UNCLOS, are now resoundingly pro-UNCLOS.¹⁰⁶ The paradox, of course, is that UNCLOS remains unratified. Thus, it might be said that the best answer to “Why hasn't the United States ratified UNCLOS?” is one that must be addressed in two parts.

First, the very nature of the U.S. legislative system allows treaties to be “drug out” across years, if not decades, as foreign policy ideologies often broadly shift every four through eight years.¹⁰⁷ Further, there are steep constitutional requirements for a treaty to actually be

¹⁰² Statement by the President, Weekly Compiled Press Document, No. 887, 887 – 888 (9 July, 1982).

¹⁰³ *Id.*

¹⁰⁴ James L. Malone, *The United and the Law of the Sea after UNCLOS III*, LAW AND CONTEMPORARY PROBLEMS, Vol. 46, No. 2, 31 (1983).

¹⁰⁵ In the words of one anti-UNCLOS proponent, even the concerns of President Reagan himself were “largely philosophical.” Kim R. Holmes, *U.N. sea treaty still a bad deal for U.S.*, THE HERITAGE FOUNDATION, 14 July, 2011.

¹⁰⁶ See James W. Houck, *The Opportunity Costs of Ignoring the Law of the Sea Convention in the Arctic*, PENN STATE LAW FACULTY WORKS, 15 – 16 (2013).

¹⁰⁷ Vincent Ostrom, *The Intellectual Crisis in American Public Administration*, 5 (2008).

ratified, as opposed to just signed, in U.S. law.¹⁰⁸ Second, there exists a rigidly anti-UNCLOS contingency within the Republican party, a party which currently maintains majority control over the U.S. Congress at both the House and Senate levels. While this anti-UNCLOS “Old Guard” is only a small portion of the larger Republican party, their numbers are sufficient to block UNCLOS ratification, especially when considered alongside the shifting foreign policies of one Executive administration to the next. Therefore, when considering these two aspects in unison, it becomes clear that the U.S. may not, in fact, have any textually legitimate and objective reason for its continued resistance to UNCLOS. But, instead, a small – yet sufficient – group within the U.S. political arena has maintained an ideological opposition to the Convention which only continues to exist due to the “back and forth” of the Executive branch, a status which makes achieving the necessary two-thirds majority for ratification difficult, if not practically impossible, to obtain.

Considering this mire of politics, policy, and complicated legal requirements, it’s tempting to just write off U.S. participation when it comes to UNCLOS. However, this stance would not only prevent any in-depth analysis from yielding effective results, it’s actually factually inaccurate. Yes, it is true that the U.S. has not ratified UNCLOS, and yes, it is also true that the U.S. maintains at least a semblance of its former reservations, even if they have become deeply clouded by antiquated (or outright misleading) ideologies. However, the U.S. has, at least in part, come to recognize UNCLOS as part of customary international law.¹⁰⁹ Indeed, this status as customary international law is often used as an argument against UNCLOS ratification.¹¹⁰ Of course, there are problems with this line of argumentation as well, and often the same tried-and-true ideologies lurk just below the surface. That said, this “partial” acknowledgement of UNCLOS does make a complicated situation even more intricate, and in that regard the actual legal status and legal history of UNCLOS within the U.S. is worth examining.

¹⁰⁸ For a broader discussion of the deeply entrenched resistance that treaties such as UNCLOS have faced throughout U.S. political history, see generally Guri Bang, *US Presidents and the failure to ratify multilateral environmental agreements*, CLIMATE POLICY, Vol. 12, No. 6, 755 – 763 (2012).

¹⁰⁹ See W. T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, YALE JOURNAL OF INTERNATIONAL LAW, Vol. 14, No. 2, 508 – 527 (1989).

¹¹⁰ While outside the scope of this thesis, the general tactic of arguing that there is “no need” to ratify UNCLOS as it is already customary international law has been examined at length as it applies to U.S. property interests. See generally Candace L. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: passive Acceptance is Not Enough to Protect U.S. Property Interests*, NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION, Vol. 31, No. 3, 745 – 792 (2005). While this topical area of UNCLOS isn’t a one-for-one comparison with the Arctic, the anti-UNCLOS argument remains largely the same.

2.2.2 – The Legal Status of UNCLOS in the United States

U.S. acceptance of UNCLOS as customary international law unfortunately does very little to decomplicate this thesis's line of questions, especially as they relate to the Arctic. This complexity stems from two distinct issues. First, the U.S. has a varied position on just what customary international law actually entails in general.¹¹¹ Second, the U.S. has a varied position on just what customary international means as it relates to UNCLOS.¹¹² In order to better understand the second issue, a discussion of the first issue – that is the U.S.' general stance on customary international law – is necessary.

Generally speaking, as discussed above, the U.S. favors a largely “protectionist” stance towards international law in general. Thus, it should come as no surprise that when it comes to interpreting customary international law the U.S. gravitates towards any particular line of argument or interpretation that favors its own sovereignty or, at the very least, provides some sort of tangible boon to its domestic endeavors. Of course, this stance often runs against the very idea of international agreements. It's no stretch to say that if every sovereign insisted on giving up nothing while gaining as much as possible in return then the international community would achieve little, if any, multilateral progress.¹¹³ In light of this stance, the U.S. has unsurprisingly generated its fair share of controversies and legal disputes as the government has continuously shifted its stance on customary international law throughout U.S. history.¹¹⁴ In fact, the U.S. has been grappling with how to deal with customary international law since shortly after its founding. The needed balance between domestic and international law was a hotly debated issue as early as 1789,¹¹⁵ and despite a codified effort to lay out at least some basic guidelines as to how customary international law was to be interpreted, the Supreme Court of the United States (“SCOTUS”) has frequently been called on to rectify inconsistent U.S. determinations.¹¹⁶

¹¹¹ See e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, HARVARD LAW REVIEW, Vol. 110, No. 4, 815 – 876 (1997).

¹¹² See e.g., Craig H. Allen, *The International Law of the Sea: A Treaty for Thee; Customary Law for Me?*, OPINIO JURIS, 14 June, 2012.

¹¹³ As just one example of such a failure, see Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, THE INTERNATIONAL LAWYER, Vol. 34, No. 3, 1033 – 1053 (2000).

¹¹⁴ Michelle M. Kundmueller, *Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudo-Legislation*, JOURNAL OF LEGISLATION, Vol. 28, No. 2, 359 – 378 (2002).

¹¹⁵ The United States Judiciary Act of 1789, Chapter 20, § 9, Statute 73 (28 U.S.C. § 1350).

¹¹⁶ See Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, CALIFORNIA LAW REVIEW, Vol. 104, 1567 – 1578 (2016).

Similarly, if one were to examine those vast sections of the United States Code (“U.S.C.”) that directly or indirectly pertain to international law, customary or otherwise, it likely wouldn’t take long to come across one clause that seemingly contradicted another.¹¹⁷ It would be a mistake, however, to assume that this was an oversight – as the U.S. has made extensive efforts to keep its stance on many international affairs fluid. This stems not only from the administrative shifts and their geopolitical origins discussed above, but also from an ongoing strategy of avoiding any irremovable or concrete international commitment that the U.S. doesn’t have effective or substantial Congressional (that is, domestic) oversight of.¹¹⁸ Thus, apparent contradictions within the U.S.C. are far more likely to be precisely calculated than they are erroneous, and the U.S.C.’s treatment of customary international law is no exception. While this thesis does rely on a detailed examination of a multitude of instruments from the U.S.C. in order to see a more nuanced pattern, an in-depth discussion of the specifics of that research is not necessary to convey the basic outlook of the U.S. government. In essence, the U.S. and its Legislative, Executive, and Judicial branches tend to treat customary international law and codified international agreements as matter of federal (as opposed to state) law, but in carrying out this treatment the U.S. only tends to apply those international provisions to the minimum extent necessary – as largely defined by the U.S. Congress (Legislative branch).¹¹⁹ Put more simply, the U.S. will generally join the international arena but will “play nice” only so as long as it feels like it isn’t losing anything of substance in its domestic sovereignty.

Customary international law, likewise, falls into this same general U.S. outlook.¹²⁰ Indeed, this very issue has appeared numerous times before SCOTUS,¹²¹ and more often than not the U.S. manages to find some way to continue this basic strategy, even if there are setbacks

¹¹⁷ Noam Chomsky, Solomon Eppel, & Tushar Khadloya, *Contradictions in U.S. Foreign Policy*, THE BROWN JOURNAL OF WORLD AFFAIRS, Vol. 14, No. 2, 229 – 239 (2008).

¹¹⁸ See Oona A. Hathaway, Sabria McElroy, & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, YALE JOURNAL OF INTERNATIONAL LAW, Vol. 37, No. 1, 51 – 106 (2012).

¹¹⁹ Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, HARVARD LAW REVIEW, Vol. 111, No. 8, 2260 – 2275 (1998).

¹²⁰ The modern U.S. outlook toward customary international law has at least partially existed since the early 1960s. See Richard A. Falk, *The Role of Domestic Courts in International the International Legal Order*, INDIANA LAW JOURNAL, Vol. 39, No. 3, 429 – 445.

¹²¹ While this list is by no means exhaustive, for a few notable SCOTUS cases on this matter, see e.g., *Jesner v. Arab Bank, PLC*, 138 S. Ct. 52 (2017); *Rasul v. Bush*, 542 U.S. 466 (2004); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). For a detailed analysis of this trend which goes beyond the scope of this thesis, see generally Kimi Lynn King & James Meernik, *The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy*, POLITICAL RESEARCH QUARTERLY, Vol. 52, No. 4, 801 – 824 (1999).

from time to time.¹²² This brings the peculiarities around UNCLOS's U.S. status as customary international law to the forefront, and perhaps unsurprisingly, the applicability of UNCLOS has also had its own day in Court.¹²³ This came about during the 2008 SCOTUS case of *Medellín v. Texas*, and although this case was not singularly related to UNCLOS, it established a general system of jurisprudence that is directly applicable to the Convention.¹²⁴ Further, UNCLOS was specifically invoked as part of the Court's reasoning – with the view that U.S. ascension to UNCLOS would bind the nation to the Convention's tribunals such as the International Tribunal for the Law of the Sea ("ITLOS").¹²⁵ The outcome of *Medellín* was, overall, a reaffirmation of the U.S. stance that international agreements such as UNCLOS were subject to a "firewall" of sorts absent U.S. Congressional action or approval. Here is important to stress that while *Medellín* made it clear that the U.S. was not presently bound to UNCLOS tribunals, it did provide examples of treaties similar in scope to UNCLOS where Congressional action, had, in fact, bound the U.S.¹²⁶ The key difference insofar as UNCLOS is considered, is that in both the opinion of SCOTUS and then-President George W. Bush's administration, there had been no Congressional action that arguably could have been described as a true "ascension" to UNCLOS.¹²⁷

Despite *Medellín*'s secondary reference to UNCLOS, the applicability of the case to the Convention was quickly picked up on by both opponents and advocates of U.S. UNCLOS ratification.¹²⁸ Insofar as actual obligations under UNCLOS are concerned, *Medellín* likely

¹²² For a few earlier examples of such setbacks regarding the plenary authority of the U.S. government to engage in such measures, see e.g., *Murray v. Schooner Charming Betsy* 6 U.S. 64 (1804); *Tablot v. Seeman* 5 U.S. 1 (1801). For more contemporary examples with the same general outcome, see e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993); *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 641 (1981); see also *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 12 (Mar. 31) (relating to U.S. plenary power in the Executive branch as it pertains to international agreements).

¹²³ *Medellín v. Texas* 128 S. Ct. 1346 (2008) (determining the domestic enforceability of UNCLOS tribunal judgments).

¹²⁴ See *id.* at ¶190.

¹²⁵ *Id.* (Stevens J., Concurring the Judgement).

¹²⁶ See e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Art. 54(1), Mar. 18, 1965, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State"); 22 U.S.C. § 1650a ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID Convention] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States").

¹²⁷ See generally, *Bush v. Texas*, THE ECONOMIST, 18 October, 2007; see also Margaret E. McGuinness, *Three Narratives of Medellín v. Texas*, SUFFOLK TRANSNATIONAL LAW REVIEW, Vol. 31, No. 2, 227 – 246 (2008).

¹²⁸ See e.g., Julian G. Ku, *Why Ratification of the U.N. Convention of the Law of the Sea May Violate Article III of the U.S. Constitution*, MINNESOTA JOURNAL OF INTERNATIONAL LAW, Vol 25, No. 1, 1 – 28 (2016); Thomas Verellen, *Federalism and Treaty Enforcement in the European Union. Letters from America*, LIRIAS, Jean Monnet Doctoral Workshop: Interactions Between European Union and International Law (2016).

provided more fuel to the fires of ratification opponents than it did to those of advocates. This was largely because it piled on more unresolved issues and because Justice Stevens of SCOTUS had used UNCLOS specifically as an example of where the U.S. was not bound – at least beyond the already murky spectrum of customary international law.¹²⁹ In effect, *Medellín* did little service for UNCLOS insofar as U.S. domestic jurisprudence was concerned simply because it left the Convention largely untouched by the more specific holdings of the case. The result was the status quo, except now opponents of ratification could also make secondary arguments, via reference to *Medellín*, that UNCLOS was simply a bad deal in terms of U.S. sovereignty. In fact, this very argument has been made on more than one occasion before the Senate Committee on Foreign Relations.¹³⁰ If this line of argumentation sounds familiar, that is because it's precisely the same logic that has been employed by the Republican Party's "Old Guard" discussed above in order to keep UNCLOS below ratification thresholds in the Senate for decades – even in spite of inter-committee support.¹³¹

The unfortunate reality is that the U.S.' long-standing and shifting stance towards customary international law, coupled with UNCLOS's apparent reduction to just that within U.S. foreign policy, means that the legal status of UNCLOS is best defined as "complicated." While *Medellín* had the chance to clarify the matter, it did not, and instead only added more arguing points to the ongoing UNCLOS debate within the United States. It is safe to say that where the U.S. has no vocal opposition to UNCLOS, it is accepted it as customary international law – with the obvious caveat that the U.S. is unlikely to acquiesce to UNCLOS jurisdiction insofar as tribunal judgments or decisions are concerned. This position has been maintained since 1983, wherein President Reagan stated that "The United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."¹³² Of course, the language of this statement is broad and leaves quite a bit open to interpretation – a fact which was almost immediately pointed out by both domestic and

¹²⁹ See Edward T. Swaine, *Taking Care of Treaties*, COLUMBIA LAW REVIEW, Vol. 108, No. 2, 331 – 403 (2008); *Medellín v. Texas* 128 S. Ct. 1346 (2008) (Stevens J., Concurring the Judgement).

¹³⁰ See e.g., Steven Groves, "Hearing before the United States Committee on Foreign Relations," June 14, 2012.

¹³¹ Richard G. Lugar, Senate Committee on Foreign Relations, "United Nations Convention on the Law of the Sea," 11 March, 2004.

¹³² Statement by the President, "Statement on United States Ocean Policy," 10 March, 1983.

international critics of the U.S. position.¹³³ For example, just what was meant by “traditional uses of the oceans?” It might seem straightforward, but in the context of a disputed UNCLOS regime it was an ambiguity that was both intentional and long-lasting.¹³⁴

Such ambiguities allow for ongoing debates over just which aspects of UNCLOS are actually customary or traditional – and, perhaps unsurprisingly – these debates are in turn used to diminish UNCLOS’s potential reach where domestic policy would clash with an otherwise legal mandate of the Convention. Indeed, these debates of “custom” are frequently used as road maps for determining U.S. foreign policies in the first place, with the general goal being to “give” as little as possible while maintaining the appropriate requirements of the already-debated customary international law.¹³⁵ Subsequently, UNCLOS both does, and does not, apply to the U.S. As alluded to earlier, this “complicated” answer may be unsatisfying, but decades worth of U.S. policy and jurisprudence have effectively created a U.S. “acceptance” of UNCLOS that requires a nearly line-item analysis in order to determine what applies, and where.¹³⁶ In many ways this is neither surprising nor unexpected, as it is largely a reflection of larger U.S. policy.

All that said, however, the above information – while accurate – is likely too cynical when viewed in isolation. The truth is that while the actual legal status of UNCLOS for the U.S. is multi-tiered and complex, real-world situations and events have displayed a U.S. that is far more willing to cooperate with the UNCLOS regime than it may first appear,¹³⁷ with the obvious and lingering caveat that the U.S. still shies away from actual ratification. For example, the U.S. Navy’s freedom of navigation operations have largely been done in compliance with and in support of UNCLOS, even where the U.S. might have otherwise claimed one custom-based argument or another.¹³⁸ In many naval aspects the U.S. has been quite respectful of

¹³³ D. Brian Hufford, *Ideological Rigidity vs. Political Reality: A Critique of Reagan’s Policy on the Law of the Sea*, YALE LAW & POLICY REVIEW, Vol. 2, No. 1, 127 – 166 (1983).

¹³⁴ See E.D. Brown, *Seabed mining: From UNCLOS to PrepCom*, MARINE POLICY, Vol. 8, No. 2, 151 – 164 (1984).

¹³⁵ In fairness to the U.S., this is also a tactic employed by the other non-parties to UNCLOS. See Tullio Treves, *UNCLOS and Non-Party States before the International Court of Justice*, OCEAN LAW AND POLICY, 367 – 378 (2016).

¹³⁶ One prominent and recent example of how this can complicate matters not only for UNCLOS as it applies to the U.S., but for how the U.S. tries to influence international oceanic law in general, is the ongoing dispute over the South China Sea. Hannah Beech, *China Will Never Respect the U.S. Over the South China Sea. Here’s Why*, TIME, 8 July, 2016.

¹³⁷ See e.g., Richard Lugar, *The Law of the Sea Convention: The Case for Senate Action*, BROOKINGS INSTITUTION, 4 May, 2004.

¹³⁸ Jonathan G. Odom, *Committed to the Law of the Sea: In Most Ways, Except for One – How the United States Helps to Preserve the International Maritime Order in East Asia, Even Though it has Not Yet Joined the Law of the Sea Convention*, THE ASIAN CENTURY, 33 – 39 (2014).

UNCLOS's articles, with some even going so far to say that the U.S. is "already abiding [by the Convention] to the maximum extent possible as a matter of customary law."¹³⁹ Building on the point of naval operations, while the U.S. may not have specifically agreed to certain aspects of UNCLOS, the U.S. navy is already bound by several treaties that predate UNCLOS and were incorporated into it.¹⁴⁰ This confluence between customary law, UNCLOS, and pre-existing treaties is in many regards a widely accepted aspect with Navy personnel – meaning that the "on-the-ground" (or, more arcuately, water) view towards UNCLOS is likely to be much more agreeable and incorporating than it perhaps would be in more high-level political doctrines.¹⁴¹ Indeed, many military personnel have already come to view UNCLOS as an operative portion of naval policy and cite "only benefits" to shifting from pseudo-participation to full party status.¹⁴² It may seem odd that those personnel most directly affected by UNCLOS' naval provisions are arguing that there is "more to gain than lose" from a more codified adoption of UNCLOS¹⁴³ and yet there has been no Congressional action, however, such is the confusing landscape of the U.S. perspective towards the Convention. That this confusion has real-world implications can be seen in the fact that the U.S. Navy has referred to UNCLOS's status in domestic policy as an undue "constraint" on some operations.¹⁴⁴ These burdens are made all the more problematic when convincing arguments have been put forward by the both (the non-opposed portions of) the U.S. government itself and political advocates which contest that U.S. practice is already so in line with UNCLOS that there would be no substantive change to (or more importantly, concessions of) U.S. law.¹⁴⁵

The good news for advocates of UNCLOS ratification is that despite the lack of ratification, the U.S. does seem to be strengthening its adherence to UNCLOS, even while stopping short of a full ascension to the Convention. Indeed, in recent years the U.S. has been

¹³⁹ *Id.* at 38.

¹⁴⁰ Andrew J. Norris, "The Other" *Law of the Sea*, NAVAL WAR COLLEGE REVIEW, Vol. 64, No. 3, 78 – 97 (2011). The Navy is not alone in being bound by pre-existing agreements which tie into UNCLOS, even if not integrated directly into it. *See* Moore, *infra* note 141.

¹⁴¹ *See* Admiral Samuel J. Locklear, "The Law of the Sea Convention: Perspectives from the U.S. Military," Testimony before the Senate Foreign Relations Committee, 14 June, 2012; *see also* John Norton Moore, "United States Adherence to the Law of the Sea Convention: A Compelling National Interest," Testimony before the House Committee on International Relations, 12 May, 2004.

¹⁴² Scott G. Borgerson, James Watkins, & John Norton Moore, *Strange Bedfellows: The Law of the Sea and Its Stakeholders*, FEDERAL NEWS SERVICE, 20 March, 2008.

¹⁴³ John B. Bellinger III, *The United States and the Law of the Sea Convention*, LAW OF THE SEA INSTITUTE, No. 5, 8 (2008).

¹⁴⁴ *See* Scott G. Borgerson, *The National Interest and the Law of the Sea*, 82 (2009).

¹⁴⁵ John F. Turner, "To Examine the 'United Nations Convention on the Law of the Sea,'" Testimony before the U.S. Senate Committee on Environment & Public Works, 23 March, 2004.

favoring a strong commitment to UNCLOS in “word and deed” if not legal ratification.¹⁴⁶ Here it is also important to note the 1992 SCOTUS case of *United States v. Alaska*,¹⁴⁷ a case which, while not as potentially precedent shattering as *Medellín* could have been, is still indicative of the U.S.’ commitment to UNCLOS as customary international law, even if that status is somewhat opaque.¹⁴⁸ In *U.S. v. Alaska*, the Court noted that “[the United States] has not ratified [UNCLOS], but has recognized that its baseline provisions reflect customary international law.”¹⁴⁹ While this is only but one small token of acknowledgement in comparison to the larger framework of UNCLOS, it is indicative of a shifting trend in U.S. policy that persisted beyond the 1994 agreement,¹⁵⁰ and which has largely been affirmed within the sphere of UNCLOS as customary international law in the twenty-six years since the Court’s decision.¹⁵¹ Thus, while *Medellín* might be seen as typical U.S. resistance towards any perceived risk to its sovereignty – that is, the ratification of UNCLOS – then *U.S. v. Alaska* may simultaneously be seen as an extension and reflection of the U.S.’ commitment to UNCLOS via customary international law. Of course, as always, the lingering issue here is that the U.S. then gets to, at least partially, “pick and choose” which portions of UNCLOS it will adhere to based almost entirely on custom-centric arguments. While the above discussion has made it clear that the U.S. is willing to agree to many aspects of UNCLOS, it is this ever-present ability to resist other portions of the Convention that makes its status within U.S. law all the more complex.

One major point to be aware of is that all this complexity and the deeply-rooted U.S. resistances to full ascension have generally been painted in broad strokes in both U.S. courts and politics. For example, even SCOTUS cases such as *Medellín* and *U.S. v. Alaska* often deal in larger, pragmatic considerations insofar as UNCLOS is concerned. In order to more fully examine just what the legal status of UNCLOS within the U.S. as customary international law means for the Arctic or the continental shelf requires a more focused analysis of the U.S.’

¹⁴⁶ John Norton Moore, *Navigation Freedom: The Most Critical Common Heritage*, INTERNATIONAL LAW STUDIES, Vol. 93, 251 – 260 (2017).

¹⁴⁷ *United States v. Alaska*, 503 U.S. 569 (1992).

¹⁴⁸ See Angelle C. Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the REALLY Cold War*, THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, Vol. 41, No. 3, 672 (2010).

¹⁴⁹ *United States v. Alaska*, 588 (1992).

¹⁵⁰ The 1994 Agreement, signed by President Clinton on 29 July, 1994 has been said to have “removed the most odious parts of UNCLOS” insofar as the U.S. was concerned. See Turner, *supra* note 145; see also Office of the President of the United States, Treaty Document 103-39, United Nations Convention on the Law of the Sea, With Annexes, And the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, With Annex, 29 July, 1994.

¹⁵¹ See Jason Warren Howard, *Don’t Be Left out in the Cold: An Argument for Advancing American Interests in the Arctic outside the Ambits of the United Nations Convention on the Law of the Sea*, GEORGIA LAW REVIEW, Vol. 42, No. 3, 833 – 866 (2008).

relationship with the CLCS. The above concerns, while generalized, were first necessary to explore in order to get a better understanding of how the U.S. perceives the Convention, and how, sometimes ironically, the U.S.' real-world actions are in conflict with its perhaps more removed and lofty political ideologies.¹⁵² Having established this broader framework, it is now important to more specifically focus on just what the U.S. relationship with the CLCS looks like and how the complicated status of UNCLOS in U.S. domestic law and policy effects that relationship.

2.2.3 – The United States and the CLCS

It should be first noted that while the U.S. has practically – if not ideologically – engaged with UNCLOS as a concept, it has not been so ready to come to terms with the CLCS itself.¹⁵³ As will be discussed, this is not to say that the U.S. has never acknowledged or been willing to “work with” the CLCS on occasion, but instead that there is not as lengthy of a history of on-the-ground efforts to comply with or even listen to the CLCS’s deliberations as there is with UNCLOS when more it is broadly defined.¹⁵⁴ Instead, the U.S.-CLCS relationship may better be described as “evolving,” and part of this stems from the fact that the CLCS has no firm grounding in customary international law in the same manner as other portions of UNCLOS.¹⁵⁵ This does not mean that disputes over the limits of the continental shelf have not arisen within the sphere of customary international law, but instead that the CLCS itself is a more novel concept, a status which unsurprisingly gives the U.S. some hesitation.¹⁵⁶ However, it would also be erroneous to say that the U.S. has outright and irreconcilably rejected the CLCS, as several U.S. actions have been quite cognizant of, and arguably even outright

¹⁵² For an older but still on-point discussion of this trend within U.S. policy, *see generally* Hebert McClosky, *Consensus and Ideology in American Politics*, THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 58, No. 2, 361 – 382 (1964).

¹⁵³ In fact, some within the U.S. government have went so far as to be outright suspicious of the CLCS, stating that “the CLCS process flawed by its secretive nature that prevents thorough examination of claims.” Howard, *supra* note 151 at 850.

¹⁵⁴ *See* Andrew King, *Thawing a Frozen Treaty: Protecting United States Interests in the Arctic with a Congressional-Executive Agreement on the Law of the Sea*, HASTINGS CONSTITUTIONAL LAW QUARTERLY, Vol. 34, No. 3, 329 – 354 (2007).

¹⁵⁵ Kevin A. Baumert, *The Outer Limits of the Continental Shelf Under Customary International Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 111, No. 4, 827 – 872 (2018).

¹⁵⁶ *See* Anna Cavnar, *Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor*, CORNELL INTERNATIONAL LAW JOURNAL, Vol. 42, No. 3, 387 – 440 (2009).

adherent to CLCS rules and procedures.¹⁵⁷ Of course this willingness is always subject to the condition that the U.S. only does so when it is amenable to the given prospect, and that it is otherwise under no true obligation to actually engage with the CLCS or its requirements.

Yet the U.S., much like with other aspects of UNCLOS, does seem to be softening its stance on the CLCS. While the possible future relationship between the U.S. and the CLCS will be discussed later in the thesis, for now there are two main points to consider as it relates the ongoing development of U.S.-CLCS relations. First, the U.S. has repeatedly highlighted concerns that accessioning to CLCS jurisdiction would risk a situation wherein the U.S. was outvoted in CLCS decisions but then obligated to abide by the ruling.¹⁵⁸ This, of course, has little to do with the CLCS itself and instead plays into the already discussed stance of the U.S. towards any conditions on its sovereignty.¹⁵⁹ In many ways this relatively unspecific argument has been one of the strongest and most lasting of the anti-CLCS sentiments in the U.S. – a status which shouldn't be surprising given the U.S.' ability to employ it in nearly all aspects of the ongoing UNCLOS debate.¹⁶⁰ However, also unsurprising, is that the future efficacy of this line of argument – as it relates specifically to the CLCS – seems to be in question. Recent years have seen a growing number of arguments for a more official and codified U.S. relationship with CLCS.¹⁶¹ Further, UNCLOS proponents are increasingly framing their pro-CLCS arguments around what the U.S. could lose, as opposed to merely “gain,” from ratification.¹⁶²

This inverse strategy of focusing on what might be “lost” has a long history of success in U.S. foreign policy debates,¹⁶³ and it is somewhat unfortunate (though wholly unsurprising) that it has taken so long to find the proper audience insofar as the UNCLOS debate is concerned. The CLCS, however, likely owes its relatively newfound popularity in U.S. discourse to this rising line of argumentation, as the continental shelf is also directly tied to the “resource” aspect of the “Race to the Arctic.”¹⁶⁴ This, in some regards, may explain why most

¹⁵⁷ David Curtis Wright, *The Dragon Eyes the Top of the World: Arctic Policy Debate and Discussion in China*, 37 (2011).

¹⁵⁸ See e.g., Frank Gaffney, “Hearing on the Law of the Sea Convention,” Testimony before the Senate Foreign Relations Committee, 4 October, 2007.

¹⁵⁹ See Davies & Zelizer, *America at the Ballot Box*, *supra* note 65.

¹⁶⁰ See Carlyle A. Thayer, *The United States and Chinese Assertiveness in the South China Sea*, SECURITY CHALLENGES, Vol. 6, No. 2, 69 – 84 (2010).

¹⁶¹ Raul Pedrozo, *Is it Time for the United States to Join the Law of the Sea Convention?*, JOURNAL OF MARITIME LAW & COMMERCE, Vol. 41, No. 2, 151 – 166 (2010).

¹⁶² See Howard, *Don't Be Left out in the Cold*, *supra* note 151.

¹⁶³ Thomas J. McCormick, *America's Half-Century: United States Foreign Policy in the Cold War and After*, 43 (1995).

¹⁶⁴ See David Reed, *In Pursuit of Prosperity: U.S. Foreign Policy in an Era of Natural Resource Scarcity*, 68 (2014).

of the major discussions around the CLCS have been fairly recent. It's not shocking that any given body or instrument would become prevalent in U.S. popular discourse and consciousness as soon as some "loss" is threatened, be it physical (resources) or political/legal (sovereignty). More pertinently though, is the question of "just what does this upswing in CLCS dialogue mean for U.S.-CLCS relations going forward?" The answer to that question is, perhaps surprisingly, a positive one. If recent trends are indicative of any future points of agreement, then the U.S. and CLCS are on increasingly good – albeit not legally binding – footing.¹⁶⁵

This comparatively decent relationship stems not only from the U.S.' fear of resource "loss" but also for the related concerns surrounding whether or not the U.S. even has a "voice at the table,"¹⁶⁶ or if it will even be able to properly engage in Arctic-related disputes in the first place.¹⁶⁷ However, while highly relevant to the discussion of U.S. and CLCS relations, these concerns have little grounding in the actual, present, legal relationship of the U.S. and the CLCS. This relationship, flowing from the U.S.' legal perspectives as a whole, might be said to simply "not exist." This stems from CLCS's murky status within customary international law and the U.S.' ascension to little more than such customs (if that). Therefore, on a purely legal level, the U.S. is neither bound by, nor obligated to, the CLCS – and, conversely – the CLCS is neither bound by, nor obligated to, the U.S.¹⁶⁸ While this thesis will discuss possible future changes to this status in a later section, for now this "non-status" or, perhaps more accurately "non-party," position between the U.S. and CLCS is worth remembering because it is also directly related to the U.S.' larger views towards not only the Arctic as a geographic region, but also towards the more geopolitically grounded issues of the "Race to the Arctic." In order to understand how the CLCS ties into this broader picture, it is first necessary to approach the Arctic through the lens of the U.S., a perspective which, unsurprisingly, is mired in decades of political, social, and legal complexities.

¹⁶⁵ For a broader discussion on just how the U.S. has made its stance on this matter clear, see Joanna Mossop, *The Law Applicable to the Continental Shelf Beyond 200nm*, 86 (2016).

¹⁶⁶ John A. C. Cartner & Edgar Q. C. Gold, *Commentary in Reply to "Is it Time for the United States to Join the Law of the Sea Convention"*, JOURNAL OF MARITIME LAW & COMMERCE, Vol. 42, No. 1, 49 – 70 (2011).

¹⁶⁷ Parker Clote, *Implications of Global Warming on State Sovereignty and Arctic Resources under the United Nations Convention on the Law of the Sea: How the Arctic is no Longer Communis Ominium Naturali Jure*, RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS, Vol. 8, 241 (2008).

¹⁶⁸ See Anna Cavnar, *Accountability*, *supra* note 156.

2.3 – The United States and the “Race to the Arctic”

If there is one area of U.S. popular discourse, outside of purely social issues, where one can easily encounter a seemingly endless variety of differing opinions it is when considering what to “do” with the Arctic.¹⁶⁹ Complicating the matter is that not only are popular and industrial¹⁷⁰ views of the Arctic changing, they are in some cases quite fickle,¹⁷¹ and they are also magnified or shifted by the current Presidential administration.¹⁷² For the purposes of this thesis, it is enough to mention the popular mindset in passing only as a tool of reinforcing the idea of U.S. Arctic perspectives as complex, fluid, and evolving. It is, insofar as UNCLOS and the CLCS are involved, more fruitful to focus on higher-level legal and governmental perspectives towards the Arctic – though these are often just and incongruent as are the popular sentiments.¹⁷³

In light of this approach, this section of the thesis has been divided into three subparts. The first will address the U.S.’ broad ideological, legal, and political views towards the Arctic as this information is necessary in order to understand its more precise concerns. The second subpart will move into the specific issues surrounding the U.S.’ perspective on, and concerns over, the continental shelf in the Arctic and the CLCS’s treatment of that debate. The third subpart will then make use of the information conveyed in the previous subparts as well as Section 2.2 above in order to address the second primary question of “How does the lack of United States ratification affect the ‘Race to the Arctic?’”

¹⁶⁹ The phrase choice of “seemingly endless” is not used here for mere effect; U.S. popular perspectives on the Arctic are so wide and various that entire works have been devoted to this sole topical area. *See e.g.*, Evan T. Bloom, “United States Perspectives on the Arctic,” in Dawn Alexandria Berry, Nigel Bowles, & Halbert Jones, *Governing the North American Arctic*, 233 – 241 (2016).

¹⁷⁰ Keith Johnson & Dan De Luce, *U.S. Falls Behind in the Arctic Great Game*, FOREIGN POLICY, 24 May, 2016.

¹⁷¹ *See generally*, Michael F. Robinson, *The Coldest Crucible: Arctic Exploration and American Culture* (2006).

¹⁷² Andrew Holland, *American’s Role in the Arctic – Opportunity and Security in the High North*, AMERICAN SECURITY PROJECT (2014).

¹⁷³ *See* William G. Dwyer, *The evolving Arctic: current state of U.S. Arctic policy*, CALHOUN, NPS Archive (2013); *see also* Mark E. Rosen, *U.S. Arctic Policy: The Video and the Audio Are Out of Synch*, THE NATIONAL INTEREST, 4 March, 2018.

2.3.1 – The United States and the Arctic: Ideologies and Geopolitical Concerns

Any examination of U.S. perspectives on the Arctic that also hopes to include a discussion of UNCLOS is best served by beginning the analysis at the dawn of UNCLOS's modern formulation in 1982. The 1982 iteration of UNCLOS was the outcome of decades of discussion and no less than four U.S. Presidential administrations. Not only is this a lengthy period of time by any metric, it's an exceptionally long period of time when it comes to U.S. policy issues.¹⁷⁴ Noting this, some have argued that much of the controversy surrounding UNCLOS ratification in the U.S. may well have been avoided had it occurred prior to the Reagan administration.¹⁷⁵ While engaging in such “what if” situations is mostly distracting outside of counterfactual history, it does highlight the rapid transitions that occur between U.S. administrations. The Arctic was no exception to this shift,¹⁷⁶ and it is for that reason that the early 1980s are as good a starting point for any evaluation of U.S. Arctic policy as they are for the previously discussed timeline of the U.S.' resistance to UNCLOS.

Insofar as the legal background is concerned, most of the U.S. law and policy which was prevalent in the 1980s (and later) stemmed from the earlier administration of President Nixon.¹⁷⁷ That administration was assuredly “environmentalist” – at least in regard to how the term would have been used at the time.¹⁷⁸ The key Nixon administration document as it relates to the Arctic was the National Security Decision Memorandum 144, which was centered around developing U.S. Arctic policy and was the first document to clearly define U.S. goals for the Arctic.¹⁷⁹ These goals were contained to three areas of focus; minimizing risk to the Arctic environment, promoting international cooperation within the Arctic moving forward, and ensuring the protection of U.S. security interests in the region.¹⁸⁰ This federal perspective was carried forward through to 1984 wherein the U.S. Congress passed the “Arctic and Policy Act of 1984” which furthered the goals of Memorandum 144 while also adding in additional

¹⁷⁴ For an analysis of just how rapidly and drastically U.S. foreign policy can change over such a timespan – a fact which makes UNCLOS all the more extraordinary – see Fred L. Block, *The Origins of International Economic Disorder: A Study of United States International Monetary Policy from World War II to the Present* (1977).

¹⁷⁵ David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, INSIGHTS, Vol. 11, No. 16, 1 – 5 (2007).

¹⁷⁶ Oran R. Young, *The Age of the Arctic*, FOREIGN POLICY, No. 61, 160 – 179 (1985).

¹⁷⁷ See e.g., Eugene Brower & James Stotts, *Arctic Policy: The Local/Regional Perspective – Nunami Qiiyanaqtuami*, UNITED STATES ARCTIC INTERESTS, 319 – 344 (1984).

¹⁷⁸ J. Brooks Flippen, *Richard Nixon, Russell Train, and the Birth of Modern American Environmental Diplomacy*, DIPLOMATIC HISTORY, Vol. 31, No. 4, 613 – 638 (2008).

¹⁷⁹ United States National Security Council, National Security Decision Memorandum 144, 22 December, 1971.

¹⁸⁰ *Id.* at 1 – 2.

considerations such as protecting commercial fishing operations and funding environmental and climate-based research in the Arctic.¹⁸¹

After these events the U.S. remained relatively mum throughout the rest of the 1980s on the issues within the Arctic, at least when it came to international relations. The next major step in U.S. Arctic policy was the Arctic Environmental Protection Strategy Agreement (AEPSA) from 1991.¹⁸² This agreement was a culmination of efforts between the U.S., Soviet Union, Canada, Denmark, Finland, Iceland, Norway, Sweden, and eight observing bodies.¹⁸³ While the more nuanced details of the AEPSA go beyond the scope of this thesis, its general purpose is noteworthy because like the domestic U.S. efforts which had predated it, it focused on the protection of the Arctic and on carrying out a variety of environment-positive research therein.¹⁸⁴ The AEPSA's strategies were themselves largely absorbed into the Arctic Council following the Ottawa Declaration of 1996.¹⁸⁵ The U.S. then used its position within the Arctic Council as its "public-facing" policy platform for Arctic issues over the next decade.¹⁸⁶ It wasn't until 2008 that hints of a U.S. shift in its Arctic policy began to emerge. While the U.S. was part of the Ilulissat Declaration,¹⁸⁷ which dealt heavily with jurisdictional issues in the Arctic,¹⁸⁸ it also used this as an opportunity to reconfirm its reluctance to ratify UNCLOS.¹⁸⁹ Though the U.S. was still at the table, it became more clear in the aftermath of the Ilulissat Declaration that it was either planning on a strategic policy divergence, or at the very least was

¹⁸¹ See Ronald O'Rourke, *Changes in the Arctic: Background and Issues for Congress*, Congressional Research Service, 4 January, 2018.

¹⁸² Declaration on the Protection of the Arctic Environment, Arctic Environmental Protection Strategy, 14 June, 1991.

¹⁸³ The observing bodies included the: Inuit Circumpolar Conference, Nordic Saami Council, USSR Association of Small Peoples of the North, Federal Republic of Germany, Poland, United Kingdom, United Nations Economic Commission for Europe, United Nations Environment Program, and the International Arctic Science Committee. *Id.* at 1.

¹⁸⁴ See *id.*, at §§ 1 – 9.

¹⁸⁵ See Arctic Council, Declaration on the Establishment of the Arctic Council (Ottawa Declaration), 19 September, 1996.

¹⁸⁶ Timo Koivurova, *Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance*, POLAR RECORD, Vol. 46, No. 2, 146 – 156 (2009).

¹⁸⁷ Arctic Ocean Conference, The Ilulissat Declaration, Ilulissat, Greenland, 27 – 29 May, 2008.

¹⁸⁸ See *id.*; see also Klaus Dodds, *The Ilulissat Declaration (2008): The Arctic States, "Law of the Sea," and Arctic Ocean*, SAIS REVIEW OF INTERNATIONAL AFFAIRS, Vol. 33, No. 2, 45 – 55 (2013).

¹⁸⁹ David W. Titley & Courtney St. John, *Arctic Security Considerations and the U.S. Navy's Roadmap for The Arctic*, NAVAL WAR COLLEGE REVIEW, Vol. 63, No. 2, 35 – 48 (2010).

considering it.¹⁹⁰ By 2009, the transparent international policies of the U.S. shared little in common with the group-oriented efforts of earlier instruments such as the AEPSA.¹⁹¹

The next sign of some form of U.S. reversion to more solitary efforts came in the form of National Security Presidential Directive NSPD-66 which was signed by then President George W. Bush during the final days of his presidency in January 2009.¹⁹² While this directive may seem more globalist in that it does indeed push for Senate ratification of UNCLOS, it is unabashedly individualist and assertively separatist in many other fashions.¹⁹³ Here it's important to note that part of the U.S.' recent reluctance to "bind" itself to multilateral Arctic goals stems from the rapidity of the melting sea ice.¹⁹⁴ In fact, despite the current Trump administration's anti-environmental stance,¹⁹⁵ the Obama administration – which took over just shortly after NSPD-66 went into effect – had largely eco-coconscious concerns,¹⁹⁶ even if these were ultimately grounded in classical issues of territory.¹⁹⁷ Still, in many ways the U.S. shift had an underlying sense of urgency, a surprising stance for a nation which had historically been comparatively slow to react to changes in the Arctic in most practical, if not policy-oriented, endeavors.¹⁹⁸

In many ways the dawn of the Obama administration was a marked shift not only in Arctic policy, but also in broad U.S. environmental policy.¹⁹⁹ With rising concerns over new routes of passage in the Arctic as ice sheets diminished, as well as newfound territorial disputes, the U.S. has – at least in some respects – moved away from a largely international effort to a more U.S.-centered policy.²⁰⁰ The persistent reasoning for this is that the impetus for Arctic action requires the U.S. to be able to freely (within reason) make its own decisions and take its

¹⁹⁰ Brooks B. Yeager, *The Ilulissat Declaration: Background and Implications for Arctic Governance*, The Aspen Dialogue and Commission on Arctic Climate Change, 5 November, 2008.

¹⁹¹ Oran R. Young, *Whither the Arctic? Conflict or cooperation in the circumpolar north*, POLAR RECORD, Vol. 45, No. 1, 73 – 82 (2009).

¹⁹² President George W. Bush, National Security Presidential Directive and Homeland Security President Directive, National Security Presidential Directive/NSPD – 66, Homeland Security Presidential Directive/HSPD – 25, 9 January, 2009.

¹⁹³ See Juliet Eilperin, Spencer S. Hsu, & John R. Crook, *Comprehensive New Statement of U.S. Arctic Policy*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 103, No. 2, 342 – 349 (2009).

¹⁹⁴ See Ronald O'Rourke, *Changes in the Arctic*, *supra* note 181.

¹⁹⁵ Najda Popovich, Livia Albeck-Ripka, & Kendra Pierre-Louis, *67 Environmental Rules on the Way Out Under Trump*, THE NEW YORK TIMES, 31 January, 2018.

¹⁹⁶ See e.g., Darry Fears & Juliet Eilperin, *President Obama bans oil drilling in large areas of Atlantic and Arctic oceans*, THE WASHINGTON POST, 20 December, 2016.

¹⁹⁷ Matthew Kupfer & Matthew Bodner, *Frozen Conflict*, THE ECONOMIST, 17 December, 2014.

¹⁹⁸ Daniel J. Graeber, *U.S. slow to protect Arctic interests*, UPI, 10 January, 2011.

¹⁹⁹ See generally Michael E. Kraft, *Environmental Policy and Politics* (2017).

²⁰⁰ See Charles K. Ebinger, *The Way Forward for U.S. Arctic Policy*, BROOKINGS, 5 June, 2014.

own actions, without the need to constantly confer with other nations.²⁰¹ Whether this sense of immediacy is governed by actual environmental concerns, or if it is merely commerce-driven, is a matter of debate – especially in the wake of the Trump administration.²⁰² Still, the U.S. appears to be quite cognizant of the fact that it can’t exclusively “go it alone” when it comes to the Arctic, especially when it comes to security measures. For example, given the non-military nature of the Arctic Council, the U.S. currently faces a good deal of gaps in its U.S. Navy and U.S. Coast Guard Arctic research and rescue operations.²⁰³ This is a fact that the Navy has constantly used in favor of UNCLOS ratification, an argument which while not yet having resulted in ratification, does seem to be falling on listening, if not active, ears.²⁰⁴

If the U.S.’ shift away from international forums and to a more internal problem-solving mechanism for the Arctic had to be summed up in a single word, it would not be inaccurate to say “security.”²⁰⁵ While the broader “Race to Arctic” is still largely defined by “resources,” the particularities of the U.S. policy shift are better summed up as being security concerns. Of course, resources do play a part in security, but it is this security and defense-based metric which the U.S. has increasingly used in justifying its policies, both domestically and internationally.²⁰⁶ President Trump, as an example, has utilized this tactic to a level not seen in several presidential administrations.²⁰⁷ The result is that entities such as the U.S. Navy and U.S. Coast Guard – which favor UNCLOS ratification – are ultimately forced to adopt operational measures designed around the absence of the UNCLOS regime beyond its status as customary international law. As discussed, this works well in some respects, but insofar as it relates to the Arctic and other facets such as the continental shelf, it’s riddled with problems.²⁰⁸ In truth, the U.S. federal policy towards the Arctic is growing increasingly muddled as the “back-and-forth” of Executive administrations is compounded by ongoing internal debates as to the veracity of UNCLOS. If one were to briefly overview even just a few

²⁰¹ Ariel Cohen, *From Russian Competition to Natural Resources Access: Recasting U.S. Arctic Policy*, THE HERITAGE FOUNDATION, 15 June, 2010.

²⁰² Joël Plouffe, *U.S. Arctic Foreign Policy in the Era of President Trump: A Preliminary Assessment*, CANADIAN GLOBAL AFFAIRS INSTITUTE (2017).

²⁰³ See e.g., Jim Dolbow, Ariel Cohen, & Lajos F. Szasdi, *The New Cold War: Reviving the U.S. Presence in the Arctic*, THE HERITAGE FOUNDATION, 30 October, 2008.

²⁰⁴ Jonathan J. Vanecko, *Time to Ratify UNCLOS: A New Twist on an Old Problem*, NAVAL WAR COLLEGE (2011).

²⁰⁵ See Rolf Tammes & Kristine Offerdal, *Geopolitics and Security in the Arctic: Regional Dynamics in a Global World* (2014).

²⁰⁶ *Id.* at 79.

²⁰⁷ Jean Chemnick, *Trump Drops Climate Threats from National Security Strategy*, SCIENTIFIC AMERICAN, 19 December, 2017.

²⁰⁸ See McLaughlin, *UNCLOS*, *supra* note 51.

U.S. federal agencies it would quickly become clear that the overall shift in U.S. Arctic policy has not been unilaterally rolled out within the U.S. government.

A few prominent examples of this can be found by comparing the agency clusters of the Executive Office of the President,²⁰⁹ the U.S. Department of the Interior (“DOI”), the U.S. Department of Energy (“DOE”), the U.S. Department of Agriculture (“DOA”), the U.S. Environmental Protection Agency (“EPA”), and the U.S. Department of Transportation (“DOT”), against their “opposing” cluster of the U.S. Department of State (“DOS”), the U.S. Department of Defense (“DOD”)²¹⁰, the U.S. Department of Commerce (“DOC”), the U.S. Department of Homeland Security (“DOHS”), and the U.S. Department of Health and Human Services (“DHHS”). That the word “opposing” is accurate here is telling as to the internal confusion and disagreement over the Arctic within the U.S. government as these agencies are obviously designed to work together and compliment on another, not clash on nearly each and every fundamental issue put before them.²¹¹ These two clusters might be referred to as the “Unilateral Arctic” (President, DOI, DOE, DOA, EPA, and DOT) and the “Multilateral Arctic” (DOD, DOC, DOHS, DHHS). As suggested by the titles, Unilateral Arctic favors a U.S.-driven and U.S.-centric approach to Arctic matters. It is this cluster which has seen a trend of being more resistant to UNCLOS ratification.²¹² Conversely, the Multilateral Arctic cluster is more open to a global and consensus-driven approach to the Arctic. Perhaps unsurprisingly, the Multilateral Arctic cluster has historically favored the ratification of UNCLOS.²¹³

As an example of how these contrasting internal policies can play out – even in the promoted area of “security” – one can compare the DOD’s “Navy Arctic Roadmap”²¹⁴ and

²⁰⁹ The Executive Office of the President also includes the Council on Environmental Quality and the Office of Science & Technology Policy. As of the Trump administration these bodies may also be counted as part of the “Unilateral Arctic” cluster. *See e.g.*, Chris Mooney, *Scientists are conspicuously missing from Trump’s government*, THE WASHINGTON POST, 13 March, 2017.

²¹⁰ The Department of Defense also includes the U.S. Navy and the U.S. Coast Guard, two entities whose positions have already been discussed and which definitively places them within the “Multilateral Arctic” cluster. *See e.g.*, Victoria Castleberry, *The Coast Guard and Maritime Chokepoints*, THE MARITIME EXECUTIVE, 20 April, 2017.

²¹¹ *See generally*, Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS, Vol. 150, No. 1, 171 – 195 (1994).

²¹² *See e.g.*, Lakshman Guruswamy, *The Promise of the United Nations Conventions on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, ECOLOGY LAW QUARTERLY, Vol. 25, No. 2, 189 – 227 (1998).

²¹³ *See e.g.*, Richard J. Grunawalt, *United States policy on international straits*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 18, No. 4, 445 – 458 (1987).

²¹⁴ J. W. Greenert, Department of Defense, Department of the Navy, Vice Chief of Naval Operations, “The United States Navy Arctic Roadmap for 2014 to 2013,” ADA595557, February, 2014.

“Navy Climate Change Roadmap”²¹⁵ to the President Trump’s Arctic policies.²¹⁶ The DOD policy, for instance, focuses on issues such “melting sea ice,” “Arctic overfishing,” and “ratifying [UNCLOS] so that [the U.S.] has a seat at the table.” Further, the DOD policy has specific concerns about the Arctic continental shelf areas. The mentality for all these issues, insofar as the DOD is concerned, is that the U.S. should be working with – as opposed to against – other nations as a way of more efficiently protecting U.S. security and resource interests. The President’s position, conversely, is in most ways exactly the opposite in that it favors putting a heavier emphasis on U.S.-centric maritime operations that are conducted without the need of, or in some cases even without regard to, international agreements.²¹⁷ That the DOD – the very U.S. entity charged with “security” – and the Executive Office of the President are at odds over just that, security, hints at deeper ideological rifts insofar as the Arctic is concerned. Unsurprisingly, the U.S.’ Arctic policy tends to vary depending on which governmental entity you rely on. For those in the Unilateral Cluster, U.S. Arctic policy has come to largely reflect the “America First” mentality, whereas the Multilateral Cluster has also phrased their Arctic arguments around security but has done so in a manner that involves global, or at the very least “Arctic Five,”²¹⁸ participation.²¹⁹

With this competing “alphabet soup” of agencies, policies, and actual on-the-ground endeavors it should come as no surprise that the U.S. Arctic policy has been difficult to track in recent years. The election of President Trump made the analysis even more difficult, as the traditionally tight policy bonds of the Executive Office of the President and the DOS were quickly stretched to near-breaking points, especially on those issues relating to the Arctic and the environment in general.²²⁰ Further complicating matters, is that President Trump has regulated most of these issues to a secondary basis – if he has even mentioned them at all.²²¹ As such, analysts are left to rely on Executive Orders or Agreements from previous administrations, a risky proposition given Trump’s tendency to nullify them either without

²¹⁵ J. W. Greenert, Department of Defense, Department of the Navy, Vice Chief of Naval Operations, “Navy Climate Change Roadmap,” 3000 Ser N09/10U103021, 21 May, 2010.

²¹⁶ See e.g., Timothy Cama, *Trump admin approves oil company’s Arctic drilling plan*, 13 July, 2017.

²¹⁷ See e.g., Łukasz Kulesa & Shatabhisha Shetty, *Trump, Putin and the Growing Risk of Military Escalation*, EUROPEAN LEADERSHIP NETWORK, Policy Brief, June, 2017.

²¹⁸ The “Arctic Five” is generally used in reference to Canada, Denmark, Norway, Russia, and the U.S. It is important to note that the “Arctic Five” is not the same entity as the “Arctic Council,” and indeed the two contingencies have occasionally been at odds with one another. See Torbjørn Pedersen, *Debates over the Role of the Arctic Council*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 43, No. 2, 146 – 156 (2012).

²¹⁹ United States Department of Department of Homeland Security, United States Coast Guard, “U.S. Coast Guard Arctic Strategic Approach,” Commandant Instruction 16003.1, 26 April, 2011.

²²⁰ See e.g., Morgan Chalfant, *Trump’s war on the State Department*, THE HILL, 14 July, 2017.

²²¹ Steve Benen, *Trump admin ignores dangers, unveils coastal drilling plan*, MSNBC NEWS, 5 January, 2018.

political consultation, or, occasionally, even in direct contrast to his advisors' suggestions.²²² On this note it is useful to consider not just the U.S.' broad ideological and geopolitical concerns surrounding the Arctic, but to instead narrow the view down to issues which more specifically relate to the continental shelf and the CLCS. While the current administration has been largely silent on these particular issues, given the precedential effects of Executive policy there is still much to be learned about how the U.S. views these issues in particular, even if, much like all that has been discussed before, the current U.S. political climate makes any given stance vulnerable to near-immediate change.²²³

2.3.2 – The United States Perspective on the Continental Shelf in the Arctic

From the outset it's important to mention that the U.S.' stance on the continental shelf in Arctic is both similar to, and distinct from, broader U.S. continental shelf concerns. Similarly, where the issues overlap with the CLCS, the U.S. tends to blur together a few different ideologies which range from Arctic-specific concerns to broader geopolitical debates.²²⁴ These overlapping U.S. positions are made more difficult to follow because the actual geography of the Arctic continental shelf is still disputed.²²⁵ This, in turn, means that raw data can't always be relied on to support or attack a particular foreign policy position – a status which the U.S. has both “used and abused” in the Arctic.²²⁶ For example, as the U.S. has not ratified UNCLOS they have not been able to formally file a claim with the CLCS as to the extended continental shelf in the Arctic,²²⁷ yet, in spite of this, the U.S. has “informally” made such claims and modeled them largely as they would have appeared within the CLCS framework.²²⁸ Further, the U.S. has made several responses to other nations' Arctic claims that in nearly every fashion appear as if the U.S. was a party to UNCLOS. This is of course

²²² Carol D. Leonning, David Nakamura, & Josh Dawsey, *Trump's national security advisers warned him not to congratulate Putin. He did it anyway*, THE WASHINGTON POST, 20 March, 2018.

²²³ See Jennifer Heuer, *Mr. Trump's Fickle Diplomacy*, THE NEW YORK TIMES, 12 April, 2017.

²²⁴ For a discussion on the various ways this ideology has played out for the U.S. beyond UNCLOS and the CLCS, see generally John Bolton, *Surrender is Not an Option: Defending America at the United Nations* (2008).

²²⁵ Elizabeth Riddle-Dixon, *Canada and Arctic Politics: The Continental Shelf Extension*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 39, No. 4, 343 – 359 (2008).

²²⁶ Sebastian Knecht, “Arctic Regionalism in Theory and Practice: From Cooperation to Integration?,” in Lassi Heininen, *Arctic Yearbook 2013*, 164 – 183 (2013).

²²⁷ James Houck, *The Law of the Sea and the Arctic*, HARVARD INTERNATIONAL REVIEW, 27 April, 2015.

²²⁸ See Molly Watson, *An Arctic Treaty: A Solution To The International Dispute Over the Polar Region*, OCEAN AND COASTAL LAW JOURNAL, Vol. 14, No. 2, 307 – 334 (2008).

reflective of the U.S.’ desire to participate without being bound, but it’s also indicative of the U.S.’ general policy of making such claims and furthering scientific knowledge regarding the Arctic continental shelf, albeit as a non-party to UNCLOS.²²⁹ In order to understand these claims it is first necessary to examine and acknowledge that, much like all the other aspects that could be related back to UNCLOS, the U.S. government has varying internal perspectives on the issue.

These varied perspectives are often inconsequential, but they can also extend to issues that affect the entirety of an Arctic claim, and thus by association, the manner in which the U.S. interacts with other nations regarding the Arctic.²³⁰ Likely the most prominent example of this is the differences of opinion between NOAA, the DOS, and the U.S. Coast Guard.²³¹ While the specific technical details of each entity’s research are beyond the scope of this thesis, the overall points of disagreement are worth mentioning. In essence, each entity is relying on differing sets of data and differing models to make their determinations.²³² While these U.S. institutions most certainly have access to each other’s data, there is a culture of hegemony between them wherein they will favor their own internal bodies over those within another U.S. governmental branch. This is a dilemma which is systemic in the U.S. – and arguably any – government structure,²³³ but which has come to the forefront of issues around the continental shelf in the Arctic in recent years.²³⁴ As a result, the U.S. is paradoxically faced with a situation wherein it both argues against foreign claims and delineations, while also being unable to decide on its own position. However, that domestic indecision has – at least in the short term – no major impact on whether or not the U.S. will make any given variety of international claims. In truth, the U.S. has a long history of positioning itself one way or another in international Arctic affairs, even if it hasn’t formally decided on the matter in its domestic policy.²³⁵ This setup largely owes its longevity

²²⁹ See Haiwen Zhang, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ*, CHINESE JOURNAL OF INTERNATIONAL LAW, Vol. 9, No. 1, 31 – 47 (2010).

²³⁰ See generally Walter Russel Mead, *Special Providence: American Foreign Policy and How It Changed the World* (2013).

²³¹ See e.g., G.M. Sulmasy & A. P. Wood, *U.S. Coast Guard Activity in the Arctic Region*, LAW OF THE SEA INSTITUTE (2014).

²³² For a discussion of how this broadly effects the operation of interagency efforts, see generally Young Han Chun & Hal G. Rainey, *Goal Ambiguity and Organizational Performance in U.S. Federal Agencies*, JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY, Vol. 15, No. 4, 529 – 557 (2005).

²³³ As just one example among many, see Arndt Wonka & Berthold Rittberger, *Perspectives on EU governance: an empirical assessment of the political attitudes of EU agency professionals*, JOURNAL OF EUROPEAN PUBLIC POLICY, Vol. 18, No. 6, 888 – 908 (2011).

²³⁴ See e.g., Philip K. Hopke, Chuanhai Lu, & Donald B. Rubin, *Multiple Imputation for Multivariate Data with Missing and Below-Threshold Measurements: Time-Series Concentrations of Pollutants in the Arctic*, BIOMETRICS – JOURNAL OF THE INTERNATIONAL BIOMETRIC SOCIETY, Vol. 57, No. 1, 22 – 33 (2001).

²³⁵ See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1996).

to the separation of powers in the U.S., though vested powers in the Executive branch also allow for intragovernmental agencies to bicker over scientific specificities while the President moves forward on their own accord.²³⁶

The major point of this domestic contention involves just what the extended continental shelf consists of. While the Trump administration has yet to issue any major policy statement on the matter, various agencies and governmental entities continue to submit varying reports and statements.²³⁷ As just a few examples of differing Arctic reports which have varied concepts of delineation, the DOS, NOAA, and U.S. Coast Guard have all relied on differing data sets to make determinations that contain several discrepancies. This is not to say that the science or data is incorrect, but merely that different models yield different results, and that rather than basing their publicized statements on a more cohesive and uniform modeling front, the various entities operate largely independently of one another when making such a determination.²³⁸ The problem therein, is that not only does this make U.S. views on the continental shelf difficult to ascertain by international bodies, it also makes it difficult to reconcile the policies domestically.²³⁹ While it is true that these varied policy statements have yet to generate any substantial conflict insofar as it relates to the Arctic, they have created unnecessary policy delays and have complicated the mission of the U.S. Extended Continental Shelf Project Task Force (“CSTF”).²⁴⁰ The CSTF’s primary mission is to carry out the U.S. Extended Continental Shelf Project (“ECSP”).²⁴¹ Unsurprisingly, when the constituent agencies and entities within the CSTF disagree, the ECSP as a whole suffers. This, in turn, further convolutes the already complicated U.S. relationship with bodies such as the CLCS. As a result, individual entities within the CSTF have employed side-measures in order to carry out

²³⁶ Chellie Pingree, *Trump ignores science with executive order dismantling Clean Power Plan*, THE HILL, 11 April, 2017.

²³⁷ See e.g., Naja Bentzen, Marc Hall, & Christian Dietrich, European Parliamentary Research Service, *Arctic continental shelf claims – Mapping interests in the circumpolar North*, European Parliament Briefing PE 595.870, January 2017; see also Ian Birdwell, *Rival Claims to a Changing Arctic*, THE MARITIME EXECUTIVE, 15 August, 2016.

²³⁸ Compare United States Department of State, Under Secretary for Economic Growth, Energy, and the Environment, Bureau of Oceans and International Scientific Affairs, Fisheries, Marine Conservation, Ocean and Polar Affairs, “U.S. Extended Continental Shelf” (2018); United States Department of Commerce, National Oceanic and Atmospheric Administration, “Extended Continental Shelf” (2017); United States Department of Homeland Security, United States Coast Guard, “Mapping the extended continental shelf in the Arctic” (2016).

²³⁹ See Kathrin Keil, *The Arctic: A new region of conflict? The case of oil and gas*, COOPERATION AND CONFLICT, Vol. 49, No. 2, 162 – 190 (2013).

²⁴⁰ United States Department of State, Under Secretary for Democracy and Global Affairs, Oceans and International Environmental and Scientific Affairs, “U.S. Extended Continental Shelf Project” (2017).

²⁴¹ For a more detailed discussion of all of the duties that fall before the CSTF, see Margaret F. Hayes, Director, Office of Ocean and Polar Affairs, U.S. Department of State, “Changes in the Arctic Environment and Law of the Sea – *Continental Shelf Limits and Jurisdiction*,” 20 May, 2009.

their given Arctic mission. Subsequently, resources that may have been allocated to the ECSP are instead used on non-CSTF endeavors.²⁴²

This poor allocation of resources is something that the Executive branch has taken note of, and despite the availability of a “fix” for the CSTF and ECSP – that is, an Executive Order to increase cooperation²⁴³ – it doesn’t seem overly likely that the Trump administration will tackle this particular issue given its track record on similar issues.²⁴⁴ Of course there is always the opportunity for the CSTF to refine its reports with security concerns,²⁴⁵ but that does little to directly address the sometimes contradictory continental shelf data analyses that the U.S. government is faced with. As a result, the very body which is best primed to relay the U.S. position on this particular aspect of the Arctic is left hindered by the individual efforts of its members. This is, oddly, to say that the U.S., by putting forth as much effort as it has, has complicated its own perspective because those efforts have been just divergent enough to cause the entire policy mechanism to slow to a near halt.²⁴⁶ The DOS, at the very least, seems to be aware of this problem and has taken steps to try to increase the CSTF’s efficiency.²⁴⁷ Intriguingly enough, in carrying out this improvement process the DOS has maintained its “Multilateral Cluster” stance,²⁴⁸ and has made statements favoring UNCLOS ratification such as “[accessioning to the Convention] would allow the United States to gain access to the procedure that maximizes international recognition and legal certainty regarding the outer

²⁴² This is not to say that the information gained has been useless or even compromised, *see e.g.*, P. J. Michael, et al., *Magmatic and amagmatic seafloor generation at the ultra-slow spreading Gakkel ridge, Arctic Ocean*, NATURE, Vol. 423, 956 – 961 (2003), but instead merely that the manner of obtaining and analyzing the data could have been carried out more efficiently if the CSTF had more oversight. *See* Klaus Dodds, *Flag planting and finger pointing: The Law of the Sea, the Arctic and the political geographies of the outer continental shelf*, POLITICAL GEOGRAPHY, Vol. 29, No. 2, 63 – 73 (2010).

²⁴³ For a discussion on how Executive Orders can effectively and rapidly steer such policies, *see generally* Kenneth R. Mayer, *Executive Orders and Presidential Power*, THE JOURNAL OF POLITICS, Vol. 61, No. 2 (1999).

²⁴⁴ *See e.g.*, Darryl Fears, *Trump says the Atlantic, Arctic could soon be open to oil drilling*, THE WASHINGTON POST, 29 June, 2017.

²⁴⁵ *See* David A. Balton, “Practical stake: ECS,” in Myhron H. Nordquist, et al., *The Law of the Sea Convention: US Accession and Globalization*, 46 (2012).

²⁴⁶ For a discussion of how some of these “infrastructural” failures have played out within the U.S. policy system, *see* Ásgeir Sigfússon, *Climate change is opening up new opportunities and challenges in the Arctic. Is the United States ready to lead?*, THE FOREIGN SERVICE JOURNAL, 12 November, 2015.

²⁴⁷ United States Department of State, Under Secretary for Economic Growth, Energy, and the Environment, Bureau of Oceans and International Environmental and Scientific Affairs, “Agreement on Enhancing International Arctic Scientific Cooperation,” 11 May, 2017.

²⁴⁸ *See* Hannes Gerhardt, et al., *Contested Sovereignty in a Changing Arctic*, ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS, Vol. 100, No. 4, 992 – 1002 (2009).

limits of its continental shelf”²⁴⁹ Thus, in trying to “fix” the CSTF and ECSP the DOS has, in fact, only complicated matters even further given the Executive’s inverse stance on the matter.

As confusing as all of the contrasting data sets and policies are, the U.S. has, for better or worse, settled on a general policy of unilaterally approaching its own claims, while at least acknowledging if not outright acquiescing to (what it perceives to be) multilateral issues such as non-U.S. contested claims.²⁵⁰ Now, here it must be said that this does not mean to imply that the U.S. is refusing to engage with international bodies as they relate to the Arctic, for instance the U.S. has not suggested any changes to its Arctic Council position²⁵¹ – and in fact it held the Chairmanship position of the Council from 24 April, 2015 to 11 May, 2017.²⁵² What these complications mean, instead, is that the U.S.’ international position on the Arctic and the continental shelf therein must be viewed with a skeptical eye by all parties, including domestic U.S. governmental entities.²⁵³ If, in contrast, the U.S. had a more cohesive Arctic policy in the era of the Trump administration then these topical areas would be easier to grapple with. However, as has been discussed there has been a gradual shift in U.S. Arctic policy since 2009, a shift made all the more difficult to follow given the current administration’s “erratic” policy behaviors.²⁵⁴ This may change, however, as the recent upswing in the “war of words” between the U.S. and Russian administrations has highlighted the fact that while the U.S. maintains naval military superiority, Russia is far better equipped to deal with the Arctic Ocean insofar as specially designed vessels are concerned.²⁵⁵ This is especially true in regards to icebreakers, of which Russia currently has forty-one with eight more under construction, whereas the U.S.

²⁴⁹ United States Department of State, Under Secretary for Economic Growth, Energy, and the Environment, Bureau of Oceans and International Environmental and Scientific Affairs, Extended Continental Shelf, “The United States Extended Continental Shelf,” Question 7 “Do the rights of the United States over its continental shelf depend upon accession to the Convention and making a submission to the CLCS?” 9 March, 2009.

²⁵⁰ See e.g., David Skidmore, *The Obama President and US Foreign Policy: Where’s the Multilateralism?*, INTERNATIONAL STUDIES PERSPECTIVES, Vol. 13, No. 1, 43 – 64 (2012).

²⁵¹ See Charles K. Ebinger, *U.S. Chairmanship of the Arctic Council: The challenges ahead*, BROOKINGS, 23 April, 2015.

²⁵² United States Department of State, Undersecretary for Economic Growth, Energy, and the Environment, Bureau of Oceans and International Environmental and Scientific Affairs, Fisheries, Marine Conservation, Ocean and Polar Affairs, “U.S. Chairmanship of the Arctic Council” (2018).

²⁵³ See Scott Borgerson, *The Coming Arctic Boom: As the Ice Melts, the Region Heats Up*, FOREIGN AFFAIRS, Vol. 92, No. 4. 76 – 89 (2013).

²⁵⁴ Brian Bennett & Noah Bierman, *Trump’s erratic deal-making style leaves both parties’ lawmakers distrustful*, THE LOS ANGELES TIMES, 28 November, 2017.

²⁵⁵ *The U.S. Stakes Its Claim in the Arctic Frontier*, STRATFOR WORLDVIEW, 4 September, 2015. In fairness to the Trump administration, the U.S. has been aware of Russia’s commercial fleet superiority in the Arctic for at least six years and, despite that, has remained largely stuck on budgetary issues for commercial projects that would make the U.S. more competitive. See Christopher Woody, *The US Navy and Coast Guard are looking to play-catch up in the Arctic*, BUSINESS INSIDER, 19 October, 2017.

only has two registered, with one additional vessel presently out of commission.²⁵⁶ While recent economic hardships have greatly hindered Russia's Arctic capabilities,²⁵⁷ this fleet discrepancy has been a point of contention for the U.S. Coast Guard for some time,²⁵⁸ though it remains to be seen if the Trump administration will acknowledge it.

With all the conflicting internal policy, it may be somewhat surprising that the U.S. is reaching out into multilateral conversations as much as it is. If, for instance, the U.S. really does have a unilateral-focus on its own endeavors – a status, which, as discussed above, is highly suggested by much of its own domestic policies and actions – then why does it continue to join bilateral and multilateral efforts with other powers? The answer to that inquiry deals largely with the previously discussed concerns of “losing out” and “security.”²⁵⁹ The U.S. is presently, by all means, “America First,” yet at the same time it does not wish to lag too far behind, and while it may offer confusing internal discussions and perspectives on the continental shelf and the Arctic in particular, it will seek to refine them at least to the point where it can enter international discourse. The U.S. undertakes this mission precisely because it – economically, militarily, socially, and pragmatically – cannot idly sit by and watch nations such as Russia, Canada, Norway, and Denmark make continental shelf claims without some “blow” to its foreign policy projections.²⁶⁰ The U.S., therefore, has a highly possessive perspective towards the continental shelf and the Arctic.

This possessive policy is bolstered by the aforementioned reasons of resources and security, but it's being hampered by the “loss” of being a non-party to UNCLOS. That, and the fact that the U.S. upholds many customary international law aspects of UNCLOS without reaping the Convention's benefits, is just one of the many reasons why proponents of UNCLOS ratification are becoming all the more vocal. In this regard, the U.S.' evolving interests and perspectives on the continental shelf and the Arctic may well serve as the final rallying cry for

²⁵⁶ David Hambling, *Does the U.S. Stand a Chance Against Russia's Icebreakers?*, POPULAR MECHANICS, 4 April, 2018.

²⁵⁷ Michael Lambert, *Russia's Arctic Ambitions Held Back by Economic Troubles*, INSIDE POLICY, 16 August, 2017.

²⁵⁸ See e.g., Robbie Gramer, *U.S. Coast Guard Chief Warns of Russian 'Checkmate' in Arctic*, FOREIGN POLICY, 3 May, 2017.

²⁵⁹ See generally Charles Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-first Century* (2007).

²⁶⁰ Using just these nations as examples, all of them have submitted formal continental shelf claims to the United Nations within the past two decades. See United Nations, Division for Ocean Affairs and the Law of the Sea, “Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982,” 11 April, 2018.

UNCLOS ratification, especially with the ongoing continental shelf disputes and the “Race to the Arctic” becoming all the more urgent.²⁶¹ Indeed, the U.S. seems to be increasingly asking the question of just what it is “losing” through its failure to ratify UNCLOS, and, at least in some circles of government, how it’s absence from the table might be effecting the future of the Arctic itself.

2.3.3 – The Impacts of the U.S. choosing to not Ratify UNCLOS

Throughout the discussion thus far, be it related to the U.S.’ position on UNCLOS, the CLCS, the Arctic in general, the continental shelf, or even its own federal agencies, it has likely become apparent that the U.S.’ decision to not ratify UNCLOS has been extremely far-reaching. Not only does the lack of ratification affect obvious entities such as the U.S. Navy, it also has rippling effects that hit even domestically-oriented entities such as the DOI.²⁶² Much of this stems from the administrative back-and-forth and its subsequent conflicts, but the fact remains, by actively keeping UNCLOS within the realm of customary international law, the U.S. is sacrificing several potential benefits at not only its own expense,²⁶³ but at the expense of UNCLOS’s potential,²⁶⁴ and even the Arctic itself.²⁶⁵ Of course, with the present administration’s tendency to reject globalism it’s unlikely that the concerns of other nations or environmental issues such as melting sea ice are going to gain much of an Executive foothold outside of a select band of security-related notions.²⁶⁶ Thus, in asking “How does the lack of United States ratification affect the ‘Race to the Arctic?’” it is arguably most effective to simultaneously ask, “...and how do those effects impact the U.S.’ interests therein?” This stems from the ongoing U.S. impetus to avoid being put at a disadvantage in comparison to other Arctic actors.

²⁶¹ See Stephanie Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, CHICAGO JOURNAL OF INTERNATIONAL LAW, Vol. 9, No. 1, 323 – 351 (2008).

²⁶² Suzanne Downing, *Shake-up at Department of Interior includes Arctic*, BIA, MUST READ ALASKA, 18 June, 2017.

²⁶³ For just one example of such a self-inflicted detriment, see Alan O. Sykes & Eric A. Posner, *Economic Foundations of the Law of the Sea*, CHICAGO UNBOUND (2009).

²⁶⁴ See Yann-Huei Song, *The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 38, No. 1, 101 – 145 (2007).

²⁶⁵ Howard S. Schiffman, *U.S. Membership in UNCLOS: What Effects for the Marine Environment?*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, Vol. 11, No. 2, 477 – 483 (2005)

²⁶⁶ See e.g., Scott Horsley & Miles Parks, *Trump Outlines His Blueprint for Military and Foreign Policy*, NPR, 18 December, 2017.

In order to conduct this analysis, essentially all aspects of the above discussion need to be brought to the table. That is, the lack of U.S. ratification directly affects, or indirectly impacts a broad array of entities and arguments. These range from the U.S. itself, to UNCLOS as a convention and concept, to the CLCS, to the debate over the continental shelf, and of course to the broad debates over the Arctic as well.²⁶⁷ In light of this, it is best to examine a variety of both actual and potential impacts, as framing these impacts as being “adverse” to U.S. interests is likely the path of least resistance for UNCLOS advocates, and, conversely, the biggest point of concern for UNCLOS opponents. Within this “aversion” analysis, the primary focus should be from behind the lens of “security.” This is because the “security” concept and its interrelated freedoms are core to the U.S.’ Arctic philosophy,²⁶⁸ even as it relates to resources.²⁶⁹ Thus, by beginning the examination with this view in mind, the lack of UNCLOS ratification and its impact on U.S. Arctic interests can be investigated more accurately.

With that focal point in mind, perhaps the best starting point for answering these questions is to consider just what the U.S. has lost and stands to lose in regard to its non-party status and the CLCS. These “losses” and “gains” are directly linked to whether or not the U.S. has a “voice at the table.”²⁷⁰ That is to say, especially as it relates to the CLCS, if the U.S. cannot metaphorically and literally “take a seat” then it will have no “voice” with which to make claims or even defend its own interests. This argument, unsurprisingly, is one of the most commonly utilized both by advocates of UNCLOS ratification and by those opposed to ratification, with the former claiming that having “no voice at the table” is a proverbial death knell for the U.S.’ Arctic interests,²⁷¹ while the later claim that it is an argument which has been vastly over-emphasized and which arguably has no merit.²⁷² The thesis will further distill this larger two-part “negative” versus “positive” dispute over UNCLOS party status into three distinct subparts. First, in Section 2.3.3(a), the thesis will address the “negative” (i.e., losses)

²⁶⁷ Marta Kolcz-Ryan, *An Arctic Race: How the United States’ Failure to Ratify the Law of the Sea Convention Could Adversely Affect Its Interests in the Arctic*, UNIVERSITY OF DAYTON LAW REVIEW, Vol. 35, No. 1, 149 – 173.

²⁶⁸ William D. Baumgartner, *UNCLOS Needed for America’s Security*, TEXAS REVIEW OF LAW & POLITICS, Vol. 12, No. 2, 445 – 452 (2008).

²⁶⁹ See Peter Johnston, *Arctic Energy Resources: Security and Environmental Implications*, JOURNAL OF STRATEGIC SECURITY, Vol. 5, No. 3, 13 – 32.

²⁷⁰ This “voice at the table” concern is something which reaches into nearly all branches of U.S. foreign policy and is by no means limited to the UNCLOS debate. See e.g., Lawrence A. Kogan, *U.S. State & Local Implementation of International Sustainable Development: An Expression of the ‘New’ Post-Modern Federalism*©, ITSDD, 25 October, 2014.

²⁷¹ See Lugar, “United Nations,” *supra* note 131.

²⁷² William L. Schachte, “Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention,” Testimony before the Senate Armed Services Committee, 17, 8 April, 2004.

aspects of U.S. non-party status as it relates to security and military issues. The thesis will then examine the negative aspects of non-party status as it relates to the CLCS more specifically. Finally, the thesis will also examine these negative aspects as they relate to the Arctic in general. After having conducted this analysis, the thesis will then, in Section 2.3.3(b), address this same series of inquiries, except it will do so with a focus on the “positive” (i.e., gains) aspects that would be attained for each of the three focal areas in the event that the U.S. had, in fact, ratified UNCLOS.²⁷³

2.3.3(a) – “Negative” Aspects of the U.S.’ Non-Party Status

Starting first with the negative aspects of the U.S.’ continued non-party status to UNCLOS as they apply to military and security concerns, it becomes quite clear that the U.S. is taking a series of quantifiable risks by choosing not to ratify UNCLOS. The U.S. Navy and JAG have been thoroughly vocal in this regard and have even outlined a series of rights and freedoms that would be better protected by UNCLOS’s plethora of codifications. These include more firmly defined benefits such as: a 12 nautical mile limit to territorial seas, innocent passage through territorial seas, archipelagic sea lanes passage through island nations (such as Indonesia), laying and maintaining submarine cables for communication warship[s] right of approach and visitation, sovereignty protections for warships and public vessels, transit passage through international straits (and their respective approaches), and high seas freedoms in [EEZs].²⁷⁴ JAG further states that:

Our non-party status is hurting us. It denies us a seat at the table when the parties to the Convention interpret (or try to amend) those rights and freedoms; it denies us use of an important enforcement tool against coastal state encroachment (binding dispute resolution); ... it creates a seam between us and our coalition partners; [and] it prevents

²⁷³ A similar analysis might be conducted by defining the UNCLOS ratification decision in terms of “wins” and “losses,” see Julia Brower, et al., *UNCLOS Dispute Settlement in Context: The United States’ Record in International Arbitration Proceedings*, INTERNATIONAL LAW AND FOREIGN RELATIONS, 10 December, 2012, however this thesis is better designed around the terms “positive” and “negative” as it relates not only to U.S. foreign policy, but larger considerations within the Arctic, and these terms are in some respects comparable to Arctic oscillation. See generally, Maarten H. P. Ambaum, Brian J. Hoskins, & David B. Stephenson, *Arctic Oscillation or North Atlantic Oscillation?*, JOURNAL OF CLIMATE, Vol. 14, No. 16, 3495 – 3507 (2001).

²⁷⁴ United States Navy Judge Advocate General’s Corps., *Eight National Security Myths: United Nations Convention on the Law of the Sea*, Office of the Judge Advocate General, 2009; see also Bernard Oxman, *The Territorial Temptation: A Siren Song at Sea*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 100, 830 – 851 (2006).

us from gaining legal certainty for our extended continental shelf in the Arctic (and elsewhere).²⁷⁵

As if anticipating the customary international law retort to these concerns, JAG continues by addressing that very issue:

Relying on customary international law as the basis for those rights and freedoms is an unwise and unnecessary risk. Our Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen put their lives on the line, every day, to preserve the rights and freedoms codified in the Convention; they deserve to be on the firmest legal ground possible as they go into harm's way; they deserve the legal certainty that accrues from treaty-based rights.²⁷⁶

Indeed, there seems to be a general culture of dismay, if not outright disdain, within the U.S. naval community as the reliance on customary international law introduces a series of uncertainties which hamper U.S. mobility and allow international opponents to better use “lawfare”²⁷⁷ against U.S. naval operations.²⁷⁸

The mounting opportunity costs that the U.S. has faced as a non-party have been called “completely unacceptable” in relation to U.S.’ inability to protect its critical freedom of navigation rights via the Convention.²⁷⁹ These critical rights, generally classified as the “Right of Innocent Passage,” “Right of Transit Passage,” “Right of Archipelagic Sea lanes Passage,” and the “Freedom of the High Seas,” have been unnecessarily complicated for the U.S. as a non-party to UNCLOS.²⁸⁰ Absent UNCLOS ratification, the U.S. is placed at a comparative disadvantage to member states as it faces additional risks to these rights – and other secondary rights such as overflight²⁸¹ – that would be diminished upon gaining member status.²⁸² Some have gone even further, and have claimed that absent UNCLOS ratification the U.S. has no chance at preserving its maritime freedoms in the long term. The reasoning for this is the apparent fluidity and suspect stability of customary international law, a situation which can

²⁷⁵ United States Navy Judge Advocate General’s Corps., *Eight National Security Myths*, *supra* note 275.

²⁷⁶ *Id.*

²⁷⁷ Lawfare (a portmanteau of the words “law” and “warfare”) has been defined as a form of asymmetric warfare wherein an enemy uses a given legal system against an opponent via damaging and/or delegitimizing tactics. The enemy need not even “win” the legal dispute, as merely tying up the opponent’s time and resources may be the goal in and of itself. See Michael P. Scharf & Elizabeth Andersen, *Is Lawfare Worth Defining – Report of the Cleveland Experts Meeting – September 11, 2010*, CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW, Vol. 43, No. 1, 11 – 27 (2010).

²⁷⁸ Robert C. De Tolve, *At What Cost? American’s UNCLOS Allergy in the Time of “Lawfare,”* NAVAL LAW REVIEW, Vol. 61, 10 (2012).

²⁷⁹ Baumgartner, *UNCLOS Needed for America’s Security*, *supra* note 268 at 449.

²⁸⁰ See Scott G. Borgerson, *The National Interest*, *supra* note 144 at 22 – 23.

²⁸¹ See Kolcz-Ryan, *An Arctic Race*, *supra* note 267 at 171.

²⁸² David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, BROOKINGS, 19 August, 2004.

“only” be rectified by becoming a party to UNCLOS.²⁸³ Under this reasoning, the U.S. simply cannot hope to continue to exclusively rely on customary international law as a way of maintaining such critical rights in the long-run.

The U.S. also loses tools to help shape international law that it would otherwise have as a party to UNCLOS. This, in effect, regulates the U.S. to the sideline while both allies and enemies mold international law without direct U.S. input.²⁸⁴ The fear here, from a security standpoint, is that U.S. adversaries could then take advantage of the U.S.’ absence from UNCLOS in order to change a given rule to the adversaries’ advantage.²⁸⁵ While these fears might at first seem to be more pragmatic or ideological than actual, the truth is that there is mounting evidence that nations such as China and Iran are already engaged in such tactics.²⁸⁶ Similarly, the U.S. loses out in other areas of seafaring security – with one major area being counter-piracy. During the rise in piracy off the coast of Somalia, for example, the U.S. military cited the U.S.’ non-party status as a source of confusion as to just what actions could be legally taken, a status which is applicable to counter-piracy options in other regions as well.²⁸⁷

The confusion over what position to take isn’t just limited to issues involving the military and its naval operations. The CLCS itself also poses a series of “negatives” to U.S. interests as a result of the U.S.’ non-party status to UNCLOS. For starters, the “seat at the table” argument has validity to it, as even though CLCS members are bound not to act purely as an agent of their respective government, as is, the U.S. simply has no legal voice in the commission whatsoever.²⁸⁸ In fact, even many critics of UNCLOS concede this point and acknowledge that the U.S. has, at the very least, suffered an opportunity cost by having no “seat at the table.”²⁸⁹ This of course stems from the inarguable fact that the U.S. has no true standing within the CLCS until it has ratified UNCLOS.²⁹⁰ Thus, by forfeiting its place at the table, the U.S. has also given up its capacity to adequately challenge CLCS claims through its continued

²⁸³ Bernard H. Oxman, “Hearing on the Law of the Sea Convention,” Testimony before the Senate Foreign Relations Committee, 4 October, 2007.

²⁸⁴ James Kraska, *Missing the Boat: Failure to join the Law of the Sea Convention harms U.S. interests*, ARMED FORCES JOURNAL, 1 April, 2009.

²⁸⁵ See Admiral Locklear, Testimony, *supra* note 141 at 5.

²⁸⁶ John T. Oliver, *A Window of Opportunity: the U.N. Convention on the Law of the Sea*, THE COAST GUARD PROCEEDINGS OF MARINE SAFETY & SECURITY COUNCIL, Vol. 66, No. 3, 7 – 8 (2009).

²⁸⁷ See Scott G. Borgerson, *The National Interest*, *supra* note 144 at 33.

²⁸⁸ Paul Pedrozo, *A Response to Cartner’s and Gold’s Commentary on “It is Time for the United States to Join the Law of the Sea Convention?”*, JOURNAL OF MARITIME LAW & COMMERCE, Vol. 42, No. 4, 493 – 494 (2011).

²⁸⁹ See Jason Warren Howard, *Don’t Be Left out in the Cold*, *supra* note 151 at 850.

²⁹⁰ See Scott G. Borgerson, *The National Interest*, *supra* note 144 at 33 – 34.

decision to remain a non-party to UNCLOS.²⁹¹ The U.S. also risks a situation wherein its own rights are being challenged within the CLCS regime and, due to its non-party status, it would be unable to properly defend them.²⁹²

Given the U.S.’ overt reliance on customary international law in its relationship with CLCS (which, as discussed, is not *per se* within such law), its actual standing is made complicated and its claims made somewhat more dubious. Making the negative aspect of this even more magnified for the U.S. is that since the U.S. relies on a customary international law approach to UNCLOS, it is being needlessly left out of a conversation which is already innately similar to such customary law in the first place. Put differently, the U.S. stands to gain nothing by taking its present view of CLCS, and its reliance on arguments of “custom” have little actual merit in regard to the commission despite its own lack of customary history. This, in effect, means that the U.S. is being left out of a critical discussion for no justifiable reason, an outcome which is only harmful to U.S. interests.²⁹³

The impacts of the U.S.’ pseudo-committal to UNCLOS via customary international law extend beyond the confines of the CLCS and also spill over to the Arctic itself. This stems from the U.S.’ “sidelined” status within the broader Arctic conversation, a conversation which is becoming increasingly reliant on UNCLOS.²⁹⁴ For example, despite having signed the Ilulissat Declaration in 2008 the U.S. has still been left out of several aspects of the ongoing Arctic conversation due to its non-party status to UNCLOS.²⁹⁵ By continuing to remain outside of the Convention the U.S. is effectively hindering its own efforts in the Arctic not just within the CLCS, but on a broader scale that encompasses both continental shelf claims as well as more mundane Arctic operations.²⁹⁶ These concerns mirror issues raised by the DOD, and have direct impacts on U.S. naval operations in the Arctic region.²⁹⁷ Further, and perhaps of special

²⁹¹ Parker Clote, *Implications of Global Warming on State Sovereignty*, *supra* note 167 at 241.

²⁹² Bernard H. Oxman, “Hearing on the Law of the Sea Convention,” *supra* note 283 at 6 – 7.

²⁹³ See Richard Lugar, “The Law of the Sea Convention: The U.S. National Security and Strategic Imperatives for Ratification,” Treaty Document 103-39, Testimony before the Senate Committee on Foreign Relations, 23 May, 2012.

²⁹⁴ See e.g., Kristen Rice, *Freezing to Heat the Future: Streamlining the Planning and Monitoring of Arctic Hydrocarbon Development*, COLORADO NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW REVIEW, Vol. 24, No. 2, 397 (2013).

²⁹⁵ David W. Titley, *Arctic Security Considerations*, *supra* note 189 at 40.

²⁹⁶ See Committee on National Security Implications of Climate Change for U.S. Naval Forces, *National Security Implications of Climate Change for U.S. Naval Forces*, National Research Council, Consensus Study Report, 25, 2011.

²⁹⁷ James Kraska, *The Law of the Sea Convention: A National Security Success – Global Strategic Mobility through the Rule of Law*, GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, Vol. 39, No. 1, 552 (2007).

note for the Trump administration,²⁹⁸ is that this status also limits the U.S.’ ability to make assertions of Arctic resource rights with any semblance of a firm legal standing.²⁹⁹ Indeed, without ratification the U.S. risks an entire Arctic regime – mineral or otherwise – being established without much meaningful input from it within the sphere of UNCLOS’ influence.³⁰⁰

The U.S. risks losing input in other areas concerning the Arctic as well. For instance, the U.S.’ non-party status to UNCLOS can, and has, complicated Arctic negotiations and agreements at the IMO due to that organization’s heavy reliance on UNCLOS for its own ruleset.³⁰¹ This, in turn, has caused the U.S. to be sidelined in areas that it may not have anticipated, as both Arctic and even global policies from the IMO are frequently based on UNCLOS, meaning that in effect the U.S. only has a needlessly narrow band of legal options with which to engage such policies.³⁰² The result is that, much like the negative effects suffered by the U.S. in the realms of military navigation and security, the U.S. also loses the ability to help shape Arctic policy. As a result, the Arctic loses out on a quintessential international actor and the U.S. has lost yet another opportunity to prevent Arctic policy from being modified adversely to its interests.³⁰³ This is in many regards the biggest and most recurrent “negative” effect or “loss” for the U.S. as it applies to many of its military and commercial concerns: due to its lack of position within the CLCS, and with its muted voice regarding UNCLOS-based Arctic policy – the U.S. simply has no real legal say in most of these matters as a non-party.

2.3.3(b) – “Positive” Aspects of the U.S. gaining Party Status

The good news for the U.S. is that not a single one of these aforementioned “negatives” or “losses” is concrete or permanent. As has likely become apparent, ratification would bring the U.S. straight into the fray and allow it to have legally-codified input at the metaphorical and literal UNCLOS “table.” This status would bring “positives” and yield “gains” to the U.S.

²⁹⁸ See e.g., Lisa Friedman, *Trump Administration Moves to Open Arctic Refuge to Drilling Studies*, THE NEW YORK TIMES, 16 September, 2017.

²⁹⁹ Parker Clote, *Implications of Global Warming on State Sovereignty*, *supra* note 167 at 240.

³⁰⁰ See Robert C. De Tolve, *At What Cost?*, *supra* note 278 at 9.

³⁰¹ See Admiral John E. Crowley, “The United Nations Convention on the Law of the Sea,” Testimony before the Senate Foreign Relations Committee, 5, 21 October, 2003.

³⁰² John T. Oliver & Steve G. Venckus, *The U.N Convention on the Law of the Sea: Now is the time to join*, THE COAST GUARD PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Vol. 70, No. 2, 55 (2013).

³⁰³ Bernard H. Oxman, “Hearing on the Law of the Sea Convention,” *supra* note 283 at 2.

in the familiar areas of military and security, the CLCS, and the Arctic in general. Given the discussion on the importance of military security to U.S. domestic and international discourse,³⁰⁴ it is useful to examine just what the U.S. would stand to gain in these areas first. One the longest-running benefits the U.S. would acquire upon UNCLOS ratification is that it would finally reap the full advantages of the navigation rights it carefully negotiated and won during the framing of UNCLOS.³⁰⁵ Almost on this point alone UNCLOS advocates have long argued that, on the balance, the gains to navigation security greatly outweigh any perceived or actual costs incurred by UNCLOS ratification.³⁰⁶ This line of argument has seen increasing gains against UNCLOS opponents, as the sheer volume of benefits that the U.S. would reap from ratification is quickly becoming a, if not ideal, then “best alternative” to securing U.S. interests.³⁰⁷

Securing these freedom of navigation benefits may well be one of the biggest “positives” the U.S. would gain as a party to the Convention, especially as such freedoms have appeared within the national security objectives of the past several Executive administrations.³⁰⁸ Here, if one accepts the argument that UNCLOS may well be the only way for the U.S. to ensure its long term Arctic interests, then it might also be said that as a party to UNCLOS the U.S. would make extensive strides in its Arctic security as well.³⁰⁹ Interestingly enough, this is a position that the U.S. Navy has maintained for some time – meaning that the Executive and Naval relationship would likely improve as a result.³¹⁰ These codified military navigation benefits would not only impact Arctic operations, but naval operations on a near-global scale as well.³¹¹ This would in turn have the secondary benefit of reinforcing foreign perspectives (from both allies and adversaries) of the U.S.’ naval rights and claims.³¹² Bolstering these claims alongside giving the U.S. a more unified presence in the UNCLOS

³⁰⁴ For an additional discussion on how the U.S. has come to rely on terms such as “military” and “security” in order to shape both its domestic and foreign policies over the past several decades, *see generally* Jeffery Michaels, *The Discourse Trap and the U.S. Military: From the War on Terror to the Surge* (2013).

³⁰⁵ James Kraska, *The Law of the Sea Convention*, *supra* note 297 at 547.

³⁰⁶ John Noyes, *U.S. Policy and the United Nations Convention on the Law of the Sea*, *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW*, Vol. 39, 628 – 629 (2007).

³⁰⁷ John Noyes, *The United States, The Law of the Sea Convention, and Freedom of Navigation*, *SUFFOLK TRANSNATIONAL LAW REVIEW*, Vol. 29, 7 – 8 (2006).

³⁰⁸ *See* James Kraska, *The Law of the Sea Convention*, *supra* note 297 at 549 – 550.

³⁰⁹ George Galdorisi, *The United States and the Law of the Sea: A Window of Opportunity for Maritime Leadership*, *OCEAN DEVELOPMENT & INTERNATIONAL LAW*, Vol. 26, No. 1, 78 (1995).

³¹⁰ *See* Committee on National Security Implications of Climate Change, *National Security Implications of Climate Change for U.S. Naval Forces*, *supra* note 296 at 27.

³¹¹ *See e.g.*, Clarence J. Bouchat, *The Paracel Islands and U.S. Interests and Approaches in the South China Sea*, Strategic Studies Institute, U.S. Army War College, 88 – 89, June 2014.

³¹² Bernard H. Oxman, “The United Nations Conventions on the Law of the Sea,” Testimony before the U.S. Senate Committee on Environment & Public Works, 24 March, 2004.

regime would simultaneously boost the U.S.’ own arguing points while also increasing its international resistance against tactics such as “lawfare.” The end result is that the U.S. would reduce the risks it presently incurs when asserting freedom of navigation rights and would improve its potential dispute mechanisms with would-be violators of those claims.³¹³

On this front the U.S. would also gain the benefits of the UNCLOS regime when it comes to contesting encroachments on navigation freedoms – a frequent issue area which UNCLOS has often proven to be successful in ameliorating.³¹⁴ Much of this success likely stems from UNCLOS’s comparatively³¹⁵ clear guidance on the freedom of navigation, be it related to territorial seas, innocent passage, or EEZs.³¹⁶ In addition to these dispute-related and efficiency benefits, party status would also confer lower military and navigational operation costs to the U.S. In fact, some operations would see a “significant”³¹⁷ reduction in costs due to less reliance on presently resource-intensive navigational programs.³¹⁸ This overall cost decrease would also allow the U.S. to focus more on broader policies, rather than on specific programmatic details. From this, it would arguably acquire more influence over UNCLOS and Arctic developmental issues, and military and security personnel have referred to this a situation wherein the “U.S. stands only to gain” by ratifying.³¹⁹

Perhaps the best argument for the positive impacts of UNCLOS ratification under the military and security arm is that it’s both an immediate boon for the military and conditionally impermanent. On the first point, and as discussed, the U.S. military enthusiastically supports the Convention. As just one example, Admiral Vern Clark, then-Chief of Naval Operations said in a 2004 report to Congress that “I fully support the Convention because it preserves our navigational freedoms, provides the operational maneuvering space for combat and other operations for our warships and aircraft, and enhances our own maritime interests.”³²⁰ As to

³¹³ James D. Brousseau, *Frozen in Time: A Fresh Look at the Law of the Sea and Why the United States Continues to Fight against it*, SOUTHERN UNIVERSITY LAW REVIEW, Vol. 42, No. 1, 175 – 176 (2014).

³¹⁴ John Norton Moore, *Navigation Freedom*, *supra* note 146 at 258 – 259.

³¹⁵ At least in relation to customary international law. See William L. Schachte, *National Security: Customary international law and the Convention on the Law of the Sea*, GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW, Vol. 8, No. 2, 709 – 715 (2009).

³¹⁶ Matthew W. Ivey, *National Security Implications in the Global War on Terrorism of the United States Accession to the United Nations Convention on the Law of the Sea*, DARTMOUTH LAW JOURNAL, Vol. 7, No. 2, 122 – 123 (2009).

³¹⁷ John Noyes, *U.S. Policy and the United Nations Convention on the Law of the Sea*, *supra* note 306 at 630.

³¹⁸ One such example is the Navy’s cost-intensive “Freedom of Navigation” program which would see less utilization in a post-ratification era. See *id.*

³¹⁹ Parker Clote, *Implications of Global Warming on State Sovereignty*, *supra* note 167 at 242.

³²⁰ Sarah Ashfaw, *Something for Everyone: Why the United States should Ratify the Law of the Sea Treaty*, JOURNAL OF TRANSNATIONAL LAW AND POLICY, Vol. 19, No. 2, 357 – 399 (2010).

the second point, while opponents of UNCLOS have continuously argued that it would impede military flexibility due to the infringements on U.S. sovereignty, the truth is that under The Vienna Convention on the Law of Treaties (“VCLT”) – which the U.S. recognizes as customary international law³²¹ – the U.S. would be able to suspend its UNCLOS obligations when its national security was threatened or where the circumstances of the Convention have fundamentally changed.³²² This aspect of the VCLT means that even in the event that UNCLOS somehow did impinge on U.S. military action, the U.S. would be able to suspend its duties under the Convention as necessary. In this regard, the VCLT, when coupled with UNCLOS ratification, would in no way leave the U.S. in a more negative situation than it could have possibly found itself absent UNCLOS ratification.³²³

Insofar as the U.S.’ relationship to the CLCS is concerned, there is much to be gained by ratification on this front as well. Here, similarly to UNCLOS more broadly, the U.S. has already endeavored to be a part of the international order and is mostly just interfering in its own forward progress by remaining a non-party. For example, the U.S. is already a party to the 1964 Convention on the Continental Shelf (“COTCS”), and has already agreed to a series of limitations, namely the outer limit of 200 nautical miles.³²⁴ However, through ratification of UNCLOS as opposed to just COTCS, the U.S. stands to gain insofar as the CLCS is concerned as it will be able to argue that it qualifies for the special considerations UNCLOS provides for states with naturally broader continental shelves.³²⁵ Here, the U.S.’ party status to COTCS is just one more example where it has one foot in customary international law and the other in a codified regime. While the system may be “operational” the U.S. ultimately needs to be a party to UNCLOS in order to reap the advantages of the more evolved CLCS system.³²⁶ In addition, as the U.S. has voiced a clear desire to influence the development of the continental shelf

³²¹ This may seem like an odd argument to make. For example, why would the U.S.’ reliance on the VCLT through customary international law be any better than the U.S.’ same position as it relates to UNCLOS? The devil, so to speak, is in the details. While large swaths of UNCLOS, especially as it relates to entities such as the CLCS, either outright don’t exist within customary international law or, even if they do exist, are subject to much debate – the “national security” aspects of the VCLT are, in contrast, much more uniform and accepted within customary international law. As a result, despite the superficial appearance of inconsistency, the U.S. may adequately rely on that aspect of the VCLT as a non-party, while also suffering a series of complications by not being a party to UNCLOS. See William L. Schachte, *National Security: Customary international law*, *supra* note 315.

³²² Vienna Convention on the Law of Treaties, 3 May, 1969, Articles 60, 62.

³²³ For a detailed discussion of the relationship between treaties (inclusive of UNCLOS), customary international law, and national security, see generally Susan Rose-Ackerman, *Treaties and National Security*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY, 1 January, 2008.

³²⁴ Sarah Ashfaw, *Something for Everyone*, *supra* note 320 at 365 – 366.

³²⁵ See *id.*; see also UNCLOS, Article 76.

³²⁶ James W. Houck, *Alone on a Wide Wide Sea: A National Security Rationale for Joining the Law of the Sea Convention*, PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS, Vol. 1, No. 1, 16 (2012).

system,³²⁷ a seat within the CLCS would prove invaluable to the U.S. as it would more effectively allow them to engage with other members and to ensure that their claims and concerns are actually heard.³²⁸

This “seat at the CLCS table” yields several gains for the U.S. beyond putting its own claims forward. It also allows the U.S. to better defend its interests against Non-governmental organizations (“NGOs”) and other non-state or rogue actors (be they domestic or international) which are actually trying to usurp the U.S.’ claims in one fashion or another.³²⁹ CLCS membership would also provide the U.S. with added defenses against more traditional adversaries and their respective claims and programs – entities which obviously pose both more of a policy and a real-world threat than do most NGOs. Two prime examples of such potential U.S. adversaries are its classic ideological opponents Russia and China, both of which are becoming increasingly active in such disputes and preparations.³³⁰ Further, a legitimized CLCS position would give the U.S. the ability to oppose not only directly contrasting claims and submissions, but those which are simply “ambiguous” as well.³³¹ This would in turn increase the breadth of U.S. oversight beyond anything it is presently capable of with its “sidelined” status as a non-party that relies solely on customary international law.

Finally, turning to the “positive” impacts on the development of the Arctic, the U.S. – needless to say – has much to bring to this endeavor, but as discussed, is currently quite limited due to its self-determined treaty status. Unsurprisingly then, there is much to be gained for the “Race to the Arctic” when it comes to U.S. UNCLOS ratification. For starters, the U.S. has already begun to follow several aspects of UNCLOS as it relates to the Arctic, a change in stance which certainly does little for the U.S. as a non-party, but which might also be reflective of their forward-looking Arctic goals. Just one example of this shift occurred in August 2007 when the U.S. framed its response to Russia’s Arctic claims around UNCLOS provisions – despite the fact that the U.S. did not recognize those particular provisions as customary

³²⁷ See e.g., The National Oceanic and Atmospheric Administration, “Extended Continental Shelf - What is it and why should we care?,” 2010.

³²⁸ See John A. C. Cartner, *Commentary in Reply*, *supra* note 166 at 59.

³²⁹ James Kraska, *High Seas Ditherers*, FOREIGN POLICY, 13 February, 2009.

³³⁰ See Jenny Johnson, *Who Owns the North Pole? Debate Heats Up as Climate Change Transforms Arctic*, BLOOMBERG NEWS, 4 April, 2014.

³³¹ Ryan P. Kelley, *UNCLOS, but No Cigar: Overcoming Obstacles to Maritime Prosecution*, MINNESOTA LAW REVIEW, Vol. 95, No. 6, 2298 (2011).

international law.³³² This approach is indicative of the U.S.’ somewhat “subvert” ascension to many aspects of the UNCLOS framework – be they formal or informal – as they relate to the Arctic.³³³ This is in spite of the current U.S. governmental control by the “Unilateral Arctic” cluster previously discussed, and even shows hints of a tacit U.S. acceptance of UNCLOS Article 76 as at least partial customary international law.³³⁴ While it remains to be seen if this stance will continue with any real vigor under the Trump administration, it has experienced some longevity as it originated within the George W. Bush administration and persisted throughout the Obama administration as well.³³⁵

The geopolitics of the Arctic would also be likely to benefit from a more stabilized U.S. presence,³³⁶ and here too ratification would allow the U.S. to see its interests better protected and its ability to conduct more operations solidified.³³⁷ In many ways this ability to “mold” the dawn of the Arctic legal regime in an era of melting sea ice, newly opening trade routes,³³⁸ and more accessible commercial passages,³³⁹ is precisely what both the Arctic regime and the U.S. need to ensure proper international cohesion.³⁴⁰ Of course, ever vigilant as it pertains to its own interests, the U.S. wouldn’t need to settle for any sort of altruistic leadership goal, and instead it would also be able to acknowledge international policy boons such as veto powers as well as more direct – possibly even outright determinative – influence over Arctic amendments and policies.³⁴¹ Of course here it is important to reiterate that these endeavors, labeled herein as “positives” and “gains,” are centered around the premise that the U.S. had, in fact, ratified UNCLOS. While the question of “how does the lack of U.S. ratification affect the ‘Race to the Arctic?’” has now been examined, it leaves open the lingering doubt as to just whether or not the U.S. will actually decide to ratify UNCLOS. This, in turn, leads to the question of “Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?”

³³² Jon D. Carlson, Christopher Hubach, & Joseph Long, *Scramble for the Arctic: Layered Sovereignty, UNCLOS, and Competing Maritime Territorial Claims*, SAIS REVIEW OF INTERNATIONAL AFFAIRS, Vol. 33, No. 2, 29 – 30 (2013).

³³³ John E. D. Larkin, *UNCLOS and the Balance of Environmental and Economic Resources in the Arctic*, GEORGETOWN INTERNATIONAL LAW REVIEW, Vol. 22, 313 – 314 (2010).

³³⁴ See Ashley J. Roach, *Today’s Customary International Law of the Sea*, OCEAN DEVELOPMENT & INTERNATIONAL LAW, Vol. 45, No. 3, 239 – 259 (2014).

³³⁵ Meagan P. Wilder, *Who Gets the Oil?*, *supra* note 40 at 541 – 542.

³³⁶ See e.g., Vesa Virtanen, *The Arctic in world Politics*, WEATHERHEAD CENTER, 17 July, 2013.

³³⁷ See William M. Fraser, “On the Law of the Sea Convention (June 14, 2014),” Testimony before the Senate Foreign Relations Committee, 14 June, 2012.

³³⁸ Jugal K. Patel & Henry Fountain, *As Arctic Ice Vanishes, New Shipping Routes Open*, THE NEW YORK TIMES, 3 May, 2017.

³³⁹ Jonathan Amos, *Arctic Ocean shipping routes ‘to open for months,’* BBC NEWS, 6 September, 2016.

³⁴⁰ James Kraska, *The Law of the Sea Convention*, *supra* note 297 at 566.

³⁴¹ See Scott G. Borgerson, *The National Interest*, *supra* note 144 at 45.

2.4 – What does the future hold for UNCLOS, the CLCS, and the Arctic in the event of United States Ratification?

Perhaps more than any other portion of this thesis, the question of just what the future holds may be the most dependent on time. For instance, had this thesis been written ten, five, or two years ago – or, even more specifically, perhaps even just five months ago – the analysis would likely have been quite different. While the thesis has, up until this point, largely looked to the past in order to explain the present, it is more difficult to predict where the U.S. and its relationship with UNCLOS may be headed.³⁴² Given the in-depth discussion throughout the course of this thesis thus far, it may be easy to look to the future of the U.S. and the UNCLOS regime with a bit of pragmatism, if not cynicism. However, it is also important to note just how many policy shifts have already been discussed, be they in 1982, 1994, or 2009. This pattern reveals that, much like it's legal relationship with UNCLOS, the U.S.' ideological relationship with the Convention is also fluid.

Yes, a small contingency of “Old Guard” Republicans may have had a lasting impact on the ratification of UNCLOS, but this cohort isn't indefinite.³⁴³ In fact, the anti-UNCLOS faction is one which continues to see decreased membership as older Senators retire and are replaced by more moderate conservatives who struggle to buy into the aged anti-UNCLOS rhetoric of the Reagan era. That said, one must also be realistic and acknowledge that the “wheels” of U.S. policy can turn quite slowly in the modern age of partisanship, and as such, even if the anti-UNCLOS contingent were to suddenly disappear then U.S. ratification would not, and could not, occur overnight.³⁴⁴ Not only is the ratification process, as discussed, quite complex,³⁴⁵ there are the ongoing political controversies and staff changes under the Trump administration which further complicate matters as they relate to all U.S. foreign policy, not just UNCLOS.³⁴⁶

³⁴² Though this is not to say that scholars and analysts haven't tried, in fact they have been making such attempts since UNCLOS was scarcely off the printing press. *See e.g.*, A. R. H. Schneider, *UNCLOS III Revisited*, ENVIRONMENTAL POLICY & LAW, Vol. 9, No. 4, 108 – 110 (1982). Further, it's a question they are still asking, *see e.g.*, Scott Benowitz, *Will Trump Support Ratification of UNCLOS Treaty?*, THE PAVLOVIC TODAY, 10 April, 2017.

³⁴³ *See e.g.*, Ken Miller, *Data shows a downward demographic spiral for Republicans*, TECH CRUNCH, 11 February, 2017.

³⁴⁴ *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, MICHIGAN LAW REVIEW, Vol. 97, No. 2, 390 – 461 (1998).

³⁴⁵ *See* Appendix – Section B – Overview of the U.S. Governmental Structure.

³⁴⁶ *See e.g.*, Mark Mazzetti, *How Trump's Allies Fanned an Ember of Controversy Into Flames of Outrage*, THE NEW YORK TIMES, 2 February, 2018.

These political controversies most directly impact the UNCLOS debate due to the fact that President Trump has tended to quickly roll over – or simply fire – his staff.³⁴⁷ The best indicator of how this might affect the future policies of the U.S. towards UNCLOS, CLCS, and the Arctic itself is the recent firing of U.S. Secretary State of Rex Tillerson.³⁴⁸ Tillerson's positions on all of UNCLOS, the CLCS, and the Arctic were quite clear: he heavily favored UNCLOS ratification.³⁴⁹ Now, it must be stated that Tillerson was squarely within the “resources” camp of the “Race to the Arctic,”³⁵⁰ but insofar as his intentions were concerned, he was overtly pro-UNCLOS.³⁵¹ Much of this stems from Tillerson's pre-Secretary of State career, wherein he was CEO of global oil and mineral resources giant ExxonMobil.³⁵² During his tenure as CEO, Tillerson quickly began to realize just how important UNCLOS was to the U.S.' Arctic interests, a position which he made clear in statements to the U.S. government on several occasions.³⁵³ Thus, when Tillerson was nominated by President Trump to become Secretary of State, UNCLOS-advocates breathed a sigh of relief,³⁵⁴ as even if Tillerson was by no means an “environmentalist,” his confirmation would at the very least steer the U.S. towards ratification, a long term success even if the short term progenitor of the pro-UNCLOS shift wasn't the ideal candidate insofar as the “non-resource” Arctic was concerned.³⁵⁵ However, UNCLOS was quickly shifted to the back-burner when Tillerson and President Trump's relationship almost immediately began to sour. While this thesis doesn't seek to delve into the politics of that relationship, the ultimate outcome was that Tillerson did not make the pro-UNCLOS strides that many had anticipated he would.³⁵⁶ Then, in a move that sealed the deal insofar as Tillerson's UNCLOS efficacy is concerned, he was fired by President Trump on 13 March, 2018 – just thirteen months after taking the position of Secretary of State.³⁵⁷

³⁴⁷ Megan Trimble, *Trump White House Has Highest Turnover in 40 Years*, U.S. NEWS, 28 December, 2017.

³⁴⁸ Philip Elliott, *Why President Trump Fired Rex Tillerson*, TIME, 13 March, 2018.

³⁴⁹ See Roncervert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT, 24 May, 2017.

³⁵⁰ Chris Mooney, *Rex Tillerson's view of climate change: It's just an 'engineering problem,'* THE WASHINGTON POST, 14 December, 2016.

³⁵¹ See Robert Hammitt, *Personnel is Policy: Tillerson, Trump's Cabinet, and the Arctic*, POLAR CONNECTION, 19 January, 2017.

³⁵² “Rex W. Tillerson – Executive Profile & Biography,” BLOOMBERG, April, 2018.

³⁵³ See e.g., Rex W. Tillerson, Chairman and CEO, ExxonMobil Corporation, Letter to U.S. Senate Committee on Foreign Relations Leadership, Chairman John Kerry (D - MA) and Ranking Member Richard Lugar (R - IN), 8 June, 2012.

³⁵⁴ See e.g., Stephen M. Walt, *Rex Tillerson is Underrated*, FOREIGN POLICY, 20 November, 2017.

³⁵⁵ See Christopher Woody, *China and Russia have their eyes on the Arctic – and Rex Tillerson says the US is 'late to the game,'* BUSINESS INSIDER UK, 30 November, 2017.

³⁵⁶ See Peter Van Buren, *The Problem with a post-Tillerson State Department*, REUTERS, 4 December, 2017.

³⁵⁷ Nicole Gaouette, Kaitlan Collins, & Dan Merica, *Trump fires Tillerson, taps Pompeo as next secretary of state*, CNN, 13 March, 2018.

Eyes then quickly turned to see who Trump would replace Tillerson with, as another UNCLOS advocate, perhaps more in line with Trump's administrative style, could just as easily make the strides Tillerson had failed to achieve. Trump ultimately appointed Mike Pompeo, the former Director of the U.S. Central Intelligence Agency ("C.I.A.") – though as of this thesis's submission date Pompeo has only recently been confirmed as Secretary of State after facing stiff opposition within the Senate.³⁵⁸ In light of Pompeo's confirmation as Secretary of State, the picture as it relates to UNCLOS unfortunately receives no further clarification. As C.I.A. Director much of Pompeo's former correspondence is of course classified, yet it's unlikely that he's even had a reason to take a public stance on UNCLOS in the first place. In fact, there is little evidence that Pompeo has ever spoken about UNCLOS on the record,³⁵⁹ a status which could be seen as either a positive or a negative depending on one's perspective.³⁶⁰

It's likely that, should Pompeo have reason to address UNCLOS in the near future, he will make his first comments on the Convention as it relates to the dispute in the South China Sea as opposed to the Arctic, though there's no real certainty on how Pompeo might digest that issue either.³⁶¹ Subsequently, any analysis of the recently confirmed U.S. Secretary of State – the second most influential position (behind the President) when it comes to foreign policy decisions – and his approach to the UNCLOS question will likely fall short. Under Tillerson one could at least make educated predictions based on past positions, but with Pompeo there is simply no past position to reference yet. Further, that Pompeo has only recently been confirmed makes any such analysis a risky endeavor in the first place. Instead, it is perhaps best to examine Tillerson's legacy and the other aspects of U.S. law and policy that may point toward, or contrast against, UNCLOS ratification.

While Tillerson may be gone, his general stance towards UNCLOS is one which is largely reflected by his counterparts in industry.³⁶² Unless there is a stark policy shift, President

³⁵⁸ Daniella Diaz, *Pompeo could be the first secretary of state nominee to receive an unfavorable committee vote since 1925*, CNN, 14 April, 2018; Gardiner Harris & Thomas Kaplan, *Senate Confirms C.I.A. Chief Mike Pompeo to be Secretary of State*, THE NEW YORK TIMES, 26 April, 2018.

³⁵⁹ See e.g., Phillipe Legrain, *Here's What the Senate Should Ask Mike Pompeo*, FOREIGN POLICY, 11 April, 2018. While Pompeo does not appear to have directly commented on UNCLOS, his broader views on conventions and treaties while he was in Congress (prior to his appointment as C.I.A. Director) seem to, at least partially, parallel those of Trump. See Paul R. Pillar, *Where Does Mike Pompeo Stand on the Issues? Too Close to Trump*, THE NEW YORK TIMES, 13 March, 2018.

³⁶⁰ See e.g., Derek Chollet & Ben Fishman, *Pompeo Has Been Undermining the State Department Since the Benghazi Investigation*, FOREIGN POLICY, 11 April, 2018.

³⁶¹ David Alexander & Jonathan Landay, *CIA nominee seeks to repair damage from Trump feud with spy agencies*, REUTERS, 12 January, 2017.

³⁶² John Noyes, *The United States and the Law of the Sea Convention: U.S. Views on the Settlement of International Law Disputes in International Tribunals and U.S. Courts*, THE PUBLICIST, Vol. 1, 51 – 52 (2009).

Trump has been closely aligned with industry and industrial goals since his inauguration as president.³⁶³ When viewing these two things in tandem, it quickly becomes apparent that there is a good chance the Trump administration is being pressured to push for UNCLOS ratification by far more people than just the now-ousted Secretary of State.³⁶⁴ While President Trump has yet to make any declarative statement on UNCLOS,³⁶⁵ one can look to other areas in which the President has catered to industry. For example, Trump targeted the automotive and pharmaceutical industries for “pro-industry” law and policy changes less than a month after his inauguration³⁶⁶ – an outcome which greatly centered around Trump’s willingness to listen to industry advocates, if not necessary those actually effected by said industries.³⁶⁷

Plus, that Trump strongly pushes the “military rhetoric” may indicate a potential foothold for UNCLOS advocates within the military, especially within the Navy.³⁶⁸ In this regard, it would be entirely unsurprising to see the “resource” camp within the “Multilateral Arctic” cluster generate enough support within the Trump administration to finally tackle the anti-UNCLOS holdouts in the Senate – and that Trump cares little for close-knit “Old Guard” Republican party lines or loyalties only strengthens this possibility.³⁶⁹ Thus, while Tillerson may be gone, he was originally appointed because of his industry ties,³⁷⁰ and, subsequently, Trump is also willing to listen to industry more broadly.³⁷¹ As has been discussed, this is a segment which almost universally wants UNCLOS to be ratified.³⁷² Therefore, in a surprising turn of events, it may well be the “America First” President who finally makes UNCLOS ratification a real possibility.

³⁶³ See Oliver Milman, *‘No Shame’: how the Trump administration granted big oil’s Wishlist*, THE GUARDIAN, 12 December, 2017.

³⁶⁴ See e.g., Kristen Miller, *Trump’s budget sells out Alaska to big business*, THE HILL, 6 June, 2017.

³⁶⁵ Mark J. Valencia, *Parsing Trump’s Recent Policy Statements on the South China Sea*, THE DIPLOMAT, 17 November, 2017.

³⁶⁶ Matthew DeBord, *Trump’s ignorance about the Chinese auto market is hurting US companies – and Elon Musk isn’t helping*, BUSINESS INSIDER UK, 23 March, 2018; Max Nisen, *So Much for Trump Going After Pharma*, BLOOMBERG, 20 January, 2017.

³⁶⁷ Susy Khimm, *Trump says he loves miners. Critics say he’s putting their lives in danger*, NBC NEWS, 15 November, 2017.

³⁶⁸ Rowan Scarborough, *Unlike Obama, Trump defers to generals’ advice on military strategy*, THE WASHINGTON TIMES, 9 April, 2017.

³⁶⁹ See Bill Scheider, *Trump Doesn’t Like Losers. So Naturally He Hates GOP Leadership*, NBC NEWS, 26 October, 2017.

³⁷⁰ Gardiner Harris, *Rex Tillerson Is Confirmed as Secretary of State Amid Record Opposition*, THE NEW YORK TIMES, 1 February, 2017.

³⁷¹ Nouriel Roubini, *How far will Trump go to keep his core supporters on his side?*, THE GUARDIAN, 11 December, 2017.

³⁷² See Patrick J. Bonner, *Neo-Isolationists Scuttle UNCLOS*, SAIS REVIEW OF INTERNATIONAL AFFAIRS, Vol. 33, No. 2, 135 – 146 (2013).

While the UNCLOS debate is arguably far more an issue of geopolitics at the federal level than it is of most U.S. federal law or state-level legislation, there is more to the picture than just the ongoing presidential and congressional conflict around UNCLOS. Not only does the U.S.’ fear of international binding bodies such as the CLCS factor into any future actions, there is also the relatively unique positioning of the Arctic itself that has to be considered. In other words, the ultimate chance for a successful UNCLOS, CLCS, and Arctic regime – insofar as the U.S. is concerned – is a multilayered process that begins with “grass roots” movements at the local level and then extends outward until it reaches the upper echelons of the U.S. federal government. So, with a President that at least wants to “open” the Arctic,³⁷³ and an industrial and military complex behind him that continues to push for UNCLOS ratification, what does this mean for those non-federal actors in the U.S., for instance the states themselves? Practically speaking, the fifty states (with a slight exclusion for Alaska³⁷⁴) have no direct impact on the UNCLOS or CLCS decision, though they do have at least ideological policy influences.³⁷⁵ This stems from the construction of the U.S. government, wherein it is the federal government that is vested with all treaty making and nearly all foreign-policy related powers.³⁷⁶ Thus, absent an actual constitutional amendment – a nearly impossible proposition in today’s sociopolitical climate³⁷⁷ – the states must be considered in only a “secondary” light. However, it is useful to examine this vast area of law and policy, as it is state voters, after all, who Congress must ultimately look to for reelection.³⁷⁸

In order to get a proper cross-section of the states, five different states were chosen from five distinct geographic regions of the U.S. The first, and arguably least-surprising as being “pro” Arctic regulation, is California. While California is infamous as the U.S.’ “green” or “liberal” state – a stereotype which in actuality has a grounding in U.S. case-law³⁷⁹ – its status as a proponent of Arctic regulation is less centered around raw environmentalism and

³⁷³ Tom DiChristopher, *Trump aims to open nearly all federal waters to offshore drilling in biggest lease sale ever*, CNBC, 4 January, 2018.

³⁷⁴ See *Arctic Contractors, Inc. v. State*, 573 P.2d 1385 (Alaska 1978).

³⁷⁵ Keith Boeckelman, *The Influence of States on Federal Policy Adoptions*, POLICY STUDIES JOURNAL, Vol. 20, No. 3, 365 – 375 (1992).

³⁷⁶ See generally Arthur Schlesinger Jr., *Congress and the Making of American Foreign Policy*, FOREIGN AFFAIRS, Vol. 51, No. 1, 78 – 113 (1972).

³⁷⁷ The Constitution provides that an amendment may be proposed either by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures. United States Constitution, Article V. These “two-thirds” thresholds are, unsurprisingly, incredibly difficult to obtain – even in more moderate political climates. See e.g., Eric Posner, *The U.S. Constitution is Impossible to Amend*, SLATE, 5 May, 2014.

³⁷⁸ See David Schleicher, *All Politics Is National*, THE ATLANTIC, 13 July, 2012.

³⁷⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

instead around its own agricultural and water scarcity issues. As the Arctic warms, California will experience not only more droughts, but more severe droughts.³⁸⁰ This will have direct and dire consequences on a region where the water table is already stretched to its limits and which relies on other states to ensure an adequate water supply.³⁸¹ Thus, in addition to California's more broadly climate change-related endeavors,³⁸² the state also favors a more strict regulatory environment for the Arctic – inclusive of the benefits UNCLOS ratification would provide.³⁸³ Another state which favors stronger Arctic regulation is Montana. Montana favors more U.S. activity in the Arctic largely due to indigenous populations.³⁸⁴ While this might seem surprising, Montana has a substantial Native American population, a contingency which has direct effects on Montana's legislature and policy.³⁸⁵ As a result, the otherwise conservative state can often be found on the ideological front-lines of indigenous peoples' issues, and it's therefore quite consistent for it to want more U.S. government involvement in the concerns of the Arctic peoples.³⁸⁶

Moving to the opposite coast of the U.S., the state of Massachusetts – already famous for its SCOTUS case which forced the EPA to regulate CO₂³⁸⁷ – is also spearheading several Arctic-centered efforts.³⁸⁸ Massachusetts's Arctic policies are largely centered around indigenous rights and environmental concerns – likely in no small part due to Boston's susceptibility to sea-level rise.³⁸⁹ Massachusetts is also one of the few states that has outright called for UNCLOS ratification, whereas many other states may issue statements on the Arctic, few have (at least publicly) tied UNCLOS to the issue.³⁹⁰ Another state which has taken a surprisingly progressive stance on the Arctic is none other than Texas.³⁹¹ Despite being one of the furthest U.S. states from the Arctic geographically, Texas has a vested interest in Arctic

³⁸⁰ James Rainey, *Disappearing Arctic ice could make California droughts worse*, NBC NEWS, 5 December, 2017.

³⁸¹ Timothy Gardner, *Arctic sea ice melt to exacerbate California droughts: study*, REUTERS, 5 December, 2017.

³⁸² See e.g., Felicity Barringer, *A Grand Experiment to Rein In Climate Change*, THE NEW YORK TIMES, 13 October, 2012.

³⁸³ See Jonathon Gurish, *Overview of California Ocean and Coastal Laws With Reference to the Marine Environment*, The California Ocean Protection Council (2007).

³⁸⁴ See Clara Goodwin, *Joint Ministerial Statement: Toward a New Arctic Policy Framework*, ABC FOX MONTANA, 15 November, 2017.

³⁸⁵ Stephen Cornell, *The Return of the Native: American Indian Political Resurgence*, 255 - 263 (1990).

³⁸⁶ See Cecily Hilleary, *Native Americans Most at Risk From Impact of Climate Change*, VOA NEWS, 19 April, 2017.

³⁸⁷ *Massachusetts v. E.P.A.*, 127 S.Ct. 1438 (U.S. 2007).

³⁸⁸ See Genevieve Wanucha, *The cold, hard truth about Arctic policy*, MIT NEWS, 18 June, 2014.

³⁸⁹ David Abel & Tim Logan, *Floods seen as warning of Boston's future*, THE BOSTON GLOBE, 6 January, 2018.

³⁹⁰ See Lauren Morello, *U.S. Pushes for Law of the Sea Ratification a New Arctic Mapping Project Begins*, THE NEW YORK TIMES, 29 July, 2009.

³⁹¹ See Caroline Sutton, *Joint Ministerial Statement: Toward a New Arctic Policy Framework*, CENTRAL TEXAS NEWS NOW, 15 November, 2017.

affairs due to the region's changing climatology. Much like California, Texas is experiencing more severe weather patterns as the jet stream is increasingly affected by changing Arctic conditions.³⁹² This has led to increased flooding in areas of Texas, a state which is already highly susceptible to damaging floods in large parts of the state.³⁹³ As a result, the otherwise quite conservative state has taken highly progressive views of the Arctic, even going so far to issue statements going against the oil industry³⁹⁴ – an industry upon which Texas is heavily reliant for its booming economy.³⁹⁵

Finally, and most importantly, is Alaska. If there is one U.S. state that generates a nearly continuous amount of Arctic-related discourse, it is Alaska, a fact which is of course only logical given its status as the exclusive Arctic state for the U.S.³⁹⁶ Not only does Alaska tout its own variant of the Arctic Council,³⁹⁷ several Alaska state laws relate to the Arctic,³⁹⁸ and the Alaskan Supreme Court has addressed Arctic issues on multiple occasions.³⁹⁹ In general, Alaska's Arctic policy has traditionally favored the oil industry,⁴⁰⁰ which is quite rational given the state's heavy reliance on the industry in order to fund even its basic state operations.⁴⁰¹ Alaska is, also unsurprisingly, the only state to have weighed in with any legal substance on the issue of the continental shelf in the Arctic.⁴⁰² Indeed, the issues within the Arctic are frequently “buzzwords” within Alaskan state politics, and it's unlikely that many other states have seen governors who incorporated Arctic policies into their electoral campaigns.⁴⁰³ That

³⁹² Mose Buchele, *A Warming Arctic Could Be Bringing Cold Spells to Texas*, KUT, 19 January, 2018.

³⁹³ See e.g., Darla Cameron, et al., *Flooding persists as Harvey downgraded to tropical depression*, THE WASHINGTON POST, 1 September, 2017.

³⁹⁴ See James Osborne, *Do oil companies want to drill in Arctic National Wildlife Refuge?*, HOUSTON CHRONICLE, 16 January, 2018.

³⁹⁵ Collin Eaton, *Oil, manufacturing will energize Texas economy in 2018, Dallas Fed says*, HOUSTON CHRONICLE, 9 January, 2018.

³⁹⁶ Though in an interesting turn of events, Maine is now also vying for “Arctic” status alongside Alaska. John Levy, *Could Maine become the nation's second 'Arctic' state?*, ANCHORAGE DAILY NEWS, 28 September, 2016.

³⁹⁷ See Alaska Arctic Policy Commission, “Final Report, Executive Summary, and Implementation Plan,” 30 January, 2015.

³⁹⁸ See e.g., Alaska Administrative Code, 3 AAC 103, §§ 103.010 – 103.170; Alaska Statute 44.99.105.

³⁹⁹ See e.g., *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000); *Veco, Inc. v. Rosebrock*, 970 P.2d 906 (Alaska 1999); *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199 (Alaska 1998); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978); *Arctic Motor Freight, Inc. v. Stover*, 571 P.2d 1006 (Alaska 1977); *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758 (Alaska 1977); *Alaska v. Arctic Maid*, 366 U.S. 199 (U.S. 1961).

⁴⁰⁰ Haley Zaremba, *Alaska has a choice to make regarding its oil future*, BUSINESS INSIDER UK, 19 August, 2017.

⁴⁰¹ Dermot Cole, *Alaska's financial dilemma: The State dependence on oil begins*, ANCHORAGE DAILY NEWS, 7 July, 2016.

⁴⁰² See Kevin G. Jones, *Major Issues in Developing Alaska's Outer Continental Shelf Oil and Gas Resources*, ALASKA LAW REVIEW, Vol. 1, No. 2, 209 – 277 (1984).

⁴⁰³ See Bob Herron, *The Alaska Arctic Policy Commission, Legislative Arctic Committees and Governor Walker's Arctic Policy Effort*, THE ARCTIC YEARBOOK (2015).

Alaska is reliant on the oil industry, an industry which itself largely advocates for UNCLOS ratification, has created an ongoing environment in which the Alaska legislature has increasingly tended to favor UNCLOS ratification.⁴⁰⁴ Alaska's own internal policy committees are also quite cognizant of the benefits that a more solidified relationship with the CLCS could bring to the state. Further, the Alaskan Army National Guard, along with North American Aerospace Defense Command ("NORAD") personnel, have expressed their desire to see UNCLOS ratified for much the same reasoning as the larger U.S. Coast Guard.⁴⁰⁵ In light of all this, it is no stretch to say that the U.S.' sole Arctic state – the very region from which most Arctic operations are, and would be, launched⁴⁰⁶ – tends to favor UNCLOS ratification, especially when considering the increasing need for unhindered NORAD functionality.⁴⁰⁷ This is just yet another indication that the U.S. may be slowly edging towards ratifying the Convention.

Of course, for all this discussion of state law and policy, one must ultimately loop back to the fact that the U.S.' decision to ratify UNCLOS or to remain a non-party will ultimately fall to the U.S. Senate. Absent a time-machine, there's no true way to predict if, or when, UNCLOS will be ratified – especially with the "Old Guard" contingency still retaining a sufficient, if dwindling, number of seats. However, as discussed, there is a growing body of evidence that, at the very least, the U.S. is entering a stage wherein UNCLOS ratification is looking all the more likely. From President's Trump tendency to favor industry and the military – both of which advocate for UNCLOS ratification – and with an increasing number of states pushing for more consistent Arctic regulation, there has never before been a better time for UNCLOS advocates to prepare for an assault on the "Old Guard" that is almost exclusively responsible for the U.S.' continued non-party status.⁴⁰⁸ Therefore, the answer to the question posed is that, insofar as the legal and political trends can be analyzed, the U.S. now seems more likely to see UNCLOS ratified than at any point in the Convention's history. As for the question of "Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic

⁴⁰⁴ See e.g., Dermot Cole, *Sullivan's flip-flopping on sea treaty weakens US Power in the Arctic*, ANCHORAGE DAILY NEWS, 28 September, 2016.

⁴⁰⁵ Wayne M. Bunker, *U.S. Arctic Policy: Climate Change, UNCLOS and Strategic Opportunity*, ADA568008, DEFENSE TECHNICAL INFORMATION CENTER, 22 March, 2012.

⁴⁰⁶ See generally, U.S. Northern Command, "DSCA Executive Seminar," United States Army Alaska, 8 April, 2016.

⁴⁰⁷ Colonel Michael J. Forsyth, *Why Alaska and the Arctic are Critical to the National Security of the United States*, MILITARY REVIEW, January, 2018.

⁴⁰⁸ See 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, Vol. 7, No. 1, 32 – 33 (2009).

policy?” it seems as though the best answer is unfortunately a non-determinative one. However, as the number UNCLOS advocates grows,⁴⁰⁹ all while the number of opponents dwindles⁴¹⁰ – this in addition to the administration of a decidedly pro-industry and pro-military Executive – ratification seems probable. This in turn, means that the chances of a UNCLOS-centered U.S. engagement with both the CLCS and the Arctic as a broad location and concept are likely to grow stronger, possibly even in the near future – a future which, despite the relatively dim events of the past, may end up being comparatively bright.⁴¹¹

3. – Conclusion

This thesis has served as an examination of the storied relationship between the U.S. and UNCLOS. Its analysis has both reconfirmed and revealed various aspects about not only the past relationship between the U.S. and the Convention, but has also highlighted future possibilities of U.S. ratification. The thesis has further examined the secondary aspects of UNCLOS, namely its tribunal, the CLCS, as well as the interrelationship between UNCLOS and broader Arctic policies. In conducting this analysis, the thesis sought to answer the questions of “Why hasn’t the United States ratified UNCLOS?,” “How does the lack of United States ratification affect the ‘Race to the Arctic?’,” and “Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy?” While the answers to these questions were complex and, at least in some ways, dependent on in-progress legal and policy deliberations, the thesis also provided an in-depth analysis of the geopolitical situation as a whole in order to better demystify the relationship between the U.S. and UNCLOS. As has been discussed, the very nature of the inquiry makes for a complex analysis, and as such, much of what has been discussed herein will ultimately be settled one way or another on the floor of the U.S. Senate. However, as this examination has revealed, each of the questions posed does have an answer, be it determinative or otherwise, and each answer therefore serves as one piece within the larger puzzle of U.S. ratification.

⁴⁰⁹ See e.g., Ernest Z. Bower & Gregory B. Poling, *Advancing the National Interests of the United States: Ratification of the Law of the Sea*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, 25 May, 2012.

⁴¹⁰ Mark Jarashow, Michael B. Runnels, & Tait Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, FORDHAM INTERNATIONAL LAW JOURNAL, Vol. 30, No. 5, 1587 – 1652 (2006).

⁴¹¹ For a study that takes a similar stance on this topic, but which focuses more on the scientific outcomes of the legal and geopolitical endeavors discussed by this thesis, see generally Wieslaw Maslowski, et al., *The Future of Arctic Sea Ice*, ANNUAL REVIEW OF EARTH AND PLANETARY SCIENCES, Vol. 40, 625 – 654 (2012).

The first of these pieces involves the decades old question of “Why hasn’t the United States ratified UNCLOS?” On review, this question can be answered by looking no further than a diminishing – yet sufficiently intact – contingent within the Republican Party, a cohort which this thesis and other scholarship have dubbed the “Old Guard.” This group has, consistently and determinatively, resisted UNCLOS ratification at every possible stage since the Convention was originally rejected by the administration of President Reagan in the 1980s. While it may seem odd to levy the blame solely against a single group, the discussion herein has revealed that this “Old Guard” has maintained their anti-UNCLOS stance and ratification-nullifying power by exploiting the ever-changing geopolitical and sociopolitical tides of the U.S. government. Further, it is the “back-and-forth” of Presidential administrations, with changes occurring every four to eight years, that has made UNCLOS ratification all the more complex. Thus, the final answer to this question is that the “Old Guard” and their meticulous exploitation of the U.S. political and governmental process are why UNCLOS has yet to be ratified.

The second piece of the larger ratification dilemma involves the question of “How does the lack of United States ratification affect the ‘Race to the Arctic?’” This question revealed the requirement for a complex and multi-tiered analysis which covered topics ranging from broad U.S. geopolitical concerns between the “Unilateral Arctic” and “Multilateral Arctic” opposition clusters, to the specific mechanisms by which the U.S. would “gain” or “lose” by obtaining CLCS membership. Here the thesis discussed and revealed a plethora of possible outcomes, with the overall trend favoring “positive” impacts over “negative” impacts in the event of U.S. ratification. This led to the secondary conclusion that by not ratifying UNCLOS the U.S. was, by and large, hindering its own efforts as well as putting itself at a disadvantage vis-à-vis both its allies and adversaries who have ratified the Convention. The absence of such a global power from nearly all aspects of the UNCLOS-based Arctic regime hinted at a series of lasting problems for the Arctic, not only in a purely policy-oriented manner, but in the realm of environmental impacts as well. Thus, the final answer to this question is that the lack of U.S. ratification adversely effects both U.S. domestic and international interests, as well as the interests of the Arctic policy regime as they relate to both UNCLOS and the “Race to the Arctic” as a whole.

The third and final piece of the ratification dilemma relates to the question of “Will the United States ratify UNCLOS, and, if so, what does the future hold for Arctic policy? Here the complicated status of the Trump administration came to the forefront, with the Secretary of

State being fired during the process of this thesis's research and with his replacement only recently having been confirmed as of this thesis's submission. Here the thesis determined that, despite what might seem most intuitive, due to its industry-favoring perspectives the Trump administration may well be the most likely to ratify UNCLOS since the U.S. originally backed away from ratification in the 1980s. The thesis also looked to the "secondary" political market of the states themselves, where – with Alaska spearheading the effort – the states are becoming increasingly active in Arctic deliberations and have, in some cases, even come out in direct support for not only UNCLOS ratification broadly speaking, but for its subcomponents such as the CLCS. In light of this trend between both the federal and state governments, the final answer to this question is that it appears to be increasingly likely that the U.S. will ratify UNCLOS, and that with the U.S. "voice" and its resources at the "table" the Arctic's future may well be less contentious and problematic than it would be in the event that the U.S. maintained its non-party status to UNCLOS.

In conclusion, this thesis has come to the determination that the U.S. is moving towards UNCLOS ratification and that the U.S., UNCLOS itself, the CLCS, and the Arctic as a whole will benefit as a result. While this thesis may have, at times, appeared overly critical of the U.S. or of U.S. policy, this critical stance is necessary in order to better display the inherent flaws in the now decades-old lines of argument against UNCLOS. In truth, while its analysis of particular anti-UNCLOS arguments may have been strenuous and demanding, on the whole this thesis hopes to have revealed a larger theme in U.S. foreign policy in that while the U.S. may not always take the most logically cohesive approach to international agreements, when it does choose to back them, it backs them almost unfailingly. As such, bringing the U.S. into the full fold of UNCLOS would not only free up U.S. resources as they relate to the military and other nautical endeavors, but it would also bring more U.S. resources to the UNCLOS regime as a whole. Similarly, as it relates to the continental shelf, the U.S. would be better able to make and defend claims, while other nations would achieve more linear pathways to address the U.S. on similar terms and issues. In sum, by leaving its non-party status behind and joining the majority of nations in ratifying UNCLOS, the U.S. would be taking steps to ensure a more stable and secure future for itself, UNCLOS, and the Arctic.

4. – Bibliography

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5. – Appendix

This appendix is provided in order to discuss a few pieces of otherwise presumed knowledge so that the larger body of the thesis may be better understood. The appendix is divided into three sections: Section A, Section B, and Section C. Section A provides a few illustrations which contain an overview of the Maritime Zones, continental shelf, and the limits of national jurisdiction and sovereignty as designated by the UNCLOS framework. Section B provides a basic overview of the structure of the U.S. government and its treaty ratification process so that the different governmental bodies discussed throughout the thesis may be better understood. Section C is focused on a high-level overview of the status of the Arctic climate and the impacts of climate change on the Arctic sea ice.

Appendix – Section A – Overview of UNCLOS Zones and The Continental Shelf

UNCLOS establishes a series of “Maritime Zones” which have been referenced in the body of the thesis. These zones are tied into various aspects of jurisdiction and sovereignty – issues with which the U.S. (and other nations) have raised various concerns over. While this thesis does not aim to provide an in-depth scientific analysis of these zones and their geological requirements, the following definitions and illustrations are provided in order to clarify any confusion as to how these terms have been referenced in the main body of the thesis.

The following image shows an overview of these zones and how they are related to one another geographically:

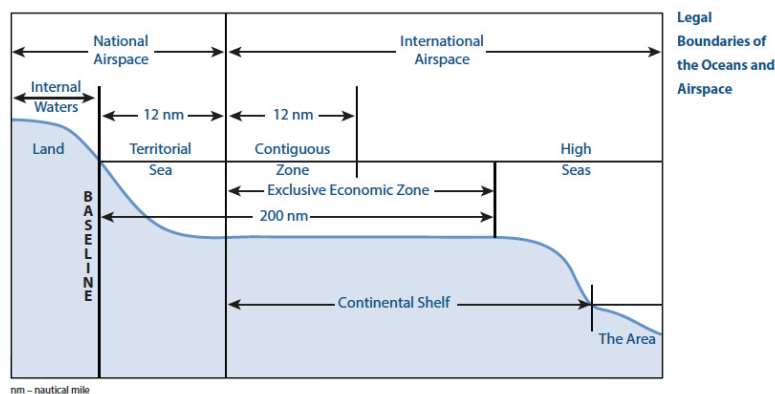


Image Source: Tufts University, The Fletcher School

Each of the zones displayed in the above image is subject to their own conditions and limitations on jurisdiction and sovereignty, as displayed by the following chart:

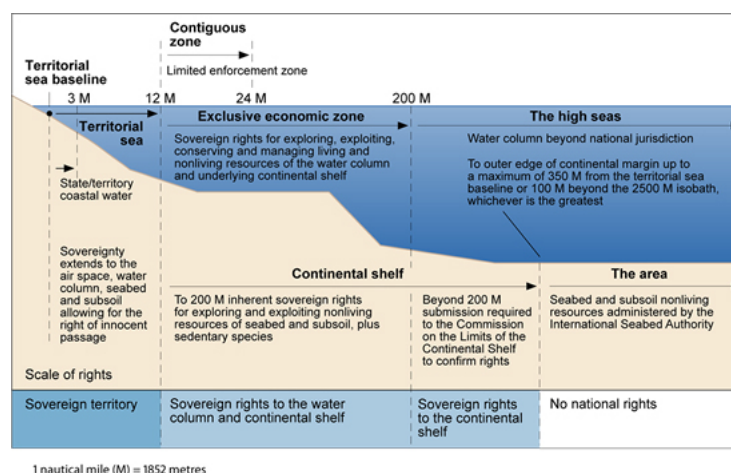


Image Source: Australia State of the Environment 2017 – 2018, Commonwealth of Australia

As can be seen from the following image, the majority of the world's oceans lie within the UNCLOS-defined zone of the “High Seas.” In this image the darker areas represent the High Seas, whereas the lighter areas represent EEZs:

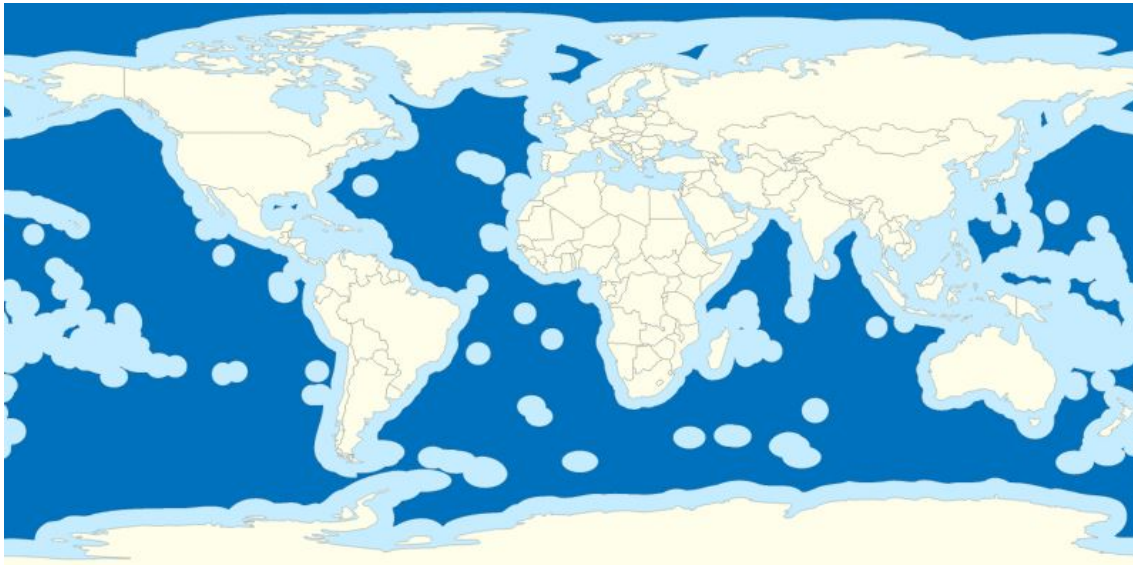


Image Source: SVG-Datei, Wikimedia Commons

It is also useful to “zoom in” on the continental shelf itself, as this area serves as a focal point for much of the debate discussed in the main body of the thesis. The next image features a more scientific analysis of what the continental shelf actually encompasses from a geological and geographical standpoint:

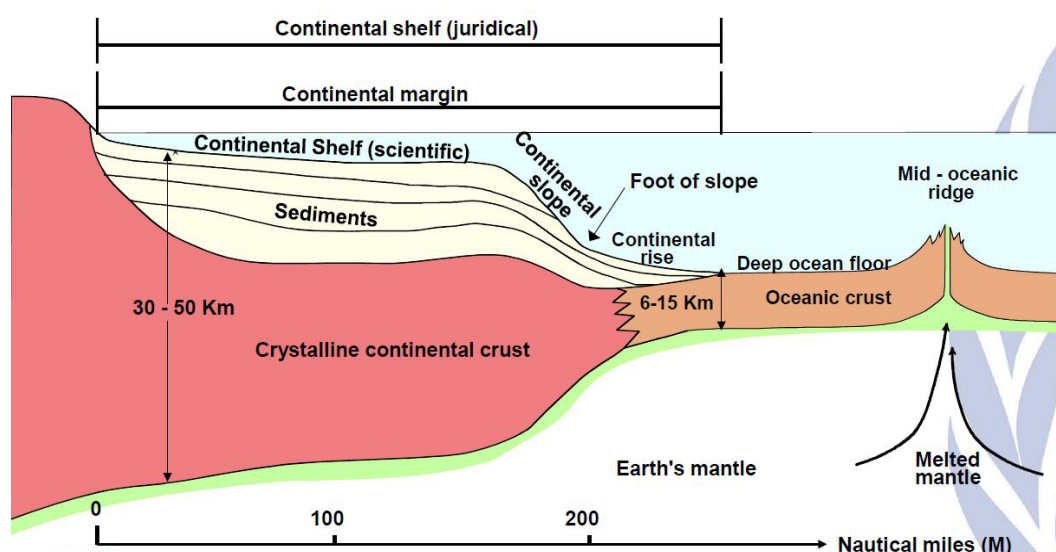


Image Source: United Nations, Division of Ocean Affairs and the Law of the Sea

As the debate over baselines extends to the continental shelf, the following image is useful in that it more clearly delineates and clarifies the position of the different “lines” and segments of the shelf area:

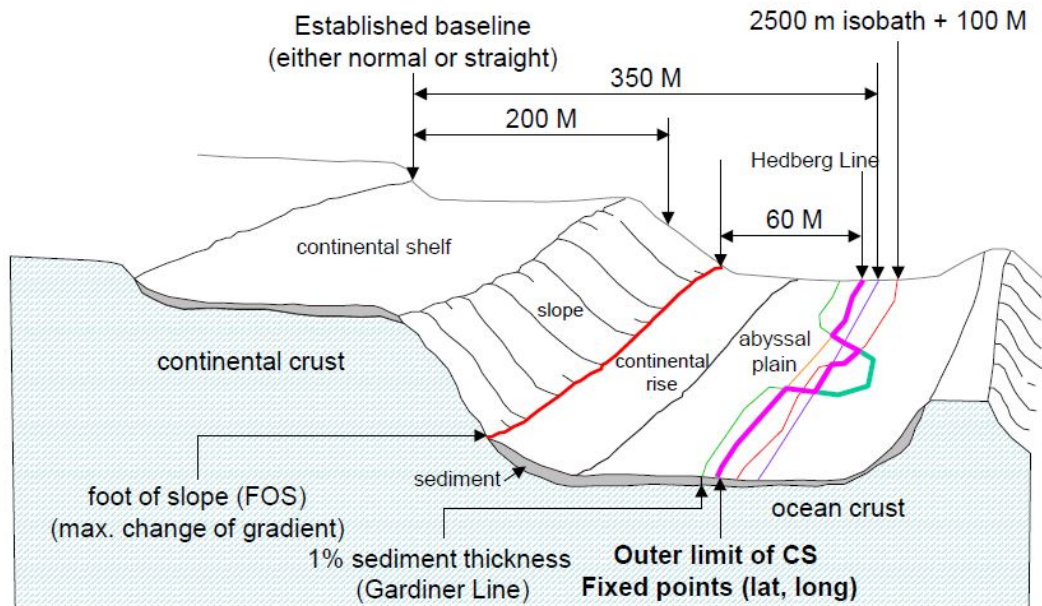


Image Source: United Nations, Division of Ocean Affairs and the Law of the Sea

Appendix – Section B – Overview of the U.S. Governmental Structure

As the body of this thesis relies on a basic understanding of the U.S.’ political and governmental system, the following image succinctly displays the basic structure of that system. While this governmental format is similar to the more widely utilized parliamentary system, there are a few institutional differences which are referenced in the main body of the thesis and which are clarified below:

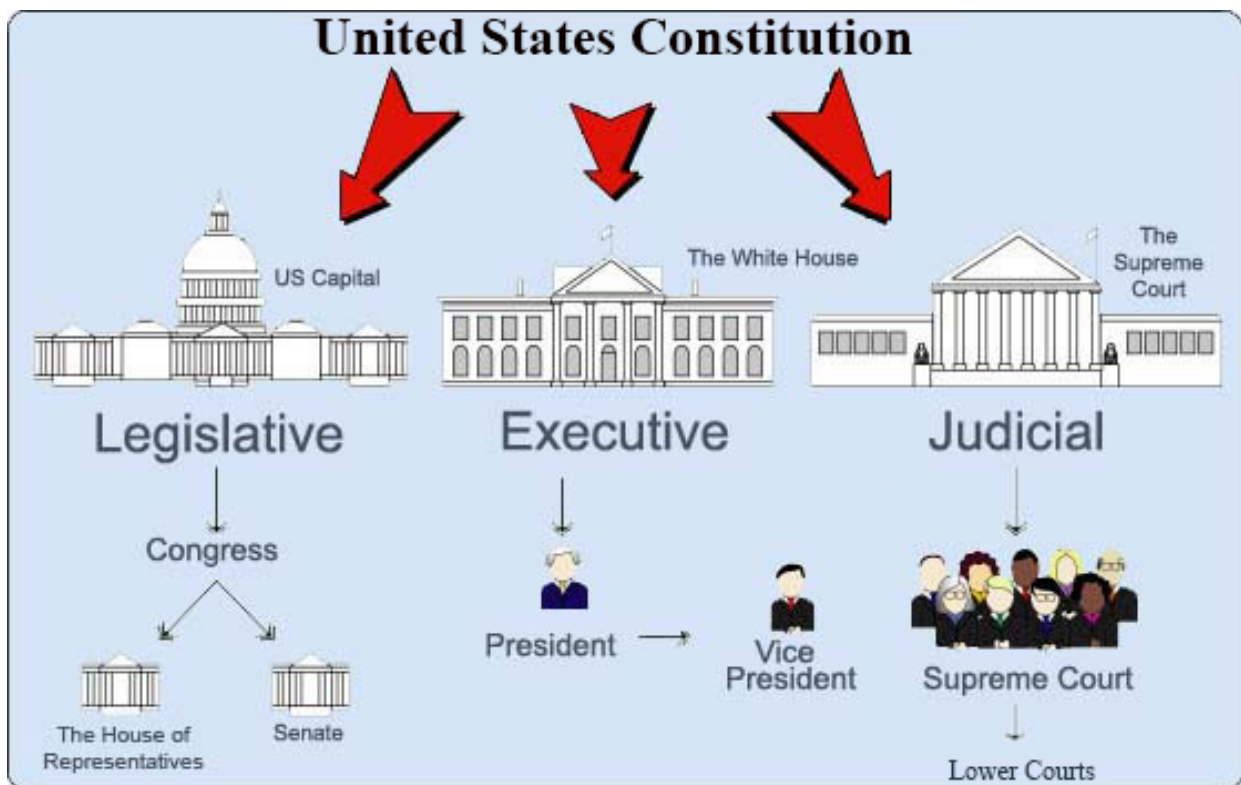


Image Source: Harry S. Truman Presidential Library & Museum

Although the above image displays a relatively simplified version of the U.S. governmental structure, it does little to reveal the inherent complexities of the treaty ratification process within the U.S. system. The following image provides a flowchart of how the ratification process begins, ends, and if necessary, starts all over. The entities referenced in the above photo are useful to consult when analyzing the flowchart on the following page.

Figure A-1. Steps in the Making of a Treaty

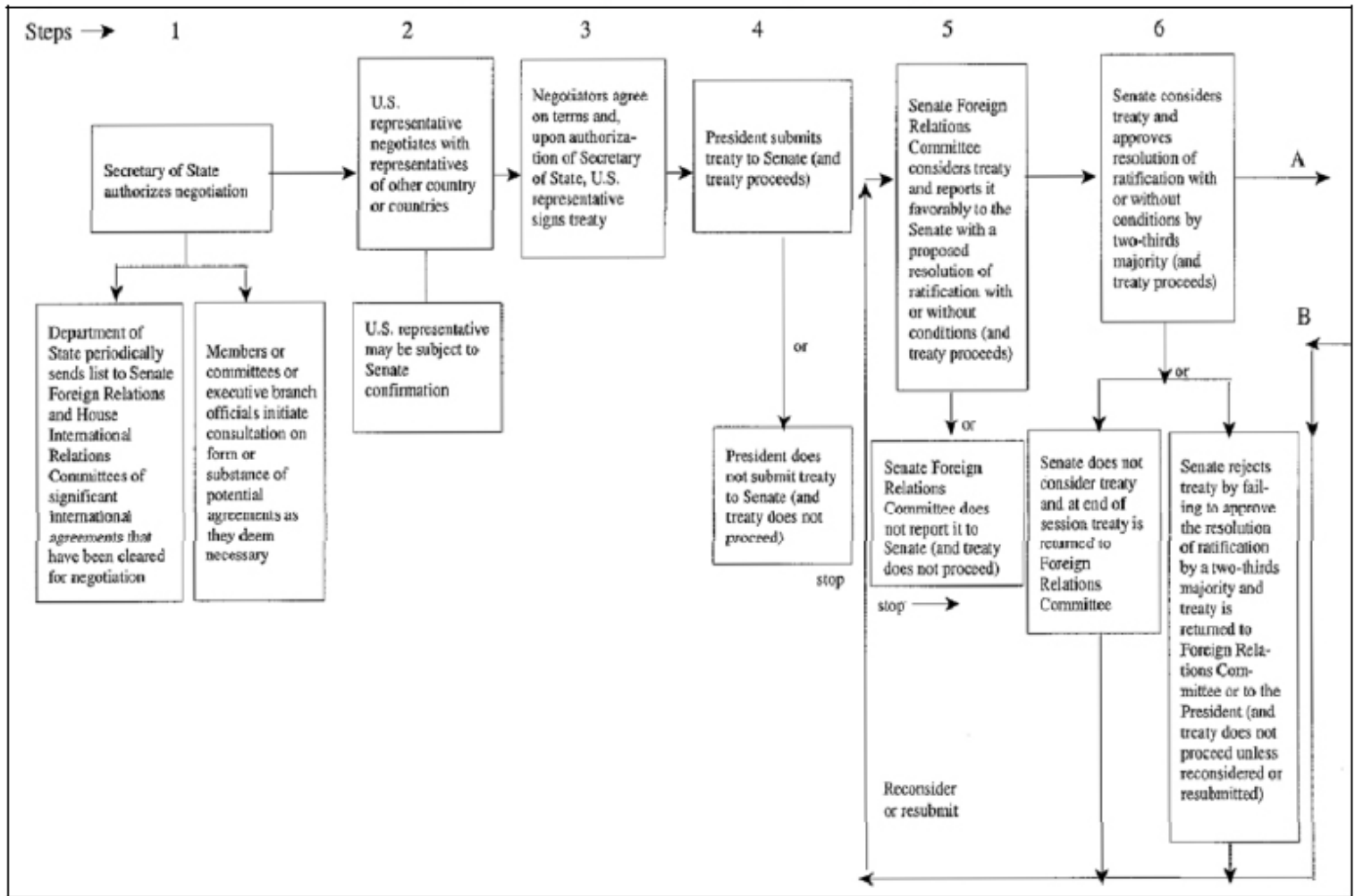


Image Source: University of Washington, Gallagher Law Library

Appendix – Section C – Overview of Melting Sea Ice and the Arctic Climate

While this thesis is not primarily focused on scientific research, it is useful to understand the climatological conditions occurring in the Arctic so that the legal, political, and social issues discussed in the body of the thesis can be better contextually understood. In that regard, the following illustrations are provided in order to share a cursory overview of the Arctic's conditions as well as to visualize some of the ongoing changes which are not only affecting the environment, but which are also heavily influencing the geopolitical discourse discussed in the main body of the thesis.

The most striking issue the Arctic is facing from a climatological standpoint is its recent warming trend. This warming trend has seen an average of 2 – 5 °C increases for any given period as compared to the 1981 – 2010 baselines. The following image, which is centered above the Arctic, uses the darker shades to reveal areas of greater warming. As can be seen, large sections of the Arctic are experiencing stark warming patterns and areas of milder warming radiate outward far beyond the Arctic itself.

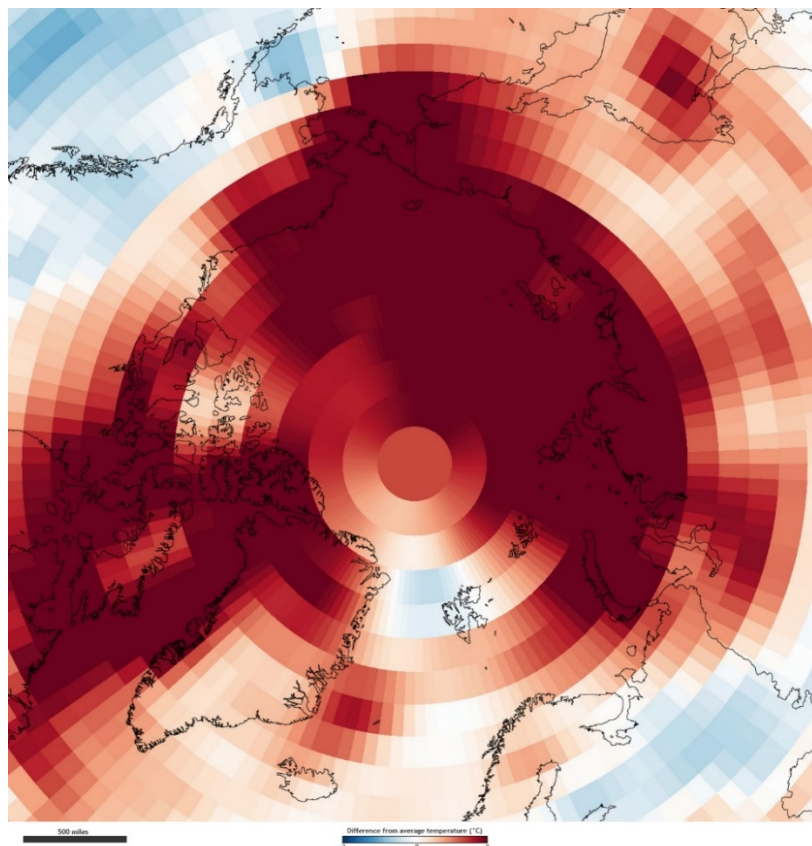


Image Source: Sagredo, Wikimedia Commons

This warming trend has had a drastic and perceptible impact on the Arctic sea ice. The Arctic sea ice is not only an important part of the Earth's own heat regulation capabilities (sunlight reflection vs. absorption), it's also a critical element of the Arctic ecosystem as it both begins (algae) and ends (Animalia) the region's ecological cycles. The following image shows just how much the sea ice has receded over the past few decades:

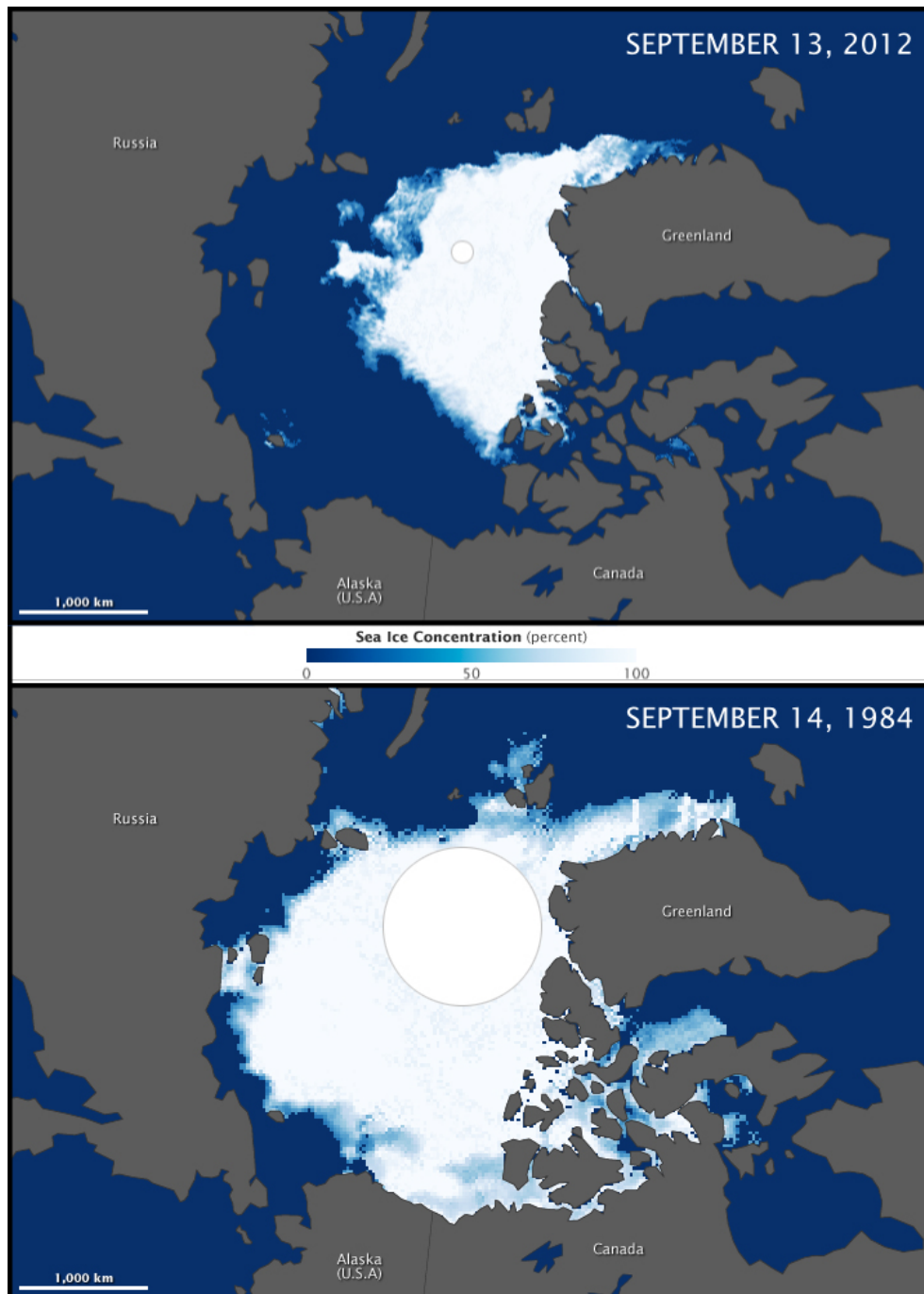


Image Source: Jesse Allen, NASA Earth Observatory

Further, the sea ice is not only seeing a reduction in surface area, it's also seeing a reduction in volume. The following image displays the total Arctic sea ice volume over time by using two different data models:

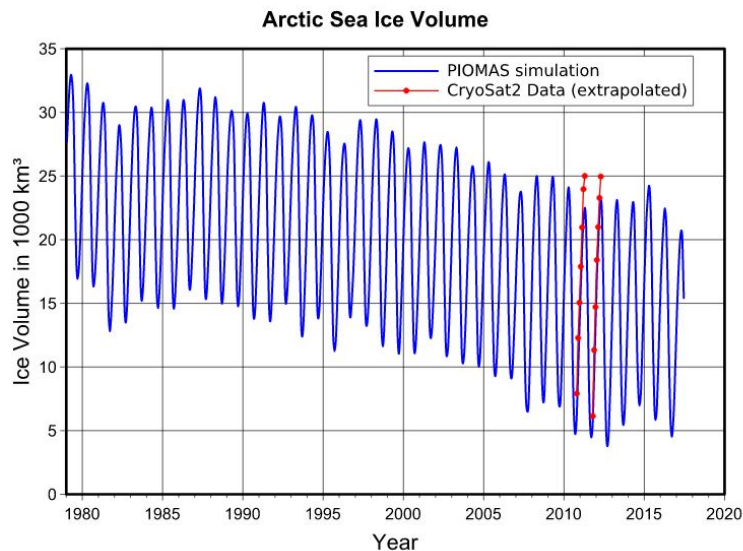


Image Source: University of Washington, Polar Science Center

To make matters even worse, current predictions and outlooks are not positive absent large-scale anthropogenic change. The following image shows a series of past and predicted sea ice levels over the next 82 years:

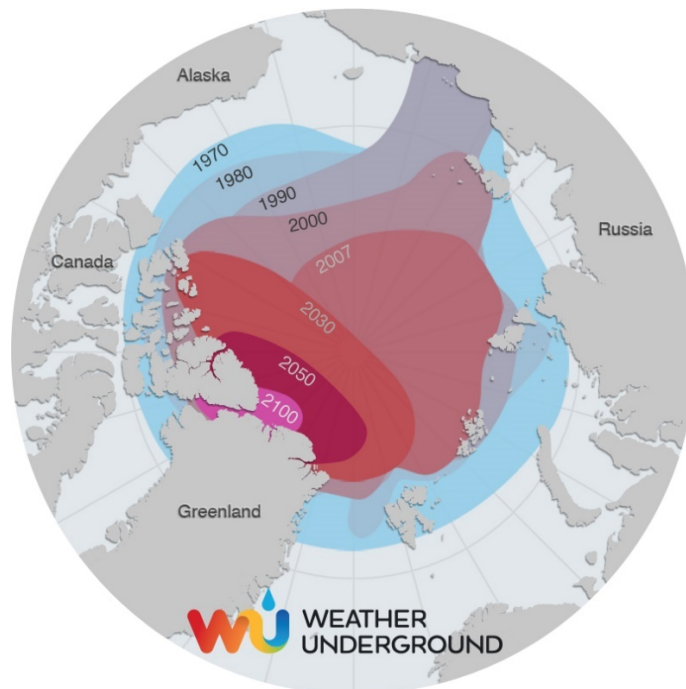


Image Source: Weather Underground