

RACING FOR THE ARCTIC? BETTER BRING A FLAG

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I. INTRODUCTION

Among all nations, large and small, there is one resource in constant demand: oil. Unfortunately, we are on the horizon of an era where current oil reserves are predicted to run out. What is going to happen when the pumps run dry? No one knows for sure, but as the race to find and claim new reserves heats up and the global temperature follows suit, much attention is being aimed at potential seabed resources in areas formerly thought to be unreachable. Such is the current situation of the Arctic Shelf in and around the North Pole.

It is a well-known fact that Global Warming is melting the Arctic ice caps. As this happens, lucrative sea-bed resources may become available.¹ As such, five major countries—the United States, Canada, Russia, Denmark and Norway—are looking to extend claims to the seabed beneath the ice-covered ocean.²

Since the summer of 2007,³ the dispute over which country owns the rights to the seabed surrounding the North Pole has become more intriguing, as Russia sent a mini-submarine beneath the ice and to the sea floor, where it planted a titanium flag, in a sense,

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¹ Adam Wolfe, *Russian Claims to North Pole Foreshadow More Arctic Disputes to Come*, *WORLD POLITICS REVIEW*, Aug. 13, 2007, available at <http://www.worldpolitics.com/article.aspx?id=1019> (explaining that an estimated total combined amount of 125 billion tons of ice are lost per year from Greenland and Antarctica alone, and this melting will provide access to new shipping lanes and make large amounts of sea-bed resources available for exploitation).

² Colin Woodard, *Who Resolves Arctic Oil Disputes?*, *THE CHRISTIAN SCIENCE MONITOR*, Aug. 20, 2007, available at www.csmonitor.com/2007/0820/p01s02-woeu.htm (“Russia’s planting of a flag at the North Pole this month has set off a race for control of the Arctic, with five nations preparing to make claims to the seabed at the top of the world.”).

³ The date of Russia’s expedition was August 2, 2007. See Wolfe, *supra* note 1.

signifying its claim to the area.⁴ Responses to Russia's actions were swift and mostly contemptuous, as the United States dismissed the stunt as one without any legal merit.⁵ The Canadian Foreign Minister added a more animated response, reminding the world that this was no longer the "15th Century," where countries could plant flags to claim territories as their own.⁶ Even late night talk shows took notice, wondering what effect the land claim would have on Santa and his elves.⁷ In the end, even the Russian government acknowledged that the flag had no real legal significance.⁸ Regardless, this "insignificant" Russian flag has brought this international dispute to the top of the agenda for the affected nations and has created a scramble to substantiate circumpolar countries' claims to seabed resources.⁹

What exactly is at stake? The size of the Arctic Shelf is about 4.5 million square kilometers.¹⁰ The U.S. Geological Survey posits that twenty-five percent of the world's undiscovered gas and oil reserves may be in the Arctic Region.¹¹ Experts from Wood MacKenzie¹² and Fugro Robertson,¹³ however, suggest that while there may be deposits, the oil reserves may not be as lucrative as the

⁴ Richard A. Lovett, *Russia Plants Underwater Flag, Claims Arctic Seafloor*, NATIONAL GEOGRAPHIC NEWS, Aug. 3, 2007, available at <http://news.nationalgeographic.com/news/2007/08/070802-russia-pole.html>.

⁵ Alexander Gabuev, *Cold War Goes North: Russia and the West Begin the Race for the Arctic Region*, KOMMERSANT, Aug. 4, 2007, available at http://www.kommersant.com/p792832/Arctic_ocean_bed_causes_upsurge_of_Russia-West_competiton. Tom Casey, deputy spokesman of the U.S. Department of the State was reported as saying, "I'm not sure whether they've—you know, put a metal flag, a rubber flag, or a bed sheet on the ocean floor. Either way, it doesn't have any legal standing or effect on this claim."

⁶ *Russia Plants Flag Under N Pole*, Aug. 2, 2007, <http://news.bbc.co.uk/2/hi/europe/6927394.stm>.

⁷ See Wolfe, *supra* note 1.

⁸ See Lovett, *supra* note 4.

⁹ Shamil Midkhatovich Yenikeeff & Timothy Fenton Krysiak, *The Battle for the Next Energy Frontier: The Russian Polar Expedition and the Future of Arctic Hydrocarbons*, OXFORD INSTITUTE FOR ENERGY STUDIES, Aug. 2007, at 4. Ottawa, Washington, and Copenhagen have all reiterated their Arctic Claims. Further, the United States, just days after the Russian expedition and subsequent flag escapade, launched their own expedition. Canada also responded with an expedition of its own, which included multiple surface ships, a submarine, and roughly 700 military personnel. Not surprisingly, the Danish government also sent out an expedition on August 12, just ten days after the Russians. The expedition was scientific in nature and included forty scientists with the goal of gathering evidence to substantiate that the Lomonosov Ridge was an extension of Greenland, not Russia. *Id.* at 4–5.

¹⁰ *Id.* at 2.

¹¹ Alexander Kukolevsky & Olga Shkurenko, *Attracted to the Same Pole*, KOMMERSANT, Aug. 13, 2007, available at http://www.kommersant.com/p794555/exploration_expansion.

¹² Wood MacKenzie is a highly-touted research, consulting, and advising firm that specializes in the energy and mining & metals industries. Wood Mackenzie: What We Do, <http://www.woodmckenzie.com>.

Survey suggests.¹⁴ Specifically, these same experts put forward that roughly seventy-five percent of the hydrocarbon deposits that will be recoverable in the next decade or two will be natural gas, compared to about twenty-five percent oil deposits.¹⁵ Either way, there are large amounts of untapped resources in the Arctic Shelf, resources that the United States, Canada, Russia, Norway and Denmark could use to feed the increased demand and consumption of oil in their growing economies.¹⁶

This Note will explore the current dispute over Arctic seabed resources surrounding the North Pole, evaluate methods for resolving this conflict, and finally suggest particular Alternative Dispute Resolution (“ADR”) methods which would be best suited to resolve the conflict peacefully and equitably. Part II will introduce the appropriate statutory law and discuss its relative effects on the disputing countries. Further, as with most conflicts, it is important to understand how the history of the area impacts the involved countries. This will be assessed in Part III. In Part IV, this Note will show how this particular conflict is better suited for ADR than litigation. Parts V–VIII will entail an evaluation of current ADR methods (negotiation, mediation, conciliation and arbitration) and their usefulness in solving this specific conflict. This is followed by an examination of past international sea-bed disputes in Part IX. These past resolutions are especially important as models for different ways in which countries involved in similar conflicts have resolved them peacefully.

While simple negotiation or mediation may seem like a viable solution, in this particular dispute, there are arguably better meth-

woodmacresearch.com/cgi-bin/corp/portal/corp/overview.jsp?overview_title=corpWhatWeDo (last visited Apr. 9, 2009).

¹³ Similar to Wood Mackenzie, Fugro Robertson is a research, consulting, and advising firm which specializes mainly in the geoscience, petroleum, and gas markets. Fugro Robertson: Corporate Details, <http://www.fugro-robertson.com/corporate/> (last visited Apr. 9, 2009).

¹⁴ Press Release, Wood Mackenzie and Fugro Robertson, ARCTIC ROLE DIMINISHED IN WORLD OIL SUPPLY (Nov. 1, 2006), available at <http://www.woodmacresearch.com/cgi-bin/corp/portal/corp/corpPressDetail.jsp?oid=751298> (calling into question prior reports that the Arctic region will produce as much oil as originally predicted, but does expect for the region to contribute nearly three million barrels per day of oil at its peak. Further, the press release points to research that suggests the region is mostly gaseous (roughly seventy-four percent). In this vein, the study suggested that at peak, the region could produce some five million barrels of gas equivalent per day.) *Id.*

¹⁵ *See id.*

¹⁶ Russia, in particular, certainly stands to benefit from the exploitation of seabed resources, as a massive boost in exportable and useable oil could bring a substantial increase in wealth to a country in need of economic leverage in the world economy. *See* Kukolevsky & Shkurenko, *supra* note 11.

ods. Disparities in economic and military strength lead to inequity in the bargaining power of each country. Further, the scientific and technical nature of data involved with measuring deepwater sea-beds requires in-depth evaluation. As such, this conflict necessitates a third-party that has the requisite knowledge to independently evaluate the evidence and subsequently make a thoughtful, equitable and lasting judgment that will take into account the interests of all parties. For these reasons, this Note suggests conciliation and arbitration as the most effective methods for solving the dispute in the Arctic.

II. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)¹⁷

In 1982, the United Nations took steps to implement a method for deciding what countries have rights to underwater sea-beds and resources. The method is just one aspect of the extensive and dense treaty known as the United Nations Convention on the Law of the Sea (“UNCLOS”).

The treaty grants countries “Exclusive Economic Zones”¹⁸ (“EEZs”), to the seabed’s natural resources and minerals—among other things—up to 200 miles offshore.¹⁹ The treaty is specific as to the 200 mile limit,²⁰ but lays down one important exception. If a country’s continental shelf²¹ exceeds the 200 mile limit, the treaty allows exclusive economic rights on this shelf up to 350 miles from a coastal State’s shoreline.²² However, this remains contingent upon the submission of scientific and technological evidence to the

¹⁷ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1984) [hereinafter UNCLOS].

¹⁸ The “Exclusive Economic Zone” is the area where the coastal State has: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.
UNCLOS, *supra* note 17, at art. 56, para. 1(a).

¹⁹ UNCLOS, *supra* note 17, at art. 57.

²⁰ *Id.* at art. 76, para. 1.

²¹ “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles”
UNCLOS, *supra* note 17, at art. 76, para. 1.

²² UNCLOS, *supra* note 17, at art. 76, para. 6.

Commission on the Limits of the Continental Shelf.²³ The role of the Commission is to “consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf . . . where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76²⁴. . . .”²⁵

Russia’s expedition to the Arctic seabed was not completely unexpected. In fact, Russia first submitted a claim to the Commission in 2001, maintaining that the Lomonosov Ridge, which runs under the North Pole, was an extension of Siberia’s continental shelf, thus giving it the rights to the natural resources buried within it.²⁶ However, the Commission considered the evidence given by Russia inconclusive, and the Russians were told to resubmit at a later date with better data.²⁷ Russia has yet to resubmit, but their recent explorations have been geared towards gathering data to do so.²⁸ Until Russia can establish sufficient scientific evidence, neither the Commission (nor any other ratifying country of UNCLOS) will acknowledge the claim.²⁹ Flags aside, Russia has certainly sparked what could become the most important territorial dispute of the twenty-first century.³⁰

III. THE NEAR FUTURE—WHAT LIES ON THE HORIZON FOR THE DISPUTING COUNTRIES?

UNCLOS grants ratifying countries ten years from ratification to prove disputed areas are part of their continental shelf.³¹ With most of the involved countries ratifying the treaty in the late 1990s or the first few years of the twenty-first century,³² there is increased urgency to find conclusive scientific data to substantiate claims.

²³ UNCLOS, *supra* note 17, at annex II, art. 1. The Commission on Limits, itself, is a creation of UNCLOS, made up of twenty-one experts in the field of geology, geophysics or hydrography. They are elected by parties to the Convention. UNCLOS, *supra* note 17, at annex II, art. 2.

²⁴ This is the article defining and limiting the area called the “continental shelf.”

²⁵ UNCLOS, *supra* note 17, at annex II, art. 3, para. 1(a).

²⁶ Wolfe, *supra* note 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ UNCLOS, *supra* note 17, at art. 76, par. 8.

³⁰ Wolfe, *supra* note 1.

³¹ UNCLOS, *supra* note 17, at annex II, art. 4.

³² See “Chronological lists of ratifications of, accessions and succession to the Convention and the related agreements as at 01 February 2008” – Chart, <http://www.un.org/Depts/los/>

The United States, which signed, but did not ratify the treaty, is in an interesting position. If it does not ratify, it is going to have trouble maintaining any claims to the region under a U.N. context, aside from the 200 mile boundary off the coast of Alaska.³³ However, the treaty has not escaped the view of important United States politicians. Specifically, the Bush administration supported it, but was not able to garner enough Congressional support to ensure its ratification.³⁴ With the inauguration of President Barack Obama, however, the treaty might finally be able to gain enough support in the Senate to be passed into law.³⁵ Eric Posner, Professor of Law at the University of Chicago, posits that the reason for the lack of Congressional support is that the treaty governs much more than just sea-bed resource exploitation and the limits of a country's continental shelf.³⁶ Posner explains, "[i]t also determines territorial waters in general, provides for the international exploitation of the seabed, provides some environmental controls, restricts how countries can treat ships on the high seas and in territorial waters, and much else."³⁷ Despite all of this, Posner clarifies that, for the most part, "[t]he United States government has no objection to this treaty, and in fact treats most of its provisions . . . as customary international law."³⁸

Since the other four countries have all ratified the treaty, they have instead focused on building up their respective militaries. Currently, Russia has the most extensive Arctic fleet, but investments are being made by the other littoral states to catch up.³⁹ Such is the case in Canada, where the Prime Minister, Stephen

reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Feb. 20, 2008).

³³ Wolfe, *supra* note 1.

³⁴ Yenikeeff & Krysiak, *supra* note 9, at 4.

³⁵ Hugo Miller, *Arctic-Seabed Oil Claims May Quicken Under New Senate (Update 1)*, BLOOMBERG, Nov. 20, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601109&sid=AXGnGj6oDSqY&refer=home>. Miller suggests that the reason the treaty had not been passed under Bush was that there was too much resistance from the Republican party within the senate. With the Democrats replacing seven Republicans, the United States most likely has moved closer to joining the over 150 nations that currently are party to UNCLOS. *Id.*

³⁶ Posting of Eric Posner, The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2007/08/the-race-to-the.html#more> (Sept. 30, 2007, 10:33 EST).

³⁷ *Id.* Posner continues, "[t]here are a few provisions that worry commentators, the most serious of which are (1) potential constraints on the ability of American forces to police the high seas, and (2) the creation of an international authority that will control seabed mining." *Id.*

³⁸ *Id.*

³⁹ Wolfe, *supra* note 1 (citing the Canadian Prime Minister Stephen Harper, who claimed that Canada will reassert its arctic claims, and embrace the philosophy the Arctic is a "use it or lose it" area, and Canada intends most definitely to use it).

Harper, announced plans to construct a cold-weather fighting training facility, a new deep-water port at Nanisivick on the northern tip of Baffin Island, and to increase its military presence in the Arctic region to an astounding 900 Rangers.⁴⁰

While the United States' response was not as extensive as the Canadians', the Russian claims prompted the United States to send an expedition of their own to the Arctic.⁴¹ The United States sent their only fully operational icebreaker ship, the Healy, to the Bering Sea.⁴² The mission was reported as being of a scientific nature, and no doubt was the beginning of many expeditions aimed at gathering deep-sea evidence to substantiate claims pertaining to the Alaskan continental shelf.⁴³ Of further concern for the Americans, the operation exposed the unfortunate reality of the critical and shaky condition of the United States' icebreaking fleet.⁴⁴ The Healy is one of only four American icebreakers, and is the only one that is reliable enough to consistently make the trip to the Arctic.⁴⁵ However, this deficiency has brought another issue to the Congressional forefront, where support has been mounting to increase Coast Guard funding in an effort to repair, replace, and expand the weak icebreaking fleet.⁴⁶

The Danes were not far behind the Americans in their response to the Russian Arctic strategy. Just days after the Americans, the Danes set sail to begin research in the Arctic in an effort to prove that the Lomonosov Ridge is an underwater extension of Greenland (Danish territory), not Russia.⁴⁷ It is also likely that they will follow the Canadians' strategy of increasing military presence in the area.⁴⁸

⁴⁰ *Arctic Military Bases Signal New Cold War*, TIMES ONLINE, Aug. 11, 2007, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2238243.ece. Further, Harper announced, about a month before, that they were planning to launch some six to eight new patrol ships to guard the Northwest Passage sea route that Canada claims, and is a lucrative shipping route in the summer months. *Id.*

⁴¹ Yenikeeff & Krysiak, *supra* note 9, at 4.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 4–5.

⁴⁶ Yenikeeff & Krysiak, *supra* note 9, at 5. The poor state of the American Fleet has also encouraged support for the approval of UNCLOS. *Id.* Another option for countries like the United States and Canada, who are looking to boost their icebreaking fleet, is to charter foreign icebreaking ships. Although expensive, it could be a short-term solution to a deficiency in functioning icebreakers. *Id.* at 6.

⁴⁷ *Id.*

⁴⁸ *Id.* The authors suggest that it would not be unlikely for the Danes, who have had prior disputes with Canada over Hans Island—a tiny Arctic island in a strategic location between

Norway has been surprisingly quiet on the issue, likely because of their history of cooperation with Russia with offshore resource development.⁴⁹ Thus, Norway serves to fare quite well if Russia substantiates its claims to the region. Norwegian drillers have by far the most experience and expertise in cold weather and offshore situations,⁵⁰ and due to the history of cooperation with Russia, would be an easy choice for a partner.⁵¹

IV. ALTERNATIVE DISPUTE RESOLUTION: A PROMISING POSSIBILITY

This is a conflict ripe for Alternative Dispute Resolution.⁵² There are currently five countries disputing claims in the Arctic, and depending on what, if anything, the disputing countries can scientifically prove, the situation could quickly go from bad to worse. This is not a dispute likely manageable by the courts. It involves a multitude of parties, each of which has competing interests and claims. The conflict also requires consideration of highly technical and scientific evidence, such that a common jury or judge would not normally have the expertise to effectively analyze and make a reliable ruling. Further, there are potential jurisdictional issues, as not all of the countries have signed UNCLOS.⁵³

Canada's Ellesmere Island and the Danish territory of Greenland—to respond to Canadian military maneuvers with a show of force of their own. *Id.*

⁴⁹ Yenikeeff & Krysiak, *supra* note 9, at 6. (“Since 2002, the Norwegian and Russian governments have signed a series of declarations outlining Norway’s role as Russia’s strategic partner in Arctic hydrocarbon development.”).

⁵⁰ *Id.* (“Norwegian companies Statoil and Norsk Hydro have thirty-five years of experience drilling wells in extreme conditions in the northern continental shelf.”).

⁵¹ *Id.* The authors posit, “Norwegian expertise and capital could prove extremely valuable to Russian [gas companies] . . . as they proceed with offshore development projects in the Arctic.” *Id.*

⁵² While there is no set-in-stone definition for Alternative Dispute Resolution, a commonly accepted definition is “a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties.” KARL MACKIE, DAVID MILES, WILLIAM MARSH & TONY ALLEN, *THE ADR PRACTICE GUIDE: COMMERCIAL DISPUTE RESOLUTION* 9 (2d. ed. 2000). However, as will be discussed later in this Note, there are options for binding ADR methods as well. *See* discussion *infra*, Part VIII.

⁵³ If any court would potentially have jurisdiction, it would most likely be the International Court of Justice (ICJ). However, there is an inherent problem with the qualification of judges sitting on the ICJ to interpret and rule on extremely scientific and technical data. *See* discussion *infra*, Part VII (discussing the advantages of third-party conciliators with expertise in the disputed subject matter).

ADR would seem to be a better way to equitably decide these cases, especially if there were to be overlapping claims without conclusive scientific evidence. A binding multi-party suit with fewer winners than losers could leave the “losing” countries with an especially jaded feeling about the whole situation. ADR is appropriate in this case because it offers non-binding strategies⁵⁴ that would give participating countries some sufficient say in the final outcome.

Proponents of ADR claim that parties that choose ADR methods tend to reach settlements that are “more creative, satisfactory and lasting than those imposed by the court.”⁵⁵ Further, ADR has been known to reduce costs and delays associated with litigation.⁵⁶ That being said, while there is no reason to rush a decision in the instant case, the potential for extensive delay could be detrimental to all of the countries who are depending on potential resources to bolster their oil supply as well as their economy.

ADR also gives the parties more “control” over the procedure and outcome of the resolution process.⁵⁷ Litigation is often very frustrating in that the process is largely dictated by long-established court rules, and the outcome is more often a function of how the case was presented, how the witnesses performed and, unfortunately, the opinions of the presiding judge.⁵⁸ ADR encourages the parties to dictate the process on a case-by-case basis, which allows the parties to decide on the best procedure in light of the particular conflict.⁵⁹

There is also the relationship-building aspect to ADR.⁶⁰ Often, the confrontation that occurs in litigation may drive the parties further apart.⁶¹ While there is certainly confrontation within ADR processes, the parties are often working together to reach an

⁵⁴ Negotiation, mediation, and conciliation will be discussed in more detail later in this Note.

⁵⁵ HENRY J. BROWN & ARTHUR L. MARRIOTT, *ADR PRINCIPLES AND PRACTICE* 13 (2d ed. 1999). Specifically, ADR can be used by practitioners to foster problem-solving approaches aimed at creating “win-win” situations that are more amenable to the parties and foster a sense of empowerment and involvement in the final settlement. *Id.*

⁵⁶ *Id.* at 14 (the authors continue that, in the American legal system, litigation costs are debilitatingly high, costs are not necessarily recoverable, and trial delays are extensive).

⁵⁷ MACKIE ET AL., *supra* note 52, at 143.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

agreement, as opposed to competing against each other.⁶² In sum, ADR has the potential to give “parties more power and greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance cooperation and to be conducive to the preservation of relationships.”⁶³

There are also forms of ADR that are binding on the parties.⁶⁴ For many disputes, a binding decision decreases some of the benefits discussed above.⁶⁵ However, it can be beneficial to have binding decisions in cases where mutual agreement or negotiation seems unlikely. Such might be the case here, as there are five countries disputing claims. A binding method of ADR also brings with it a potential scapegoat⁶⁶ for parties on the shorter end of the stick.⁶⁷ Due to the greater adversarial nature of the process, a party has less to explain if a panel rules against them than if that same country negotiated an unfavorable—although maybe more realistic—settlement.⁶⁸

UNCLOS, suggests procedures similar to those of particular ADR methods.⁶⁹ Under the treaty, countries with claims are required to submit their claims to the Commission on the Limits of the Continental Shelf.⁷⁰ However, the Commission is not as powerful as the treaty attempts to make it sound. While article 76 re-

⁶² MACKIE ET AL., *supra* note 52, at 144. The authors concede that the atmosphere during ADR cases can undoubtedly reach high levels of tension and aggression. However, they posit that the process serves to contribute to, rather than destroy the parties’ relationships. *Id.*

⁶³ BROWN & MARRIOT, *supra* note 55, at 15.

⁶⁴ This note will discuss the use of arbitration as a binding ADR method. *See infra* Part VIII.

⁶⁵ Namely, a binding arbitration is not necessarily a settlement, and involves less “negotiating” between the parties, as an arbitration panel has the final and binding opinion on the matter. There is no chance for the parties to bargain after the decision has been made, which may create the same “win-loss” mentality as litigation. *See* What is Arbitration?, <http://www.mediate.com/articles/grant.cfm> (last visited Apr. 9, 2009).

⁶⁶ *See infra* note 100 (pertaining to a mediator’s role as “Scapegoat/Lightning Conductor/Sponge”).

⁶⁷ This being because of the finality and binding nature of the settlement.

⁶⁸ Either way, ADR methods, different from litigation, often allows both parties to “win a little,” as opposed to potentially losing it all. *See generally* BROWN & MARRIOT, *supra* note 55.

⁶⁹ UNCLOS, *supra* note 17, at part XV, art. 279, requires that disputing parties settle disputes by any agreeable peaceful means. UNCLOS, though, does advocate Conciliation (Annex V), Arbitration (Annex VII), and Special Arbitration (Annex VII).

⁷⁰ *Id.* at part VI, art. 76, para. 8 (requiring that parties claiming continental shelves exceeding the regular 200 mile limit, must submit their claims to the Commission (set up under Annex II of UNCLOS) who is to make recommendations on the outer limits of the shelf to be considered and hopefully accepted by the claiming party).

quires claiming parties to submit to the Commission, the findings of the Commission are strictly *recommendations*, not legally binding decisions.⁷¹ Only the disputing parties can make a binding decision.⁷² In short, the submitting state can choose to honor the recommendations of the Commission or to ignore them.⁷³ In the face of an unfavorable recommendation, it seems obvious what would happen.

On a different front, since the dispute here involves multiple countries that have conflicting claims, there is a distinct chance that, after submission to the Commission, there could potentially be overlapping results. For example, if the Lomonosov, or some other ridge, was shown to be a part of the continental shelf of all of the claiming countries, the treaty points to article 83⁷⁴ which, in oversimplified terms, calls for disputing parties to come to an agreement on their own.⁷⁵ If they cannot do so, the treaty points them to other settlement options laid out in part XV of the treaty.⁷⁶

As a general principle, UNCLOS stipulates that disputing parties ought to settle their disputes by any number of “peaceful means.”⁷⁷ The treaty gives the parties the freedom to choose their

⁷¹ *Id.* at Part VI, art. 76, para. 8, which reads in relevant part: “The Commission shall make recommendations to coastal States on matters related to the establishment of outer limits of their continental shelf. The limits of the shelf *established by a coastal State on the basis of these recommendations shall be final and binding*” (emphasis added).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See UNCLOS, *supra* note 17, at part IV, art. 83 (requesting that countries with overlapping claims should negotiate a settlement amongst themselves).

⁷⁵ *Id.*

⁷⁶ *Id.* at para. 2. Unfortunately, the treaty creates an escape clause for parties with article 83 disputes. In part XV, article 298, par. 1(a)(i), the treaty allows countries with legitimate overlapping claims (as described in article 83), limited opportunities to opt out of the mandatory dispute settlement procedures described in part XV. UNCLOS, part XV, art. 298, par 1(a)(i). Also, UNCLOS, part XV, art. 279 requires that disputing parties settle disputes by any agreeable peaceful means. UNCLOS, though, does advocate Conciliation (Annex V), Arbitration (Annex VII), and Special Arbitration (Annex VII). See *supra* note 69 and accompanying text.

⁷⁷ UNCLOS, *supra* note 17, at part XV, art. 279 states in pertinent part:

States parties shall settle any dispute between them concerning the interpretation of the convention by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter.

Id. See also U.N. Charter art. 2, para. 3 (“All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”). Article 33, alluded to in the provision, names acceptable forms of peaceful means: “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” *Id.* at art. 33, para. 1.

own method for deciding the dispute amicably, as long as they agree on the method.⁷⁸ The treaty, though, lists many of its own procedures for settling disputes in part XV. Specifically, when parties are unable to come to an agreement themselves, they are urged⁷⁹ to submit their claims to binding adjudication.⁸⁰ The treaty creates its own Tribunal,⁸¹ but the parties are not required to submit to it, as UNCLOS allows for the use of other qualifying arbitral tribunals.⁸² The disputing countries then submit their claims to the agreed upon tribunal and a binding decision can be made. While this is certainly a possibility for solving disputes, there is a potential problem with getting parties to agree on a tribunal or method for settlement.⁸³ Also, as Professor Posner notes, international adjudication—by any method—is rarely as effective as it looks on paper and can be extremely slow,⁸⁴ which thwarts one of the major goals and benefits of ADR.

It is quite obvious that an Arctic land grab—like the nineteenth century imperial land grab—would not be beneficial for anyone, nor is it likely.⁸⁵ Either way, it is very important to the global oil market for the involved parties to come to some mutually ac-

⁷⁸ *Id.* at part XV, art. 280.

⁷⁹ UNCLOS, *supra* note 17. So long as they do not opt out of this provision under an article 298 exception. *See supra* note 76.

⁸⁰ *See* UNCLOS, *supra* note 17, at Part XV, art. 287, para. 1. The treaty provides that:

[A] state shall be free to choose . . . one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Id. In short, disputing parties have a choice as to where they want to submit the dispute, so long as the arbitral tribunal meets the requirements of the statute.

⁸¹ *Id.* at annex VI. This sets forth the composition, objectives, and rules governing The International Tribunal for the Law of the Sea.

⁸² *See supra* note 80 (discussing text of UNCLOS, part XV, art. 287, par. 1, dealing with a ratifying state's ability to choose where to submit a dispute, as long as it is an acceptable procedure under UNCLOS).

⁸³ *See supra* note 76 (discussing potential for countries to opt out of provisions requiring binding adjudication).

⁸⁴ Posner, *supra* note 36.

⁸⁵ "According to Peter Croker of the UN Commission on the Limits of the Continental Shelf, the Arctic Sea Grab is not a repeat of the 19th century imperial land grab." Paul Reynolds, *The Arctic's New Gold Rush*, BBC NEWS, Oct. 25, 2005, <http://news.bbc.co.uk/2/hi/business/4354036.stm> (last visited Sept. 14, 2007). According to Croker, "[p]eople have bought into the mechanism for settling disputes and to some extent we will be used" (referring to the Commission on the Limits of the Continental Shelf). *Id.*

ceptable agreement. As mentioned earlier, this is not a situation well-suited for some kind of we win-you lose scenario. This being the case, using established ADR methods is the most likely way to get the disputing parties into negotiations that will lead to useful, proactive and agreeable settlements. These methods will now be looked at in more detail.

V. NEGOTIATION

Negotiation, the most basic of Alternative Dispute Resolution procedures, is defined as a “[b]ilateral or multilateral process in which parties who differ over a particular issue attempt to reach agreement or compromise over that issue through communication.”⁸⁶ It is the most frequently used method of ADR and is often considered the first step in attempting to resolve any dispute.⁸⁷ Its popularity generally stems from the fact that “it is the most flexible, informal, party-directed, closest to the parties’ own circumstances and control, and can be geared to each party’s own concerns.”⁸⁸ The process itself generally involves two or more parties that “meet together in good faith to identify and discuss the issues at hand, present facts and supporting data, arrive at mutual solutions, and abide by the outcome.”⁸⁹ Negotiation is usually a confidential proceeding with minimal third-party involvement.⁹⁰ It is normally voluntary and any solutions reached are generally non-binding.⁹¹ Further, negotiation is something that most people have been doing all of their lives.⁹²

In the current situation, with five disputing parties, it is unlikely that this method would be the most practical or beneficial. If anything, it seems likely that the parties with more international, regional and military power would end up being the big winners of

⁸⁶ Douglas H. Yarn, *DICTIONARY OF CONFLICT RESOLUTION* 314 (1999).

⁸⁷ Jay E. Grenig, *ALTERNATIVE DISPUTE RESOLUTION* 25 (3d ed. 2005).

⁸⁸ MACKIE, ET AL., *supra* note 52, at 11. Aspects that are flexible include, “location, timing, agenda, subject-matter and participants,” among others. *Id.*

⁸⁹ Grenig, *supra* note 87, at 25.

⁹⁰ Yarn, *supra* note 86, at 314.

⁹¹ Grenig, *supra* note 87, at 25.

⁹² See BROWN & MARRIOT, *supra* note 55, at 103. Negotiation is also considered a “business method,” and as such, is standard in all forms of commercial and non-commercial interactions amongst companies and individuals. MACKIE, ET AL., *supra* note 52, at 11. In short, everyone from children to professionals use negotiation on a regular basis, and so this more structured form of a basic human process is often the first place to which feuding parties look. *Id.*

any resolutions achieved via negotiation.⁹³ A resolution reflecting this type of negotiation, where one or more countries bully the other into an agreement,⁹⁴ is not only unfair, but does not seem to be very peaceful, either. As such, while a peaceful and equitable resolution via negotiation would be an enormous plus, it seems relatively improbable.⁹⁵

VI. MEDIATION

More likely to be applicable would be mediation, as it essentially embodies the techniques of negotiation, while adding the presence of a neutral third-party whose goal is to facilitate an acceptable settlement.⁹⁶ Mediation has been defined as a “facilitative process in which the disputing parties engage the assistance of an impartial⁹⁷ third-party, the mediator, who helps them to try to ar-

⁹³ See Posner, *supra* note 36. Posner believes that any type of negotiated settlement will reflect each particular country's bargaining power. Basically, he posits that whichever country is the strongest, will prevail. He furthers that the country that can most effectively extract deposits while using their navy to keep others out will end up winning the battle for the Arctic (or at least come out with the lion's share of the territory). In this particular situation, he points towards the Russians as particularly suited to emerge on top if it were to come to this. While the United States and others may attempt to put pressure on Russia in order to prevent this, he does not think that any of these disputes will lead as far as war. If anything, Posner predicts added tension between the disputing parties, a tension that would lead to making the extraction of any seabed resources that much more risky.

⁹⁴ Despite the voluntary nature of negotiation giving each party the ability to walk away at any time, proponents of ADR warn against situations where one or more parties are substantially more powerful than any of the others. See MACKIE, ET AL., *supra* note 52, at 140 (“[a] party which is perceived to have limitless resources to pursue or resist litigation can often exploit its advantage, thereby forcing the weaker party into a compromise at a figure below that which they could reasonably expect in litigation.”). The United States, in particular, is probably in the best economic position out of any of the other parties. However, the argument could be made that with a product like oil, where the countries with the most economic clout are also the largest consumers, the need to get at the resources quickly and efficiently would create a dynamic of cooperation amongst countries that may have less economic power, but are more suited to access and exploit the seabed resources. Since the United States is not the best situated to access and exploit the resources, this could negate at least some of the disparities in economic power between the countries.

⁹⁵ See *infra* Part IX for examples of disputes where negotiation was used, at least in part.

⁹⁶ MACKIE, ET AL., *supra* note 52, at 11.

⁹⁷ As Brown & Marriot point out, impartiality is vital to the success of the process. They make a distinction between “impartiality” and “neutrality,” explaining that “neutrality” has been accepted to mean that the mediator will not bring his or her personal values into the process. However, “impartiality,” described as having no interest in the outcome or any connection to the disputing parties, according to the authors, is the more realistic standard between the two. See BROWN & MARRIOT, *supra* note 55, at 128–29.

rive at an agreed resolution of their dispute.”⁹⁸ This Note will focus generally on two kinds of mediation: *facilitative* and *evaluative*.⁹⁹ The differences between them reflect the role of the mediating third-party.¹⁰⁰

In facilitative mediation, the mediator’s role is to generally enhance the parties’ own efforts to come to a resolution.¹⁰¹ The mediator is advised to use particular techniques, skills and procedures to help disputing parties understand each other’s positions and aid in the culmination of mutually agreeable settlements.¹⁰²

In evaluative mediation, the mediator makes an effort to assist the parties “by introducing a third-party view over the merits of the case or of particular issues between the parties.”¹⁰³ However, in neither of these models is it the mediator’s responsibility, nor does he or she have the authority, to make binding decisions.¹⁰⁴ His or her job is simply to aid the disagreeing parties in doing so.¹⁰⁵

⁹⁸ *Id.* at 127.

⁹⁹ MACKIE, ET AL., *supra* note 52, at 11.

¹⁰⁰ Mackie refers to a non-inclusive list of some of the many hats a mediator must wear. They include: *Process Manager* (setting out the nature of the proceedings and stages of the negotiation); *Facilitator* (promoting effective bargaining and exchange of ideas while easing hostile or tense atmospheres); *Problem Solver* (get the parties to think “outside the box,” by suggesting innovative problem solving methods and referring the parties to outside sources where appropriate); *Information Gatherer* (mediators may be used to fill gaps in knowledge between the parties when there have been individual meetings, or propose more efficient strategies for information exchange via joint meetings with the parties); *Reality Tester* (while a mediator should certainly remain impartial, playing “devil’s advocate” or questioning parties’ arguments in order to get the party to review its evidence and rethink its arguments is an effective tool to add perspective to an unyielding party); *Scapegoat/Lightning Conductor/Sponge* (mediation, more so than litigation, gives the aggrieved parties a chance to be heard, and in the event of an unfavorable settlement, a person to blame. This can be a very useful outlet for parties who feel as if they would not have a voice in the restrictive procedures of litigation); *Observer and Witness* (someone silently watching the parties interact and in the position to intervene were things to get out of control. Also, a person who can relate back the happenings to parties in subsequent private meetings); *Messenger* (a person to relay information to adverse parties in the event that the parties are not convened in the same room. This is usually a relatively inefficient role for the mediator if the end goal is to the parties to come to some agreement); *Deal Maker* (mediator can himself make suggestions for offers or counter-offers that might be agreeable on the basis of each party’s interests); *Post-Breakdown Resource* (if the mediation does not end in a settlement, the mediator has been there and is a reliable resource for later discussions or negotiations). *Id.* at 182–188.

¹⁰¹ *Id.* at 11.

¹⁰² BROWN & MARRIOT, *supra* note 55, at 127.

¹⁰³ MACKIE, ET AL., *supra* note 52, at 11.

¹⁰⁴ BROWN & MARRIOT, *supra* note 55, at 127. It should be noted, however, that in some forms of evaluative mediation, it is suggested that at the end of all negotiations, the mediator give a written *suggestion* or *recommendation* as to how the parties should decide based on the mediator’s view of the facts. MACKIE, ET AL., *supra* note 52, at 12.

¹⁰⁵ Brown & Marriot, *supra* note 55, at 127.

The idea behind having a mediator is that the parties, having a very strong interest in the outcome, cannot separate themselves from the conflict in order to figure out an efficient conclusion.¹⁰⁶ Mediation, thus, stresses the new dynamic that an educated but impartial third-person creates.¹⁰⁷ Through the use of a mediator, the goal is for *the parties* to create a consensual agreement. Not only is this empowering for the parties, but mutual consent to the agreement is the only way a binding outcome can be reached.¹⁰⁸

Still, while this is undoubtedly a step in the right direction, it is not the best way for the parties in this particular dispute to resolve their issues. A mediator or other neutral third-party is certainly necessary, but since this conflict involves international treaties and in-depth scientific and technological research to substantiate claims, a more sophisticated and comprehensive method is necessary. Further, a particular type of mediator would be required (if not a whole panel). This mediator must be a neutral, skilled negotiator while also having the knowledge to understand the scientific basis for the claims. Such people do exist; in fact, many of them may sit on the Commission for the Limits on the Continental Shelf, which was created by UNCLOS pursuant to Annex II, articles 1–9.¹⁰⁹ That being said, a more comprehensive and research-based type of non-adjudicative ADR, conciliation, would be better suited for the current dispute.

VII. CONCILIATION

As noted above, conciliation¹¹⁰ is a more comprehensive type of mediation in that it affords the third-party a more active role than even the most involved evaluative mediators.¹¹¹ The goal of

¹⁰⁶ *Id.* at 128.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 129.

¹⁰⁹ The Commission is made up of twenty-one experts in the field of geology, geophysics or hydrography. They are elected by parties to the Convention. UNCLOS, *supra* note 17, at annex II, art. 2.

¹¹⁰ It should be noted that the word “conciliation” is often used synonymously with “mediation.” Grenig, *supra* note 87, at 26. However, “conciliation,” as it is used here, is a form of ADR where the conciliator has the more active role of evaluating the facts and issues of the dispute and making a proposal for a suggested resolution based on the merits. *Id.* The definition used for this Note is more common in international ADR cases, such as the one here. *Id.* at 380.

¹¹¹ Grenig, *supra* note 87, at 26 (“[i]n another form of conciliation, unlike a mediator, a conciliator is called upon to make a nonbinding recommendation or finding that often concerns the

conciliation is for a neutral third-party—or commission¹¹²—to gather, examine, and clarify the facts in dispute and then make educated proposals in an effort to bring the parties to a mutually agreeable and just resolution.¹¹³ This gives the third-party a chance to independently examine the facts of a particular dispute, a luxury likely not afforded in mediation. From there, the conciliator is expected to make concrete, fact-based proposals for the parties to use in deciding the final settlement.¹¹⁴ Conciliation, as a non-adjudicatory method, is by definition non-binding on the parties. While the conciliator makes a formal determination, it is up to the parties to agree to be bound by such a determination.¹¹⁵

Of course, a conciliator in this dispute would require knowledge about the situation as well as the capability of understanding and interpreting highly technical, scientific data. In that vein, conciliators could—and probably should—include members of the Commission on the Limits of the Continental Shelf. Members of the International Tribunal for the Law of the Sea may also be viable conciliators. Also possible as conciliators, but probably less informed of the technical aspects, would be members from the International Court of Justice. Regardless of whom the parties choose, qualified people are needed to analyze the evidence and make useful recommendations.¹¹⁶ As such, conciliation is particularly appropriate for disputes like the current one, which involves

factual or legal issues in dispute, as well as what the conciliator considers is the appropriate resolution of the dispute to be.”). See *supra* Part VI, for a discussion of *evaluative* mediation.

¹¹² A useful clarification of the role of a “conciliation commission” is as follows:

[t]he task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavor to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make a decision.

See Yarn, *supra* note 86, at 106 (quoting Revised Geneva Gen. Act for the Pac. Settlement of Int'l Disp., 1949, art. 15, para. 1). A less inclusive description of the role of the conciliation commission in UNCLOS states the function as, “[t]he commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view of reaching an amicable settlement.” UNCLOS, *supra* note 17, at annex V, art. 6.

¹¹³ Yarn, *supra* note 86, at 106–07.

¹¹⁴ *Id.* at 106.

¹¹⁵ *Id.* at 106–07. Further, the quasi-judicial procedures of conciliation (i.e., the independent fact finding) help give the conciliator's determinations persuasive weight, which may make parties more likely to accept them. *Id.* at 107.

¹¹⁶ In fact, due to the nature of the resources involved and the potential monetary gain from such resources, it is unlikely that disputing countries would be willing to make many concessions without substantive scientific evidence in support of an adverse claim. Again, this is another major upside of conciliation.

highly technical information that many lay-persons would not understand.

Because of its advantages, UNCLOS acknowledges conciliation as useful, and suggests it as a dispute resolution mechanism in article 284 of the Treaty.¹¹⁷ However, the submission of a dispute to conciliation requires that all parties consent to such treatment.¹¹⁸ Provisions like this make conciliation—or any method of dispute resolution, for that matter—tougher to administer, but, in comparison to the other methods, it certainly has promise for bringing about an equitable solution.

VIII. ARBITRATION

Arbitration is another form of Alternative Dispute Resolution that could be used to resolve the current problem. On its face, it is similar to conciliation, as it is a method where parties submit a dispute to an impartial person or persons and, after a hearing of the facts, an independent judgment is made.¹¹⁹ Further, like conciliation, the decision of an arbitration panel can be non-binding,¹²⁰ however, only binding arbitration will be discussed here. In binding arbitration, there is a hearing¹²¹ where the arbitration panel hears evidence from both sides and then delivers a decision that is final *and* binding on the parties.¹²² Arbitration awards, to some extent, carry even more finality than litigation, as arbitration clauses often require the parties to agree to give up their right to

¹¹⁷ UNCLOS, *supra* note 17, at part XV, art. 284, para. 1. In fact, the Treaty designates a whole section to the procedures and rules of conciliation. *Id.* at annex V.

¹¹⁸ *Id.* at part XV, art. 284, para. 2.

¹¹⁹ See Grenig, *supra* note 87, at 32.

¹²⁰ See *id.* at 32–33. Non-binding arbitration is similar in some ways to conciliation. It allows for evidence and testimony to be heard by a neutral arbitrator or panel of arbitrators. The decision is advisory only, to be used (or disregarded) by the parties in an effort to facilitate an agreement. *Id.*

¹²¹ The hearing is generally preceded by a number of stages that look similar to modern trial procedures. There is a stage where each party gets to state its claims and subsequently, its responses. There is normally some form of discovery where relevant documents are produced and inspected. From there, a hearing with oral statements, questioning of witnesses, and testimony are heard. Finally, based on all that is brought forth in the hearing, the arbitrator or arbitration panel renders its decision as well as the underlying reasons. Daniel Renken, *The ABC's of ADR. A Comprehensive Guide to Alternative Dispute Resolution*, http://www.mediate.com/articles/renkenD.cfm#_edn34 (last visited Nov. 14, 2007).

¹²² Grenig, *supra* note 87, at 32.

appeal the award.¹²³ While the procedures followed may, in certain respects, mimic that of a normal trial, arbitration procedures are generally much less formal.¹²⁴ Interestingly, arbitrators are not necessarily required to follow the law; instead, they must base decisions on what the arbitration clause in the contract says, which can include “business custom and practice, technical insight, or broad principles of equity and justice.”¹²⁵ However, once a decision has been reached, the award is as enforceable as any other court judgment.¹²⁶

Arbitration has very beneficial aspects that make it applicable to the current dispute. Specifically, the binding nature of arbitration often creates a judgment that is given the same force as a judicial order.¹²⁷ Further, since arbitration offers the parties the ability to pick their own arbitrators,¹²⁸ there is a better chance that the arbitrators will be more knowledgeable about the subject matter.¹²⁹ Even more important, arbitration, like conciliation, receives the benefit of an independent judgment made by an impartial third-party following a hearing of the facts.¹³⁰

As mentioned above, arbitrators are allowed to make decisions based on general ideas of equity and fairness as well as common business practice.¹³¹ Therefore, arbitrators have more leeway to make an award that benefits all parties instead of just one. Basically, the flexibility and relaxation of formal legal rules can lead to a “splitting the baby,” or a compromise that allows all parties to leave the arbitration feeling like they can claim at least a small vic-

¹²³ See What is Arbitration?, *supra* note 65. Review of an arbitration award is often only available in situations where there is clear evidence of wrongdoing, for example, corruption or fraud.

¹²⁴ *Id.* Specifically, the parties are allowed the freedom to agree on their own procedure and to choose the degree of the adversarial nature of the proceedings. See BROWN & MARRIOT, *supra* note 55, at 53.

¹²⁵ Jay E. Grenig, *An Introduction to the use of Alternative Dispute Resolution to Resolve Insurance Disputes*, 51 FED’N DEF. & CORP. COUNSEL Q. 239 (2001).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *supra* Part VII for a similarly discussed dispute, such as the one here, highly specialized arbitrators would be necessary for an equitable and fair outcome. These arbitrators would need to be able to understand and interpret the highly technical and scientific data to be offered at the arbitration hearing. As such, arbitrators in this situation could very likely include members of the Commission on the Limits of the Continental Shelf and/or members of the International Tribunal for the Law of the Sea.

¹³⁰ Grenig, *supra* note 87 at 32.

¹³¹ *Id.*

tory.¹³² Finally, consistent with ADR principles, arbitration can usually be heard more quickly than litigation, the adjudication is often less time consuming, and costs are usually lower than those incurred through standard litigation.¹³³

On the other hand, the problems with arbitration are often the same as those that make litigation less appealing. As mentioned above, while arbitration is normally not as drawn out as a trial, it still ends with a binding decision (adjudication), which brings back the arguments against “win-loss.”¹³⁴ In other words, the advantage of ADR, other than binding arbitration, is that it allows the disputing parties to decide for themselves—albeit often with the help of a neutral third-party—creating a sense of justice, compromise and satisfaction with the result.¹³⁵ Non-binding arbitration and conciliation—as well as the other discussed ADR methods—offer this, while litigation and binding arbitration may not.

However, these relative weaknesses do not outweigh the advantages in many situations. This is especially true when dealing with multiple parties—such as those in this dispute—who are unlikely to be able to come to an equitable agreement themselves. The “binding” aspect of arbitration gives the dispute finality, something that nothing short of litigation—after an exhaustion of potential appeals—is guaranteed to do. Further, a binding decision negates (at least in part) the argument that the parties with the most international power and ability to police the Arctic will take the lion’s share of the seabed.¹³⁶ The binding decision can be enforced if not adhered to,¹³⁷ thereby evening the score for countries that would normally have less bargaining power in non-adjudicatory proceedings. As such, arbitration may very well be the most effective method when dealing with disputes that are unlikely to be settled by the parties themselves, or disputes where a conciliation “recommendation” would most likely not be ratified by the disputing parties.

¹³² See *What is Arbitration?*, *supra* note 65.

¹³³ *Id.*

¹³⁴ See *supra* Part IV.

¹³⁵ BROWN & MARRIOT, *supra* note 55, at 13.

¹³⁶ See Posner, *supra* note 93 (discussing Professor Posner’s theory on the interaction of economic bargaining power, military strength, and extraction capability in relation to who will take the lion’s share of the disputed Arctic Sea). See also *supra* note 94, for another short discussion of the role economic power plays in this particular dispute.

¹³⁷ Grenig, *supra* note 87, at 32.

IX. PAST DISPUTES

A. The Jan Mayen Continental Shelf Dispute: Conciliation

In late May of 1980, the governments of Iceland and Norway, after a time of dispute, came to an agreement with regard to the claims by each for fishery zones and exclusive continental shelf rights.¹³⁸ Norway recognized Iceland's claim to an EEZ of 200 miles; however, no agreement was reached on Iceland's claim to an EEZ beyond the 200 mile limit which included an area near Jan Mayen Island, a volcanic island under Norwegian sovereignty, located about 290 miles northeast of Iceland.¹³⁹ Pursuant to a draft of UNCLOS,¹⁴⁰ the two countries decided to put the dispute before a Conciliation Commission¹⁴¹ in order to consider the dividing line for the continental shelf area between Iceland and Jan Mayen Island.¹⁴²

The Commission, aided by a team of talented geophysicists and geologists, was instructed to analyze the evidence¹⁴³ and give a recommendation which the countries hoped would be a final solution.¹⁴⁴ The commission was told to specifically take into account Iceland's strong economic interests in the area, existing geological and geographical factors, and other special factors.¹⁴⁵ Of the disputed area, the Jan Mayen Ridge—which was determined to be a prolongation of neither Iceland nor Jan Mayen Island—was the most important part of the dispute, as it was seen as the most likely area for hydrocarbon potential.¹⁴⁶

Following the geological assessment, the Commission first stated that the Jan Mayen Ridge was its own micro-continent and,

¹³⁸ 1 RESEARCH CENTRE FOR INTERNATIONAL LAW, UNIVERSITY OF CAMBRIDGE 683 (Grotius Pubs. 1992) (hereinafter RESEARCH CENTRE).

¹³⁹ *Id.*

¹⁴⁰ The final draft of UNCLOS was not put into effect until December 10, 1982. See UNCLOS, *supra* note 17.

¹⁴¹ The countries, pursuant to provisions within the draft of UNCLOS, negotiated acceptable procedural issues and ended up using three mediators, one from each of the respective countries and another from the United States. See RESEARCH CENTRE, *supra* note 138, at 686.

¹⁴² *Id.* at 683.

¹⁴³ *Id.*

¹⁴⁴ RESEARCH CENTRE, *supra* note 138, at 686–87 (discussing the procedures of the conciliation commission). Further, while conciliation inherently includes a *non-binding* recommendation, the countries involved agreed that the resulting recommendation would be given due regard. *Id.* at 686.

¹⁴⁵ *Id.* at 683.

¹⁴⁶ See RESEARCH CENTRE, *supra* note 138, at 683.

as stated above, not considered a natural prolongation of Iceland or Jan Mayen Island (Norway).¹⁴⁷ Next, since the Commission considered the Jan Mayen Ridge the most likely place for hydrocarbon development, they set out to divide it in a way that would be equitable to both countries, and reflect their individual capabilities and needs.¹⁴⁸ As such, the Commission suggested a “joint-cooperation” model to guide the countries in assessing, developing and drilling in the specified area.¹⁴⁹ The model suggested an equitable way to decide how to divide the potential resources and split the area into zones where each country would have a more advantageous share.¹⁵⁰ The Commission also recommended that the two countries work together to elicit outside funding—specifically from oil companies who would stand to gain from the discovery of hydrocarbon deposits—as they would be beneficial in aiding the large financial undertaking that hydrocarbon development requires.¹⁵¹

¹⁴⁷ *Id.* at 694.

¹⁴⁸ *Id.* at 684.

¹⁴⁹ *Id.* The crux of the idea was basically to give each country a stake in the potential resources. The commission suggested different stages of development, starting with joint-exploration of the area, followed by the negotiation of details for joint-ventures agreements if hydrocarbons were deemed likely to lie within the shelf. Instead of creating a whole new arbitrary demarcation line, the commission kept the demarcation line at the same spot as the Icelandic EEZ line. North of the line, Norwegian legislation was to apply, south of the line, Icelandic law was to apply. *Id.*

¹⁵⁰ *Id.* at 704–08. The specified area carried over into the 200 mile EEZ of Iceland, so where the specified area was overlapping with Iceland’s EEZ, the commission suggested a 75–25% interest in deposits that might be found in the area in favor of Iceland over Norway. For the part of the specified area beyond Iceland’s 200 mile limit, the commission suggested Norway should take 75–25% over Iceland. The commission stipulated that these percentages were negotiable by the parties. This would give Norway a larger interest in the specified area overall, which seems unfair, but the commission took into account the fact that Norway was the more capable of the two countries to handle hydrocarbon excavation. The commission also stated that the countries were supposed to fund the development of the area in proportion to a similar percentage. Particularly favorable to Iceland, due to the enormous costs of exploration and development, the commission suggested that Iceland be given the option to forego any participation in Norwegian exploration efforts north of the Icelandic EEZ line, but still reserve the right to their 25% interest if any exploration is found to have positive results. If Iceland were to exercise this option and participate in the development stage of the hydrocarbon excavation, they would be required to reimburse Norway the 25% they forwent while sitting out of the exploration stage. Therefore, while Norway may have more to gain overall, the commission suggested that they potentially take more of the risk, due to their greater economic wealth and greater experience in hydrocarbon exploration and excavation. On the southern side of the demarcation line (within Iceland’s EEZ), Iceland would not be required to give Norway the same risk-free exploration. Instead, if Norway opted out of the exploration stage of the southern side of the demarcation line, Iceland would not be required to let them have their interest in the development stage, regardless if Norway reimbursed Iceland for their proportion of the exploration costs.

¹⁵¹ See RESEARCH CENTRE, *supra* note 138, at 704–08. Each country would be responsible for costs equal to the agreed upon interest in potential hydrocarbon discoveries. This would,

In short, the Jan Mayen Ridge dispute illustrated a situation where a conciliation commission was the right choice. The Commission, intelligently made up of representatives from both countries, mapped out an acceptable and equitable resolution, taking into account each country's economic interests and strengths. This shows that conciliation is a viable option for the current dispute. However, it must be noted that the Jan Mayen dispute included only two countries. The dispute over the Arctic Shelf, involving five countries, might be harder to settle in this manner as it would require substantially more inter-nation negotiation and cooperation. Nonetheless, the success of the Jan Mayen case is encouraging from a methodological and logistical perspective.

B. The Bay of Biscay Dispute: Collaboration, Negotiation and Collective Submission

Another preferable way to approach the Arctic issue would be the way that France, Ireland, Spain, and Britain recently resolved their dispute over claims made on the continental shelf offshore from the Bay of Biscay.¹⁵² In 2003, the four countries began consultations and together obtained geophysical and geological data to map the limits of the continental shelf.¹⁵³ In May of 2006, once they had compiled enough data, the countries made a group submission to the Commission on the Limits of the Continental Shelf.¹⁵⁴ This collaborative effort marked the first joint submission

pursuant to the commission, likely be roughly 25% to Iceland and 75% to Norway. *See also supra* note 150 (discussing proportionate interest percentages).

¹⁵² *See* Owen Bowcott, *EU Countries Seek to Annex Lucrative Tract of Atlantic Seabed: UK, Ireland, France and Spain in Mining Rights Bid: Environmentalists Accuse Coalition of 'Land Grab'*, *THE GUARDIAN*, June, 6, 2006, at 23. The disputed area is a shelf under the Celtic sea and the Bay of Biscay. It covers over 30,000 square miles of sea bed. The claimed area is seemingly beyond the depth that is possible to be reached via current commercial extraction (the seabed is nearly 5,000 meters from the surface, a distance over twice as deep as is viable for current commercial abstraction), but with the technology expected to increase in the coming years, these depths may become realistic in the near future. Ireland's Foreign Minister, Dermot Ahern explained the bold submission as such:

We probably don't have either the technologies or the economies of scale to work in such waters [now]. But as energy prices continue to soar and our ability to tap resources is realised, our exploration rights to such a vast expanse of ocean will pay dividends for generations to come.

Id.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

to the Commission under UNCLOS and, if successful, would give the involved nations a potential stronghold on whatever hydrocarbons lie beneath the seabed.¹⁵⁵ The idea behind the joint submission was a shared belief that once granted the collaborative prospecting rights to the area, they could effectively negotiate an equitable way to subdivide the area amongst themselves.¹⁵⁶ Further, by submitting as a group, the countries sought to thwart any international resistance.¹⁵⁷

To the nations involved in the gathering of the data for submission, the experience itself was hailed as a success.¹⁵⁸ However, just because a submission was made, does not mean that the battle is over. The Commission on the Limits of the Continental Shelf could hypothetically reject the entire submission, or find the data insufficient and require the countries to resubmit at a later date, as they have done with Russia in the past.¹⁵⁹ Regardless, the mixture of cooperation and negotiation is an outcome to which disputing countries should aspire. Of course, the proximity of the countries to each other and the disputed area, as well as the generally amicable political relations between the involved nations made the Biscay dispute a rather novel situation. Nonetheless, the Biscay resolution certainly gives hope to parties involved in multi-country disputes, even if not necessarily applicable to the countries disputing the rights to the Arctic seabed.¹⁶⁰

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Bowcott, *supra* note 152. Regardless of the intentions to ward off any international resistance, the submission is already being called “unfair” by large environmental groups such as Greenpeace. Simon Reddy, Greenpeace’s policy director for the United Kingdom, called the submission unfair and “basically a land grab.” *Id.*

¹⁵⁸ Woodard, *supra* note 2 (“‘We did research cruises together and there was a tremendous amount of bonhomie,’ recalls Professor Parson. ‘It was practical and pragmatic all around.’”).

¹⁵⁹ Russia first submitted to the Commission in 2001, but was told that their data was inconclusive and required to resubmit at a later date. See Wolfe, *supra* note 1.

¹⁶⁰ This is not to say that the five nations in the Arctic dispute could not agree to make some kind of group submission. However, it seems relatively unlikely. The competition and scars from the Cold War continue to linger between the United States and Russia. Further, in the Arctic region, the United States and Canada have consistently argued about rights to the North West Passage, an important shipping lane, open during only a few short weeks in the summer. See Reynolds, *supra* note 85. The United States is also currently at odds with Canada over claims for seabed in the Beaufort Sea. Canada and Denmark have been involved in a long-time dispute over Hans Island, which is a tiny (roughly 100 meters in width) island between Canada’s Ellesmere Island and Greenland, a territory of Denmark. Despite its minuscule size, its possession could be vital in future exploration and exploitation rights. With seemingly much more at stake in the Arctic shelf dispute, it seems unlikely that a peaceful joint submission would occur. *Id.*

C. The 1959 Antarctic Treaty: Negotiation and a Moratorium on Claims

The most extreme example of dispute and subsequent resolution occurred in Antarctica. Although not a seabed-specific dispute, the Antarctic Treaty warrants discussion due to its relevant location and because, much like the area near the Arctic Shelf, it is believed to be rich in mineral resources.¹⁶¹ Prior to the Treaty in 1959, twelve countries were active in the scientific exploration and research of Antarctica.¹⁶² Of these twelve, nine laid territorial claims to the area.¹⁶³ By the late 1950s, the countries involved in the research¹⁶⁴ realized that the territorial claims were causing tension that threatened the future of the scientific endeavors in the region.¹⁶⁵ The involved nations jointly decided that it was necessary to put aside legal and political differences to preserve cooperation and research and, as such, set forth on drafting a treaty to govern the international rules pertaining to Antarctica's land, resources, wildlife and the continuation of scientific research.¹⁶⁶

What came out of this was the 1959 Antarctic Treaty,¹⁶⁷ which set aside (or "froze") all territorial disputes and claims, and subsequently, claims to mineral deposits (specifically hydrocarbons). The Treaty further stipulated that no further claims would be made by any party to the Treaty while the Treaty is in force.¹⁶⁸ Still enforced today, the 1959 Antarctic Treaty is the ultimate example of countries putting aside their differences and negotiating in the

¹⁶¹ ROBERTO BARGAGLI, *ANTARCTIC ECOSYSTEMS: ENVIRONMENTAL CONTAMINATION, CLIMATE CHANGE, AND HUMAN IMPACT* 6–9 (1995) (stating that in the 1970s, many oil companies explored Antarctica and claimed that since it was once a part of a supercontinent that included countries and continents such as South America, Africa, Arabia, Madagascar, India, Ceylon, Australia and New Zealand, that it would have similar mineral make-up. This led explorers to posit that there were indeed areas on the continent that would likely yield valuable extractable minerals. Opponents to this theory claim these predictions are nothing more than speculations, unfounded due to the lack of geological speculation).

¹⁶² The Antarctica Treaty Explained—British Antarctic Survey, http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/explained.php (last visited Mar. 10, 2009). (The twelve countries were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the United Kingdom, the United States, and the USSR).

¹⁶³ *Id.*

¹⁶⁴ The research program was entitled the International Geophysical Year (IGY). *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ The Antarctic Treaty (1959)—Full Text—British Antarctic Survey, (entered into force June 23, 1961), available at http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/update_1959.php.

¹⁶⁸ See *id.* at Part IV.

name of the greater cause of environmental longevity. While it is true that the Treaty does not exactly *resolve* the disputes, it successfully puts them on hold indefinitely, which allows the issues to be put off until a time when they are more manageable and necessary.

This is certainly something that, if mirrored with the Arctic Shelf dispute, could be highly beneficial for the parties. This way, no country feels as if any of the others are gaining anything at their expense. Also, this type of solution would leave time for cooperative international exploration and mapping of the area, which might make future negotiations proceed more smoothly.

Further, one must consider the reality of the current situation: away from the massive sheets of ice and extreme weather conditions that obstruct access to areas where hydrocarbon potential is high, there are a number of other environmental factors that come into play.¹⁶⁹ Among other things, exploration and excavation of seabed hydrocarbons would require “full-scale international cooperation with local indigenous communities, environment [organizations], government agencies, and academic institutions dealing with environment research, climate change, oceanography, [and] marine biology”¹⁷⁰ In short, getting to these hydrocarbons is a thing of the future, and a treaty modeled on the Antarctic Treaty would grant the involved countries time to do further research and come up with the most suitable and equitable distribution for the disputed area.

D. Arbitration Cases

Since the instatement of UNCLOS, the disputes that have gone to arbitration regarding delimitation of the continental shelf have been few and far between. However, one notable case before the passing of UNCLOS was the Anglo-French Arbitration in 1977.¹⁷¹ This conflict centered on a disputed continental shelf boundary in the English Channel.¹⁷² After over ten years of failed negotiations, the parties agreed to arbitrate, requesting that the arbitration panel¹⁷³ decide the boundary in accordance with interna-

¹⁶⁹ Yenikeyeff & Krysiak, *supra* note 9, at 9.

¹⁷⁰ *Id.*

¹⁷¹ See RESEARCH CENTRE, *supra* note 138, at 353.

¹⁷² *Id.*

¹⁷³ The arbitration panel was made up of five judges. *Id.* at 15. Two of the judges, the English and French representatives, were members of the International Court of Justice (ICJ).

tional law.¹⁷⁴ The details of the disagreement and subsequent decision were highly technical,¹⁷⁵ but the eventual method of resolution was truly innovative. As evidenced by the ten-plus years of unsuccessful negotiation, it was clear that England and France were not going to settle the problem without the help of a third-party with the power to make a binding decision. As such, the parties agreed to arbitration.¹⁷⁶ On June 30, 1977, the award from the Arbitration panel was made, and the case, after years of disagreement, was decided.¹⁷⁷

This particular dispute was a glaring example of a situation that required more structure and outside intervention than offered via simple negotiation. The Arctic conflict will likely be of the same nature. Multiple parties are involved and, in light of the current actions of the involved nations, simple negotiation seems relatively unlikely. Further, because of the particular resources at stake (i.e., oil and hydrocarbons), the rising price of oil, and the daunting truth that at some point, oil will run out, arbitration should certainly be considered as an option.

X. CONCLUSION: ILULISSAT AND THE ROAD AHEAD

The conflict in the Arctic shelf is unlikely to be resolved within the very near future. With five countries currently making claims to extensive parts of the Arctic seabed, there is, inherently, a lot of scientific work that needs to be done. Russia's initiative to 'claim' large parts of the area has sparked much agitation and action amongst the other four involved nations.¹⁷⁸ While war is not a likely outcome, this is a conflict that cannot be ignored.

Fortunately, there have been some encouraging developments since the conflict began in August of 2007. Roughly nine months later, on May 28, 2008, Canada, Denmark, Norway, Russia and the United States came together for the Arctic Ocean Conference in Ilulissat, Greenland.¹⁷⁹ The goal of the Conference, initiated by

¹⁷⁴ RESEARCH CENTRE, *supra* note 138, at 353.

¹⁷⁵ See *id.* at 353–554 (providing a more detailed discussion of the technical nature of the dispute).

¹⁷⁶ *Id.* at 353.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* Part III.

¹⁷⁹ See Conference Could Mark Start of Arctic Power Struggle, <http://www.canada.com/topics/news/world/story.html?id=d0135cd8-c15a-48a3-9579-0df5f8e185c1> (last visited Apr. 12, 2009).

Denmark's Foreign Minister, Per Stig Møller, was to foster unity and cooperation in the Arctic area so as to prevent an environmental catastrophe.¹⁸⁰ The result of the Conference was the short but significant Ilulissat Declaration.¹⁸¹ Most notably, the Declaration states that no new legal framework will be set up to govern the Arctic.¹⁸² Instead, the parties agreed to proceed using the guidelines set forth in UNCLOS.¹⁸³ While this Declaration is not necessarily ground-breaking, it is encouraging in that it signals a willingness of the involved parties to work together in amicably settling the dispute over the Arctic.

In accordance with UNCLOS, ADR is a potential solution to the problem. More specifically, the two most effective methods would likely be conciliation or arbitration. Both methods are forms of evaluative ADR,¹⁸⁴ granting a panel of conciliators or arbitrators—with the help of specialized geoscientists—the necessary ability to analyze the evidence and make an equitable decision.¹⁸⁵ Due to the number of parties involved, arbitration would probably be more efficient than conciliation.¹⁸⁶ Without a binding judgment (as with conciliation), there is the inevitable risk that one or more

¹⁸⁰ See Conference on the Arctic Ocean, http://arctic-council.org/article/2008/5/conference_on_the_arctic_ocean (last visited Apr. 12, 2009).

¹⁸¹ The Ilulissat Declaration (2008), (entered into force May 28, 2008) available at <http://www.sikunews.com/art.html?catid=2&artid=4950>.

¹⁸² See *id.*

¹⁸³ See *id.*

Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.

This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean. We will keep abreast of the developments in the Arctic Ocean and continue to implement appropriate measures.

Id.

¹⁸⁴ An *evaluative* process is described as a third-party process where the disputing parties have less control over the outcome, and the third-party, in many cases, a mediator, conciliator, or arbitrator, expresses opinions on the merits of the case and advises how the dispute should be settled. In evaluative processes, third-parties may also work with the parties to set agendas, improve communication between parties, and clarify the issues. See Grenig, *supra* note 87, at 28. See also MACKIE, ET AL., *supra* note 52, at 12–13.

¹⁸⁵ See *supra* Parts VII & VIII.

¹⁸⁶ Conciliation, discussed *supra*, in Part VII, as compared to arbitration, is a form of non-binding ADR. See Yarn, *supra* note 86, at 106–07. As such, in the end, it is up to the parties to decide to accept or not to accept the recommendations of the conciliation panel. *Id.*

of the involved parties would not abide by the result, which could nullify all the hard work, time, effort and money expended by the parties in an attempt to reach a resolution. In fact, due to the potential hydrocarbon yield of the disputed area, and the significance of the oil in the future of the world economy, potential recommendations seem highly likely to be disputed. Arbitration, with its binding authority, would be the only real way to enforce a decision.

Optimistically, a peaceful, equitable resolution is not out of the question, but, as noted above, it will require an enormous amount of cooperation. While a resolution similar to the 1959 Antarctic Treaty¹⁸⁷ is probably unlikely, there is reason to hope that the parties, with the help of a highly organized and motivated third-party and a binding dispute resolution method, can solve this problem in a peaceful, timely and equitable manner.

¹⁸⁷ See *supra* Part IX, Sec. C.

