

# A CALL FOR MEDIATED SOLUTIONS TO ARCTIC REGION DISPUTES

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## I. INTRODUCTION

The “Age of the Arctic” has arrived.<sup>1</sup> Over the past decade,

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\* Juris Doctor, Benjamin N. Cardozo School of Law, June 2010. The majority of the research for this Note was conducted during the 2008-09 academic year. Despite changes in the Arctic region's political landscape since that time, the primary thesis advocating for consensus-based mediation still applies.

diverse areas of the Arctic region<sup>2</sup> have increasingly become the focus of parties asserting competing claims over energy,<sup>3</sup> mineral,<sup>4</sup> fishery,<sup>5</sup> military,<sup>6</sup> navigational,<sup>7</sup> and territorial<sup>8</sup> rights. There is significant agreement among climatologists and other scientists that the Earth shows increasing evidence of warming caused by human activities.<sup>9</sup> The United Nations has declared climate

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<sup>1</sup> Christopher C. Joyner, *The Age of the Arctic: Hot Conflicts and Cold Realities*, 85 AM. J. INT'L L. 584, 584 (1991) (book review); Oran R. Young, *The Age of the Arctic*, 61 FOREIGN POL'Y, 160-79 (Winter 1985-86).

<sup>2</sup> There is no fixed definition of Arctic region borders; sixty degrees latitude is sometimes used to delineate the borders of the Arctic. Melissa A. Verhaag, Note, *It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment*, 15 GEO. INT'L ENVTL. L. REV. 555, 558 (2003).

<sup>3</sup> The United States Global Survey estimates that the region north of the Arctic Circle contains approximately "13% of the world's undiscovered oil." *Arctic 'Has 90bn Barrels of Oil'*, BBC NEWS, July 24, 2008, <http://news.bbc.co.uk/2/hi/business/7523118.stm>.

<sup>4</sup> Paul Reynolds, *Russia Ahead in Arctic 'Gold Rush'*, BBC NEWS, Aug. 1, 2007, [http://news.bbc.co.uk/2/hi/in\\_depth/6925853.stm](http://news.bbc.co.uk/2/hi/in_depth/6925853.stm).

<sup>5</sup> Jeremy Faith, Comment, *Enforcement of Fishing Regulations in International Waters: Piracy or Protection, Is Gunboat Diplomacy the Only Means Left?*, 19 LOY. L.A. INT'L & COMP. L. REV. 199, 204 (1996).

<sup>6</sup> For a brief overview of the importance of the Arctic as a military zone during the Cold War, when, for example, the United States and the Soviet Union resisted efforts to curtail the movements of their nuclear submarines operating beneath the polar icecap, see Dr. Robert Huebert, *The Law of the Sea and the Arctic: An Unfulfilled Legacy*, in 18 OCEAN YEARBOOK 193, 196-209 (Aldo Chircop & Moira L. McConnell eds., 2004).

<sup>7</sup> The most prominent example of an Arctic navigational (and also territorial) dispute relates to the status of the Northwest Passage, with Canada asserting that this waterway is part of its internal waters and most other states viewing it as international strait subject to UNCLOS's Article 38 (which guarantees the right of free passage so long as it is continuous, peaceful, and expedient). Stephanie Holmes, Comment, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 324 (2008).

<sup>8</sup> For a map detailing Arctic territorial and jurisdictional disputes, see *Arctic Map Shows Dispute Hotspots*, BBC NEWS, Aug. 5, 2008, <http://news.bbc.co.uk/2/hi/science/nature/7543837.stm> (follow link to "Maritime jurisdiction and boundaries in the Arctic region") [hereinafter *Arctic Map*]; Nathaniel Gronewold, *Geopolitics: As the Planet Heats Up, So Do Long-Slumbering Disputes*, CLIMATEWIRE, June 13, 2008, <http://www.eenews.net/public/climatewire/2008/06/13/1>; Joyner, *supra* note 1, at 584.

<sup>9</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 2, [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf) (stating that "[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level"); UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, CURRENT EVIDENCE OF CLIMATE CHANGE, [http://unfccc.int/essential\\_background/feeling\\_the\\_heat/items/2904.php](http://unfccc.int/essential_background/feeling_the_heat/items/2904.php) (last visited Sept. 28, 2009); B. EKURZEL AND S.J. HASSOL, FINDINGS OF THE IPCC FOURTH ASSESSMENT REPORT (May 2007), [http://www.ucsusa.org/assets/documents/global\\_warming/ucs-ipcc-wg2-300dpi.pdf](http://www.ucsusa.org/assets/documents/global_warming/ucs-ipcc-wg2-300dpi.pdf); Univ. of Illinois at Chicago, *Scientists Agree Human-induced Global Warming is Real, Survey Says*, SCIENCEDAILY, Jan. 21, 2009, <http://www.sciencedaily.com/releases/2009/01/090119210532.htm>. For a brief overview of the scientific evidence of global warming, see *Evidence of a*

change a “flagship issue”<sup>10</sup> and undertaken numerous initiatives to address it, including the United Nations Framework Convention on Climate Change<sup>11</sup> (which produced the Kyoto Protocol to the United Nations Framework Convention on Climate Change<sup>12</sup>) and programs launched from the United Nations Development Programme.<sup>13</sup>

Global warming is evidenced in part by the melting of sea ice in the Arctic region, which many scientists agree is likely to continue.<sup>14</sup> The once-fabled Northwest Passage has now become a reality,<sup>15</sup> and by 2013 the Arctic Ocean may be entirely ice-free

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*Warming Earth*, THE WOODS HOLE RESEARCH CENTER, [http://www.whrc.org/resources/online\\_publications/warming\\_earth/scientific\\_evidence.htm](http://www.whrc.org/resources/online_publications/warming_earth/scientific_evidence.htm) (last visited Sept. 28, 2009). For a contrary view questioning the consensus about and reality of “human-caused” global warming, see generally U.S. SENATE AND PUBLIC WORKS COMMITTEE, U.S. SENATE MINORITY REPORT: MORE THAN 700 INTERNATIONAL SCIENTISTS DISSENT OVER MAN-MADE GLOBAL WARMING CLAIMS, SCIENTISTS CONTINUE TO DEBUNK “CONSENSUS” IN 2008 & 2009 (2008), available at [http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=83947f5d-d84a-4a84-ad5d-6e2d71db52d9](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=83947f5d-d84a-4a84-ad5d-6e2d71db52d9). There is “a small but vocal number of scientists in climate and climate-related fields that disagree with the consensus view” regarding global warming. Univ. of Illinois at Chicago, *Global Warming Controversy*, SCIENCEDAILY, [http://www.sciencedaily.com/articles/g/global\\_warming\\_controversy.htm](http://www.sciencedaily.com/articles/g/global_warming_controversy.htm) (last visited Sept. 27, 2009).

<sup>10</sup> In his concluding remarks to the United Nations General Assembly, the U.N. Assembly President, Srgjan Kerim, stated that “climate change has become the flagship issue” of the current Assembly and told delegates that “[y]ou have sent a strong political message that the time for talk has passed—that the time for action has begun . . .” U.N. News Centre, *UN Assembly Wraps Up Annual High-Level Debate with Calls for Action—President* (Oct. 3, 2007), [www.un.org/apps/news/story.asp?NewsID=24178&Cr=general&Cr1=debate](http://www.un.org/apps/news/story.asp?NewsID=24178&Cr=general&Cr1=debate).

<sup>11</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

<sup>12</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

<sup>13</sup> U.N. News Centre, *New UN Initiative to Help Governments Tackle Climate Change Problems* (Nov. 5, 2008), <http://www.un.org/apps/news/story.asp?NewsID=28824&Cr=climate&Cr1=change>.

<sup>14</sup> Andrew C. Revkin, *No Escape: Thaw Gains Momentum*, N.Y. TIMES, Oct. 25, 2005, available at [http://www.nytimes.com/2005/10/25/science/earth/25arctic.html?\\_r=1](http://www.nytimes.com/2005/10/25/science/earth/25arctic.html?_r=1) (stating that many scientists have determined that the loss of the Arctic’s summer sea ice is “past the point of no return”); Dr. Barry Hart Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL’Y REV. 1, 1 (2005) (stating that “within 50-100 years the polar sheet will probably disappear”); Scott Borgerson, *Sea Change*, ATLANTIC MONTHLY, Nov. 2008, available at <http://www.theatlantic.com/doc/200811/map-arctic> (stating that “[t]he polar ice cap has lost up to half its thickness near the North Pole in just the past six years”). “Temperatures in the region are rising at a rate faster than in any other area on earth.” DR. ROB HUEBERT & BROOKS B. YEAGER, A NEW SEA: THE NEED FOR A REGIONAL AGREEMENT ON MANAGEMENT AND CONSERVATION OF THE ARCTIC MARINE ENVIRONMENT 4 (2008), [http://assets.panda.org/downloads/a\\_new\\_sea\\_jan08\\_final\\_11jan08.pdf](http://assets.panda.org/downloads/a_new_sea_jan08_final_11jan08.pdf).

<sup>15</sup> In August 2008, a Canadian cargo ship became the world’s first commercial vessel to

during summer months,<sup>16</sup> giving rise to increased oil and gas development, mining, military operations,<sup>17</sup> shipping,<sup>18</sup> fishing, tourism,<sup>19</sup> and other uses.<sup>20</sup> Ironically, these activities, made possible in part by the effects of global warming in freeing up ice-covered waters, may further contribute to harmful climate change.<sup>21</sup> Additionally, increased usage and development of the Arctic could upset the delicate ecological balance that characterizes the region.<sup>22</sup> Many Arctic inhabitants, including indigenous communities, find their lifestyles rapidly changing as

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traverse the Northwest Passage. Morten Andersen, *A First in Commercial Arctic Sailing*, UNITED NATIONS CLIMATE CHANGE CONFERENCE (Dec. 8, 2008), <http://en.cop15.dk/news/view+news?newsid=362>. Likewise, the Northern Sea Route, which connects the Pacific and Atlantic oceans along the Siberian coast, has also become navigable, permitting the circumnavigation of the North Pole for the first time in 125,000 years. Paul Koberstein, *A Harsh New Reality Transforms the Arctic*, CASCADIA TIMES, 2009, available at <http://www.times.org/archives/2009/harsh1.html>. See Richard Morgan, *Today, Countries Battle for a Piece of the Arctic. Tomorrow? The Moon*, WIRED (Nov. 27, 2007), available at [http://www.wired.com/science/space/magazine/15-12/st\\_essay](http://www.wired.com/science/space/magazine/15-12/st_essay).

<sup>16</sup> Jonathan Amos, *Arctic Summers Ice-Free 'by 2013'*, BBC NEWS, Dec. 12, 2007, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/sci/tech/7139797.stm>.

<sup>17</sup> Jonathan Pearlman & Ben Cubby, *Defen[s]e Warns of Climate Conflict*, SYDNEY MORNING HERALD, Jan. 7, 2009, <http://www.smh.com.au/news/environment/global-warming/defence-warns-of-climate-conflict/2009/01/06/1231004021036.html?page=fullpage#contentSwap1> (quoting AUSTRALIAN DEFENSE FORCE WHITE PAPER, CLIMATE CHANGE, THE ENVIRONMENT, RESOURCES AND CONFLICT (2007) ("Climate change is unlikely to increase the risk of major conflict, although there is one exception. The Arctic is melting, potentially making the extraction of undersea energy deposits commercially viable. . . . Conflict is a remote possibility if these disputes are not resolved peacefully.")). Some predict global climate change will also increase conflict over water resources. PACIFIC INSTITUTE, CLIMATE CHANGE AND TRANSBOUNDARY WATERS, available at [http://www.pacinst.org/reports/transboundary\\_waters/index.htm](http://www.pacinst.org/reports/transboundary_waters/index.htm).

<sup>18</sup> *First Commercial Ship Sails through Northwest Passage*, CBC NEWS (Nov. 28, 2008), <http://www.cbc.ca/canada/north/story/2008/11/28/nwest-vessel.html>.

<sup>19</sup> See HUEBERT & YEAGER, *supra* note 14, at 11 n.23 (discussing the increase in ships carrying tourists in Canadian Arctic waters between 2004 and 2005). "[P]olar tourism has surged in the past decade, potentially promoting environmental degradation . . . in the Arctic." U.N. News Centre, *Melting Ice Will Affect Hundreds of Millions Globally*, *New UN Report Says* (June 4, 2007), <http://www.un.org/apps/news/story.asp?NewsID=22773&Cr=environment&Cr1=>.

<sup>20</sup> John B. Bellinger, III, Legal Adviser, Remarks at the Law of the Sea Institute: The United States and the Law of the Sea Convention (Nov. 3, 2008), <http://www.state.gov/s/rls/111587.htm>.

<sup>21</sup> "[T]here is something paradoxical about seeking in the Arctic the very carbon fuels that are melting the northern ice. . . . The rush to exploit Arctic resources can only perpetuate the vicious cycle of human-induced climate change," says Mike Townsley of Greenpeace International." James Graff, *Fight for the Top of the World*, TIME, Sept. 19, 2007, available at <http://www.time.com/time/world/article/0,8599,1663445-2,00.html>.

<sup>22</sup> See Revkin, *supra* note 14.

ice thins, permafrost melts,<sup>23</sup> and wildlife is displaced.<sup>24</sup>

The circumpolar Arctic region consists of approximately equal portions of land and ocean.<sup>25</sup> Eight states possess territory within the Arctic: Canada, Denmark (through Greenland), Norway, the Russian Federation, the United States, Sweden, Finland, and Iceland.<sup>26</sup> Five of these states—Canada, Denmark, Norway, Russia, and the United States (Arctic Five)—have coastlines with the Arctic Ocean. The potential for conflict in the region has increased as the Arctic Five have focused on establishing claims over portions of the petroleum- and mineral-rich Arctic Ocean seabed and subsoil.<sup>27</sup> The warming of the Arctic and the rush to assert sovereignty claims in this region<sup>28</sup> have given rise to the question of how to move forward in recognizing rights in and instituting protection for a globally significant<sup>29</sup> and environmentally vulnerable<sup>30</sup> bioregion.

In May 2008, amid growing concern over the possibility of military confrontation, the Arctic Five issued a statement<sup>31</sup> declaring their intention to peaceably resolve any overlapping territorial claims and asserting their commitment to the legal framework established by the United Nations Convention of the Law of the Sea (UNCLOS or Convention).<sup>32</sup> While some lauded

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<sup>23</sup> Margot Roosevelt, *Bubbles of Warming, Beneath the Ice*, L.A. TIMES, Feb. 20, 2009, available at <http://www.latimes.com/news/science/environment/la-na-global-warming22-2009feb22,0,646220.story>.

<sup>24</sup> “Species that depend on the ice for their subsistence and survival—including humans, polar bears, walrus and ice seals—are facing significant disruptions in their lives.” Koberstein, *supra* note 15.

<sup>25</sup> “The circumpolar Arctic covers 14.8 million square kilometers of land and 13 million square kilometers of ocean.” *Global Significance of Arctic Biodiversity*, ARCTICPORTAL.ORG, [http://cbmp.arcticportal.org/index.php?option=com\\_content&view=article&id=5&Itemid=5](http://cbmp.arcticportal.org/index.php?option=com_content&view=article&id=5&Itemid=5) (last visited Feb. 27, 2011).

<sup>26</sup> Verhaag, *supra* note 2, at 556.

<sup>27</sup> Graff, *supra* note 21.

<sup>28</sup> *Id.*

<sup>29</sup> *Global Significance of Arctic Biodiversity*, *supra* note 25.

<sup>30</sup> *Arctic Biodiversity Under Pressure*, ARCTICPORTAL.ORG, [http://cbmp.arcticportal.org/index.php?option=com\\_content&view=article&id=6&Itemid=6](http://cbmp.arcticportal.org/index.php?option=com_content&view=article&id=6&Itemid=6) (last visited Feb. 27, 2011).

<sup>31</sup> See The Ilulissat Declaration, Arctic Ocean Conference, Greenland, May 27-29, 2008, <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> [hereinafter Ilulissat Declaration].

<sup>32</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. As stated in the convention:

[UNCLOS] developed . . . new legal concepts such as exclusive economic zones [EEZ], archipelagic status for island states, the special status of the deep-sea bed, and the outer edge of the continental shelf. It created new institutions to regulate these concepts—an International Seabed Authority

this announcement as a commitment by regional states to the amicable settlement of potentially harmful jurisdictional conflicts, others decried it as a “carving up” of territory that does not belong solely, if at all, to the formal parties to the dispute.<sup>33</sup> Further criticism was leveled at the Arctic Five for excluding the other three Arctic states, local inhabitants, and other stakeholders from playing a more central role in determining how to protect the delicate Arctic bioregion from harmful exploitation and unsustainable development.<sup>34</sup>

As discussed in this Note, the fate of the region need not be driven by jurisdictional claims of the Arctic Five, but should instead be determined through a consensus-based approach involving a broad range of stakeholders. This Note examines some of the complex issues inherent in the dispute over portions of the Arctic Ocean, and proposes that mediation initiated by the United Nations may be an appropriate and effective way of creating a just and sustainable future for the entire region, its inhabitants, and the planet as a whole. It further suggests that the question of “who owns the Arctic” would best be viewed from a “worldcentric” perspective: one that reaches beyond a narrow focus on the rights of nation-states in recognition of the actual and symbolic significance of the Arctic region for all humanity.<sup>35</sup>

Part II.A examines the recent background of the Arctic dispute, describes the stakeholders involved, and discusses the legal mechanisms governing the region, particularly UNCLOS. Part II.B introduces mediation and its relevance to international environmental disputes, including the use of mediation by the United Nations, and discusses the concept of a worldcentric perspective. Part III begins by surveying the range of approaches to dispute resolution, and suggests that an interest-based approach to the region would be preferable to a rights-based approach under UNCLOS. It further maintains that a perspective which gives primacy to nation-state jurisdictional claims is an

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(ISA), a Commission on the Limits of the Continental Shelf (CLCS) and an International Tribunal on the Law of the Sea (ITLOS)—to act as an important part of the Convention’s comprehensive dispute settlement system . . . .

David Freestone, *A Decade of the Law of the Sea Convention: Is it a Success?*, 39 GEO. WASH. INT’L L. REV. 499, 499 (2007).

<sup>33</sup> See Peter Gorrie, *UN to Play Mediator in Arctic Disputes*, TORONTO STAR, May 29, 2008, available at [www.thestar.com/sciencetech/article/432671](http://www.thestar.com/sciencetech/article/432671); Julian Borger, *Arctic Declaration Denounced as Territorial ‘Carve Up,’* THE GUARDIAN, May 29, 2008, available at <http://www.guardian.co.uk/environment/2008/may/29/fossilfuels.poles>.

<sup>34</sup> See Borger, *supra* note 33.

<sup>35</sup> For a discussion of the concept of “worldcentric,” see *infra* Part II.B.

inappropriate lens through which to view the issue of how to protect and manage the delicate Arctic bioregion. Part III.A argues that the legal framework established by UNCLOS is inadequate to meet the challenges found in the Arctic because it may lead to the marginalization of critical stakeholders, make creative outcomes less likely, and will take too much time. Part III.B explores how mediation could be helpful in resolving the Arctic dispute, discusses the advantages of mediation over adjudicatory-like processes, and describes the Great Bear Rainforest mediation—an example of an environmental dispute resolved through a consensus-based mediation process which demonstrated worldcentric values. It further considers objections to the use of mediation and examines how these concerns might be met by a worldcentric mediation approach led by a well-respected and influential United Nations-sponsored mediator. Part IV concludes the Note by stressing the importance of addressing international environmental issues from a perspective that gives primacy to the long-term sustainability of the planet and all its inhabitants.

## II. BACKGROUND

### A. *The Battle Over the Arctic*

The Arctic is heating up in more ways than one—the prospect of an ice-free Arctic has set off a race of states and indigenous peoples to establish sovereignty rights over portions of the region.<sup>36</sup> There are several different disputes among states that have made claims to territories within Arctic maritime waters.<sup>37</sup> Although some of these disputes are decades old,<sup>38</sup> tensions have notably increased in the past several years, particularly between members of the Arctic Five asserting sovereignty claims over portions of the “high seas.”<sup>39</sup> Denmark claimed jurisdictional

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<sup>36</sup> See Op-Ed., *A Mad Scramble for the Shrinking Arctic*, N.Y. TIMES, Dec. 11, 2008, available at [http://www.nytimes.com/2008/09/10/opinion/10iht-edarctic.1.16040367.html?\\_r=1](http://www.nytimes.com/2008/09/10/opinion/10iht-edarctic.1.16040367.html?_r=1).

<sup>37</sup> See *Arctic Map*, *supra* note 8.

<sup>38</sup> For instance, the United States and Canada have openly disputed the status of the Northwest Passage since at least 1985, when the United States sent a Coastguard icebreaker through the strait without asking Canada for permission. See Michael Byers, *The Need to Defend our Northwest Passage*, THE TYEE, Jan. 30, 2006, available at <http://thetyee.ca/Views/2006/01/30/DefendNorthwestPassage>.

<sup>39</sup> “High seas” are “waters beyond the national jurisdiction of the [c]oastal [s]tate . . . .”

rights to the North Pole in 2004.<sup>40</sup> In August 2007, Russia garnered worldwide attention by planting its flag on the seabed beneath the North Pole and declaring it would increase its military presence in the region.<sup>41</sup> Canada, the United States, and Norway (the three other Arctic coastal states) have also asserted sovereignty claims over portions of the Arctic Ocean.<sup>42</sup>

The Arctic region is regarded as an environmentally sensitive bioregion—territory more appropriately characterized as sharing ecological and geographical features than geopolitical borders.<sup>43</sup> In 1991, the eight Arctic-rim states adopted the Arctic Environmental Protection Strategy (AEPS),<sup>44</sup> which “recognized the need to cooperate in identifying and combating risks to the Arctic.”<sup>45</sup> The Ottawa Declaration of 1996 established the Arctic Council, an intergovernmental forum composed of the eight Arctic states and indigenous peoples with legally recognized territorial or other rights in the Arctic region.<sup>46</sup> The Arctic Council was

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THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (A HISTORICAL PERSPECTIVE), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited Sept. 24, 2010).

<sup>40</sup> Dubner, *supra* note 14, at 1; Julian Coman, *Denmark Causes International Chill by Claiming North Pole*, DAILY TELEGRAPH, Oct. 17, 2004, available at <http://www.telegraph.co.uk/news/worldnews/1474377/Denmark-causes-international-chill-by-claiming-North-Pole.html>.

<sup>41</sup> Miriam Elder, *Russia Threatens to Seize Swathe of Arctic*, DAILY TELEGRAPH, Sept. 28, 2008, available at <http://www.telegraph.co.uk/news/worldnews/europe/russia/2976009/Russia-threatens-to-seize-swathe-of-Arctic.html>; Randy Boswell, *Russia to Increase its Arctic Military Presence*, CANWEST NEWS SERVICE, June 11, 2008, <http://www.canada.com/topics/news/world/story.html?id=e701e1d7-812a-4f81-af00-619bcbced92e&k=5804>; Reynolds, *supra* note 4.

<sup>42</sup> Jupiter Kalambakal, *Arctic Nations Heighten Military Presence as Row Continues over Sea Lanes, Oil Reserves*, AHN, Jan. 16, 2008, <http://www.allheadlinenews.com/articles/7009737607>; HUEBERT & YEAGER, *supra* note 14, at 4.

<sup>43</sup> See Bio-Glossary, European Commission, [http://ec.europa.eu/research/biosociety/library/glossarylist\\_en.cfm?Init=B](http://ec.europa.eu/research/biosociety/library/glossarylist_en.cfm?Init=B) (last visited Sept. 28, 2009) (defining bioregion as a “territory defined by a combination of biological, social, and geographic criteria, rather than geopolitical considerations; generally, a system of related, interconnected ecosystems”); see also Christine M. Reed, *Mediation and the New Environmental Agenda*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 6 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

<sup>44</sup> Institutional Aspects of Sustainable Development in Canada, <http://www.un.org/esa/agenda21/natlinfo/countr/canada/inst.htm> (last visited Sept. 28, 2009).

<sup>45</sup> Stephanie L. Pfirman et al., Op-Ed., *We Have to Protect No-Longer-Pristine Arctic*, N.Y. TIMES, Dec. 29, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE3D81630F93AA15751C1A964958260>.

<sup>46</sup> Richard J. Ansson, Jr., *The North American Agreement on Environmental Protection and the Arctic Council Agreement: Will These Multinational Agreements Adequately Protect the Environment?*, 29 CAL. W. INT'L L.J. 101, 103 (1998); Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, <http://arctic-council.org/article/about> (last visited Feb. 28, 2009) (follow link to “Declaration on the Establishment of the Arctic

“charged with recommending, implementing, and developing environmental policies [to protect the Arctic’s pristine environment].”<sup>47</sup> The AEPS and cooperative agreements issued by the Arctic Council have been characterized by some as “soft law,” lacking enforcement mechanisms adequate to protect the Arctic region from potentially harmful exploitation.<sup>48</sup>

Unlike Antarctica, which has been protected by a framework of treaties<sup>49</sup> prohibiting mining and other industrial activities unrelated to scientific research,<sup>50</sup> only one international treaty—the 1973 Agreement on the Conservation of Polar Bears<sup>51</sup>—protects the entire Arctic region.<sup>52</sup> Claims over the Arctic are subject to a variety of international laws and regimes, including UNCLOS,<sup>53</sup> which has been called a “constitution of the oceans.”<sup>54</sup> UNCLOS “[d]efines rights [and] responsibilities of countries in: sea usage, business regulations, environmental protection and marine resource management.”<sup>55</sup>

UNCLOS established exclusive economic zones (EEZ):<sup>56</sup>

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Council” hyperlink). Only the eight Arctic member states have voting rights in the Arctic Council. About Arctic Council, Oct. 22, 2007, <http://arctic-council.org/article/about>. Permanent participants actively participate in all meetings and activities of the Arctic Council. *Id.* Observer status is open to: non-Arctic states; global and regional intergovernmental organizations; and non-governmental organizations. *Id.*

<sup>47</sup> Ansson, *supra* note 46.

<sup>48</sup> See HUEBERT & YEAGER, *supra* note 14, at 23.

<sup>49</sup> Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. The Antarctic Treaty created the Antarctica Treaty System. Paul Lincoln Stoller, *Comment, Protecting the White Continent: Is the Antarctic Protocol Mere Words or Real Action?*, 12 ARIZ. J. INT’L & COMP. L. 335, 366 n.3 (1995).

<sup>50</sup> Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455, 1461, 1991 WL 626652. Article 7 of the Protocol bans mining unrelated to scientific research for an indefinite period of time. Stoller, *supra* note 49, at 362, 366 n.4.

<sup>51</sup> Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918, 13 I.L.M. 13.

<sup>52</sup> Verhaag, *supra* note 2, at 556. Global treaties by definition also cover the Arctic region; only the Agreement on the Conservation of Polar Bears specifically targets the Arctic. HUEBERT & YEAGER, *supra* note 14, at 53.

<sup>53</sup> See UNCLOS, *supra* note 32; see also Holmes, *supra* note 7; John B. Bellinger, Op-Ed., *Treaty on Ice*, N.Y. TIMES, June 23, 2008, available at <http://www.nytimes.com/2008/06/23/opinion/23bellinger.html>; Don Rothwell, *Arctic Ocean Seabed Rights: The Last Great Land Grab?*, JURIST, Mar. 1, 2008, <http://jurist.law.pitt.edu/forumy/2008/03/arctic-ocean-seabed-rights-last-great.php>.

<sup>54</sup> Tullio Treves, *United Nations Convention on the Law of the Sea*, United Nations Audiovisual Library of International Law, [http://untreaty.un.org/cod/avl/pdf/ha/uncls/uncls\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/uncls/uncls_e.pdf).

<sup>55</sup> SIMON A. MASON ET AL., CTR. FOR SEC. STUD. & SWISSPEACE, LINKING ENVIRONMENT AND CONFLICT PREVENTION: THE ROLE OF THE UNITED NATIONS 103 (2008), [http://www.css.ethz.ch/UNstudy\\_Long-June-2008.pdf](http://www.css.ethz.ch/UNstudy_Long-June-2008.pdf).

<sup>56</sup> See UNCLOS, *supra* note 32, part V; *Arctic Map*, *supra* note 8.

offshore territory extending up to two hundred nautical miles from a state's coastline, over which the state has "sovereign rights for the purpose of exploring, exploiting, conserving, and managing living and nonliving resources, whether found in ocean waters, the seabed, or subsoil."<sup>57</sup> The Convention on the Continental Shelf<sup>58</sup> granted coastal states exclusive resource rights over the seabed and subsoil of their continental shelves, to a maximum distance of 200 nautical miles from a coastline.<sup>59</sup> Article 76 of UNCLOS affords a state an opportunity to establish the outer boundaries of its continental shelves up to 350 nautical miles.<sup>60</sup> Within ten years of ratifying UNCLOS, a state may submit geological evidence to the U.N. Commission on the Limits of the Continental Shelf (CLCS) in order to prove that an underwater feature is a "natural prolongation"<sup>61</sup> of its continental shelf.<sup>62</sup> If the CLCS recognizes this feature, the state will have exclusive exploration and exploitation rights to the seabed and subsoil of its "outer continental shelf" (OCS).<sup>63</sup> Territory left unclaimed "becomes part of what is known as 'The Area,' which is administered by the International Seabed Authority (ISA) on behalf of humanity as a whole."<sup>64</sup>

In December 2001, Russia submitted an OCS claim under Article 76 in an effort to expand its sovereignty rights over large

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<sup>57</sup> U.S. COMM'N ON OCEAN POLICY, FINAL REPORT, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 72 (2004), [http://oceancommission.gov/documents/full\\_color\\_rpt/000\\_ocean\\_full\\_report.pdf](http://oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf).

<sup>58</sup> Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 7302.

<sup>59</sup> See HUEBERT & YEAGER, *supra* note 14, at 36.

<sup>60</sup> *See id.* at 35.

<sup>61</sup> Randy Boswell, 'Race for the North Pole is Cancelled,' CANWEST NEWS SERVICE, May 29, 2008, <http://www.canada.com/news/communitybriefs/story.html?id=72471b81-fe28-487f-acb3-fc8bd8b96bdd> [hereinafter Boswell, *Race*].

<sup>62</sup> Reynolds, *supra* note 4.

<sup>63</sup> *See* UNCLOS, *supra* note 32, art. 76, para. 8. Article 76 governs the determination of jurisdictional claims to seabed soil and subsoil beyond a 200 nautical mile limit, but does not govern the water column or areas beyond any state's EEZ or outer continental shelf borders, leaving numerous issues of shipping, fishing, and scientific research unaddressed. Alex G. Oude Elferink & Constance Johnson, *Outer Limits of the Continental Shelf and "Disputed Areas:" State Practice Concerning Article 76(10) of the LOS Convention*, 21 INT'L J. OF MARINE & COASTAL L. 461, 463 (2006); Telephone Interview with Dr. Robert Huebert, Associate Director, Centre for Military and Strategic Studies, University of Calgary, in Calgary, Alberta, Canada (Jan. 12, 2008). Although its scientific determinations have "enormous significance as to the legitimacy of OCS claims", the CLCS does not engage in legal or political disputes, and has thus far avoided making OCS findings that "may result in overlapping claims between two or more states." Rothwell, *supra* note 53.

<sup>64</sup> *Arctic Map*, *supra* note 8 (quoting Martin Pratt, Director of Durham University's International Boundaries Research Unit).

swathes of the Arctic Ocean.<sup>65</sup> In 2002, the CLCS rejected Russia's claim without prejudice.<sup>66</sup> Russia is expected to resubmit its scientific evidence to the CLCS in 2013 in an effort to extend its recognized outer continental shelf out to and beyond the North Pole, adding as much as 460,000 square miles to Russian territory.<sup>67</sup> Russia will reportedly base its claim on an underwater sea feature called the "Lomonosov Ridge," a 1,240 mile-long seabed mountain range, which, if recognized by the CLCS, could extend Russia's continental shelf out to and beyond the North Pole.<sup>68</sup> Canada and Denmark are likewise conducting research in preparation for their OCS submissions, in which they are also expected to claim ownership rights to portions of the Lomonosov Ridge.<sup>69</sup> According to polar experts, "[s]cience and law will only go so far when it comes to defining the undersea boundaries between [these] three nations whose claims . . . are almost certain to overlap near the centre of the Arctic Ocean."<sup>70</sup>

In May 2008, the Arctic Five held the Arctic Ocean Conference (AOC) in Ilulissat, Greenland.<sup>71</sup> The stated purpose

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<sup>65</sup> Rothwell, *supra* note 53. See Comm'n on the Limits of the Continental Shelf (CLCS)—Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Russian Federation, available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_rus.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus.htm). Norway submitted an OCS claim in 2006. Continental Shelf Submission of Norway in Respect of Areas in the Arctic Ocean, the Barents Sea, and the Norwegian Sea: Executive Summary, Oljedirektoratet (2006), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_exec\\_sum.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf) [hereinafter Norway OCS Submission]. Canada's and Denmark's deadlines are 2013 and 2014, respectively. Coalther G. Lathrop, Letter to the Editor, FOREIGN AFF. May-June 2008, available at <http://www.foreignaffairs.com/articles/64298/coalter-g-lathrop-scott-borgerson/the-road-to-the-arctic>.

<sup>66</sup> Marc Benitah, *Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS*, ASIL INSIGHTS, Nov. 8, 2007, available at <http://www.asil.org/insights071108.cfm>.

<sup>67</sup> Mike Nizza, *Russian Scientists Say the Arctic is Theirs*, N.Y. TIMES, June 28, 2007, available at <http://thelede.blogs.nytimes.com/2007/06/28/whats-the-russian-for-santas-work-shop/?pagemode=print>; Zachary Fillingham, *Arctic Ownership Claims*, GEOPOLITICAL MONITOR, Apr. 8, 2009, <http://www.geopoliticalmonitor.com/content/backgrounders/2009-04-08/arctic-ownership-claims>; Nathaniel Gronewold, *Seabed Claims Mount, Swamping U.N. Commission*, E&E PUBLISHING, LLC, May 14, 2009, <http://www.eenews.net/public/Greenwire/2009/05/14/3>.

<sup>68</sup> Nizza, *supra* note 67.

<sup>69</sup> *Id.*

<sup>70</sup> Boswell, *Race*, *supra* note 61. The United States is also mapping geologic formations to determine the extent of its continental shelf. Graff, *supra* note 21. Norway submitted an OCS claim in 2006. See Norway OCS Submission, *supra* note 65.

<sup>71</sup> Denmark Hosts the Five Nations: Arctic Ocean Conference in Greenland, Ministry of Foreign Affairs of Denmark, May 28, 2008, <http://www.ambwashington.um.dk/en/menu/theembassy/news/newsarchive2008/denmarkhoststhefivenationsarcticoceanconferenceingreenland.htm>.

of the meeting was to “discus[s] the framework for the future handling of the possibilities and challenges in and around the Arctic Ocean that arise as a consequence of climate change.”<sup>72</sup> With little explanation, the Arctic coastal states excluded the other Arctic Council states—Iceland, Sweden, and Finland—which do not have coastlines with the Arctic Ocean.<sup>73</sup> Local inhabitants and indigenous groups, including permanent participants of the Arctic Council, were likewise not invited to the AOC.<sup>74</sup>

At the conclusion of the conference, the Arctic Five issued a joint statement, the “Ilulissat Declaration” (Declaration),<sup>75</sup> which maintained that the five coastal states were in a “unique position”

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<sup>72</sup> Conference in Ilulissat, Greenland: Landmark Political Declaration on the Future of the Arctic, <http://www.missionfnnewyork.um.dk/en/menu/dkandtheUN/news/ilulissatgreenland.htm> (last visited Sept. 28, 2009).

<sup>73</sup> *Denmark Defends List of Nations for Arctic Meeting*, CBC NEWS, May 20, 2008, <http://www.cbc.ca/canada/north/story/2008/05/20/arctic-meeting.html>. “Icelandic government officials . . . voiced their concerns about being excluded from Ilulissat, but have since been assured that they aren’t being left out.” *Id.* It is not clear how Sweden and Finland responded; one observer reported that “Danish officials . . . [were] ‘working overtime’ to soothe the feelings of those left out . . .” *Denmark Could Put Canada’s Arctic Ambitions on Ice, Expert Warns*, CANWEST NEWS SERVICE, May 26, 2008, <http://www.canada.com/topics/news/world/story.html?id=c13dcd4b-bc3c-4b70-9486-8b3be3487274>. The responses of these excluded states were less muted prior to a subsequent meeting of the Arctic Five in Chelsea, Canada in March 2010. “[A]ll three have expressed concerns that the Chelsea conference will threaten the existence of the Arctic Council and the larger notion of a global Arctic consensus.” Carl Meyer, *Canada Called Out by Arctic Allies: Iceland, Finland, and Sweden Frustrated at Non-Invitations to Arctic Summit*, EMBASSY, Feb. 17, 2010, <http://www.embassymag.ca/page/view/arctic-02-17-2010>. Some of these countries “believe that a global intertwining of resources, climate and trade render them vulnerable to Arctic [Ocean] policy” decisions by the Arctic Five. *Id.* Iceland’s foreign affairs spokesperson stated that “[t]he waters surrounding Iceland are interlinked with the Arctic Ocean via currents and migrating fish stocks. All decisions on issues concerning the Arctic Ocean can therefore directly influence the livelihood and security of Icelanders.” *Id.* Sweden’s senior Arctic official stated that the Arctic Five, when questioned about their decision to exclude the three non-coastal Arctic states from the Chelsea conference, “cannot give a reply.” *Id.* At the conclusion of the Chelsea conference, U.S. Secretary of State Hilary Clinton unexpectedly criticized Canada for excluding the three non-coastal Arctic states and aboriginal leaders from the meeting. Randy Boswell and Juliet O’Neill, *Clinton Blasts Canada for Exclusivity of Arctic Talks*, March 29, 2010, CANWEST NEWS SERVICE, <http://www.canada.com/news/Clinton+blasts+Canada+exclusivity+Arctic+talks/2740399/story.html>. She stated that “[s]ignificant international discussions on Arctic issues should include those who have legitimate interests in the region . . . and I hope the Arctic will always showcase our ability to work together, not create new divisions.” *Id.*

<sup>74</sup> Indigenous leaders protested their exclusion from the AOC. *See, e.g.,* Liv Inger Somby, *Greenland: Arctic Powers Duel for Energy Wealth*, GALDU, May 29, 2008, <http://www.galdu.org/web/index.php?&odas=2833&giella1=eng>). Indigenous groups harshly rebuked the Canadian government for excluded them from a subsequent meeting of the Arctic Five in Chelsea, Canada. *See Meyer, supra* note 73.

<sup>75</sup> *See Ilulissat Declaration, supra* note 31.

to address many Arctic region issues. The Declaration also: (1) identified UNCLOS as the predominant governing legal regime for the region and countered calls for a new international legal Arctic framework;<sup>76</sup> (2) acknowledged the growing importance of the region in light of global warming; and (3) stated that with increased usage of the area came the potential for environmental damage to the “unique ecosystem” of the Arctic Ocean, “which the five coastal states have a stewardship role in protecting.”<sup>77</sup>

In addition, the Declaration announced that the Arctic Five were committed to submitting competing jurisdictional claims over the Arctic Ocean and seabed to the U.N. Secretary-General under UNCLOS.<sup>78</sup> UNCLOS, which the United States has not yet ratified,<sup>79</sup> contains numerous provisions related to a variety of mandatory and voluntary dispute resolution mechanisms,

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<sup>76</sup> The Declaration stated that the legal framework of UNCLOS “provides a solid foundation for responsible management by the five coastal States and other users of the [Arctic] 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.” *Id.*

<sup>77</sup> *Id.* See *The Ilulissat Declaration*, SIKU CIRCUMPOLAR NEWS SERVICE, May 29, 2008, <http://www.sikunews.com/art.html?catid=2&artid=4950>; Bellinger, *supra* note 20; Ben Muse, *The E.U. Challenges the Premises of the Ilulissat Declaration*, ARCTIC ECON., Oct. 27, 2008, [http://benmuse.typepad.com/arctic\\_economics](http://benmuse.typepad.com/arctic_economics) (go to Archives and follow link to October 2008). The Arctic Five also “pledged their commitment to freedom of navigation in Arctic waters . . . [and] cooperative marine scientific research . . .” Fact Sheet, Extended Continental Shelf (Mar. 9, 2009), <http://www.state.gov/g/oes/rls/fs/2009/120185.htm>.

<sup>78</sup> See Gorrie, *supra* note 33. Although the United States has not ratified UNCLOS, it may nonetheless submit itself to the dispute-resolution mechanisms outlined in the Convention. See Treves, *supra* note 54.

<sup>79</sup> The United States is the only one of the five Arctic coastal states that has not ratified UNCLOS. Randy Boswell, *Conference Could Mark Start of Arctic Power Struggle*, CANWEST NEWS SERVICE, May 28, 2008, <http://www.canada.com/topics/news/world/story.html?id=d0135cd8-c15a-48a3-9579-0df5f8e185c1> [hereinafter Boswell, *Conference*]. The United States has failed to ratify UNCLOS for various reasons, including a fear of being subject to the binding decisions of the dispute resolution bodies, such as the ITLOS, which:

[H]as jurisdiction over ‘all ocean space, its uses and resources,’ including the high seas and the parts of the ocean claimed by water-adjacent countries. . . . The tribunal has been viewed with suspicion by some countries unsure of how it might execute its authority; indeed, the United States has not yet ratified the treaty in part because of opposition to the idea of subjecting American interests to foreign court oversight despite a belief on the part of the executive branch that signing would be consistent with the United States’ foreign policy objectives.

David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT’L L. 563, 598 (2008). Some opponents of the Treaty refer to it as LOST (Law of the Sea Treaty). See Bellinger, *supra* note 20.

including mediation.<sup>80</sup> Parties are required to privately attempt to peaceably resolve disputes prior to submitting claims to “mandatory” third-party adjudication by the International Tribunal for the Law of the Sea, the International Court of Justice in The Hague, or to one of two forms of binding arbitration.<sup>81</sup>

While some approved of the Declaration<sup>82</sup> as an important step toward the de-escalation of military posturing, others decried what they perceived as a “carve up” of territory and resources by the Arctic Five.<sup>83</sup> In order to submit or oppose claims within the framework set by UNCLOS, “Canada, Russia, the United States, Norway, Denmark and Iceland are rushing to stake claims on the Arctic seabed,”<sup>84</sup> belying a proclamation made at Ilulissat that “the race for the North Pole is cancelled.”<sup>85</sup>

Some parties who do not border the Arctic region view themselves as stakeholders who should play a role in determining how to move forward in allocating rights.<sup>86</sup> They give voice to a widespread perception that the Arctic and its future are crucially important to all the world’s citizens from a multitude of perspectives, including geopolitical, environmental, and moral.<sup>87</sup> Non-Arctic states, recognizing the important role the Arctic plays on several fronts for the world as a whole, have expressed their wishes to join the Arctic Council.<sup>88</sup> Indigenous peoples and

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<sup>80</sup> See UNCLOS, *supra* note 32. UNCLOS provisions relating to dispute settlement are contained in more than one hundred articles and address a wide range of dispute subject areas. A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 282 (1987).

<sup>81</sup> See International Tribunal for the Law of the Sea, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Sept. 28, 2009) (go to General Information, follow link to “Overview;” follow link to “International Tribunal for the Law of the Sea”); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 442 (2008).

<sup>82</sup> For instance, Professor “Michael Byers praised the direction of the grouping he dubbed ‘the Arctic Ocean 5.’” Boswell, *Conference*, *supra* note 79.

<sup>83</sup> See Borger, *supra* note 33.

<sup>84</sup> Catherine Brahic, *Map Shows Front Lines of Arctic Carve-Up*, NEW SCIENTIST (Aug. 6, 2008), <http://www.newscientist.com/article/dn14475-map-shows-front-lines-of-arctic-carveup.html>.

<sup>85</sup> Boswell, *Race*, *supra* note 61.

<sup>86</sup> See Ian Traynor, *Europe Joins International Contest for Arctic’s Resources*, THE GUARDIAN, Nov. 21, 2008, available at <http://www.guardian.co.uk/world/2008/nov/21/arctic-energy-eu>.

<sup>87</sup> Monaco’s Sovereign Prince Albert II advocated for a unified response under the United Nations for the protection of the Arctic, stating that such action was a “moral imperative.” *Arctic Conference in Monaco Faces the Future*, MONACO TIMES, Nov. 10, 2008, available at <http://www.rivieratimes.com/index.php/monaco-article/items/arctic-conference-in-monaco-faces-the-future.html>.

<sup>88</sup> These states include Italy, Germany, the United Kingdom, China, France, and Spain, all of which have observer status in the Arctic Council. *Growing Interest in Arctic*

numerous small-island tropical states issued a joint message stating that “changes in the Arctic and island regions have implications for the rest of the world.”<sup>89</sup>

The reality of the global importance of the Arctic region is perhaps most strongly felt by Arctic-region inhabitants, who are already experiencing the challenges presented by global warming in an immediate and profound way.<sup>90</sup> Inupiaq Eskimo Patricia Cochran, Chair of the Inuit Circumpolar Council<sup>91</sup> (a permanent participant of the Arctic Council), detailed in a keynote presentation at a United Nations Environment Programme (UNEP) meeting the many ways in which indigenous communities have been being affected by climate change, and urged world leaders to act with “global unity and clarity of purpose” to halt global warming and its effects on the Arctic and the planet.<sup>92</sup>

Some commentators contend that in order to fully understand the environmental and other challenges presented by the Arctic dispute, it is necessary to view these difficulties within a global context.<sup>93</sup> The Arctic region has been described as the “common

Council, SIKU CIRCUMPOLAR NEWS SERVICE, Oct. 4, 2008, <http://www.sikunews.com/art.html?artid=5520&catid=2>.

<sup>89</sup> Press Release, UNEP GRID-Arendal, Many Strong Voices Act on Climate Change, <http://www.grida.no/polar/news/2877.aspx>, June 25, 2008.

<sup>90</sup> Approximately four million people live in the Arctic region. HUEBERT & YEAGER, *supra* note 14, at 4; *Melting Ice—A Hot Topic? New UNEP Report Shows Just How Hot It's Getting*, June 4, 2007, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=512&ArticleID=5599&l=en>.

<sup>91</sup> The Inuit Circumpolar Council (ICC) is an international organization representing the rights of “Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaalit (Greenland) and Yupik (Russia)” peoples. Inuit Circumpolar Council (Canada), [http://inuitcircumpolar.com/index.php?auto\\_slide=&ID=374&Lang=En&Parent\\_ID=&current\\_slide\\_num=](http://inuitcircumpolar.com/index.php?auto_slide=&ID=374&Lang=En&Parent_ID=&current_slide_num=) (last visited Sept. 20, 2010). The ICC Charter declares that the “arctic and sub-arctic areas we use and occupy transcend political boundaries . . . [and that] the Inuit homeland and its resources are of critical importance to the international community . . .” *Id.*

<sup>92</sup> See Patricia A.L. Cochran, *The Arctic: Indicator of Global Change*, Apr. 2, 2008, adopted from a keynote address presented to a UNEP “Many Strong Voices” meeting in May 2007, [http://www.un.org/esa/socdev/unpfii/documents/EGM\\_cs08\\_Cochran.doc](http://www.un.org/esa/socdev/unpfii/documents/EGM_cs08_Cochran.doc). Ms. Cochran referenced the 2004 Arctic Climate Impact Assessment (ACIA), a scientific study commissioned by the Arctic Council which found “that climate change is altering the fabric of the entire polar region” and threatening “the entire world.” HUEBERT & YEAGER, *supra* note 14, at 3, 6. It detailed how “[a]rctic warming and its consequences have worldwide implications” such as “the melting of highly reflective snow and ice cover that will in turn lead to a greater warming of the planet; an increase in glacial melt and river runoff that will result in rising sea levels; and the possible slowing of the world’s ocean current circulation system.” *Id.* at 6.

<sup>93</sup> Dubner, *supra* note 14, at 11. “It could be argued that the high seas, the stratosphere, outer space, or uninhabited areas of the globe such as the Arctic or Antarctica are ‘global commons’ or ‘the common heritage of mankind.’” Stephen A. Silard, *The Global Environment Facility: A New Development in International Law and*

heritage of mankind,”<sup>94</sup> a concept which can be “traced back to international space treaties”<sup>95</sup> such as the Moon Treaty.<sup>96</sup> In recognition of the value of the Arctic as belonging to all of humanity, scholars and activists have proposed constructing an agreement modeled on the 1959 Antarctic Treaty and subsequent agreements which preserved the Antarctic as a world park, limiting mineral and other development rights and preserving the continent for the global commons.<sup>97</sup> Greenpeace International has campaigned to designate the Arctic region the “Great Bear World Park,” and responded to Russia’s flag-planting by asserting that “[t]he [A]rctic should be protected by all 192 UN member flags and not claimed by one.”<sup>98</sup>

### B. Mediation

The Arctic region is a focal point for diverse stakeholders asserting a variety of competing claims and proposing a range of solutions to address the issue of how the fragile ecosystem should be managed, developed, and divided. The inhabitants of the region are experiencing the effects of harmful climate change in ways that are changing how many of them live, work, and travel. Legal, political, environmental, and scientific issues abound. In this context of upheaval and uncertainty, the issue of appropriate and effective approaches to dispute resolution in the Arctic region is of paramount importance.

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*Organization*, 28 GEO. WASH. J. INT’L L. & ECON. 607, 611 (1995).

<sup>94</sup> ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 231-236 (1993).

<sup>95</sup> Silard, *supra* note 93, at 654 n.15. The phrase is also contained in the preamble to the Convention. See UNCLOS, *supra* note 32, pmbl. For an overview of the concept of the “common heritage of mankind,” see generally Brian M. Hoffstadt, *Moving the Heavens: Lunar Mining and the “Common Heritage of Mankind” in the Moon Treaty*, 42 UCLA L. REV. 575 (1994).

<sup>96</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 12, 1979, 18 I.L.M. 1434 (entered into force July 11, 1984). For a discussion of how the dispute over the Arctic may implicate the determination of future lunar rights, see Morgan, *supra* note 15.

<sup>97</sup> “There is nothing new about the concept of an international world park that is controlled by more than one State.” Dubner, *supra* note 14, at 11 (providing as an example “the park known as Pico de Neblina,” an Amazonian mountain forest range located on both Venezuelan and Brazilian territory). See Verhaag, *supra* note 2, at 555. See generally Jonathan D. Weiss, *The Balance of Nature and Human Needs in Antarctica: The Legality of Mining*, 9 TEMP. INT’L & COMP. L.J. 387 (1995).

<sup>98</sup> *World Park Arctic*, Aug. 27, 2007, [http://www.greenpeace.org/international/news/world\\_park\\_arctic270807#more\\_story](http://www.greenpeace.org/international/news/world_park_arctic270807#more_story). The call for an Arctic Treaty or some other new, legal international framework for the region was explicitly countered by the Arctic Five in the Declaration, which asserted that UNCLOS adequately governs the legal issues related to the region. See *supra* note 76.

One such potential approach, used successfully in many complex international conflicts, is mediation. Mediation in some form or another has existed almost as long as individuals have entered into negotiations, for mediation is “simply a negotiation process with the added assistance of a third party.”<sup>99</sup> A more specific definition of mediation is that it is “a process of dialogue and negotiation in which a third party assists two or more conflicting parties, with their consent, to prevent, manage or resolve a conflict without recourse to force.”<sup>100</sup> Typically, the neutral third-party listens to the concerns of disputants, enables them to better understand each other’s perspectives, and assists them in formulating a mutually acceptable agreement that will resolve some or all of their concerns.<sup>101</sup>

Mediation has been utilized in resolving numerous international disputes,<sup>102</sup> including border, navigational, fishery, and environmental disputes.<sup>103</sup> Many forms of mediation are

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<sup>99</sup> HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 13 (2004).

<sup>100</sup> Martin Griffiths & Teresa Whitfield, *Mediation Ten Years On: Challenges and Opportunity for Peacemaking* 7, March 2010, [http://www.cic.nyu.edu/staff/Staff%20Docs/Whitfield\\_Mediation.pdf](http://www.cic.nyu.edu/staff/Staff%20Docs/Whitfield_Mediation.pdf). There is considerable debate “over what processes can be rightfully called mediation,” as opposed to other forms of alternative dispute resolution (ADR) processes. ABRAMSON, *supra* note 99, at 68. The United Nations has defined mediation as “a method of peaceful settlement of an international dispute where a third-party intervenes to reconcile the claims of the contending parties and to advance his own proposals aimed at a mutually acceptable compromise solution.” JONATHAN WILKENFELD ET AL., *MEDIATING INTERNATIONAL CRISES* 13 n.2 (2005) (quoting *HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES* 40, U.N. Doc. OLA/COD/2394 (1992)).

<sup>101</sup> Talibah Peugh, *Alternative Dispute Resolution: A Study of the History and Function of ADR Techniques as Mechanisms for International Peacekeeping*, 25 T. MARSHALL L. REV. 139, 153 (Fall 1999-Spring 2000).

<sup>102</sup> “International [m]ediation has become almost as common as conflict itself.” Jacob Bercovitch, *The Structure and Diversity of Mediation in International Relations*, in *MEDIATION IN INTERNATIONAL RELATIONS* (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1996). “The growing interest in mediation at the international level is reflected in numerous international and regional organizations, laws and protocols.” Jacqueline Nolan-Haley, *Teaching Comparative Perspectives in Mediation: Some Preliminary Reflections*, 81 ST. JOHN’S L. REV. 259, 259 (2007).

<sup>103</sup> See generally PREVENTIVE NEGOTIATION: AVOIDING CONFLICT ESCALATION (I. William Zartman ed., 2000). Other environmental conflict resolution processes include conflict assessment, facilitation, conciliation, negotiated rulemaking, policy dialogues, and quasi-judicial processes such as Early Neutral Evaluation, mini-trials, summary jury trials, fact finding, and the use of settlement judges. KIRK EMERSON ET AL., *The Challenges of Environmental Conflict Resolution*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 10-15 (Rosemary O’Leary & Lisa B. Bingham eds., 2003).

utilized in international settings.<sup>104</sup> These processes starkly contrast with more conflict-oriented forms of dispute resolution such as warfare, “cold wars,” adversarial negotiations, and litigations.<sup>105</sup> Mediation has a better success rate than conflict-oriented processes; one study of United Nations-led mediation efforts found that the likelihood of an agreement being reached is two to five times greater in mediated conflicts than in those where mediation is not utilized.<sup>106</sup>

The United Nations has a long-standing commitment to mediation as a method of resolving international conflicts.<sup>107</sup> The U.N. Charter urges member-states to resolve disputes through mediation<sup>108</sup> or other peaceful modes of resolution.<sup>109</sup> “[T]he settlement of disputes is a basic institutional objective”<sup>110</sup> of the United Nations, which utilizes mediation<sup>111</sup> at all stages of conflict resolution, from pre-conflict preventive diplomacy to post-conflict peace building efforts.<sup>112</sup> Mediation has been used extensively in negotiating complex international regimes, such as the U.N. Conference on Environment and Development (UNCED) and the

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<sup>104</sup> Nancy D. Erbe lists the following forms of mediation: “ombuds mediation; mediated decisions; policy and rule making; dialogues in ethnic conflicts; and mediated litigation.” Nancy D. Erbe, *Appreciating Mediation’s Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 358 (2006).

<sup>105</sup> CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, *MEDIATION: PRACTICE, POLICY AND ETHICS* 312 (2006).

<sup>106</sup> MASON ET AL., *supra* note 55, at 103.

<sup>107</sup> Bercovitch, *supra* note 102.

<sup>108</sup> *Id.*

<sup>109</sup> Mediation is one of several dispute resolution mechanisms listed in the U.N. Charter. “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” U.N. Charter art. 33, para. 1. Conciliation has been successfully used to resolve territorial disputes under UNCLOS, most notably in *Jan Mayen Continental Shelf Case (Iceland v. Norway)* (1982) 62 ILR 108. See NII LANTE WALLACE-BRUCE, *THE SETTLEMENT OF INTERNATIONAL DISPUTES: THE CONTRIBUTION OF AUSTRALIA AND NEW ZEALAND* 43 (1998).

<sup>110</sup> J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 29 (4th ed. 2005).

<sup>111</sup> For how the United Nations becomes involved in mediating a dispute, see Peugh, *supra* note 101, at 161-64.

<sup>112</sup> Nita Yawananajah, Department of Political Affairs (DPA), United Nations, *quoted in* Christopher Honeyman & Nita Yawananajah, *Mediation*, BEYOND INTRACTABILITY, Sept. 2003, <http://ww.beyondintractability.org/essay/mediation>. Parties to mediation led by a United Nations mediator agree to a “mediation mandate” that acknowledges the role of the mediator, who meets with and listens to the disputants, consults with all relevant parties, and may propose solutions to help devise a mutually acceptable resolution of the dispute. *Id.*

Global Environmental Facility (GEF).<sup>113</sup> The United Nations has publicly announced its intention to increase its use of mediation in international disputes, particularly in relation to peacekeeping operations.<sup>114</sup> Referring to the complexity of many international conflicts, the President of the U.N. Security Council stated that the United Nations was required “to resort to the most innovative and ingenious mediation strategies.”<sup>115</sup>

This Note proposes that one innovative approach to resolving international environmental issues may be a mediation process that incorporates and advocates worldcentric values. Worldcentric is a term used to describe a stage of psychological, moral, and spiritual development.<sup>116</sup> Integral theorist Ken Wilber

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<sup>113</sup> BERTRAM SPECTOR, NEGOTIATING INTERNATIONAL REGIMES: LESSONS LEARNED FROM THE U.N. CONFERENCE ON ENVIRONMENT AND DEVELOPMENT 242-45 (1994).

<sup>114</sup> Fact Sheet: Strengthening the Department of Political Affairs, (2007), <http://www.un.org/depts/dpa/docs/StrengtheningDPA.pdf> (last visited Sept. 25, 2010). The United Nations Department of Political Affairs (DPA) Mediation Support Unit (MSU), established in 2006, formalized the United Nation’s commitment to mediation. Press Release, DPA, United Nations Announces New “On-Call” Mediation Team to Advise Peace Envoys in Field, U.N. Doc. PA/1 (Mar. 5, 2008), available at <http://www.un.org/News/Press/docs/2008/pa1.doc.htm>. The MSU provides education, training, the sharing of “best practices,” and personnel (including a “standby team of mediation experts”) for peacekeeping and conflict prevention activities. *Id.* These developments in the DPA’s commitment to mediation are currently directed toward peacekeeping and crisis intervention efforts rather than any UNCLOS-related disputes, which are not handled by the DPA. Telephone Interview with Kelvin Ong, United Nations DPA, Mediation Support Unit, in New York, United States (Jan. 7, 2008). United Nations Secretary-General Ban Ki-moon recently issued a report highlighting the imperative to increase support for the MSU so that its mediators can effectively “help parties design and pursue processes that will address the root causes of their conflicts, overcome obstacles that block progress, and achieve agreements that lead to sustainable peace.” The Secretary-General, *Report of the Secretary-General on Enhancing Mediation and its Support Activities 1, delivered to the Security Council*, U.N. Doc. S/2009/189 (Apr. 8, 2009) [hereinafter U.N. Report on Mediation], <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/278/78/PDF/N0927878.pdf?OpenElement>.

<sup>115</sup> Address by Mr. Blaise Compaor, President of Burkina Faso, U.N. S.C., 63rd Sess., 5979th mtg. at 2, U.N. Doc. S/PV.5979 (Sept. 23, 2008), available at [http://www.undemocracy.com/securitycouncil/meeting\\_5979#pg002-bk05-pa08](http://www.undemocracy.com/securitycouncil/meeting_5979#pg002-bk05-pa08).

<sup>116</sup> Christian J. Grostic, *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation* 105 MICH. L. REV. 151, 155 n.23 (2006) (quoting KEN WILBER, A THEORY OF EVERYTHING 19 (2000)). See Christopher Riedy, *Two Social Practices to Support Emergence of a Global Collective*, 10(4) J. FUTURE STUDIES 45 (2006), [http://www.jfs.tku.edu.tw/pdf/A\\_5.pdf](http://www.jfs.tku.edu.tw/pdf/A_5.pdf). For a discussion of a developmental approach to mediation, which can provide “a new window through which mediators can view mediation clients, the mediation process, and their own behavior in the mediation room,” see generally Lynn C. Holaday, *Stage Development Theory: A Natural Framework for Understanding the Mediation Process*, 18 NEGOTIATION J. 191 (2002).

characterizes the worldcentric stage of development as one that is more evolved than egocentric or ethnocentric perspectives.<sup>117</sup> “At the worldcentric stage, universal care, justice, and fairness emerge as ideals, and the guiding moral principle becomes ‘what is right and fair, not just for me or my tribe or my nation, but for all peoples . . . .’”<sup>118</sup> Accordingly, a worldcentric approach to the governance and management of the Arctic region would not necessarily give primacy to nation-state jurisdictional claims, but would rather seek to include and meet the interests of a broad range of stakeholders in order to develop consensus-based outcomes promoting the long-term health and sustainability of the region and the planet as a whole.

### III. ANALYSIS

“In the dispute resolution literature, three general approaches to disputes have been identified: (1) a power-based approach; (2) a rights-based approach and (3) an interest-based approach.”<sup>119</sup> A power-based approach is “typically a matter of imposing costs on the other side or threatening to do so, whether through acts of aggression or withholding the benefits that derive from a relationship.”<sup>120</sup> The most well-known and extreme version of a power-based approach in international disputes is armed conflict.<sup>121</sup> Prior to the Ilulissat Declaration, some actions taken by the Arctic states, such as threatening to increase their military

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<sup>117</sup> KEN WILBER, *A BRIEF HISTORY OF EVERYTHING* 185 (1996); Grostic, *supra* note 116, at 155. Ken Wilber describes development from an egocentric to ethnocentric to worldcentric perspective as one that expands one’s sense of identity from “me” to “us” to “all of us.” KEN WILBER, *INTEGRAL SPIRITUALITY: A STARTLING NEW ROLE FOR RELIGION IN THE MODERN AND POSTMODERN WORLD* 7 (2006). “All of us” includes “all human beings and even all sentient beings . . . .” *Id.* at 8. According to Wilber, efforts made to protect the environment will ultimately fail unless humanity develops “worldcentric levels of values and consciousness.” *Id.* at 30.

<sup>118</sup> Grostic, *supra* note 116, at 155 n.23 (quoting WILBER, *supra* note 117, at 19). For an approach that has broadened the spectrum of those deserving rights beyond that of “all peoples,” see Levi Novey, *Ecuador 1st Nation in World to Give Nature Rights Via Constitution*, *ECOWORLDLY*, Sept. 29, 2008, <http://ecoworldly.com/2008/09/29/ecuador-1st-nation-in-world-to-give-nature-rights-via-constitution>.

<sup>119</sup> CONNIE PECK, *THE UNITED NATIONS AS A DISPUTE SETTLEMENT SYSTEM* 10 (1996). Interest-based approaches emphasize the “needs, desires, concerns, and fears that underlie [parties’] positions.” *Id.*

<sup>120</sup> Michelle Maiese, *Interests, Rights, Power and Needs Frames*, Sept. 2004, [http://www.beyondintractability.org/essay/interests\\_rights\\_power\\_needs\\_frames/?nid=1136](http://www.beyondintractability.org/essay/interests_rights_power_needs_frames/?nid=1136).

<sup>121</sup> PECK, *supra* note 119.

presence, were expressions of this approach.<sup>122</sup>

At Ilulissat, by emphasizing that UNCLOS would govern the division of disputed Arctic territories, the Arctic Five announced their agreement to establish their jurisdictional claims peaceably under a rights-based approach, where the prevailing party is determined under a standard “such as a treaty, convention or accepted custom.”<sup>123</sup> In accordance with their rights-based approach, Arctic coastal countries are conducting scientific research in preparation for their OCS submissions under UNCLOS—including the United States, which as a non-party to UNCLOS is not currently permitted to submit its formal territorial claims to the CLCS,<sup>124</sup> but will be permitted to do so if it ratifies UNCLOS.<sup>125</sup>

Despite public assertions that these states will seek rights-based, peaceable solutions, the potential for these states to pursue power-based maneuvers and strategies remains present.<sup>126</sup> In June 2008, shortly after Russia publicly agreed to the peaceful resolution of Arctic disputes at Ilulissat, it announced a heightened training plan to prepare its troops to defend Russia’s Arctic claims.<sup>127</sup> Russia stated that its training exercise was in response to the U.S. military displays in the Arctic.<sup>128</sup> The North American

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<sup>122</sup> Graff, *supra* note 21.

<sup>123</sup> PECK, *supra* note 119, at 10. Rights-based approaches emphasize “independent standards of fairness or legitimacy that are either socially recognized or formally established in law or contract. Such standards include reciprocity, precedent, equality, and seniority.” Maiese, *supra* note 120.

<sup>124</sup> See Brahic, *supra* note 84; Betsy Baker, *Conference: International Arctic Change and the Law and Politics of the Arctic Ocean Seabed: Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-U.S. Cooperation in the Beaufort Sea*, 34 VT. L. REV. 57, 120 n.61 (2009).

<sup>125</sup> While the United States may not assert claims to the CLCS because it has not acceded to UNCLOS, its responses to other states’ OCS claims are made available to the CLCS through the U.N. Secretary General. Rothwell, *supra* note 53.

<sup>126</sup> *Id.*

<sup>127</sup> Bradley Cook, *Russian Army Trains for Arctic Resource War*, THE NAT’L POST, June 24, 2008, available at <http://www.financialpost.com/story.html?id=610362>.

<sup>128</sup> *Id.* “The U.S. recently held a 12-day military exercise in Alaska called Northern Edge 2008 with 5,000 troops after contesting Russia’s polar claim. Russia’s military trainers ‘can’t ignore such facts,’ [Lieutenant General Vladimir Shamanov] said.” *Id.* See Matthias Schepp & Gerald Traufetter, *Riches at the North Pole: Russia Unveils Aggressive Arctic Plans*, SPIEGEL ONLINE INT’L, Jan. 29, 2009, <http://www.spiegel.de/international/world/0,1518,604338,00.html>. Such displays of militarization are especially worrisome because the two states with the world’s majority of nuclear weapons—the United States and Russia—may become increasingly entangled as the ice melts. This situation may give rise to border skirmishes, further posturing displays, and the risk of misunderstandings and accidents, which could quickly escalate to dangerous levels of antagonism. Russian policy makers have declared: “It cannot be ruled out that the battle for [Arctic] raw materials

Treaty Organization (NATO) has also demonstrated increased military interest in the Arctic.<sup>129</sup> In a report issued by European Union officials “highlighting the global dangers that will result from climate change[,] . . . [t]he potential for conflict in the melting Arctic topped their list.”<sup>130</sup> Russian policy makers recently declared: “It cannot be ruled out that the battle for [Arctic] raw materials will be waged with military means.”<sup>131</sup>

Under these dangerous and incendiary geopolitical conditions, an interest-based approach to conflict resolution, such as mediation, becomes increasingly attractive. Mediation uncovers and addresses the interests motivating parties to adopt power- and rights-based positions. “In an interest-based approach, parties attempt to reconcile their underlying interests by discovering solutions which will bridge their different needs, aspirations, fears or concerns in a manner that is satisfactory to both.”<sup>132</sup> Interest-based solutions have several important advantages over power-based<sup>133</sup> and rights-based outcomes.<sup>134</sup> These include: (1) the consideration of the long-term relationships of the disputants; (2) an increased chance of reaching “a satisfactory outcome for all concerned;”<sup>135</sup> (3) better preservation of resources; and (4) less likelihood of conflict reoccurring.<sup>136</sup> Interest-based mediation is a particularly attractive dispute resolution approach when contrasted with the rights-based framework provided for by UNCLOS,<sup>137</sup> which is inadequate to address the many challenges

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will be waged with military means.” Dean Babst, *U.S. and Russian Nuclear Defense Strategies are Fatally Flawed—They Can’t be Used Without Self-Destruction*, NUCLEAR AGE PEACE FOUNDATION, June 2001, [http://www.wagingpeace.org/articles/2001/06/00\\_babst\\_fatally-flawed.htm](http://www.wagingpeace.org/articles/2001/06/00_babst_fatally-flawed.htm).

<sup>129</sup> *NATO Shows Enhanced Interest in Arctic*, BARENTS OBSERVER, Jan. 16, 2009, <http://www.barentsobserver.com/nato-shows-enhanced-interest-in-arctic.4547217-58932.html>.

<sup>130</sup> Scott Borgerson, *The Road to the Arctic*, FOREIGN AFF., May/June 2008, available at <http://www.foreignaffairs.org/20080501faletter87372/coalter-g-lathrop-scott-borgerson/the-road-to-the-arctic.html> [hereinafter Borgerson, *Road*].

<sup>131</sup> Schepp & Traufetter, *supra* note 128.

<sup>132</sup> PECK, *supra* note 119, at 11.

<sup>133</sup> *Id.*

<sup>134</sup> In a rights-based conflict, “[w]hile one party may be judged to be ‘in the right’ and therefore to have its position upheld, the other is left with its interests unaddressed. As well, the adversarial nature of a rights contest inevitably strains the relationship, although not as seriously as in a power contest.” *Id.* at 12.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> UNCLOS encourages parties to engage in mediation. This Note’s discussion of UNCLOS’s inadequacies focuses on the limitations of parties looking to UNCLOS’s legal mechanisms to determine the apportionment and governance of the region.

presented by the dispute over the Arctic region.

A. *The Inadequacy of UNCLOS Legal Processes*

One reason UNCLOS processes are not adequate to meet the demands posed by the Arctic dispute is that many current Arctic issues were not envisaged when the treaty was drafted.<sup>138</sup> The Arctic Five are asserting “Article 76” rights<sup>139</sup> over enormous swathes of the ocean<sup>140</sup> not contemplated when the treaty was negotiated, drafted, and approved.<sup>141</sup> “[T]he treaty’s drafters never could have envisioned perennial sea ice turning into open water. For this reason, the provisions of UNCLOS (written in 1982) do not fully address the dilemmas presented by the special case of the Arctic Ocean.”<sup>142</sup> The procedure established for the CLCS’ determination of the outer limits of the continental shelves simply “was not written with the Arctic Ocean’s unique geography in mind.”<sup>143</sup> CLCS decisions may thus give an air of legitimacy to processes and solutions formally allowable under UNCLOS, but inappropriate for the unique character of the region and inequitable to the inhabitants there.

The apportionment of rights under UNCLOS may extend jurisdictional boundaries by hundreds of miles, potentially exposing these areas to additional mining, drilling, and shipping activities that have the potential to harm the sensitive Arctic bioregion.<sup>144</sup> UNCLOS grants jurisdictional rights but prescribes minimal environmental obligations.<sup>145</sup> Oil spills, such as those that issued from the Exxon Valdez or from blown-out oil platforms,<sup>146</sup>

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<sup>138</sup> HUEBERT & YEAGER, *supra* note 14, at 21.

<sup>139</sup> Boswell, *Race*, *supra* note 61.

<sup>140</sup> *Id.*

<sup>141</sup> See Borgerson, *Road*, *supra* note 130.

<sup>142</sup> *Id.*

<sup>143</sup> See *id.*

<sup>144</sup> See generally Mark Nuttall, Editorial, INDIGENOUS AFF. 7 (Jan.-Feb. 2008); *Race for the Arctic: Voices from Abroad*, 2 CQ GLOBAL RESEARCHER 213, 217, 241 (Aug. 2008) [hereinafter *Voices from Abroad*], [http://www.oceana.org/fileadmin/oceana/uploads/Oceana\\_in\\_the\\_News/08.08.Congressional\\_Quarterly.pdf](http://www.oceana.org/fileadmin/oceana/uploads/Oceana_in_the_News/08.08.Congressional_Quarterly.pdf).

<sup>145</sup> See generally Verhaag, *supra* note 2. The Norwegian Minister of Foreign Affairs acknowledged at Ilulissat, “the guidelines for Arctic oil and gas exploration . . . recall existing obligations and define certain minimum procedures and standards. They leave it to the States concerned to go beyond them if required.” Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, Speech at the Arctic Ocean Conference in Ilulissat, Greenland: Key Elements of Norway’s Policy on the Arctic (May 28, 2008), [http://www.regjeringen.no/nb/dep/ud/aktuelt/taler\\_artikler/utenriksministeren/2008/marine\\_environment.html?id=514842](http://www.regjeringen.no/nb/dep/ud/aktuelt/taler_artikler/utenriksministeren/2008/marine_environment.html?id=514842).

<sup>146</sup> The Deepwater Horizon/BP oil spill in the Gulf of Mexico reportedly resulted from

or heavy pollution leaking from land-based infrastructures as a result of melting permafrost<sup>147</sup>—these and similar accidents do not recognize national boundaries. As demonstrated by the persistent effects of toxic pollutants as a result of the Exxon Valdez oil spill, Arctic pollution remains in the environment for decades, negatively affecting wildlife and human populations.<sup>148</sup>

For these and additional reasons discussed below, UNCLOS processes are inadequate to address the full range of issues presented by Arctic region disputes.

### 1. *Critical Stakeholders are Marginalized*

An additional reason UNCLOS processes are inadequate to meet the challenges presented by Arctic region issues is that critical, non-legal stakeholders are more likely to be marginalized. These stakeholders include: (a) Arctic Council members and participants; (b) non-Arctic states and intergovernmental entities; and (c) non-governmental organizations (NGOs), including those representing the interests of wildlife, nature, and future generations. Each of these groups, by contrast, could be included in interest-based, multi-stakeholder mediation processes.

#### a. *Arctic Council Members and Participants*

As discussed previously, the Arctic Five excluded Arctic Council states, as well as non-state members and participants, from the Arctic Ocean Conference. At the conclusion of the AOC, the Arctic Five announced their agreement that UNCLOS was the appropriate legal framework for the governance of the Arctic Ocean, and for determining the apportionment of jurisdictional and other rights in the region. They did not seek alternative

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a faultily installed blowout preventer. *Oil Spill: Safety Valve was Wrongly Plumbed on Rig, Says BP Executive*, DAILY TELEGRAPH, Aug. 25, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7964890/Oil-spill-safety-valve-was-wrongly-plumbed-on-rig-says-BP-executive.html>. BP, along with other major oil companies, is expected to drill for oil in Arctic waters. *Id.*

<sup>147</sup> These scenarios were presented by Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, in a speech at the Arctic Ocean Conference in Ilulissat. Støre, *supra* note 145.

<sup>148</sup> A 2003 summary review published by Science concluded that oil from the Exxon Valdez accident “persisted beyond a decade in surprising amounts and in toxic forms, was sufficiently bioavailable to induce chronic biological exposures, and had long-term impacts at the population level.” Maria Fossheim, *Consequences of a Large Oil Spill in the Arctic*, BELLONA, Dec. 21, 2007, [http://www.bellona.org/articles/articles\\_2007/Consequences\\_of\\_large\\_oil\\_spill\\_in\\_the\\_Arctic](http://www.bellona.org/articles/articles_2007/Consequences_of_large_oil_spill_in_the_Arctic) (emphasis in original).

solutions in conjunction with the Arctic Council, thus denying it the ability to exert meaningful influence on whether the fate of the Arctic should be fundamentally determined by jurisdictional boundaries and under what kinds of alternative legal and political frameworks the region could be managed. The Declaration acknowledged the Arctic Council had “taken important steps on specific issues” and stated that “[t]he five coastal states of the Arctic Ocean will continue to contribute actively to the work of the Arctic Council . . . .”<sup>149</sup> However, there was no mention as to how the Arctic Council could “contribute actively” to the deliberations and decision-making processes of what is arguably a new and potentially dominant quasi-governmental entity.<sup>150</sup>

Over the past fifteen years, indigenous Arctic communities have sought and received from their home states an increased degree of autonomy and self-governance over their own affairs and territories.<sup>151</sup> Indigenous groups have also secured representation rights on intergovernmental bodies such as the Arctic Council.<sup>152</sup> “Indigenous peoples must be assured that they will play a key role in the regional and global dialogues that will determine the kind of responses to climate change and the social and economic changes that will take place in their homelands.”<sup>153</sup> The Permanent Participants to the Arctic Council and other indigenous groups are likely to experience the most impact from the apportionment of the Arctic. Their health, livelihood, and

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<sup>149</sup> Ilulissat Declaration, *supra* note 31.

<sup>150</sup> According to one observer, the Arctic Ocean Conference participants resembled “a kind of Arctic G-5 with ambitious plans for overseeing polar oil and mineral exploration, maritime security, transportation and environmental regulation.” Boswell, *Conference*, *supra* note 79. This same commentator stated that rather than excluding the Arctic Council from the AOC, the meeting “should have been seen as a way of invigorating the Arctic Council, and the Arctic Council should have been the organization that was given the mandate to deal with it . . . .” *Natural Resources Minister to Attend Arctic Meeting in Greenland*, CBC NEWS, May 22, 2008, <http://www.cbc.ca/canada/story/2008/05/22/north-meeting.html>.

<sup>151</sup> Boswell, *Conference*, *supra* note 79, at 5.

<sup>152</sup> See ARCTIC COUNCIL, *supra* note 46.

<sup>153</sup> Nuttall, *supra* note 144. In response to the exclusion of indigenous representatives from the AOC at Ilulissat, Aqqaluk Lyngé, President of the Inuit Circumpolar Council, stated that Inuit leaders would hold their own summit to discuss how to “collectively respond to the main forces—state, industry and others—that are debating questions of ownership of our lands and seas without us having a meaningful voice.” Somby, *supra* note 74. Lyngé forcefully expressed the frustration of the Arctic’s 150,000 Inuit: “We no longer want to accept the isolation and harsh treatment that has been inflicted upon us in the past. We paid the price of the sovereignty of these governments who steal our land, our resources. Enough is enough . . . we demand to be treated humanely.” *Voices from Abroad*, *supra* note 144, at 241.

culture will be directly affected by the allocation of jurisdictional rights, as well as by the subsequent actions taken by the Arctic Five as they manage these territories.<sup>154</sup> “There will be the potential for new commercial shipping, more extensive oil and gas development, and perhaps new fisheries”<sup>155</sup>—all of which will have the potential to affect surrounding indigenous populations in dramatic ways. In part because of their exclusion from intergovernmental groupings framed by UNCLOS (as was the case with the Arctic Ocean Conference), indigenous groups now fear they will be marginalized and their interests disregarded in a dash to extract valuable resources from the ocean.<sup>156</sup>

#### b. Stakeholders Outside the Arctic Region

The Arctic Five’s decision to regard UNCLOS as a primary determinant of Arctic region rights and obligations may also lessen the likelihood of critical non-Arctic states and other entities substantively participating in shaping the future of the Arctic.<sup>157</sup> In opposition to the pronouncements of the Declaration, which emphasized the UNCLOS-conferred “special status” of the Arctic Five, the European Parliament, by an overwhelming margin, passed a resolution calling for “the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic . . . .”<sup>158</sup> A recent European Union (EU) report stated that “the Arctic is a region that is both crucial in terms of the global climate and host to important research and economic activities carried out by a number of non-Arctic states, including many EU member states, thus making its governance and future legal status a global responsibility.”<sup>159</sup>

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<sup>154</sup> HUEBERT & YEAGER, *supra* note 14, at 4.

<sup>155</sup> *Id.*

<sup>156</sup> *Race for the Arctic: Who Owns the Region’s Undiscovered Oil and Gas?*, 2 CQ GLOBAL RESEARCHER 213, 213 (2008), [http://www.oceana.org/fileadmin/oceana/uploads/Oceana\\_in\\_the\\_News/08.08.Congressional\\_Quarterly.pdf](http://www.oceana.org/fileadmin/oceana/uploads/Oceana_in_the_News/08.08.Congressional_Quarterly.pdf).

<sup>157</sup> According to one commentator, the Declaration’s position on the role of “nations that do not use the Arctic” is that they “evidently don’t have a role” in deciding how to move forward in helping to determine the future of the region. Muse, *supra* note 77.

<sup>158</sup> Muse, *supra* note 77 (quoting Resolution of 9 October 2008 on Arctic Governance, EUR. PARL. DOC., P6\_TA (2008) 0474, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0474+0+DOC+XML+V0//EN> [hereinafter Arctic Governance]). The resolution also calls “for a future cross-border political or legal structure that could . . . mediate political disagreement over resources and navigable waterways in the High North . . . .” Arctic Governance, at N-7(d).

<sup>159</sup> European Defense and Security Assembly, *Recommendation 833 on Europe’s Northern Security Dimension*, Doc. A/2016 (Dec. 4, 2008), available at

EU representatives and some commentators have made the argument that the Arctic should be protected in a similar manner to Antarctica, where most non-scientific usage is banned under the Antarctica Treaty.<sup>160</sup> India, China, South Korea, and Japan are among eleven states that have a research presence in the Arctic.<sup>161</sup> According to one India-based commentator, “[n]on-Arctic countries should join hands to push for an Arctic region that is accessible to all countries for peaceful and mostly scientific purposes only.”<sup>162</sup>

### c. Non-Governmental Organizations

Non-governmental organizations (NGOs) “undertake an enormous diversity of humanitarian, developmental and environmental work around the world,”<sup>163</sup> and have played an important role in international environmental negotiations.<sup>164</sup> NGOs disseminate information through the media and grassroots campaigns; gather and analyze scientific data; advocate, lobby, and advise; and monitor and help implement environmental treaty mechanisms.<sup>165</sup> NGOs are regarded by some as playing a quasi-representative role<sup>166</sup> across national borders, advocating on behalf of their worldwide membership—which can number in the millions.<sup>167</sup> Some NGOs represent issues, values, and entities that

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[http://www.assembly-weu.org/en/documents/sessions\\_ordinaires/rpt/2008/2016.php#P50\\_451](http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2008/2016.php#P50_451). See *Growing Interest in Arctic Council*, *supra* note 88.

<sup>160</sup> See Graff, *supra* note 21; see also Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455, 1461, 1991 WL 626652.

<sup>161</sup> Arvind Gupta, *Geopolitical Implications of Arctic Meltdown*, ISDA STRATEGIC COMMENTS, Dec. 17, 2008, <http://www.idsa.in/publications/stratcomments/ArvindGupta171208.htm>. For “[many] institutions around the world, the Arctic has become a massive laboratory for the study of global warming and its impacts on life on Earth.” Koberstein, *supra* note 15.

<sup>162</sup> Gupta, *supra* note 161.

<sup>163</sup> Beaudry E. Kock, Engaging Non-Governmental Organizations with International Environmental Negotiations: Institutional Approaches to Reforming State-NGO Interactions 1, <http://www.pon.org/downloads/ien15.4.Kock.pdf>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 12-13.

<sup>166</sup> See Karen Morrow, *Public Participation in the Assessment of the Effects of Certain Plans and Programmes on the Environment: Directive 2001/42/EC, the UNECE Espoo Convention and the Kiev Protocol*, 4 EUR. Y.B. ENVTL. L. 49 (2004), as reprinted in ENVIRONMENTAL PROTECTION, LAW AND POLICY 130 (Jane Holder & Maria Lee eds., 2d ed. 2007).

<sup>167</sup> “[T]ransnational or global environmental NGOs . . . are groups organized across state boundaries and committed explicitly to regional or global environmental protection. [Examples include] Greenpeace International, Friends of the Earth, and the [World Wildlife Fund]. . . . [S]ome of these organizations have memberships in the millions . . . .”

would otherwise have no voice. Increased activity in the Arctic will have a direct effect on wildlife, the biosphere,<sup>168</sup> and future generations,<sup>169</sup> the perspectives of which should be included in environmental deliberations. Nevertheless, NGOs are frequently excluded from the international legal system,<sup>170</sup> and are more likely to be marginalized if the future of the Arctic Ocean is approached primarily from a state-rights perspective rather than through a worldcentric, multi-stakeholder, interest-based approach.

## 2. Creative Outcomes are Less Likely

In addition to excluding critical stakeholders, another limitation of parties resolving the dispute over the Arctic under UNCLOS' legal mechanisms is the lack of flexibility afforded by these processes, which consequently may limit the possibility of creative outcomes. Jurisdictional issues settled under UNCLOS are likely to be decided narrowly, as in many adjudicatory processes.<sup>171</sup> In contrast, mediation allows parties to address a broad array of diverse issues and interests in order to overcome non-legal impediments to settlement.<sup>172</sup>

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Paul Wapner, *The Transnational Politics of Environmental NGOs: Governmental, Economic, and Social Activism*, in *THE GLOBAL ENVIRONMENT IN THE TWENTY-FIRST CENTURY: PROSPECTS FOR INTERNATIONAL COOPERATION* 92 (Pamela S. Chasek ed., 2000).

<sup>168</sup> “[T]he biocentric philosophy is one of the most important ‘innovations’ of moral and political thought in the last two decades.” AVNER DE-SHALIT, *WHY POSTERITY MATTERS: ENVIRONMENTAL POLICIES AND FUTURE GENERATIONS* 7 (Routledge 2005) (1995). See Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 *PACE ENVTL. L. REV.* 263, 337 (2008) (discussing “Earth Jurisprudence,” a normative theory which advocates for the moral standing of nature). In 2008, Ecuador recognized the standing of nature in its Constitution. See Novey, *supra* note 118.

<sup>169</sup> Increased exploitation of the region may result in short-term gain for the present generation at the long-term expense of future generations. DE-SHALIT, *supra* note 168, at 8. One philosopher has stated, “environmental issues [are] a question of intergenerational justice.” *Id.* Although the Arctic Five announced their recognition of a stewardship role in protecting the Arctic, see *Ilulissat Declaration*, *supra* note 31, a process that formally recognized the status of future interests would more greatly allow for the consideration and protection of such interests. For an example of how mediators include such considerations in a “hybrid” model of mediation and adjudication, see Stephen Higgs, *Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court*, 37 *ENVTL. L.* 61 (2007).

<sup>170</sup> Kock, *supra* note 163, at 1.

<sup>171</sup> Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 *HARV. NEGOT. L. REV.* 113, 131 (2000).

<sup>172</sup> ABRAMSON, *supra* note 99, at 4, 7. Impediments to settlement which might be better addressed through mediation than adjudicatory-like processes include: relationship conflicts caused by strong emotions and miscommunication; value conflicts caused by

There are many creative solutions that could arise out of multi-stakeholder mediation processes. Potential outcomes include the designation of the Arctic region as a world park,<sup>173</sup> the formulation of new multilateral agreements to manage the region in an environmentally sustainable way,<sup>174</sup> or the establishment of a new legal framework that would recognize legal territorial claims under UNCLOS, but subject development rights to the oversight of the Arctic Council or a new regional intergovernmental body.<sup>175</sup>

Additionally, as discussed previously, indigenous communities were not invited to attend the Ilulissat conference. “Indigenous knowledge, combined with indigenous peoples’ experience of the environment, may . . . prove to be better placed to deal with [the] uncertainty”<sup>176</sup> characterizing the effects of climate change in the Arctic region.<sup>177</sup> Mediation processes that include indigenous perspectives and knowledge could result in creative proposals that would meet the interests of native communities, state actors, and non-governmental organizations, as well as local and other business entities wishing to develop portions of the region in sustainable ways.

### 3. UNCLOS Processes Will Take Too Much Time

A recently released policy paper concluded there is “only a short window of opportunity for the international community to work together to establish an Arctic that has trans-governmental authority before individual countries’ self interest[s] . . . take precedence as the desire for commercial activity in the area increase[s with the decrease of] Arctic ice . . . .”<sup>178</sup> So long as the Arctic Five look toward UNCLOS as the primary legal framework for the region, important issues are likely to remain unaddressed until the completion of the relevant UNCLOS processes. Because of the complexity of the expected claims and the enormity of the

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differences of ideology and religion; and interest conflicts caused by psychological and other needs of parties. *See id.* at 104-09 (discussing Christopher W. Moore’s classification of sources of conflict).

<sup>173</sup> *See supra* note 97.

<sup>174</sup> *See generally* HUEBERT & YEAGER, *supra* note 14.

<sup>175</sup> *See generally id.*

<sup>176</sup> Nuttall, *supra* note 144, at 5.

<sup>177</sup> *Id.*

<sup>178</sup> *Time Running Out for a Peaceful Solution*, ARCTIC FOCUS, Apr. 22, 2009, <http://arcticfocus.com/2009/04/22/time-running-out-for-a-peaceful-arctic-solution/>. The need for a timely negotiated solution for the region is also necessary because UNCLOS does not cover significant portions of the Arctic Ocean, including the water over the seabed floor. *Id.* *See* Elferink & Johnson, *supra* note 63.

Arctic region, a United Nations pronouncement regarding the boundary lines in the Arctic “is not expected until 2020.”<sup>179</sup> Denmark and Canada have until 2013 and 2014 respectively to submit their OCS claims,<sup>180</sup> and if the United States ratifies UNCLOS, it will have ten years to make its OCS submissions.<sup>181</sup> Until a final determination of territorial boundaries is made, the region will likely be characterized by uncertainty and insecurity, with decisions being made on an *ad hoc* basis.<sup>182</sup> Such uncertainty could devolve into a scramble to maximize opportunities for short-term gain at the long-term expense of the region.<sup>183</sup>

### B. For the Mediation of the Arctic Dispute

Because UNCLOS legal processes are likely to exclude key stakeholders and decrease the possibility of creative outcomes, while taking years to conclude—leaving the Arctic region and its inhabitants susceptible to unsustainable commercial activity and exploitation—it is imperative that alternative and more appropriate forms of dispute resolution such as mediation are utilized. Rather than give primacy to UNCLOS’ legal mechanisms, the Arctic Five should engage in mediation with other stakeholders to resolve key issues in a timely manner.

#### 1. Advantages of Mediation

Mediation is widely viewed as a preferable option to adjudicatory-like processes for a variety of reasons, the most basic of which may be the principle of self-determination, which frequently “results in buy-in and compliance by the parties.”<sup>184</sup> Additional advantages of mediation include: (1) its problem-solving orientation; (2) a focus on the future rather than the past; (3) the flexibility of the process, as parties are able to develop agreements tailored to the particulars of their situation in ways

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<sup>179</sup> *Arctic Summit in Greenland*, NORDEN, May 25, 2008, <http://www.norden.org/en/news-and-events/news/arctic-summit-in-greenland>.

<sup>180</sup> See Lathrop, *supra* note 65.

<sup>181</sup> See HUEBERT & YEAGER, *supra* note 14, at 35.

<sup>182</sup> See Boswell, *Conference*, *supra* note 79 (“[Professor] Huebert said the five-country plan to manage the ocean’s affairs means ‘Arctic issues will be dealt with on an *ad hoc*, piecemeal, bilateral basis. The Arctic is much too complicated to deal with in this manner today.’”).

<sup>183</sup> *Time Running Out for a Peaceful Solution*, ARCTIC FOCUS, Apr. 22, 2009, <http://arcticfocus.com/2009/04/22/time-running-out-for-a-peaceful-arctic-solution/>.

<sup>184</sup> E-mail from Alan Gross, Ph.D. to author (May 23, 2010) (on file with author).

that courts or tribunals could not order; (4) its ability to provide for integrative solutions that meet the interests and needs of all parties; and (5) the presence and role of the third-party neutral, whose knowledge, expertise, and influence may enhance the possibility of settlement.<sup>185</sup>

These general benefits of mediation are applicable to the Arctic region dispute. Mediation's focus on creative problem solving stands in contrast to seeking a legal solution under UNCLOS. Under UNCLOS, parties submit jurisdictional claims—their positions—to the appropriate decision-makers.<sup>186</sup> In mediation, by working together to consider all interests rather than focusing on positions, parties can develop integrative<sup>187</sup> rather than merely distributive or positional outcomes.<sup>188</sup> A consideration of those interests within mediation would allow parties to creatively work together to enlarge “zero-sum” or “win-lose” approaches to jurisdictional issues into “win-win” negotiations and solutions.<sup>189</sup>

Mediation may also be more likely to better address the serious environmental issues presented by the Arctic dispute than UNCLOS' adjudicatory-like processes:

The difficulty with using the courts to resolve environmental disputes is that the parties are forced by the nature of the adversarial process to fight for their side as the morally correct position. There may, in fact, be a certain number and type of

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<sup>185</sup> Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 507-08 (2003). See Nancy A. Oretskin & Ann L. MacNaughton, *Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?*, in ENVIRONMENTAL DISPUTE RESOLUTION 207-09 (Ann L. MacNaughton & Jay G. Martin eds., 2002) (listing four reasons why mediation may be appropriate in international disputes that have an environmental component: (1) mediation can efficiently resolve “disputes that do not fit neatly into one provision or another of [an] applicable trade agreement;” (2) more flexibility in fashioning outcomes; (3) ability of mediators to enhance communication across different cultures and value-spheres; and (4) “mediation can be used before conflict escalates into a ‘dispute’”).

<sup>186</sup> See UNCLOS, *supra* note 32.

<sup>187</sup> “[M]ediation can facilitate collaborative, integrative problem solving rather than adversarial, distributive bargaining. It can thereby produce creative, ‘win-win’ outcomes that reach beyond formal rights to solve problems and satisfy parties’ genuine needs in a particular situation.” ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 16 (1994).

<sup>188</sup> Of course, negotiation and mediation also allow for distributive outcomes, particularly when the parties are adversaries. For a comparison of the key features of adversarial and “problem-solving” negotiations, see ABRAMSON, *supra* note 99, at 17, 31.

<sup>189</sup> ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 70 (2d ed. 1991) [hereinafter FISHER ET AL., *GETTING TO YES*].

disputes requiring adjudication. In the environmental arena, however, the moral impact of a decision more often stems from what is best for the community as a whole, including the surrounding ecosystem.<sup>190</sup>

Negotiations or mediation processes would also enable parties to explore the linkage between geopolitical issues and interests within and outside the Arctic region. For instance, some observers have commented that Russia's recent military activities in the Arctic may in part be a direct response to NATO activities in Eastern Europe.<sup>191</sup> Through multilateral negotiations, perhaps in the context of a mediation process, Russia's interest in security in Eastern Europe could be met through a withdrawal of NATO missile defense systems, in exchange for Russia's meeting the West's interest in a demilitarized and environmentally protected Arctic.<sup>192</sup>

## 2. *The Benefits of a Powerful Mediator Sponsored by the United Nations*

Many Arctic issues have until recently drawn little public attention, but solutions devised to resolve the dispute over the Arctic "should be cause for concern" throughout the world.<sup>193</sup> A

<sup>190</sup> Reed, *supra* note 43, at 5, 14.

<sup>191</sup> See Richard Holt, *Russia Bombers Launch Missiles Over Arctic*, DAILY TELEGRAPH, Sept. 4, 2007, available at <http://www.telegraph.co.uk/news/worldnews/1562055/Russian-bombers-launch-missiles-over-Arctic.html>. "Moscow has been enraged by attempts to expand NATO to Russian borders and place a missile defence shield in Eastern Europe." *Russia Plans Biggest Missile Test for 24 Years*, DAILY TELEGRAPH, Oct. 7, 2008, available at <http://www.telegraph.co.uk/news/worldnews/europe/russia/3148912/Russia-plans-biggest-missile-test-for-24-years.html>.

<sup>192</sup> See Ellen Barry, *A Crossroad for Russia and America*, N.Y. TIMES, Jan. 10, 2009, available at <http://www.nytimes.com/2009/01/11/weekinreview/11barry.html>. Barry considers a scenario of cooperation between Russia and the United States, where Russia steps back from its competitive use of oil and gas wealth as a means to regain superpower status, and the United States slows NATO's expansion in Eastern Europe: "Washington slows its timetable on NATO expansion and missile defense; Russia defers the dream of recapturing the Soviet 'privileged sphere of influence'...and toward long-term partnership with the West." *Id.*

<sup>193</sup> See UN News Centre, *Melting Ice Will Affect Hundreds of Millions Globally*, *New UN Report Says* (June 4, 2007), <http://www.un.org/apps/news/story.asp?NewsID=22773&Cr=environment&Cr1=>. In an introduction to a recently released United Nations report on the state of the Arctic, Achim Stein, U.N. Under-Secretary General and UNEP Executive Director, stated that the subject matter of the report:

[I]s about ice and snow and may to some people seem to address issues from remote and faraway places. But [it] underlines that the fate of the world's snowy and icy places in a climatically challenged world should be cause for concern in every ministry, boardroom and living room across the world. Indeed the findings are as relevant to people living in the Tropics and

powerful and respected mediator<sup>194</sup> could help enlist agents of influence, such as world leaders, the media, and others, to bring global attention to what has been until recently a relatively unpublicized issue.<sup>195</sup> Increased global awareness of and concern for the Arctic dispute generated as a result of media publicity could persuade reluctant parties to enter into mediation. A powerful mediator also may make it more difficult for parties to “walk away” from negotiations, particularly when doing so could result in unfavorable world or domestic public opinion.<sup>196</sup>

Powerful mediators have successfully negotiated solutions to seemingly intractable international problems.<sup>197</sup> “Scholars have recently noted that an important factor in selecting a mediator is that the selected mediator be seen as capable of promoting an agreement through the use of leverage, power potential, and influence.”<sup>198</sup> As one diplomat noted upon the appointment of

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temperate climes—and in cities from Berlin to Brasilia and Beijing to Boston—as they are for the people living in Arctic or in ice-capped mountain regions.

*Melting Ice—A Hot Topic? New UNEP Report Shows Just How Hot It’s Getting*, UNITED NATIONS ENVIRONMENT PROGRAMME (June 4, 2007), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=512&ArticleID=5599&l=en>.

<sup>194</sup> A mediator need not be a single individual. “The list of potential mediators in international conflicts and crises is extensive: single states, groups of states, international governmental organizations, regional governmental organizations, private transnational organizations, private individuals, or a combination of any of these.” JONATHAN WILKENFELD ET AL., *MEDIATING INTERNATIONAL CRISES* 5-6 (2005).

<sup>195</sup> A public relations campaign would help bring Arctic region issues to global attention. See Huebert, *supra* note 63. Such publicity might compromise confidentiality—a key principle of mediation. However, confidentiality as to the internal processes of mediation is different from publicizing the fact that mediation is occurring. For a discussion of the importance of the media in publicizing environmental matters, and how a “Strategic Public Relations Method” utilized by United Nations organizations such as UNEP could “give the press more incentive to cover environmental issues by enabling them to dramatize, visualize, and personalize [environmental] issue[s],” see Masako Konishi Otsuka, *The Role of the Press in Creating Effective Environmental Treaty Negotiations*, 14 *PAPERS ON INTERNATIONAL ENVIRONMENTAL NEGOTIATION* 1, 1 (Lawrence E. Susskind & William R. Moomaw, eds., 2005).

<sup>196</sup> Salman M.A. Salman, *Good Offices and Mediation and International Water Disputes*, in *RESOLUTION OF INTERNATIONAL WATER DISPUTES* 155, 178 n.71 (2002).

<sup>197</sup> See Daniel Curran, et al., *Case Analysis: Two Paths to Peace: Contrasting George Mitchell in Northern Island with Richard Holbrooke in Bosnia-Herzegovina*, 20 *NEGOTIATION J.* 513 (2004), excerpted in MENKEL-MEADOW, *supra* note 105, at 521-32 (illustrating how dispute outcomes were closely related to the negotiation styles and personalities of the mediators).

<sup>198</sup> Sulan Chen, *Instrumental and Induced Cooperation: Environmental Politics in the South China Sea* 69 (Dec. 7, 2005) (unpublished Ph.D dissertation, Univ. of Maryland) <http://www.lib.umd.edu/drum/bitstream/1903/3227/1/umi-umd-3053.pdf>. The challenge of finding such mediators may be a reason that mediation is not used more frequently for international disputes. See U.N. S.C., 5979th mtg. at U.N. Doc. S/2008/590, Karel De

Richard C. Holbrooke as the U.S. “special representative” to Afghanistan and Pakistan, where “[y]ou have a problem that is larger than life . . . [t]o deal with it you need someone larger than life.”<sup>199</sup>

A mediator affiliated with the United Nations could be most effective in helping to resolve the dispute over the Arctic region. The United Nations is perhaps the most credible intergovernmental entity for resolving international disputes.<sup>200</sup> One commentator has written that “[t]he UN is often the most legitimate actor for mediation in peace processes, with the most resources and the greatest leverage.”<sup>201</sup> The United Nations has successfully utilized mediation processes to help resolve a number of international disputes. In 1997, the East Timor situation was resolved as a result of Indonesia agreeing to participate in United Nations mediation.<sup>202</sup> In 2006, U.N. Secretary-General Kofi Annan’s mediation efforts were instrumental towards settling a long-standing border dispute between Nigeria and Cameroon.<sup>203</sup>

Attesting to the important role the United Nations plays in relation to mediation for crisis situations, a permanent representative to the United Nations recently stated:

[I]nternational mediation calls for a broad array of talents and instruments: the skill of analysing political processes; knowledge of local situations; the ability to forge links with all parties involved, including the local population; and early warning and rapid reaction mechanisms. Those are some of the qualities and instruments that we need on various levels. The United Nations clearly has a central role to play in this field.<sup>204</sup>

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Gucht, Belgium Minister for Foreign Affairs (Sept. 3, 2008), *available at* [http://www.undemocracy.com/securitycouncil/meeting\\_5979#pg009-bk02-pa03](http://www.undemocracy.com/securitycouncil/meeting_5979#pg009-bk02-pa03).

<sup>199</sup> Jodi Kantor, *Back on World Stage, a Larger-Than-Life Holbrooke*, N.Y. TIMES, Feb. 7, 2009, *available at* [http://www.nytimes.com/2009/02/08/us/politics/08holbrooke.html?page\\_wanted=all](http://www.nytimes.com/2009/02/08/us/politics/08holbrooke.html?page_wanted=all).

<sup>200</sup> The United Nations is “the only global intergovernmental organization whose primary function is the maintenance of international peace and security . . . .” U.N. Report on Mediation, *supra* note 114, at 22.

<sup>201</sup> MASON ET. AL., *supra* note 55, at 104.

<sup>202</sup> UN News Centre, *Remarks at Security Council High-Level Debate on Mediation and the Settlement of Disputes* (Sept. 23, 2008), [http://www.un.org/apps/news/infocus/sgspeeches/search\\_full.asp?statID=324](http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=324).

<sup>203</sup> UN News Centre, *Under Intensive UN Mediation, Nigeria and Cameroon Sign Accord Ending Border Dispute*, (June 12, 2006), <http://www.un.org/apps/news/story.asp?NewsID=18825&Cr=cameroon&Cr1=nigeria>.

<sup>204</sup> U.N. S.C., 5979th mtg. at U.N. Doc. S/2008/590, Karel De Gucht, Belgium Minister for Foreign Affairs (Sept. 3, 2008), *available at* [http://www.undemocracy.com/securitycouncil/meeting\\_5979#pg009-bk02-pa03](http://www.undemocracy.com/securitycouncil/meeting_5979#pg009-bk02-pa03).

A mediator sponsored by the United Nations<sup>205</sup> could help not only to bring the Arctic dispute to the attention and consideration of the entire world's population,<sup>206</sup> but also to motivate parties to reach outcomes reflecting worldcentric, rather than primarily state-centric, perspectives.

### 3. *Adopting a Worldcentric Approach to Mediation*

With increased globalization and technology, it can be said that hardly any portion of the Earth is now unaffected by human activity.<sup>207</sup> Consequentially, there are also numerous environmental problems whose effects are not limited to any one country or region, but rather threaten, to varying degrees, the health of the entire planet and its inhabitants. These threats include the many negative consequences of global warming, deforestation, the thinning of the ozone layer, the depletion of fish stocks, the dying of coral reefs, and the extinction of numerous species.<sup>208</sup>

In the face of such environmental challenges, where consequences extend beyond the confines of any one party-state's immediate interests, some experts believe it is imperative that new public policies and strategies be developed to meet these

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<sup>205</sup> See generally Otsuka, *supra* note 195 (proposing a United Nations "Strategic Public Relations Method" utilized to help focus public attention on environmental issues). "Press coverage along with the attention of the public would help [a] state adopt environmental treaties more quickly, and move more steadily toward environmental protection before it's too late." *Id.* at 20.

<sup>206</sup> Of course, adjudication processes also may be, and are, publicized; however, by their nature, courts and arbitration panels may be less likely to be swayed by the influence of publicity than the decision-makers in negotiations or mediation, where the decision-makers are the parties themselves. For a discussion of how non-binding ADR outcomes under UNCLOS are enforced through public pressure, see A. Neil Craik, *Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law*, 10 GEO. INT'L ENVTL. L. REV. 551 (1998).

<sup>207</sup> Some experts have proposed that the present time era should be called "the Anthropocene, or human-made, age," in recognition of the pervasive impact of human activity on the climate, biodiversity, and geology of the Earth. Scott Norris, *Human Activities Triggering "Global Soil Change,"* NAT'L GEOGRAPHIC NEWS, Feb. 5, 2008, <http://news.nationalgeographic.com/news/2008/02/080205-anthropocene.html>. A recent study of Earth's marine environments concluded that no portions of the world's oceans were "completely untouched" by human activity, and that forty-one percent were "heavily affected." Alan Boyle, *Map Shows How Oceans Suffer in Graphic Detail*, MSNBC, Feb. 14, 2008, <http://www.msnbc.msn.com/id/23155918/>. Human-caused global warming is planetary in its scope and effects. See generally *supra* note 9.

<sup>208</sup> See generally United Nations Environment Programme, *Global Environment Outlook 3: Past, Present, and Future Perspectives* (2002), available at [www.unep.org/GEO/geo3](http://www.unep.org/GEO/geo3) [hereinafter, GEO-3].

challenges.<sup>209</sup> Accordingly, increasing globalization and the recognition of planetary interconnectedness necessitate change in how dispute resolution practitioners approach international environmental disputes such as those in the Arctic region.<sup>210</sup>

As discussed previously,<sup>211</sup> one such approach may be a mediation process that incorporates and advocates worldcentric values. A worldcentric approach can in part be captured by “[p]hrases such as ‘think global and act local’[, which] have galvanized [environmental] action at many different levels”<sup>212</sup> over the past several decades.<sup>213</sup> While “think global and act local” is an apparently simple dictum, it has complex practical implications when applied to environmental disputes involving multiple stakeholders with diverse interests and perspectives.

An example of a mediation process that captured some of the ideals of a worldcentric approach to resolving environmental conflict was the mediation of the Great Bear Rainforest dispute over logging rights. The Great Bear Rainforest, located in British Columbia, Canada,<sup>214</sup> has been called the “Amazon of the North” and is “the largest remaining intact temperate coastal rainforest.”<sup>215</sup> In an effort to protect the forest from unsustainable industrial clearcut logging,<sup>216</sup> NGOs mobilized an international campaign that raised global public awareness about this remote bioregion.<sup>217</sup> This publicity compelled resistant logging companies to enter into negotiations.<sup>218</sup> Additional diverse interest groups—including local employees, indigenous communities, NGOs, governments, and large retail companies—had competing interests

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<sup>209</sup> “Many scientists and public officials are saying that environmental problems, such as global climate change, acid rain, and the loss of biodiversity, will require new strategies and methods to prevent species from becoming endangered, restore damaged ecosystems, and reduce ecological, as well as human, health risks from pollution.” Reed, *supra* note 43, at 6.

<sup>210</sup> Over a decade ago, Christine M. Reed called for “‘environmental mediation’ based on a ‘new environmental agenda.’” *Id.* at 11.

<sup>211</sup> See *supra* Parts III.B.1-2.

<sup>212</sup> GEO-3, *supra* note 208, at Synthesis 1.

<sup>213</sup> *Id.*

<sup>214</sup> Clifford Krauss, *Canada to Shield 5 Million Forest Acres*, N.Y. TIMES, Feb. 7, 2006, available at [http://www.nytimes.com/2006/02/07/international/americas/07canada.html?\\_r=1&emc=eta1](http://www.nytimes.com/2006/02/07/international/americas/07canada.html?_r=1&emc=eta1).

<sup>215</sup> *Id.*

<sup>216</sup> The Rainforest Solutions Project, *March 31, 2009: Great Bear Rainforest Agreements Become Reality* (2009), [http://www.savethegreatbear.org/mediacentre/GBR\\_mar31\\_back\\_grounder](http://www.savethegreatbear.org/mediacentre/GBR_mar31_back_grounder).

<sup>217</sup> See generally Merran Smith et al., *From Conflict to Collaboration: The Story of the Great Bear Rainforest*, FOREST ETHICS (2009), [www.forestethics.org/article.php?id=1809](http://www.forestethics.org/article.php?id=1809).

<sup>218</sup> *Id.*

in the region, many of which were met through mediation processes.<sup>219</sup>

The Great Bear Rainforest mediation resulted in an “agreement between environmental, economic, social and [indigenous groups]” that was achieved by seeking “input from disciplines such as natural sciences, economics, politics, culture, psychology and spirituality,”<sup>220</sup> and by viewing the situation from individual and collective perspectives.<sup>221</sup> The parties joined together “in a way that respected the global significance of [the] temperate rainforest”<sup>222</sup> as well as the needs and perspectives of local stakeholders. According to one commentator, the outcome was a “revolutionary new conservation plan [which] required an equally radical planning and negotiation process.”<sup>223</sup> Unanticipated creative solutions were devised as the parties coalesced around the recognition of each other’s interests and a deepening shared appreciation for the global significance of the region.<sup>224</sup> One participant to this multi-stakeholder settlement outcome reportedly stated that “if other areas of global significance in the world follow this process of collaboration we will have exported a very valuable product . . . .”<sup>225</sup>

The Great Bear Rainforest resolution process could be

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<sup>219</sup> *Id.*

<sup>220</sup> Heather Ramsay, *Landmark Great Bear Agreement is Down to the Wire*, THE TYEE, Sept. 11, 2005, <http://thetyee.ca/News/2005/09/11/GreatBear/>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Smith, *supra* note 217, at 13. In this process, “trust [was] a critical ingredient” and “the presence of mediators and facilitators [was] fundamental to reaching agreement at all levels.” *Id.* Negotiations and mediation efforts involving environmentalists, indigenous leaders, government workers, and logging company officials required “thousands of hours under fluorescent lights in stale meeting rooms at airport hotels and YMCAs,” which resulted in a 2006 agreement entitled “A New Vision for Coastal B.C.” Kristin Kolb-Angelbeck, *Canada’s Great Bear Park? Not Exactly*, SIGHTLINE DAILY, Feb. 8, 2006, [http://daily.sightline.org/daily\\_score/archive/2006/02/08/canadas\\_great\\_b?searchterm=Great%20Bear%20Rainforest](http://daily.sightline.org/daily_score/archive/2006/02/08/canadas_great_b?searchterm=Great%20Bear%20Rainforest). The agreement “completely protect[s] 2.1 million hectares of ancient temperate rainforest from logging and will see lighter-touch logging implemented in another four million hectares.” Sierra Club of Canada News Release, *George Heyman to Lead Sierra Club BC: Former BCGEU President Will Foster New Alliances to Tackle Global Warming*, Apr. 6, 2009, <http://www.sierraclub.ca/national/media/item.shtml?x=2892>. Additionally, the mediation resulted in a commitment to devise an “ecosystem-based management” plan that was successfully completed by its March 2009 deadline. Kolb-Angelbeck, *supra* note 223. *See supra* note 216. Though lauded by many, the outcome was, however, lambasted by some conservationists, who decried the process after negotiators “rejected the recommendations of a blue-ribbon team of conservation biologists.” Kolb-Angelbeck, *supra* note 223.

<sup>224</sup> *See generally* Smith, *supra* note 217.

<sup>225</sup> Ramsay, *supra* note 220.

instructive for how to proceed with the mediation of the Arctic dispute. Similarly to what occurred in British Columbia, Arctic-region mediation could inculcate a heightened appreciation for the global significance of the region, consider the interests and perspectives of multiple stakeholders, and utilize global public attention to motivate parties to negotiate and to ensure the bioregion is protected and developed in a sustainable manner.<sup>226</sup> Nevertheless, there are worthy objections to a proposed mediation of the Arctic dispute.

#### 4. *Reluctance to Engage in Mediation of the Arctic Region Dispute*

One objection to a proposed mediation of the Arctic region dispute is the practical difficulty of persuading states to engage in a process that could potentially limit their jurisdictional claims. One polar expert observed that there has never “been an agreement to put to mediation a limitation of an EEZ or a territorial sea.”<sup>227</sup> Parties are unlikely to agree to engage in voluntary dispute resolution processes unless they believe they can achieve an outcome superior to their “best alternative to a negotiated agreement” (BATNA).<sup>228</sup> As a result of their negotiations in

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<sup>226</sup> See generally Smith, *supra* note 217.

<sup>227</sup> See Huebert, *supra* note 63.

<sup>228</sup> The BATNA is “the standard against which any proposed agreement should be measured.” FISHER ET AL., GETTING TO YES, *supra* note 189, at 100. “Simply put, if, through negotiation, you cannot do as well for yourself as your BATNA, you should walk away from the negotiation and live with your BATNA.” LAWRENCE SUSSKIND ET AL., NEGOTIATING ENVIRONMENTAL AGREEMENTS 22 (2000). Parties will compare the progress of negotiation settlement process against their BATNAs at all stages of the mediation process, including after a final settlement has been reached. Guy Burgess & Heidi Burgess, *Environmental Mediation: Beyond the Limits Applying Dispute Resolution Principles to Intractable Environmental Conflicts* (Univ. of Colorado Conflict Research Consortium, Working Paper 94-50, 1994), [http://www.colorado.edu/conflict/full\\_text\\_search/AllCRCDocs/94-50.htm](http://www.colorado.edu/conflict/full_text_search/AllCRCDocs/94-50.htm).

[P]articipants in environmental problem-solving processes may amicably and sincerely work to achieve the best possible negotiated settlement. However, once the final settlement begins to emerge, participants will be asked by their constituents (if not themselves) if there are other arenas or power contests through which their interests might better be pursued and their opponents confronted. In other words, can they get a better deal by pursuing their interests in other forums? . . . If *any* of the parties believe that they can get a better deal through *any potentially viable* alternative to a negotiated agreement, then they can be expected to try to do so. The negotiation process will then fail and the mirage of a draft settlement will vanish—just as it appeared to be so tantalizingly close.

*Id.* (emphasis in original).

Ilulissat, the Arctic coastal states signaled their intention to move away from power-based displays to rights-based processes presumably because they understood they could obtain a better result under the peaceable framework established by UNCLOS than from military posturing and armed conflict. Similarly, to shift from rights-based to interest-based approaches such as mediation, the parties must believe that they might be able to achieve a solution superior to their BATNA by utilizing such a process.

One response to this reluctance is that mediation could be useful for resolving disputes not governed by UNCLOS, such as the management of Arctic areas not reached by any state's UNCLOS claims. Such issues could be seen as appropriate subjects for mediation, even to those proposing rights-based solutions, as a multilateral mediation process which includes members and participants of the Arctic Council and other stakeholders need not encroach upon any state's present or potential rights under UNCLOS.

Additionally, UNCLOS provides little guidance for how overlapping jurisdictional claims should be resolved.<sup>229</sup> Consequently, a rights-based approach would likely fail in determining the statuses of expected competing claims in, for example, the three-way dispute between Canada, Denmark, and Russia over the North Pole and surrounding areas.<sup>230</sup> Interest-based negotiations or mediation would be preferable to the outcome envisaged by one commentator—that the failure of UNCLOS to offer a rights-based solution will result in the dispute “ultimately . . . [being] decided, like any fight, by timing, power and strong-arm tactics—or retreat.”<sup>231</sup> With no clear rights-based solution available, interest-based negotiations or mediation would be far better alternatives than resorting to power-based approaches to resolve such disputes. Mediation has a record of success in territorial disputes. For instance, the dispute between Egypt and Israel over the Sinai Desert was resolved with the assistance of U.S.-led mediation in 1978, which helped the parties craft “interest-based” rather than distributive or positional solutions.<sup>232</sup>

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<sup>229</sup> See Holmes, *supra* note 7.

<sup>230</sup> Boswell, *Race*, *supra* note 61; Holmes, *supra* note 7, at 325.

<sup>231</sup> Boswell, *Race*, *supra* note 61.

<sup>232</sup> FISHER ET AL., GETTING TO YES, *supra* note 189, at 116. A “One-Text” procedure was employed by President Carter to arrive at a mutually acceptable solution to the Egypt-Israel dispute over the Sinai Desert. ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 129 (1996) [hereinafter FISHER ET

Another response to concerns about mediation would be that parties are free to engage in mediation while also pursuing and awaiting the recognition of jurisdictional boundaries and rights under UNCLOS.<sup>233</sup> Indeed, mediation frequently occurs as “bargaining in the shadow of the law;”<sup>234</sup> a mediator may remind mediation participants that unlike a win-lose court outcome, mediation permits parties to fashion their own solutions—a prospect that can be especially desirable in situations where parties do not know if a judge or jury will find in their favor.<sup>235</sup> This sense of insecurity regarding a third-party’s determination might be especially pronounced where the ruling will be final and binding, as may be the case with CLCS findings.<sup>236</sup> Consequently, states may wish to avoid binding outcomes by attempting to satisfy their

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AL., BEYOND MACHIAVELLI]. In a “One-Text” process, a third-party neutral inquires into the parties’ interests, drafts a proposed settlement agreement that serves as an initial focal point for discussion, revises the text (repeatedly, if necessary) based on the parties’ criticisms and suggestions, and requests that each party agree to the final document. *Id.* at 124-29. The mediator-drafted settlement utilizing this procedure satisfied Egypt’s interest in territory and Israel’s interest in security with the award of a demilitarized Sinai to Egypt. FISHER ET AL., GETTING TO YES, *supra* note 189, at 116. Such an approach could work for the Arctic dispute, where many interests and proposals would need to be considered: “The one-text procedure is a great help for two-party negotiations involving a mediator. It is almost essential for large multilateral negotiations,” where many proposals cannot be constructively discussed without a simplification of the decision-making process. *Id.* After meeting with all invited stakeholders, a mediator could draft a proposed settlement agreement reflecting all parties’ interests, and then work with parties to modify this agreement in joint sessions and caucuses. A “One-Text” approach can be contrasted to “concession hunting,” where a mediator meets with parties to extract concessions in order to bring the participants closer together—a process that frequently begins with parties taking extreme initial positions because of their expectation that they will be forced to make concessions. FISHER, ET AL., BEYOND MACHIAVELLI, *supra* note 232, at 125-29. Such an approach “often fails because it does not address the underlying interests of the disputants that have impeded a settlement.” *Id.*

<sup>233</sup> See UNCLOS, *supra* note 32, art. 279.

<sup>234</sup> See generally Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT’L L. & POL. 789 (2009).

<sup>235</sup> Vincente Marotta Rangel, *Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunal*, 21 INT’L J. MARINE & COASTAL L. 347, 353 (2006) (quoting UNCLOS, art. 76, para. 8). One commentator has argued that the finality of the Commission’s findings as to the limits of a state’s “extended legal continental shelf” gives impetus to states to quickly submit their claims, because legal certainty may promote cooperation in the “international sea-bed area” and “states with opposite or adjacent coasts are not in a good position to negotiate their joint boundaries in the area beyond 200 miles . . . [nor] define in this area their respective interests in relation to third states.” *Id.* at 350-51.

<sup>236</sup> “The outer limits of the shelf established by a coastal state on the basis of the Commission’s recommendation shall be ‘final and binding.’” *Id.* at 353 (quoting UNCLOS, *supra* note 32, art. 76, para. 8).

interests directly through negotiations. Additionally, as discussed previously, it may be many years before boundaries are established under UNCLOS processes. Engaging in mediation during this time period could resolve in a timely manner important environmental, fishery, navigational, mining, military, and other matters. Should mediation efforts fail, parties will have sacrificed none of their potential rights or claims.<sup>237</sup>

Some critiques of mediation in general would potentially apply to the mediation of the Arctic dispute.<sup>238</sup> A worldcentric approach could meet many of these concerns. For example, one argument against using mediation to resolve Arctic disputes is that even “win-win” solutions will exclude the interests of those not party to the mediation process. A worldcentric approach to mediation would encourage parties to redefine what is in their best interests—to expand their circle of concern beyond state boundaries and to the consideration of the planet as a whole. As Steve McIntosh has written:

[T]he more our consciousness develops, the more our sense of morality—our estimate of the scope of those worthy of moral consideration—expands to encompass the world. Indeed, a worldcentric morality is a clear marker of higher consciousness. But apart from considerations of higher morality, ameliorating global problems is increasingly becoming a matter of self-interest. The globe is more connected and interdependent than ever before, so what happens in Indonesia or Sudan increasingly affects conditions here in the developed world.<sup>239</sup>

Thus, in worldcentric mediation, parties would seek to reach “win-win-win”<sup>240</sup> solutions that would reach beyond the mediation

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<sup>237</sup> Gross, *supra* note 184.

<sup>238</sup> See Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 52-53 (2001), listing critiques of mediation:

(1) Powerful parties can impose their will on weaker parties, partly because mediation's informal setting provides fewer safeguards than more formal forums; (2) Mediation's focus on individual disputants will hide from public view disputes with societal implications; (3) Mediation's emphasis on accommodation and compromise may drain energy from collective action that would be of greater benefit to disadvantaged groups than a series of individual decisions; (4) Mediation may deter large-scale structural changes in political and societal institutions that can only be corrected through the judiciary and not through mediation; [and] (5) Co-option of less powerful groups by more powerful groups.

<sup>239</sup> STEVE MCINTOSH, INTEGRAL CONSCIOUSNESS AND THE FUTURE OF EVOLUTION: HOW THE INTEGRAL WORLDVIEW IS TRANSFORMING POLITICS, CULTURE, AND SPIRITUALITY 104-05 (2007).

<sup>240</sup> DON EDWARD BECK & CHRISTOPHER C. COWAN, SPIRAL DYNAMICS: MASTERING VALUES, LEADERSHIP AND CHANGE 284 (1996) (defining “win-win-win” as

room to address and satisfy interests “of the greater good . . . and the entire society”<sup>241</sup>—considerations that even typical mediation processes might exclude.

Worldcentric mediation would thus contain a norm-advocating component.<sup>242</sup> In norm-advocating mediation, the mediator insists that whatever agreement is reached by the parties incorporate and adopt legal and societal standards.<sup>243</sup> “Norm-advocating mediators are found in public policy, human rights, or environmental disputes where decisions could have an impact on generations to come.”<sup>244</sup> A worldcentric mediation process would seek to address and resolve the ethical issues presented by international environmental challenges and disputes, while preserving mediator neutrality. This could be accomplished by coupling a neutral, facilitative<sup>245</sup> mediation process with a norm-advocating, evaluative component, resulting in what can be called a “mediation PLUS,” mixed process.<sup>246</sup>

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meaning “that unless the greater good . . . [and] the entire society . . . are considered in negotiation, simple and selfish win[-]win deals between only two parties will emerge. Such a narrow outcome will not produce positive results in the long term”).

<sup>241</sup> *Id.*

<sup>242</sup> Some scholars distinguish norm-neutral approaches to mediation from those that educate participants as to the existence of, or advocate for, particular norms. See, e.g., Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997) (identifying “‘norm-generating,’ ‘norm-educating,’ and ‘norm-advocating’” models of mediation). In norm-neutral mediation, the terms of agreement are developed by “the particular parties involved, rather than being a statement about public norms.” JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* 16 (2008).

<sup>243</sup> Waldman, *supra* note 242, at 745.

<sup>244</sup> CHERYL ANN PICARD ET AL., *THE ART AND SCIENCE OF MEDIATION* 117 (2004).

<sup>245</sup> For a table listing key differences between adversarial negotiation, and problem-solving (or facilitative) negotiation and mediation, see ABRAMSON, *supra* note 99, at 56.

<sup>246</sup> Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295-96 (2000). The neutrality and accountability of the mediator in environmental disputes has been debated by Professors Lawrence Susskind and Joseph B. Stulberg. See MENKEL-MEADOW, *supra* note 105, at 272-73. Susskind has argued that environmental mediators must forcefully intervene to “fulfill their responsibilities to the community-at-large,” Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 47 (1981), whereas Stulberg has countered that such intervention, and holding a mediator “accountable for the mediated outcome . . . [are] conceptually and pragmatically incompatible with the goals and purposes of mediation.” Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981). See William Hall, *Turning Points in Environmental Negotiation: Dynamics, Roles, and Case-Related Factors* 5 n.1 (Nov. 7, 2007) (unpublished Ph.D. dissertation, George Mason Univ.), available at <http://hdl.handle.net/1920/2936> (follow link to full text). A worldcentric mediation process could be characterized as a norm-advocating dispute resolution approach that takes a “middle path” between these two views.

A potential criticism of a worldcentric approach to mediation would be the level of complexity involved in such an endeavor. If the entire world is a stakeholder to the Arctic dispute, critics may ask, who will decide who gets a seat at the mediation table, and by what process will this decision be made? A worldcentric mediator would work with the initial parties in pre-negotiation sessions,<sup>247</sup> advocating for the inclusion of representatives of those stakeholders who would be most affected by the outcome of the mediation process. In addition to indigenous communities,<sup>248</sup> candidates for inclusion would include representatives from intergovernmental entities such as the European Union and non-governmental organizations representing the needs of wildlife, nature, and the interests of sustainable business entities.

Concerns over who would be part of the formal mediation sessions may be somewhat less important than in “norm-neutral” mediation, because a norm-advocating, worldcentric mediator will occupy a “third side” position<sup>249</sup>—one that ensures that any mediated settlement takes into account the concerns of the larger community affected by the outcome.<sup>250</sup> William Ury coined the term “Third Side,” which is “*a way of looking at the conflicts around us not just from one side or the other but from the larger perspective of the surrounding community.*”<sup>251</sup> A “thirdsider” mediator focuses on understanding “both sides of the conflict[,] . . . [e]ncourage[s] a process of cooperative negotiation [and] [s]upport[s] a wise solution—one that fairly meets the essential needs of both sides and the community.”<sup>252</sup>

A mediator utilizing a worldcentric approach would be best suited to deal with the level of complexity inherent in Arctic region disputes as a whole, particularly where the mediator is able to recognize and address the perspectives of formal parties to the dispute as well as the larger community’s diverse interests and

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<sup>247</sup> ROGER SIDAWAY, *RESOLVING ENVIRONMENTAL DISPUTES: FROM CONFLICT TO CONSENSUS* 76 (2005).

<sup>248</sup> A worldcentric approach would ensure full participation of local inhabitants such as indigenous communities. Indigenous participants could share issues of concern, explain their interests, and play an important role in determining how rights are recognized and obligations allocated. They would contribute the important perspectives of those who live in the region and who are thus most familiar with how decisional outcomes might impact local cultural, economic, and environmental factors.

<sup>249</sup> William Ury, *The Third Side—Conflict Resolution*, <http://www.thirdside.org/thirdside.cfm> (last visited Sept. 29, 2010).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* (emphasis in original).

<sup>252</sup> *Id.*

needs.<sup>253</sup> As discussed previously, because of the prominence of the United Nations on the world stage, a mediator affiliated with or supported by the United Nations would be well-situated to introduce a worldcentric approach to the mediation of international disputes affecting numerous stakeholders, such as the dispute over the future of the Arctic region.<sup>254</sup>

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<sup>253</sup> This Note recommends that a mediator able to hold and convey a perspective that accounts for all stakeholder interests is best suited for the mediation of Arctic issues that will affect all multiple stakeholders—as opposed to comparatively minor border disputes over territories which happen to be situated in the Arctic, such as Canada and Denmark’s competing ownership claims over Hans Island. See Kenn Harper, *Hans’ History*, <http://www.canadiangeographic.ca/hansIsland/background.asp> (last visited Sept. 27, 2009).

<sup>254</sup> A recent report on the link between environmental disputes and armed conflict—and the role of the United Nations in such matters—points to the “unique roles” the United Nations could play, due to its “expertise and legitimacy in both ‘environment’ and ‘conflict prevention.’” MASON ET AL., *supra* note 55, at 9. The report recommends that: “The UN’s role in implementing environmental conflict prevention measures should be enhanced, especially with regard to . . . mediation combined with environmental expertise to support participatory resource and conflict management . . .” *Id.* at 11. It also suggests that “[t]he Mediation Support Unit (MSU) of the DPA . . . should explore how to integrate the environmental security dimension into mediation support.” *Id.* at 59. The report further envisions “mixed teams of environmental experts and mediators” from the DPA and UNEP engaging in “multiple stakeholder dialog processes” in order to “increase[] legitimacy and sustainability of decisions” where “environmental concerns . . . affect diverse stakeholder groups.” *Id.* at 78. In such a “mixed-team” effort, “[t]he role of the environmental experts is to provide neutral scientific data that is relevant in understanding the environmental issues at hand and in developing appropriate mitigation measures.” *Id.* at 103. Suggesting what could be characterized as a “mediation PLUS” evaluative process, see Love & Kovach, *supra* note 246. The report recommends that:

The role of mediation experts is different; they focus on procedural issues, structure the process, facilitate communication, or draft solutions based on the common ground that was identified in the negotiation process. If the mediators introduce technical data—even if it is scientifically sound—they may be viewed as being biased, and be prevented from achieving their core task. . . . It is important . . . that their roles be kept separate.

MASON ET AL., *supra* note 55, at 103. In a worldcentric mediation process, the mediation could take place within the context of normative boundaries drafted by a panel of UNEP personnel in conjunction with scientists, sociologists, and other experts. See U.N. Report on Mediation, *supra* note 114, at 12 (discussing the “normative boundaries for United Nations mediators” and the need for mediators to “rely on the expertise developed within the United Nations system and by relevant external experts.” The norms described relate to gross human rights violations and demands for amnesty. One could argue for the development by the UNEP of “environmental norms” that would also have normative force). The resulting guidelines could play a role in two stages of a mediation process. In consultation with the initial parties to the mediation, the mediator could work with the panel to ensure that relevant stakeholders were included in the mediation process. See JOHN FORESTER, *Lawrence Susskind: Activist Mediation in Public Disputes*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 309, 326-27 (Deborah M. Kolb et al. eds., 1997) (discussing the appropriateness of a mediator acceptable to the parties recruiting unrepresented stakeholders). Additionally, a “mediation PLUS” norm-advocating

## IV. CONCLUSION

In an increasingly interconnected and interdependent world, humanity requires new ways of resolving conflict, so as to not only survive, but to flourish and create a positive future. State leaders must recognize that national security interests can best be met through enhanced cooperation that places the integrity of the biosphere before any one country's short-term gains. A jurisdictional "carve-up" of Arctic territory and resources under UNCLOS (while preferable to unregulated exploitation) conflicts with the practical realities and ethical demands of globalization.<sup>255</sup> Peter Singer has written:

[H]ow well we come through the era of globalization (perhaps whether we come through it at all) will depend on how we respond ethically to the idea that we live in one world. For the rich nations not to take a global ethical viewpoint has long been seriously morally wrong. Now it is also, in the long term, a danger to their security.<sup>256</sup>

Approaching the Arctic in a way that places the short-term interests of individual states before the long-term health and benefit of the larger world community may increase global warming, militarization, environmental hazards, and other threats, endangering the security of all states and peoples, including the Arctic Five. "[G]lobal survival requires that we expand our loyalty to include not just our family, city, state or province, and country, but to humanity and the planet as well . . . ."<sup>257</sup>

There are undoubtedly instances in which power-based and rights-based processes are appropriate. Power-based solutions may be preferable where rights-based approaches fail; Neville Chamberlain's negotiations with Adolph Hitler were clearly an inappropriate means by which to attempt to resolve the growing

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evaluation component could be envisaged, see Love & Kovach, *supra* note 246, where a UNEP panel with a worldcentric perspective would review proposed outcomes or assist a mediator in drafting a proposed initial agreement to be reviewed and revised by the parties. As to where to draw the line regarding the approval or rejection of proposals that cross an environmental normative boundary, the United Nations has stated that in regard to questions involving matters of justice, "where the line would be drawn is a question that would need to be borne out by experience." U.N. Report on Mediation, *supra* note 114, at 12. Similar line-drawing based on experience might need to be developed as the United Nations' commitment to issues of environmental justice grows and strengthens.

<sup>255</sup> See PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION 13 (2002).

<sup>256</sup> *Id.* at 13.

<sup>257</sup> JERRY TETALMAN & BYRON BELITSOS, ONE WORLD DEMOCRACY: A PROGRESSIVE VISION FOR ENFORCEABLE GLOBAL LAW 14-15 (2005).

menace of German expansionism.<sup>258</sup> Rights-based solutions may be preferable to interest-based mediation outcomes; *Brown v. Board of Education*<sup>259</sup> would not have had its historic precedential effect had the dispute been resolved in mediation.<sup>260</sup> However, mediation has been found to be an effective tool for peaceably resolving disputes in a multitude of situations, and may be a key tool to ensure our collective survival. In mediation, zero-sum or “loyalty-to-oneself-only” mentalities are left behind in the pursuit of solutions where all parties benefit. Such results are likely to be more stable and create more benefits than “win-lose” outcomes, and may lead to previously unforeseen opportunities for cooperation in the future.

For mediation to resolve challenges that are global in nature, such as overpopulation, species extinctions, loss of biodiversity, and global warming,<sup>261</sup> it is imperative that mediators and parties adopt a worldcentric perspective. Although such a perspective may seem unrealistic or overly idealistic to many, one need only look at the history of dispute resolution to see how far humanity has come in resolving conflict peaceably. “By 2004, more conflicts had been settled by negotiation in the previous [fifteen] years than in the last two hundred, mostly facilitated by third parties and driven by the comparative activism of the [United Nations] and regional organizations.”<sup>262</sup>

One practical implication of a worldcentric approach to environmental disputes is that mediation processes will not exclude the interests of critical stakeholders who are, from a “global” perspective, significantly affected by the outcome of a mediation settlement. Another is that parties will redefine what it means to “win” a dispute. But most importantly, conflict resolvers and those in conflict will experience a broadened sense of

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<sup>258</sup> See Robert Benjamin, *The Dirty, Risky Business of Negotiation: Ideology and the Risk of Appeasement* (June 2008), <http://www.mediate.com/articles/benjaminappeasement.cfm>; see also Robert H. Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1089-91 (2003). Note that a seminal book on negotiations and mediation is subtitled “Negotiating Agreement Without Giving In.” FISHER ET AL., *GETTING TO YES*, *supra* note 189.

<sup>259</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>260</sup> Judge Frank Scardilli, Former Chief Circuit Mediator for the United States Court of Appeals for the Second Circuit, Classroom Discussion, The Benjamin N. Cardozo School of Law (Feb. 25, 2009).

<sup>261</sup> Kenneth Cloke, *Climate Change and Conflict: How Mediation Can Help Save the Planet*, ADRHUB.COM (Aug. 6, 2010, 4:51 PM), <http://adrhub.com/forum/topics/climate-change-and-conflict> (follow link to ClimateChangeCreighton1.ppt).

<sup>262</sup> Griffiths & Whitfield, *supra* note 100, at 8.

identity—a wider circle of care and concern that increasingly embraces the actual and potential unity of a globalized world. The dispute over the fate of the Arctic presents an opportunity for this kind of unifying approach; one that will result in long-term, sustainable outcomes which place the needs of the planet and its inhabitants before the short-term interests of a few. Indeed, our future survival and evolution may depend on our achieving nothing less.