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NATURAL RESOURCES IN THE ARCTIC: THE EQUAL DISTRIBUTION OF UNEVEN RESOURCES

By Ganeswar Matcha and Sudarsanan Sivakumar*

This paper analyses the governance machine in place at the Arctic and examines the application of the principles of “common heritage of mankind” at the Arctic. This paper also offers some tentative propositions aimed at protecting Out Bound investment rights and how the World Trade Organization or other countries, like the U.S., can intercede in the Arctic investment sphere and attempt to regulate along with the United Nations Convention for the Law of the Sea.

INTRODUCTION

The world we live in is a symbiotic living organism that went through a schism of unevenly distributed natural resources. Humanity has always relied upon the exploitation and use of these natural resources to meet its evolution requirements. All these resources are essential for the endurance of humanity’s survival in this planet. *Natural resources* are defined as the “[i]ndustrial materials and capacities (such as mineral deposits and waterpower) supplied by nature.”¹ In light of the industrial revolution, these resources became a source of profit and business equal to its use of being a catalyst of life and survival. Industrialists and countries alike sought to utilize these resources to ensure the development of industrial and state economy. As these resources diminished, it created a struggle between competing state powers to lay claim to resource sources to satisfy its growing needs.

“The Arctic is the northernmost region on Earth” and is dominated by the Arctic Ocean basin, Scandinavia, Russia, Alaska, Canada, and Greenland.² It encompasses a significant amount of minerals and crude oil, Projections show that the area of land and sea that falls within the Arctic Circle is home to an estimated 90 billion barrels of oil, an incredible 13% of Earth’s reserves.³ This may seem insignificant on the scale of simple mathematics, however, on the scale of value it is numbered at several billions of dollars.⁴ Several mining companies pay royalties to exploit this piece of earth in spite of the lack of regulation and control.⁵

Currently, Out Bound Investors from Russia are the top investors in the arctic zone. Investors and states are interested in the Arctic Circle as the region is believed to contain approximately 160 billion barrels of oil, which equals roughly 30 percent of the world’s undiscovered natural gas.⁶ However, unlike the Antarctic, the Arctic is melting at a higher rate.⁷ It is surrounded by the ocean, so there is no international treaty, and

the United Nations Convention for Law of the Sea (hereinafter referred to as “UNCLOS”), tries to governs most of the area.

I. THE BIRTH OF THE ARCTIC COUNCIL

The “Egg of Columbus” of the *Ottawa Declaration*⁸, the Arctic Council (hereinafter referred to as the “Council”) is a high inter-governmental forum that came into existence in the year 1996. This region is monitored by the eight states/countries surrounding the Arctic Circle, and they are responsible for consistently forming the Council. Since its establishment, the Council has provided space and a mechanism for the eight states’ entities to address common concerns across the Arctic arena. Over a couple of decades, the Council has emerged as the pre-eminent high-level forum of the Arctic region to discuss these issues. It has turned the region into an area of unique international cooperation between the eight states.⁹ Later bringing up UNCLOS as the predominant body to govern the seas is one of most unnatural events ever to occur in the history of public international law. When UNCLOS was created in 1982, the Arctic was added largely as an afterthought at the behest of Canada, the Soviet Union, and the U.S. In fact, most non-Arctic states refrained from adopting strong stances in the deliberations regarding the region, leaving the aforementioned trio to negotiate privately an “Arctic Deal”.¹⁰ In practice, this does not mean that UNCLOS itself represents the sole framework for the Arctic but rather, it is part of a patchwork of other regionally convened agreements that together govern the conduct of maritime activities in the region.

The formation of the council was considered an important milestone in enhancing cooperation in the circumpolar North.¹¹ The Council mainly focuses on the Arctic people, biodiversity, ocean, pollutants, climate and emergencies. The essential reason for the eight states to be members of the council is because of the geographical location of the states.

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II. THE PROPOSED LEGAL CONTRAPTIONS DETERMINING THE ARCTIC COUNCIL

The Arctic Council is not considered to be based on any legally binding instrument such as a treaty, a formally concluded and ratified agreement between countries. It lacks the legal personality of an international organization under international law, which would enable it to develop legislation or conclude treaties with other subjects of international law. However, a stream of debate exists as to whether the Council's contribution towards the Arctic makes their contributions to the region to predominantly be recognised under international law.

Presently, the Council provides leadership in the process that leads or may lead to regulatory instruments. The Council rather than being a "legislative body" is a de facto contributor to the advancement of international law in the region. In particular, the Council was engaged in the development and negotiation of three legally binding agreements concluded by the eight Arctic states.¹² However, there are contrasting views on the role of the Council in international law-making. E.J. Molenaar, one of the researchers, has examined the concept of Arctic Council System (hereinafter referred to as "ACS").¹³ The ACS will help to explain how the Council gets involved in regulatory activities without having direct competence.¹⁴

The ACS "has two basic components: the Council's constitutive instrument (the 1996 Ottawa Declaration), other Ministerial Declarations, other instruments adopted by the Council and the Council's institutional structure. The second component consists of treaties negotiated under the Council's auspices and their institutional components".¹⁵ The linkage between the Council and the ACS is not confined to the instruments' mere negotiation under the Council's auspices, but also comprises a considerable and increasing extent of substantive and institutional integration.¹⁶ This is a remedial development by the council to develop an alternative as the decisions cannot be recognised by the international law and the status of the Council is also quite unique to be determined by the international law due to the absence of generally accepted definition of intergovernmental organization.

III. SPECIAL LEGAL RIGHTS FOR THE ARCTIC STATES AND DISRUPTIONS OF SOVEREIGNTY

In order to address the question of which organization is governing the state's own sovereignty and claims of the minerals and crude oil in the region, the solution decided by the states is the predominant body of UNCLOS. UNCLOS was created from the desire to solve and settle disputes relating to seas in the year 1982.

Provided the uncertain geographical location of the region and to avoid quarrelling of the nations over the natural resources, UNCLOS has provided a special privilege to the eight states, the members of the council, surrounding the Arctic under the concept of "Extended Continental Shelf/ECS." The ECS, under the Article 76¹⁷ of UNCLOS, permits a country to extend its portion of continental shelf beyond the 200 nautical miles from the shore/baseline. The condition set forth by UNCLOS to the

countries involves a country, upon ratification of UNCLOS, has a ten-year period to make claims to an extended continental shelf, which, if validated by the organization, gives it exclusive rights to resources on or below the seabed of that extended shelf area.¹⁸ In order for the ECS claims to be proven valid, the state shall file their submissions to the Commission of Limits on Continental Shelf (hereinafter referred to as "CLCS"), a subordinate commission of UNCLOS whose role is to consider the scientific and technical data submitted by coastal states seeking to establish the outer limits of their continental shelf beyond 200 nautical miles and to make recommendations.¹⁹

The Four States surrounding the Arctic geographically, namely Canada, Russia, Norway, and Denmark, have already claimed their Extended Continental Shelf.²⁰ The United States of America is yet to ratify the UNCLOS regiment so its position in the claiming its ECS in the Arctic is still placed on hold. Similar to the many territorial disputes in the world, the ECS claims of the four states also face the same issue under the concept of "overlapping continental shelf." Though the disputes between the Arctic Five (A5) still exist, in the Ilulissat Declaration of 2008—a conference on Arctic Ocean—the A5 has guaranteed the orderly settlement of the overlapping continental shelf and will follow the legal framework of the law of the sea when addressing the issue of overlapping.²¹

"Sovereignty is the bedrock of international relations. The concept lays out basic rules for how countries are allowed to interact with one another."²² Today, as the world grows increasingly interconnected, what constitutes a violation of sovereignty is up for interpretation, for instance, under UNCLOS, most of the Arctic's natural resources are divided among the sovereign jurisdictions of the Arctic states. The non-arctic states or land-locked states (hereinafter referred to as "LDS") are thus severely limited in their ability or at the current point do not have a claim to exploit resources. This argument has been raised from the concept of relatively of what is being pursued in the Deep-Sea Mining Regulations. The International Seabed Authority, an intergovernmental subordinate body under UNCLOS, under the concept of "common heritage of mankind" has guaranteed benefit to the LDS's States. The claims from Land Locked States can be presented to UNCLOS, however, the Arctic is being claimed by a special privilege of ECS by the five states so this claim might not have much weight as under Article 76 of the UNCLOS, the Arctic can be considered under the state's continental shelf and hence cannot be considered as under the concept of common heritage of mankind.

Subsequently, "both the currently accessible trans-Arctic shipping routes are claimed by Russia and Canada as "internal waters" under international law, subject to the sovereign control of Moscow and Ottawa."²³ While international law does certainly provide privilege to the rights of regional actors, distant states or LDS are not entitled to some say in the Arctic affairs as non-Arctic observers may face significant restrictions when navigating the Arctic, "including denial access to the region."²⁴ The denial of access regime is a crucial question to non-Arctic parties as in the Antarctica treaty,²⁵ the non-members have no

claims in the region. The Antarctica Treaty is quite different in contrast to the Arctic region, as the treaty highlights that the region of the Antarctica can also be used by member states for peaceful purposes under Article 1 of the Treaty.²⁶

UNCLOS is acting as the bulwark in the issue between accessible trans-Arctic routes and non-arctic states. A reformative solution is greatly due in this matter as at the very least the convention should try to negotiate with Arctic states over the shipping routes in the region to avoid further escalation between the Arctic states and non-Arctic states.

IV. CURRENT INVESTMENT DISPUTES

Many arguments suggest that the Arctic could have an international treaty like the Antarctica but there are many reasons why the Arctic does not have a treaty like the south pole and many different researchers have different perspectives. In particular, the rush to reclaim the Arctic is reminiscent of early efforts to conquer Antarctica. The Antarctic Treaty System is a unique international legal regime and has developed international cooperation for almost fifty years. When the Antarctic Treaty was negotiated in 1959, it designated the continent as a completely demilitarized zone of peace, halting all claims of sovereignty in order to focus on exploration and scientific research.²⁷ Drilling was also prohibited without the approval of three fourths of the nations with voting power. Whilst in the case of Arctic, the states are rushing to exploit the vast number of resources the region holds.

Another view suggests that the Antarctic Treaty, even though it was formed nearly five decades ago, is not perfect itself and has major issues including the claiming of the region and the Antarctic treaty was a treaty that was based solely on environmental protection and not resource exploitation. Hence, the best alternative suggested by many states is UNCLOS. The Arctic nations have settled on UNCLOS, adopting it in their laws and subsequent agreements and it forms the basis for governance of the Arctic region.²⁸

V. THE WORLD TRADE ORGANIZATION AND INVESTMENT

The Joint Statement on Investment Facilitation for Development by the World Trade Organization (WTO) aims at developing a multilateral agreement to improve investment and business climate. The result is that investors in every sector of the economy would find it easier to invest, conduct their day-to-day business, and expand their operations in the future.²⁹ There is an interrelationship between the activity of trade and all other sectors of commercialization. In order to implement a legal framework, UNCLOS can be complemented by the WTO and could be incorporated as a regulation superstructure through an incremental process. As a result of this, the WTO may be able to expand its long arm of trade regulations and look into creating a legal framework for the Arctic region. As a result, no state actor in the Arctic would be able to claim the entirety of the Arctic by citing a sense of economic emergency or a sense of sovereignty.

The economic and political concerns that are in place at the Arctic can be effectively addressed by the interpretation of the Panel regarding ‘National Security’ under **Article XXI** of the **General Agreement on Tariffs and Trade**.³⁰ The Dispute Settlement Panel found that the reference to war or other emergency in international relations, as well as the content of the matters discussed in subparagraphs (i) and (ii) of **Article XXI(b)**, meant that political or economic differences would not be sufficient to constitute an emergency in international relations.

[P]olitical or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be ‘emergencies in international relations’ within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.³¹

In the context of this citation, it is clear that international relations between countries cannot deteriorate due to political or economic differences at any point in time. According to the authors, the same interpretation can be applied with regard to the strained tensions between the sovereign powers engulfing the Arctic during the present time. The far-reaching influence of the WTO essentially covers the investment aspect of trade. Whenever natural resources are mined, they are either used to ensure development or undergo a manufacturing process to be exported after they have been extracted. It is also vital for the WTO to work with UNCLOS to achieve Sustainable Development Goal (SDG) 12.2 by 2030,³² as it is critical to ensure sustainable management and effective use of Arctic resources.

VI. THE AUTHORS’ ANATHEMA

As the United States is not a signatory member of the UNCLOS, can the United States extend its rights into the Arctic under Article 76 of the UNCLOS? Unless the United States ratifies UNCLOS, the United States will be less able to promote and protect its self-interest as it will be “left without a voice when the Arctic region is being divided amongst other nations.”³³ Also, the UNCLOS has expressly mentioned that only ratified States can file their claims for ECS with CLCS.³⁴ Specifically, the United States will not be able to participate in the extended continental shelf process pursuant to Article 76³⁵ when Russia and other Arctic nations submit their extended territorial claims to the CLCS. This will not only put the United States at a significant disadvantage in the Arctic region but will also undermine the current balance of socioeconomic power among the Arctic nations. For example, without UNCLOS ratification by the United States, Russia will be able “to pursue its arctic claims without opposition from America” stated UNCLOS.³⁶ Russia

has started drilling for oil and gas in the Arctic region and full scale commercial operations are in progress.³⁷

Another issue that the authors would like to address is the link between the oil and gas sector in the Arctic and global trade. The United States and its allies have imposed sweeping sanctions, export controls, and other measures following the start of Russia's war against Ukraine. Since February 2022, the United States Department of the Treasury has implemented more than 2,500 sanctions in response to Russia's war of choice.³⁸ Despite such robust sanctions, Gazprom, a Russian majority state-owned multinational energy corporation, seems to have no dispute about supplying its gas from Russia's claim in the Arctic to the rest of the world. In 2014, the launch of a gas exchange in St. Petersburg by SPIMEX, the St. Petersburg International Mercantile Exchange. This provided the latest and most serious opportunity for a true market price to be established in Russia.³⁹ The establishment of SPIMEX has made it easier for Russian companies to trade their gas with customers in the West. Following the establishment of SPIMEX, Gazprom, apart from selling its gas product, has also taken on the official status of commodity delivery operator for gas on SPIMEX. This means that it is assuming the role of balancer for gas sold out of the exchange onto the Russian gas market.⁴⁰ According to a report by SPIMEX in 2018, the major buyer of the gas product is Eurochem, a Swiss-based fertilizer manufacturing company.⁴¹ Eurochem has used natural gas to produce urea ammonium nitrate, a liquid fertilizer, which in turn has been distributed to countries across the world, including the United States.⁴² Eurochem was recognized as a crucial player in the food supply chain by the U.S. Department of the Treasury.⁴³ However, the ownership of the Eurochem was under scrutiny following the sanctions imposed by the West as the ownership has shifted from a Russia businessman, Andrey Melnichenko, to his wife, Aleksandra Melnichenko, a Siberian citizen. Following the ban of Aleksandra Melnichenko by the European Union (EU) for taking part directly in the organization,⁴⁴ Eurochem has released a press report that the board of directors are only EU based members and Aleksandra Melnichenko is acting as the beneficiary of the company.⁴⁵ In general, beneficiary of a company refers to: "[t]he person or entity that you legally designate to receive the benefits from your financial products."⁴⁶ The authors feel this is an undiscovered area as the sanctions imposed by the United States and its allies or EU did not specify implications on a person for acting as a beneficiary to an organization. Placing aside the sanctions, this proves the potential of the Arctic natural resources and how its tradelines could benefit countries worldwide.

One unique course may be to avoid a solution under public international law entirely, and instead, the Arctic coastal states may find a remedy through private international law, perhaps through the humble bilateral investment treaty. Interestingly, private enterprise has accommodated for an increasingly volatile environment of energy exploitation—an environment in which investors have grappled with governmental expropriation, unilateral changes to the tax regime, or other sources of economic and political instability. If the coastal states were to enter into a

bilateral investment treaty specifically for the benefit of the oil and gas industry, the diplomatic negotiations over such a treaty may accomplish what an Antarctica style structure, the CLCS, or any one of the formalists' legal "solutions" never could: provide the Arctic with a stable legal regime. Because bilateral investment treaties often include dispute resolution, security, investment protections, and a host of other facilitating mechanisms, many of the Arctic's chilling effects on energy development may be avoided. While the exact nature of such a bilateral investment treaty is beyond the scope of this Article, an agreement under private international law could be a plausible way forward.

The UNCLOS does not have any regulations in place for investor protection rights, but it is believed by many legal researchers that as nations are applying to extend into the Arctic premises, the investors will have to follow the same national rights in the extended zone. The UNCLOS articles 77 and 79 are most relevant to this case. Subsections 1-3 of Article 77 state that:

[T]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.⁴⁷

The natural resources referred to in this article consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Subsection 4 of Article 79 goes on to mention that:

[N]othing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.⁴⁸

Regardless, subsection 4 of Article 79 is not completely relevant to the oil and gas sector or the minerals sector, it can be assumed that the extended continental shelf provides the same jurisdiction of the State parties over the region. However, the situation of the United States remains uncertain as firstly, it is not a signatory member of the UNCLOS for the organization to approve its claims.

The complication of overlapping zones is a substantial constraint in place and the most plausible approach to this issue, apart from the peaceful agreements or peaceful negotiation signed between the five states, is the "Joint Development Zone"

(hereinafter referred to as JDZ) approach. Typically, the JDZ approach will involve two states agreeing to “share resource revenues and costs for a specified period of time (probably in the region of 30 to 50 years). There will be varying degrees of form and complexity, but all will require party agreement.”⁴⁹ Though this approach has been questioned for the uncertainty of unsettled boundary issue. Another solution to this case is the unitized development. The key difference between both the approaches is the principle of settled boundary dispute but given the uncertain relations between all the A5 states in Arctic Circle, the authors believe it is wise for the states to settle on the JDZ approach.

The A5 states that have been granted the special privilege of the Extended Continental Shelf are within the Arctic circle territory and due to climate change impact, many myths have surfaced that the ice keeps melting down, which causes the Arctic to change its geographical position every year, which in turn might affect investments, but the concept of sovereignty of oil is completely unique from the Arctic position itself. Despite the tensions escalating between the western nations and Russia recently, this alone is not enough for the west to determine the position of Russia, provided its massive investments in the region, in the seat of the Arctic Council or to threaten the outbound investors from Russia.

VII. CONCLUSION

Although there have been long debates over whether the United States should join the UNCLOS, signing the agreement would be a wise move on the part of the country if it did. The authors also believe that it is critical to establish a Regional Bureau for Polar Affairs in the U.S. Department of State as it is of utmost importance to level the playing field in the Arctic. Further regulation is possible if the WTO ziggurat can establish a working framework to complement UNCLOS. Regarding arctic jurisdiction, the authors suggest that the Arctic Council or other international organs create a post known as “Arctic Ambassador,” which would speed up negotiations over disputed zones, helping investors. In order to enhance the effectiveness of Alaska’s offshore oil and gas industry, there ought to be an acceleration of the development of Alaska-specific offshore oil and gas standards and a discussion of their application in bilateral and multilateral forums. Finally, there should be enough cause to build support for an industry-led establishment of an Arctic-specific resource-sharing organization for oil spill response and safety. While these suggestions will not resolve the current disputes, they can help maintain and protect investor rights and benefit the environment.



ENDNOTES

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