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ARCTIC CONFLICTS & RUSSIAN FOREIGN POLICY

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ABSTRACT

In this paper, we analyze the intersections of legal and political dispute resolution methods in Arctic territorial disputes involving Russia and several Western governments, including Canada and the United States. There are two current disputes. The first dispute concentrates on the Lomonosov Ridge, a geological feature that runs near the North Pole and has been used by three states to claim the North Pole as part of their continental shelf. The second dispute deals with the legal status of the Northern Sea Route. Our paper evaluates the tradeoffs between the legal and political constraints in these disputes between Russia and the West, and considers the possible methods of dispute settlement. In the paper, we suggest that the resolution of Arctic conflicts is likely to include a set of legal-political equilibria, such as international adjudication, voluntary mediation, and intergovernmental regulation. The Lomonosov Ridge dispute is likely to be resolved by voluntary mediation through a voluntary conciliation procedure coupled with the political support of Russia, Denmark, and Canada. However, the Northern Sea Route dispute is likely to be addressed by intergovernmental regulation because Russia's argument on coastal jurisdiction is opposed by that of the United States on international waters and the right to free navigation.

INTRODUCTION

The Arctic is a territory of cooperation and conflict. Five states border the Arctic Ocean – Russia and four NATO members: Norway, Denmark (Greenland), Canada, and the United States. Conflicts, actual and potential, abound, some concern natural resources, while others concern shipping, military presence, and state boundaries.[1] The receding ice due to climate change exacerbates these issues.[2] The primary rivalry underlying these disputes is between Russia and the Western Arctic states.[3] The main challenge to resolving this set of conflicts is that there is neither a unified Arctic law, nor is there a primary dispute resolution process.[4] In this paper, we focus on the analysis of two pending disputes, the Lomonosov Ridge dispute and the Northern Sea Route dispute. The Lomonosov Ridge is a maritime feature that the disputing parties claim as an extension of their continental shelves, and

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[1] Spencer Cook, *Potential for Conflict in the Arctic: The New Cold War?*, STORY MAPS (July 17, 2020), https://storymaps.arcgis.com/stories/a19b6a79bc5c4596b52531856af389c9/print.

[2] *Id.*

[3] *Id.*

[4] Zhao Long, *Arctic Governance*, COUNCIL ON FOREIGN RELS. (Nov. 29, 2018), https://www.cfr.org/report/arctic-governance.

the Northern Sea Route is a shipping route to which Russia lays claim, though the United States disputes that claim.[5]

Is there a legal path for the resolution of these disputes? Resolving sensitive security questions in a courtroom could lead to increased tensions, and, as noted by the former head of the International Tribunal for the Law of the Sea (ITLOS), the expectation that a court can itself secure peace may be unrealistic.[6] On the other hand, political regulation may respond to the readiness of diplomatic and military options, which could facilitate an unsustainable legal-political equilibrium.[7] Our analysis focuses on the tradeoffs between legal adjudication and political regulation. After we examine the differences between judicial and diplomatic methods, we explore the possibilities of combining judicial and extra-judicial resolution methods. We propose that there is no universal panacea, but that different combinations of these methods can resolve different disputes.

In Part I, we discuss the norms, concepts, and procedures of international law that govern the logic of Arctic conflicts. International law regulates ownership of natural resources, governing access to and control over them through territorial or jurisdictional rights.[8] We discuss the role of maritime zones, straight baselines, the extension of the continental shelf, maritime boundaries, the status of straits, and navigation rights. Our paper also examines the dispute resolution framework provided by the UN Convention on the Law of the Sea (UNCLOS) and other institutions that may play a role in these conflicts, such as the Arctic Council and the various courts and tribunals that may have the jurisdiction to hear cases related to these disputes. The latter include the International Court of Justice (ICJ), the International Tribunal for the Law of the Seas (ITLOS), and arbitration tribunals and conciliation commissions, which usually are administered by the Permanent Court of Arbitration (PCA). We summarize a selection of relevant cases to show how international adjudication may decide these two disputes. We then compare the effectiveness of legal and political constraints.

In Part II, we discuss the strategies of the five Arctic states, focusing particularly on Russian foreign policy. Strategy documents and disputes with Russian involvement are used to show how the Kremlin defines its position in related events. We identify which dispute resolution mechanism has the

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[5] David Auerswald, Commentary, *Now Is Not the Time for a Fonop in the Arctic*, WAR ON THE ROCKS (Oct. 11, 2019), https://warontherocks.com/2019/10/now-is-not-the-time-for-a-fonop-in-the-arctic/.

[6] Marc Engelhardt, *Law of the Sea in the Strait of Hormuz*, DEUTSCHLANDFUNK (Oct. 08, 2019), https://www.deutschlandfunk.de/seerecht-in-der-strasse-von-hormus-das-ringen-um-die.724.de.html?dram:article_id=460555.

[7] *See id.*

[8] Richard B. Bilder, *International Law and Natural Resources Policies*, 20 NAT. RES. J. 451, 452 (1981).

highest chance of success given Russia's international legal and foreign policy behavior. In Parts III and IV, we elaborate on the two Arctic disputes: the Lomonosov Ridge and the Northern Sea Route. Russia, Denmark, and Canada have provided expert arguments on why the Lomonosov Ridge is part of their continental shelf in their submissions to the UN Commission on the Limits of the Continental Shelf (CLCS). The Russian government views the Northern Sea Route as a historic waterway over which it can exert its sovereignty.[9] It has established a regime, which holds that vessels traversing the route require a Russian icebreaker accompaniment.[10] The United States views this as an infringement on the freedom of navigation.[11] In Part V, we explain the degree to which legal-political equilibria can resolve these conflicts.

I. BACKGROUND

There are several sources of Arctic law. The Bering Strait, the body of water between Eastern Russia and Alaska, is governed by nearly 160 legal acts from the local level in Russia and the US to the international level.[12] The international law applicable in the Arctic is composed of hard law, which includes international agreements like UNCLOS and the rulings of international courts.[13] This is complemented by international soft law, which includes non-binding agreements and forums, such as the Arctic Council.[14] Relevant sources beyond the scope of this paper include the national law of the Arctic states as well as private and transboundary laws, which may apply to contracts between states and companies.[15]

International law provides limits to how states can exercise their power.[16] As there is no international law enforcement, states need to accept the agreed upon or customary international law for it to work – this has been called the "Achilles' heel" of international law.[17] Generally, states adhere to

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[9] *See* Sean Fahey, *Access Control: Freedom of the Seas in the Arctic and the Russian Northern Sea Route Regime*, 9 HARV. NAT'L SEC. J. 154, 170 (2018).
[10] *Id.* at 169.
[11] *Id.* at 162.
[12] *See* Paul A. Berkman et al., *Governing the Bering Strait Region: Current Status, Emerging Issues and Future Options*, 47 OCEAN DEV. & INT'L L. 186, 190 (2016).
[13] *See* Edward Canuel, *The Four Arctic Law Pillars: A Legal Framework*, 46 GEO J. & INT'L L. 735, 739 (2015).
[14] *See id.* at 744; Christian Tomuschat, *Effectiveness and Legitimacy in International Law*, 77 HEIDELBERG J. INT'L L. 309, 311 (2017).
[15] *See* Canuel, *supra* note 13, at 739.
[16] Bjarni Mar Magnusson & Charles H. Norchi, *Geopolitics and International Law in the Arctic*, *in* ROUTLEDGE HANDBOOK OF ARCTIC SECURITY 246, 247 (Gunhild Hoogensen Gjørv, Marc Lanteigne & Horatio Sam-Aggrey eds., 2020); Canuel, *supra* note 13, at 739.
[17] Tomuschat, *supra* note 114, at 310.

international law when it serves their national interest.[18] These interests range from taking advantage of the broad maritime claims UNCLOS allows, to preserving various resources by not having to negotiate the same issues repeatedly.[19] Adherence to international law can also prevent states from appearing unjust before their domestic audience or the international community.[20] Some transgressions, like those in environmental law, have transboundary consequences.[21] Hence, states may want to avoid this, leading to acceptance of such regulations. Furthermore, some states that have joined international agreements voluntarily participated in their drafting and have been encouraged to comply with agreement due to reciprocity.[22]

Prior research has concentrated on the legal architecture of the Arctic, drawing together acts of law and creating legal guidebooks on specialist issues, such as oil and gas development in the Arctic,[23] or access to the Arctic by non-Arctic actors.[24] All of these refer to the most comprehensive agreement for matters related to oceans: UNCLOS, to which all Arctic states, except for the United States, are party.[25] However, it is generally agreed that the United States accepts most of UNCLOS as customary law.[26] UNCLOS incorporated the 1958 conventions on the High Seas, the Continental Shelf, and the Convention on the Territorial Sea and the Contiguous Zone, while regulating a wide range of topics, among them fisheries, shipping, piracy, marine environment, oil spills, and maritime boundaries.[27] The Arctic states underscored that they accepted the applicability of international law to the Arctic in the Ilulissat Declaration of 2008:

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[18] *See* Magnusson & Norchi, *supra* note 116, at 247; Canuel, *supra* note 13, at 739.
[19] Clive Schofield & Andreas Østhagen, *A Divided Arctic: Maritime Boundary Agreements and Disputes in the Arctic Ocean*, *in* HANDBOOK ON GEOPOLITICS AND SECURITY IN THE ARCTIC 171, 175 (Joachim Weber ed., 2020); Canuel, *supra* note 13, at 739.
[20] *See* Mortimer Sellers, *The Effectiveness of International Law*, *in* REPUBLICAN PRINCIPLES IN INTERNATIONAL LAW 52, 52 (2006); ROBERT KOLB, THEORY OF INTERNATIONAL LAW 243 (2016).
[21] Donald R. Rothwell, *International Law and the Protection of the Arctic Environment*, 44:2 INT'L & COMP. L. Q. Apr., 1995 at 280.
[22] KOLB, *supra* note 20, at 242.
[23] *See* generally RACHAEL LORNA JOHNSTONE, OFFSHORE OIL AND GAS DEVELOPMENT IN THE ARCTIC UNDER INTERNATIONAL LAW: RISK AND RESPONSIBILITY (Malgosia Fitzmaurice et al. eds., 2015).
[24] *See generally* TIMO KOIVUROVA ET AL., ARCTIC LAW AND GOVERNANCE: THE ROLE OF CHINA, FINLAND, AND THE EU (Timo Koivurova et al. eds., 2017); AKIHO SHIBATA ET AL., EMERGING LEGAL ORDERS IN THE ARCTIC: THE ROLE OF NON-ARCTIC Actors (Akiho Shibata et al. eds., 2019).
[25] *See* John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 2 (2005).
[26] *See id.* at 10.
[27] *See* United Nations Convention on the Law of the Sea, Preamble, Dec. 10, 1982, 1833 U.N.T.S. 397.

> [W]e recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.[28]

A. Maritime Zones

Beyond a state's coast lay waters governed under a number of different rights and regulations, such as the regime of territorial waters and the Exclusive Economic Zone (EEZ).[29] The two Arctic disputes that we

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[28] Klaus Dodds, *The Ilulissat Declaration (2008): The Arctic States, "Law of the Sea," and the Arctic Ocean*, 33 SAIS REV. INT'L AFF. 45, 49–50 (2013).

[29] In addition to territorial waters or the contiguous zone, a state can extend its sovereignty over water areas up to 200 nm from the baseline: the *Exclusive Economic Zone* (EEZ). United Nations Convention on the Law of the Sea art. 57, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The *continental margin* "comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." *Id.* art. 76(3). In this area, the coastal state can exploit or conserve living and non-living resources – for example fish and oil and gas. *Id.* art. 56. The EEZ is a concept that was first created by UNCLOS. According to UNCLOS, a state can also claim the area beyond 200 nm, (usually up to 350 nm, or to 100 nm from the 2,500-mile isobath – a line that connects the depth of 2,500 meters) if the state can prove that its continental shelf extends that far. *Id.* art. 76. There are two ways in which a state can do this: (i) by referring to the thickness of sedimentary rocks or (ii) in reference to fixed points from the continental slope. *Id.* art. 76(4). States must submit their grounds for their claims to the Commission on the Limits of the Continental Shelf, which is constituted according to UNCLOS Annex II. *Id.* art. 76(8). These applications must be backed up with geographic and geological evidence. However, the legal and the geologic continental shelf can differ. Michael Byers, *The Law and Politics of the Lomonosov Ridge*, *in* 19 CTR. FOR OCEANS L. AND POL'Y 42, 44 (Myron H. Nordquist et al. eds., 2016). What a state receives is the right to access the resources. Other rights, such as freedom of navigation, remain available for foreign vessels. *Id.* art. 38(2). Beyond the EEZ and the extended continental shelf are the *high seas* and *the Area*. UNCLOS Article 86 holds that the high seas are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state. They are free for use by all states, UNCLOS, art. 87(1), which means all states can freely navigate and fly over, but also fish, lay underwater cables or construct artificial islands in the high seas. The Area is defined as the seabed and ocean floor and subsoil thereof, and is beyond the limits

analyze in this paper involve questions of ownership and sovereignty over water areas and the seafloor. The UN Convention on the Law of the Sea holds that a coastal state's sovereignty extends beyond the landmass and internal water, meaning its sovereignty extends also over the "territorial sea", including the seabed and subsoil as well as the airspace above.[30] The territorial sea can be established to a breadth of up to 12 nautical miles (nm) from a state's "baselines",[31] which are defined as the "low-water line along the coast".[32] A state's "contiguous zone" can extend up to 24 nm, wherein the coastal state may exert control to prevent infringements of its customs, fiscal, sanitation, or immigration laws and regulations.[33]

Regarding baselines, UNCLOS provides that states can draw straight baselines joining "appropriate points" where the coastline is deeply indented or cut into.[34] If applied, this increases the area of territorial waters as well as any related areas, over which the state can exercise sovereignty and bring economic benefits.[35] Some states argue that use of straight baselines has become "excessive."[36] There is evidence that eighty states have drawn straight baselines since 1951.[37] In the Arctic, only the United States has not followed that practice.[38]

B. Boundary Delimitations

UNCLOS provides how boundaries are delimited; relevant concepts here include baselines, the equidistance line, and equity.[39] UNCLOS

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of national jurisdiction. *Id.* art. 1(1)(1). Rather than being free for all, UNCLOS established the International Seabed Authority (ISA), headquartered in Jamaica, to manage access to seabed resources such as oil, gas and rare earths. *Id.* art. 156. This provision constitutes a compromise between coastal states and states without seashores. Coastal states wanted to extend the area they had control over and expand access to seabed resources, while the other states wanted to maximize the Area – the common heritage of mankind. Byers, *supra* note 29, at 45. Granting coastal states special rights but also providing pathways to resources for non-coastal states makes participating states more likely to uphold the Convention, as they benefit from it. *See id.*

[30] UNCLOS, *supra* note 29, art. 2.

[31] *Id.* art. 3.

[32] *Id.* art. 5.

[33] *Id.* art. 33.

[34] *Id.* art. 7 (1).

[35] *See* Waseem Ahmad Qureshi, *State Practices of Straight Baselines Institute Excessive Maritime Claims*, 42 S. ILL. U. L. J. 421-422 (2018).

[36] *Id.* at 422.

[37] W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION 105, 105 (1992).

[38] Tullio Scovazzi, *Sovereignty over Land and Sea in the Arctic*, 34 AGENDA INTERNACIONAL 169, 172 (2016) (Peru).

[39] UNCLOS, *supra* note 29, art. 9.

provisions differ depending on the maritime zone in which the boundary is to be drawn: territorial waters, EEZ, or the continental shelf.[40] UNCLOS Article 74 holds that boundaries in the EEZ should also be delimited by an international agreement (1). If no agreement can be reached in a reasonable time, parties can refer the dispute to compulsory dispute settlement procedures as set out in UNCLOS Part XV (2). While a boundary agreement is being negotiated, the states should come to a provisional agreement for practical purposes, and not hamper the reaching of a final agreement (3). Any questions about the delimitation should be determined in accordance with the agreement (4). With regard to the continental shelf, delimitation should be carried out in the same manner as in the EEZ (UNCLOS Art. 83).[41]

The concept of the equidistance boundary line is a delimitation concept that stems back to the 1958 Territorial Sea Convention.[42] Since then, it has come under criticism as it led to "unreasonable" results; for example, where the coast of one state is concave and the other is convex. In the North Sea Continental Shelf Case from 1969 (the first international court case for the maritime boundary delimitation) the ICJ stated: "It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity . . . ."[43] Although the ICJ has stated that it is neither customary international law to apply it, nor that the method of equidistance is privileged in relation to other methods, it is often used as a starting point in negotiations and arbitrations.[44] This is called the equidistance/relevant circumstances method and involves the equidistance line being drawn as a provisional line, and adjusted or shifted if relevant circumstances exist:

> In the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ expressly articulated the approach of dividing the delimitation process into two stages, namely "to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of that

[40] A maritime boundary in the territorial seas between two states' adjacent or opposite coasts should be delimited by agreement. *See* ALINA KACZOROWSKA-IRELAND, PUBLIC INTERNATIONAL LAW 323 (2015). If it is not, according to UNCLOS Article 15, the limit for one state's territorial waters should be drawn at the equidistance line between the baselines of the two, which makes it the median line. This does not apply where historic titles or special circumstances provide for a different way of delimitation.

[41] UNCLOS, *supra* note 29, art. 74.

[42] *See* Convention on the Territorial Sea and the Contiguous Zone art. 12, Apr. 29, 1958, 516 U.N.T.S. 205.

[43] North Sea Continental Shelf (Ger. v. Den.), Judgment, 1969 I.C.J. 1, ¶ 89 (Feb. 20).

[44] NUGZAR DUNDUA, DELIMITATION OF MARITIME BOUNDARIES BETWEEN ADJACENT STATES 16, (2007).

> line" (Judgment, I.C.J. Reports 1993, p. 38, at p. 61, para. 51). This general approach has proven to be suitable for use in most of the subsequent judicial and arbitral delimitations. As developed in those cases, it has come to be known as the equidistance/relevant circumstances method.[45]

The merits of the equidistance line are that its application is scientific and, therefore, relatively easy.[46] One survey of ICJ delimitation rulings found that, while the ICJ maintains the equidistance line is not the preferred method, it nevertheless most often decides on boundaries drawn using the equidistance line: "States who submit their disputes to the Court may well expect that this is the method that would be applied by the Court in delimiting their boundaries."[47]

Another method that is sometimes invoked is the angle-bisector method. This was applied by the ICJ in several maritime boundary cases, including the 1982 *Tunisia v. Libyan Arab Jamahiriya* case,[48] 1984 Gulf of Maine case,[49] and 2007 *Nicaragua v. Honduras* case.[50] In the third case, the ICJ stated:

> The use of a bisector — the line formed by bisecting the angle created by the linear approximations of coastlines — has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method.[51]

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[45] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, ¶ 229.
[46] *See* DUNDUA, *supra* note 44, at 24.
[47] Fayokemi Olorundami, *ICJ and Its Lip Service to the Non-Priority Status of the Equidistance Method of Delimitation*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 53, 53 (2015).
[48] *See* Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18 (Feb. 24).
[49] *See* Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12).
[50] *See* Territorial and Maritime Dispute Between Nicaragua and Honduras in Caribbean Sea (Nicar. v. Hond.) 2007 I.C.J. 659 (Oct. 8).
[51] *Id.* ¶ 287.

Another guiding principle which the ICJ and arbitral tribunals have used in delimitation cases is equity. In the 1982 delimitation case between Libya and Tunisia, the ICJ defined this principle:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems, the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; [sic] the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.[52]

In this sense, equity requires that delimitation be just, implying that the equidistance line cannot be the sole delimitation method. Alternatively, as the ICJ put it in the North Sea Continental Shelf Case: "Equity does not necessarily imply equality."[53] Another concept is proportionality, based on the idea that the proportion of maritime zones should correspond to the length of coast.[54] This was invoked by Germany in the continental shelf delimitation case of 1969.[55] The ICJ did not accept this outright, but rather used it as a test for equity:

> A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.[56]

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[52] Continental Shelf (Tunis v. Libya), Judgment, 1982 I.C.J. 18, ¶ 71 (Feb. 24).
[53] North Sea Continental Shelf (Ger. v. Den.), Judgment, 1969 I.C.J. 1, ¶ 91 (Feb. 20).
[54] *Id.*
[55] *Id.*
[56] *Id.* ¶ 98.

Importantly, the 1969 ruling stated that there is no reason why only one method should be used: "[N]o objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods."[57] In other words, the equidistance line is a helpful tool, but there are several others that may be used when defining a boundary.

C. Boundaries & International Jurisdiction

Of the Arctic maritime boundaries, only one boundary is still in dispute: that between the United States and Canada in the Beaufort Sea.[58] Four boundaries have been delimited through agreements negotiated without third-party involvement. However, this status quo refers only to the boundaries within the 200 nm EEZ.[59] Beyond this area, disputes remain with several Arctic states having overlapping claims and await recommendations by the Committee on the Limits of the Continental Shelf (CLCS). UNCLOS holds that maritime boundaries should be formed by international agreement.[60] These agreements may be the result of negotiations or come into being through the ruling of a court or an arbitration tribunal.[61]

A key difference between the dispute resolution methods above is transparency. In closed negotiations between two parties, it is difficult to gain insights into the arguments given and concessions allowed. We can only infer the political pressures exerted on the disputing parties from what is made public. In contrast, open court cases are associated with transparency and allow the public to comprehend the range of influences determining how a boundary is decided.

Arctic states that have joined UNCLOS have accepted different dispute settlement procedures: Denmark and Norway have chosen the ICJ's resolution mechanism;[62] Canada has chosen ITLOS and Annex VII

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[57] *Id.* ¶ 90.

[58] Schofield & Østhagen, *supra* note 19, at 176.

[59] *See* Andreas Østhagen & Clive Schofield, *An ocean apart? Maritime boundary agreements and disputes in the Arctic Ocean*, THE POLAR J. (Sept. 2021), https://www.tandfonline.com/doi/full/10.1080/2154896X.2021.1978234.

[60] UNCLOS, *supra* note 29, arts. 74(1), 83(1).

[61] UNCLOS refers boundary delimitation disputes to Part XV. This includes the provision of compulsory dispute settlement measures. UNCLOS, art 286. Ratifying states can declare in writing which method(s) they accept: a) the International Tribunal of the Law of the Sea, b) the ICJ, c) Annex VII arbitration, or d) Annex VIII arbitration, which deals with special cases. UNCLOS, *supra* note 29, art. 287(1).

[62] *Settlement of Disputes Mechanism*, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, https://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm (last updated Aug. 30, 2019).

arbitration;[63] and Russia has chosen ITLOS for disputes related to the prompt release of detained vessels and crews, Annex VIII special arbitration for disputes relating to fisheries, marine scientific research and navigation, and the protection and preservation of the marine environment (including pollution from vessels and dumping), and Annex VII arbitration for all other disputes. In general, when two parties to a dispute have different preferred methods, the default method is Annex VII arbitration, unless the parties agree otherwise.[64] However, boundary disputes are among the categories of disputes that can be excluded from compulsory dispute settlement, as are disputes concerning military activity and disputes related to the UN Security Council.[65] Russia and Canada have excluded all of these from the UNCLOS compulsory dispute resolution procedure according to Part XV. Norway and Denmark have only excluded Annex VII arbitration for Article 298 disputes.[66]

Until now, the ICJ has not heard a case directly related to the Arctic, but has issued many rulings on territorial and border disputes. The International Tribunal of the Law of the Sea (ITLOS), established by UNCLOS, has ruled on three disputes about the delimitation of maritime boundaries.[67] ITLOS has stated that customary law from rulings play a significant role in deciding delimitation cases: "In a matter that has so significantly evolved over the last [60] years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation."[68] ITLOS refers to rulings of ITLOS and the ICJ equally. ITLOS views the equidistance/relevant circumstances method as the established delimitation method: "The Tribunal notes that jurisprudence has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by international courts and tribunals in the majority of the delimitation cases that have come before them."[69]

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[63] *Id.*

[64] UNCLOS, *supra* note 29, art. 287(5).

[65] UNCLOS, *supra* note 29, art. 298.

[66] *Settlement of Disputes Mechanism*, *supra* note 62.

[67] *List of Cases*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, https://www.itlos.org/en/main/cases/list-of-cases/ (last visited Dec. 14, 2021).

[68] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, ¶ 184.

[69] *Id*. ¶ 238. This is done in a three-stage process: "[A]t the first stage [the Tribunal] will construct a provisional equidistance line, based on the geography of the Parties' coasts and mathematical calculations. Once the provisional equidistance line has been drawn, it will proceed to the second stage of the process, which consists of determining whether there are any relevant circumstances requiring adjustment of the provisional equidistance line; if so, it will make an adjustment that produces an equitable result. At the third and final stage in this process the Tribunal will check whether the line, as adjusted, results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant

II. RUSSIAN FOREIGN POLICY: DEGREES OF COMPLIANCE TO THE LAW OF THE SEA

There are several shades of Russian compliance to the law of the sea that may provide useful inferences for Arctic conflicts. We review the most important ones.

A. Svalbard

Norway and Russia are in dispute about Norway's sovereignty claims over Svalbard. Svalbard was regarded as *terra nullius* – land that has "vacant and belonging to no one else"[70] – until the 1920 Svalbard Treaty established that Norway would have the "full and absolute sovereignty" over the Archipelago of Spitsbergen (as Svalbard used to be called).[71] The treaty included some limits to Norway's power over Svalbard in the treaty, including that all nationals of the contracting parties could become a resident of Svalbard and fish, hunt,[72] and carry out mining or other commercial operations there.[73] The treaty explains these limitations with the wish that the territories would be "provided with an equitable regime, in order to assure their development and peaceful utilization."[74]

However, there are lasting disputes on issues related to the Svalbard Treaty, as well as on the interpretation of the treaty itself. These disputes

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maritime areas allocated to each Party." *Id.* ¶ 240. For years, the Arctic and its issues have been compared with the South China Sea. Nevertheless, the two conflicts are not similar. Magnusson & Norchi, *supra* note 116, at 247. The two parties subject to the South China Sea Arbitration were the Philippines and China. *See* South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/7/. The case dealt with historic rights, activities regarding marine resources and the nine-dash-line, which China considers a demarcation line. *Id.* Due to the UNCLOS compulsory dispute resolution mechanism, the Philippines was able to bring the case before court, despite objections and non-participation by China. *Id.* at 3. The arbitration tribunal decided that the dispute focused on islands that China attempted to use to claim an EEZ. *Id.* at 175. Since China had made a declaration under UNCLOS Article 298 excluding boundary disputes from binding dispute resolution, the tribunal could not set a boundary. *Id.* at 92. However, the tribunal did consider itself to have jurisdiction to rule on the question of whether the islands China claimed as basis for its EEZs could be considered islands according to UNCLOS. *Id.* at 464. It found that they did not. *Id.*

[70] THE NEW OXFORD COMPANION TO LAW 1161 (Peter Cane & Joanne Conaghan eds., 2008).

[71] Treaty Concerning the Archipelago of Spitsbergen art. 1, Feb. 9, 1920, 2 L.N.T.S. 8 [Svalbard Treaty].

[72] Svalbard Treaty, *supra* note 71, art. 2.

[73] Svalbard Treaty, *supra* note 71, art. 3.

[74] Svalbard Treaty, *supra* note 71.

involve the rights to Svalbard's rich resources, like fish and oil, and could include rights to shipping, as Arctic ice melts.[75] Today forty-four states are party to the agreement, including all of the Arctic states. The dispute between Russia and Norway involves questions about who is allowed to exploit and benefit from the resources in the exclusive economic zone (EEZ): "The Norwegian government argues that the equal rights of fishing and mining do not apply beyond the territorial sea, whereas a number of other States parties take the opposite view."[76] The 1920 Svalbard Treaty only covers territorial waters (four nautical miles), considering the concept of EEZ extending 200 nautical miles had not been defined by international law at the time of the treaty's signing. Norway does not want to grant other states equal rights in the EEZ, while Iceland, the Netherlands, Russia, Spain, and the United Kingdom argue the opposite.

A Russian news report from 2017 noted that the Russian government sees the potential for military conflict with Norway because it assumes that Norway wants "absolute national jurisdiction over the [Svalbard] archipelago and the adjacent 200-mile water area."[77] Despite confrontations, an analysis by the Arctic Institute suggests that the two countries have opted for cooperation and interest alignment rather than escalation.[78] One reason for this may be that Russia potentially benefits more from the status quo than if conflict actually erupted.[79] Nevertheless, declining fish stocks could cause the conflict to escalate.[80]

B. Bering Strait

In 1990, Russia's first bilateral Arctic delimitation agreement was concluded as a result of negotiations between the Soviet Union and the United States.[81] The agreement delimits economic zones and the continental shelf in the Bering Sea, including the Bering Strait, and took nine years to negotiate.[82]

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[75] Robin Churchill & Geir Ulfstein, *The Disputed Maritime Zones Around Svalbard*, *in* 14 CENTER FOR OCEANS LAW AND POLICY, CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA 551, 554 (Myron H. Nordquist et al. eds., 2010).

[76] Churchill & Ulfstein, *supra* note 75, at 551.

[77] Alexandra Djordjevic et al., *Геополитика в помощь снабжению – Военным морякам хватает вызовов и не хватает обеспечения* [*Geopolitics to Help Supply: Military Sailors Have Enough Challenges and Not Enough Security*], 183 KOMMERS. 1 (Oct. 3, 2017) (Russ.), https://www.kommersant.ru/doc/3428044.

[78] Andreas Østhagen, *How Norway and Russia Avoid Conflict over Svalbard*, THE ARCTIC INST. (June 19, 2018), https://www.thearcticinstitute.org/norway-russia-avoid-conflict-svalbard/.

[79] *Id.*

[80] *Id.*

[81] *See* Magnusson & Norchi, *supra* note 16, at 251.

[82] *See* Magnusson & Norchi, *supra* note 16, at 251-52.

It was not ratified by Russia due to concerns that the Soviet Union's poor negotiation gave too much territory to the United States.[83] In practice, however, the agreed boundary has not been challenged by Russia.[84] In fact, the region is a positive example of functional cooperation between Russia and the United States, at least in terms of environmental protection.[85] One reason for this may be that the current agreement influences the Northern Sea Route.[86] While some believe that the Russian Government is considering renegotiation,[87] others believe that more could be lost than gained as a consequence of this strategy.[88] Russia mentioned this agreement in its submission to the CLCS and stated: "The United States ratified this Agreement; the Russian Federation applies it provisionally from the date of signature to present."[89]

C. Barents Sea

In 2010, Russia signed a boundary agreement with Norway covering the Barents Sea – the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean – which ended a 40-year dispute.[90] The dispute involved Russia and Norway's overlapping claims to an areas of about 175,000 km^2, covering the border between Svalbard on the Norwegian side

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[83] *See* Magnusson & Norchi, *supra* note 116, at 252; Paul Goble, *Moscow May Soon End 'Provisional Enforcement' of 1990 Bering Strait Accord with US*, EURASIA DAILY MONITOR (Jan. 30, 2020, 8:05 PM) https://jamestown.org/program/moscow-may-soon-end-provisional-enforcement-of-1990-bering-strait-accord-with-us/.

[84] *See* Magnusson & Norchi, *supra* note 116, at 252.

[85] *See* Berkman et al., *supra* note 12, at 198.

[86] Goble, *supra* note 83.

[87] *Id.*

[88] Oksana Borisova et al., *Разрыв ущербного договора грозит новым конфликтом между Россией* [*Breaking of the Flawed Treaty Threatens a New Conflict Between Russia and the United States*], ВЗГЛЯД ДЕЛОВАЯ ГАЗЕТА [LOOK BUS. GAZ.] (Jan. 28, 2020) (Russ.), https://vz.ru/politics/2020/1/28/1020438.html.

[89] GOVERNMENT OF RUSSIA, PARTIAL REVISED SUBMISSION OF THE RUSSIAN FEDERATION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF IN RESPECT OF THE CONTINENTAL SHELF OF THE RUSSIAN FEDERATION IN THE ARCTIC OCEAN: EXECUTIVE SUMMARY 10 (2015), https://www.un.org/depts/los/clcs_new/submissions_files/rus01_rev15/2015_08_03_Exec_Summary_English.pdf.

[90] *See* Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Nor.-Russ., Sept. 15, 2010 [Barents Sea Treaty], https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF.

and Franz Josef Land on the Russian side.[91] The disputed area was divided roughly in half.[92] A press release by the Center for Borders Research stated: "Both governments have praised the agreement believing that it will facilitate offshore licensing and pave the way for future hydrocarbon exploration while also maintaining the cooperative fisheries arrangements that have developed over several decades."[93] Russia's willingness to compromise was induced by to the potential goodwill that could benefit its continental shelf submission.[94] This dispute was resolved through diplomacy.[95]

D. Caspian Sea

Russia has been involved in water disputes beyond the Arctic such as the dispute in the oil–and–gas–rich Caspian Sea, which has been at least formally resolved. Initially, in 1921 and 1940, two agreements between the Soviet Union and Iran reduced some uncertainties in the sea, but they did not address boundaries or resources.[96] The dispute arose again when three new states emerging from the collapse of the Soviet Union – Kazakhstan, Turkmenistan and Azerbaijan – asserted claims to the water, its seabed, and the resources therein.[97] The five states had to come to an agreement on whether to consider the Caspian Sea as a sea – and therefore UNCLOS as applicable – or as a lake, which would have different implications about possible state claims.[98] A breakthrough came in 2018, when an agreement was reached: the Caspian Sea would get a special status.[99] The treaty still did not allocate the entire seabed, and it remains unclear if a pipeline can be built, but all five littoral states signed it.[100]

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[91] Arild Moe et al., *Space and Timing: Why Was the Barents Sea Delimitation Dispute Resolved in 2010?*, 34:3 POLAR GEOGRAPHY 145, 145 (2011).
[92] *Id.* at 146.
[93] *Norway and Russia Sign Historic Maritime Boundary Agreement*, IBRU CTR. BORDERS RSCH. (Sep. 17, 2010), https://web.archive.org/web/20171119025248/https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=10741&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news+Headlines.
[94] Moe et al., *supra* note 91, at 155.
[95] The treaty contains dispute settlement provisions when hydrocarbon repositories extend across the boundary line. Barents Sea Treaty, *supra* note 90, art. 5. Any such disputes shall be resolved according to Annex II. *Id.* If negotiations do not resolve the issue after six months, an ad hoc arbitral tribunal shall be instituted. *Id.* at Annex II art. 3.
[96] I. William Zartman, *Sources of Negotiating Power in the Caspian Sea*, 19 PIN POINTS 1 (2002).
[97] *Id.*
[98] *Id.*
[99] Convention on the Legal Status of the Caspian Sea art. 1, Aug. 12, 2018, 58 I.L.M., 399, https://doi.org/10.1017/ilm.2019.5.
[100] *Id.*

E. Ukraine vs. Russian Federation

In November 2018, three Ukrainian naval vessels were detained by authorities of the Russian Federation in the Black Sea near the Kerch Strait.[101] Ukraine stated that the ships were on their way from Odessa to Berdyansk, one of the two Ukrainian ports in the Sea of Azov,[102] while Russia claimed that the vessels had illegally crossed its state border.[103] Ukraine instituted arbitral proceedings under Annex VII on March 31, 2019, and on April 16, 2019, submitted to ITLOS a "request for provisional measures, accordingly instituted proceedings under Annex VII to the Convention."[104]

Two weeks later, the Embassy of the Russian Federation in Germany wrote to the Tribunal stating they would not participate in the hearing.[105] The reason given therein was that both parties made reservations under Article 298 of UNCLOS, which exempted "disputes concerning military activities" from compulsory measures set out in Part XV section 2.[106] The note also stated that the Russian Federation would nonetheless submit to the Court written materials about its position on the case.[107] These submissions were sent on May 7, 2019, and public hearing commenced on May 10, 2019.[108]

Addressing the question of jurisdiction and the applicability of Article 298 declarations, the tribunal concurred with the Ukrainian argument that the case was not about military activity but about law enforcement activities.[109] The Tribunal also decided to proceed with the hearing despite Russia not being present because under Article 28 of the statute, a case cannot be halted by one party not appearing at a hearing and therefore failing to defend itself, if the other party wishes the proceedings to continue.[110] The tribunal prescribed provisional measures:

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[101] Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order 2019/2 of May 2, 2019, ¶ 30, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.
[102] *Id.* ¶ 31.
[103] *See id.* ¶ 32.
[104] *Id.* ¶ 35.
[105] *See id.* ¶ 8.
[106] UNCLOS, *supra* note 29, art. 298.
[107] *See* Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order 2019/2 of May 2, 2019, ¶ 12, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.
[108] *See id.*
[109] *See id.* ¶¶ 63-77.
[110] *See* Statute of the International Tribunal for the Law of the Sea art. 28, ITLOS, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf.

> Having examined the measures requested by Ukraine, the Tribunal considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring the Russian Federation to release the three Ukrainian naval vessels and the 24 detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine.[111]

This was passed by nineteen votes to one, with the one dissenting vote coming from the Russian judge, Roman Kolodkin.[112] The Russian judge argued along the same lines as the Russian Federation, that "the Arbitral Tribunal *prima facie* lacks jurisdiction to consider the dispute because of the 'military activities exception.'"[113] Five of the nineteen judges also made additional declarations or issued separate opinions.[114]

Both parties submitted compliance reports to the ITLOS Registry. Ukraine wrote that Russia had not complied with any part of the order, including the return and release of vessels and servicemen, and the commitment to not further aggravate the dispute; specifically, Ukraine cited the May 27 decision by a Moscow City Court to extend detention of five of the servicemen by three months.[115] The Russian Federation stated in its report that it would release the vessels and servicemen, despite them being under investigation for violating Russian legislation.[116] The Ministry of Foreign Affairs of the Russian Federation communicated the same to the Ukrainian Embassy in Moscow, in a *note verbale*; however, it had asked Ukraine for "written guarantees of participation of each of the 24 Ukrainian sailors" in the Russian proceedings, and "written guarantees of the preservation of physical

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[111] Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order 2019/2 of May 2, 2019, ¶ 118, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.

[112] *See id.* ¶ 124.

[113] Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Dissenting Opinion of Judge Kolodkin of May 25, 2019, ¶ 1, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_disop_RK.pdf.

[114] *See* Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.

[115] *See* Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Report of Ukraine of June 25, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C-26_-_UA_Report_on_Compliance.pdf.

[116] *See* Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Report of Russian Federation of June 25, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C26_Report_Russian_Federation.pdf.

evidence" of the naval vessels.[117] On September 7, the sailors were released as part of a prisoner swap, in which each country released 35 prisoners.[118] Moreover, in November 2019, according to media reports, Russia returned the vessels with tugboats to Ukraine.[119] In this dispute, Russia's approach was to reject the jurisdiction of an international court, bypassing the court's enforcement capacity, because of its relative military advantage in the conflict.[120]

F. Netherlands vs. Russian Federation

ITLOS has only once ruled on an Arctic dispute. In September 2013, the *Arctic Sunrise*, a vessel flying the flag of the Netherlands and chartered by the environmental NGO Greenpeace, was used to stage a protest near the Prirazlomnoye oil drilling platform that was located in the south-eastern Barents Sea and part of Russia's EEZ.[121] Russian authorities seized the ship and arrested thirty people on board, arguing that the actions of Greenpeace constituted piracy under the 1958 Convention on the High Seas.[122] Netherlands instituted arbitration proceedings in accordance with UNCLOS Annex VII, registered at the Permanent Court of Arbitration, and called on ITLOS for provisional measures to release the ship and persons.[123] ITLOS granted the provisional measures, and the persons were to be released on a bond for 3,600,000 euros.[124] Russia, however, did not participate in the proceedings as it did not accept the tribunal's jurisdiction.[125] Russia underscored that they had excluded disputes about military and law enforcement activities from the UNCLOS compulsory dispute resolution mechanism, and that this was a case falling under that exception.[126] ITLOS

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[117] Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Supplementary Report of Ukraine of June 26, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/C_-_26_-_UA_Supplementary_Report_on_Compliance_with_annex.pdf.

[118] Marc Bennetts, *Families Reunite in Russia-Ukraine Prisoner Exchange*, THE GUARDIAN (Sept. 7, 2019, 9:49 AM), https://www.theguardian.com/world/2019/sep/07/long-awaited-russia-ukraine-prisoner-exchange-begins.

[119] *Russia Returns Navy Vessels Seized from Ukraine*, DEUTSCHE WELLE (Nov. 18, 2019), https://p.dw.com/p/3TBsi.

[120] *See Id.*

[121] Alex G. Oude Elferink, *The Arctic Sunrise Incident: A Multifaceted Law of the Sea Case with A Human Rights Dimension*, 29 INT'L J. MARINE & COASTAL L. 244 (2014).

[122] *Id.* at 245.

[123] Arctic Sunrise Case (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.

[124] *Id.* ¶ 96.

[125] *Id.* ¶ 42.

[126] *Id.*

dismissed this argument but without addressing it in detail.[127] A separate joint opinion by Judges Wolfrum and Kelly states "it is worth mentioning that the activities undertaken by the Russian authorities prima facie are not to be considered as 'military activities' as referred to in the declaration," [128] and expands on why the Russia declaration did not justify Russia's non-appearance:

> To the extent that the Russian Federation relied on this declaration to justify its non-appearance, it is called for to state that this declaration cannot justify the non-appearance. Even if the declaration would exclude the jurisdiction of the Annex VII arbitral tribunal, the decision on its jurisdiction rests with that tribunal and not with the Russian Federation. International courts and tribunals have a sole right to decide on their jurisdiction.[129]

The arbitral tribunal established the issues of the case as whether Russian authorities should have obtained the Netherlands' consent before boarding and investigating the ship, whether Russia violated UNCLOS by not participating in the ITLOS proceedings, and the amount Russia should pay in damages for the seized ship.[130] In addition, the European Court of Human Rights was called on by the crew and passengers of the Arctic Sunrise to rule on their claims, namely that their arrest was "deprivation of liberty" in the scope of Article 5 of the Human Rights Convention, that they were falsely accused of piracy, and that their right to peaceful protest had been violated.[131]

The legal bases in consideration were UNCLOS, the Human Rights Convention, and customary international law.[132] Russia did not participate in the proceedings, and it stated that it did not accept ITLOS jurisdiction.[133] However, Russia released the crew and the others anyway, and after a further

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[127] *Id.* ¶ 33.

[128] Arctic Sunrise Case (Neth. v. Russ.), Case No. 22, Joint Separate Opinion of Judges Wolfrum and Kelly, Nov. 22, 2013, ¶ 11, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Wolfrum_Kelly_221113.pdf.

[129] *Id.* ¶ 8.

[130] Arctic Sunrise Case (Neth. v. Russ.), *supra* note 128.

[131] Bryan vs. Russia, App. No. 22515/14 (Dec. 6, 2017), http://hudoc.echr.coe.int/eng?i=001-179765.

[132] *Id.* ¶ 9.

[133] Arctic Sunrise Case (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ¶ 46, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.

six months the ship was released.[134] In Russia, this was justified not by the ITLOS decision but based on a domestic decision by the Russian investigative committee.[135]

III. THE LOMONOSOV RIDGE DISPUTE

Stretching through the Arctic from Russia's New Siberian Islands to Ellesmere Island in the Canadian Arctic, the Lomonosov Ridge separates the American and the Eurasian basins and spans about 1800 km.[136] Russia, Denmark and Canada have claimed the Lomonosov Ridge as a prolongation of the margin of their continental shelf.[137] The United States has stated its view that the Lomonosov Ridge is a standalone feature, not belonging to the continental shelf of any of the Arctic states.[138] The category of *seafloor high*, to which the Lomonosov Ridge belongs, is highly important for its legal characterization.[139] States intending to extend their continental shelf and show that the Lomonosov Ridge forms part of their territory are usually obliged to submit geological and geographical evidence to the UN Commission on the Limits of the Continental Shelf (CLCS), which is made up of scientists.[140] Submissions to CLCS must contain information on whether there are unresolved disputes with other states about all or parts of their claims. Only the executive summaries of the states' submissions are public.

A. Russian submission

In 2001, Russia was the first state to provide its submission to the CLCS and included their claims over the Lomonosov Ridge.[141] The other Arctic states and Japan notified the CLCS that there was not enough data to evaluate the claim.[142] In its submission, Russia labelled the Lomonosov Ridge

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[134] John Vidal, *Arctic 30: Russia Releases Greenpeace Ship*, THE GUARDIAN (June 6, 2014, 7:05 AM), https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship.

[135] *Greenpeace: Russian Investigative Committee Closes Arctic Sunrise Case*, INTERFAX (Oct. 1, 2014, 12:14 PM) https://interfax.com/newsroom/top-stories/40325/.

[136] *See* Byers, *supra* note 29, at 43.

[137] *See id.* at 46.

[138] United States Mission to the United Nations, Communication with Regard to the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf (Oct. 30, 2015), https://www.un.org/depts//los/clcs_new/submissions_files/rus01_rev15/2015_11_02_US_NV_RUS_001_en.pdf.

[139] *See* Byers, supra note 29, at 45.

[140] UNCLOS, *supra* note 29, art. 76.

[141] GOVERNMENT OF RUSSIA, *supra* note 89, at 5.

[142] Jon D. Carlson et al., Scramble for the Arctic, 33 SAIS REV. INT'L AFF. 21, 29 (2013).

as a submarine elevation.[143] The Commission advised Russia that the ridge could not be considered as such and "recommend[ed] that according to the materials provided in the submission the Lomonosov Ridge cannot be considered a submarine elevation under the Convention."[144] The significance of this is that submarine elevations can extend the area over which a state has sovereign control beyond the 350 nm limit applied to submarine ridges:

> Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.[145]

In a 2015 submission, Russia provided extensive details on the nature of the Lomonosov Ridge, with the executive summary recounting how the Arctic Basin was formed many million years (Ma) ago and concluding that the Lomonosov Ridge is in fact a submarine elevation.[146] The Russian submission explains that the Commission's conclusion was based on insufficient data and that new seismic sounding and other data collection since then have proven their earlier claim.[147] Furthermore, the Russian submission mentions that consultations with each of the competing states (Canada and Denmark) have taken place and statements would be provided to the CLCS to ensure that the evaluation goes ahead.[148] Moreover, Russia has underscored the following unresolved disputes of maritime delimitations in the Arctic Ocean: 1) between Russia and Denmark in areas of the Lomonosov Ridge, 2) between Russia and Canada on the Mendeleev Rise.[149]

B. Danish submission

Denmark submitted its Arctic claim on behalf of Greenland in 2014, ten years after Denmark ratified UNCLOS.[150] The coast of Greenland is the

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[143] GOVERNMENT OF RUSSIA, *supra* note 89, at 5.
[144] *Id.*
[145] UNCLOS, *supra* note 29, art. 76 (6).
[146] GOVERNMENT OF RUSSIA, *supra* note 89, at 17-18.
[147] *Id*. at 12.
[148] *Id*. at 30.
[149] *Id*. at 9.
[150] *See* GOVERNMENT OF DENMARK, PARTIAL SUBMISSION OF THE GOVERNMENT OF THE KINGDOM OF DENMARK TOGETHER WITH THE GOVERNMENT OF GREENLAND TO THE

closest to the North Pole of any of the Arctic states, being about 2,000 kilometers away.[151] In its submission, Denmark claims the Lomonosov Ridge as part of Greenland: "The Lomonosov Ridge is both morphologically and geologically an integral part of the Northern Continental Margin of Greenland."[152] Based on the executive summary of their submission, it appears that their claim relies on a comparison of rock samples and geologic historical evidence.[153] To comply with the rules of procedure regarding claims of disputed maritime areas, the submission contains the disclaimer that negotiations are in place with the four other Arctic states who may have overlapping claims and that any decision by the CLCS will not prejudice any negotiations on delimitation.[154] Regarding Norway, the Danish submission mentions that there is an agreement in place for the area between Greenland and Svalbard.[155]

C. Canadian submission

Canada submitted their claim to the CLCS on May 23, 2019.[156] They acquired bathymetric, gravimetric, and seismic reflection data using ice breakers and camps, as well as 800 kg of rock samples from six sites.[157] It claims part of the Lomonosov Ridge and points that exceed the 350 nm limit.[158] After Canada made its submission, the CLCS received comments on it from the Governments of Russia, Denmark, and the U.S.[159] Since they

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COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF: EXECUTIVE SUMMARY (2014), https://www.un.org/depts//los/clcs_new/submissions_files/dnk76_14/dnk2014_es.pdf.

[151] *Id.* at 12.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 18

[155] *Id.* at 17.

[156] GOVERNMENT OF CANADA, PARTIAL SUBMISSION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF BY CANADA: EXECUTIVE SUMMARY 6 (2019), https://www.un.org/Depts/los/clcs_new/submissions_files/can1_84_2019/CDA_ARC_ES_EN_secured.pdf.

[157] *Id.* at 6.

[158] *Id.* at 8-9.

[159] United States Mission to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Aug. 28, 2019) https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_08_28_USA_NV_UN_001.pdf ("[T]he Government of the United States confirms that it does not object to Canada's request"); Permanent Mission of Denmark to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Aug. 29, 2019), un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_08_29_DNK_NV_UN_002.pdf ("[I]t does not object to the consideration of the partial submission of Canada by

discussed the matter with the Government of Canada beforehand, all of them noted the overlap of Canada's claim with their own and confirmed that they had no objections to the Commission making a recommendation based on it, as long as this would not prejudice their own claims or any further border negotiation between themselves and Canada.[160] In contrast to the other two submissions, Canada states explicitly that their continental shelf limits "will depend on delimitation with the Kingdom of Denmark, the Russian Federation and the United States of America."[161]

D. United States comments

The United States has not ratified UNCLOS and therefore has not made a submission. However, it has sent *note verbales* after every submission dealing with the Arctic Ocean since Russia's first submission in 2001. That first *note verbale* included their general arguments, including on the Lomonosov Ridge; noting "[t]he [Lomonosov] ridge is a freestanding feature in the deep, oceanic part of the Arctic Ocean Basin, and not a natural component of the continental margin of either Russia or any other State."[162] Following Russia's submission of 2015, the US observations include points

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the Commission"); Permanent Mission of the Russian Federation to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Dec. 3, 2019), https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_12_03_RUS_NV_UN_001_en.pdf ("[T]he Russian Federation does not object to the Commission's consideration of the submission made by Canada").

[160] United States Mission to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Aug. 28, 2019) https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_08_28_USA_NV_UN_001.pdf ("[T]he Government of the United States confirms that it does not object to Canada's request"); Permanent Mission of Denmark to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Aug. 29, 2019), un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_08_29_DNK_NV_UN_002.pdf ("[I]t does not object to the consideration of the partial submission of Canada by the Commission"); Permanent Mission of the Russian Federation to the United Nations, Communications Received with Regard to the Partial Submission Made by Canada to the Commission on the Limits of the Continental Shelf (Dec. 3, 2019), https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_12_03_RUS_NV_UN_001_en.pdf ("[T]he Russian Federation does not object to the Commission's consideration of the submission made by Canada").

[161] *Id*. at 9.

[162] United States, Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf 3 (Mar. 18, 2002), https://www.un.org/depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf.

about the Bering Strait agreement, they state that both parties, Russia and the United States, have abided by the 1990 treaty.[163] With this, they implicitly make the statement that the maritime boundary once agreed on, but not ratified by Russia, should be considered customary law.[164]

IV. THE NORTHERN SEA ROUTE DISPUTE

The dispute over the status of the Northern Sea Route ("NSR") is mainly a conflict between Russia and the United States dating back to the 1960s.[165] Russia claims jurisdiction over the route due to parts of the route go through its internal waters and that it has jurisdiction over the route.[166] Accordingly, Russia has enacted national laws, which require vessels to apply for access to the route thirty days prior to passage and to employ Russian icebreakers and mandatory pilotage, as well as to cover the costs for these services.[167] This policy has been seen by the United States as infringement on international law, particularly on the right of freedom of navigation and more specifically on the right of transit passage through international straits.[168] A 2012 federal amendment law classified the Northern Sea Route as a "historically developed national transport communication of the Russian Federation" going through all the different maritime zones: "The area of the Northern Sea Route means a water area adjoining the northern coast of the Russian Federation, including internal sea waters, territorial sea, contiguous zone and exclusive economic zone of the Russian Federation."[169] This law, titled *On Amendments to Certain Legislative Acts of the Russian Federation*

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[163] United States, Communication with Regard to the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf (Oct. 30, 2015), https://www.un.org/depts//los/clcs_new/submissions_files/rus01_rev15/2015_11_02_US_NV_RUS_001_en.pdf.

[164] Once the Commission has issued its recommendations on the outer limits of the continental shelves of the applicants, the five Arctic states can delimit the shelf according to Article 83 UNCLOS. UNCLOS, *supra* note 29, art. 83.

[165] Christopher C. Joyner, *The Legal Regime for the Arctic Ocean*, 18 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 230, 230-31 (2006).

[166] *Id.* at 230.

[167] *See generally* Viatcheslav Gavrilov, *Russian Legislation on the Northern Sea Route Navigation: Scope and Trends*, 10 THE POLAR J. 273, 277 (2020).

[168] Joyner, *supra* note 165, at 230-31; UNCLOS, *supra* note 29, art. 38.

[169] Federal'nyĭ zakon ot 28 iiulia 2012 goda N. 132-FZ o vnesenii izmeneniĭ v otdel'nye zakonodatel'nye akty Rossiĭskoĭ Federatsii v chasti gosudarstvennogo regulirovaniia torgovogo moreplavaniia v akvatorii Severnogo morskogo puti [Federal Law of 28 July 2012 No. 132-FZ of the Russian Federation on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, art. 5.1 and art. 14.

Concerning State Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, established the current Northern Sea Route regime.[170] The Russian Federation updated relevant provisions of the 1999 *Merchant Shipping Code* and the 1998 Federal Law No. 155-FZ *On the Internal Sea Waters, Territorial Sea and Contiguous Zone*.[171] On the basis of this, the Northern Sea Route Administration (NSRA) adopted new rules in 2013, making the process more clear-cut and convenient for foreign ships.[172] According to the 1990 rules, which they replaced, the authority had four months to reply to a request of thoroughfare, which had to be transmitted by telegraph.[173] Now, the NSRA has 25 days to respond and the request can be made via the internet.[174]

Russia has provided legal justifications for the NSR regime. On the one hand, the route goes through internal waters based on historic title and, in 1985, the USSR drew straight baselines along its Arctic coast, in some places connecting islands with its mainland, thereby officially claiming the waters between the landmasses as internal waters.[175] On the other hand, Russia has justified its legislation with recourse to UNCLOS Article 234 on "ice-covered areas," arguing that its NSR regime is necessary, inter alia, to protect the environment.[176]

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[170] Viatcheslav Gavrilov, Russian Legislation on the Northern Sea Route Navigation: Scope and Trends, 10 THE POLAR J. 273, 277 (2020).

[171] Federal'nyĭ zakon ot 28 iiulia 2012 goda N. 132-FZ o vnesenii izmeneniĭ v otdel'nye zakonodatel'nye akty Rossiĭskoĭ Federatsii v chasti gosudarstvennogo regulirovaniia torgovogo moreplavaniia v akvatorii Severnogo morskogo puti [Federal Law of 28 July 2012 No. 132-FZ of the Russian Federation on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, art. 5.1 and art. 14.

[172] *Id.*

[173] Viatcheslav Gavrilov, *Russian Legislation on the Northern Sea Route Navigation: Scope and Trends*, 10 THE POLAR J. 273, 277 (2020).

[174] *Id.*

[175] Scovazzi, *supra* note 38, at 175.

[176] UNCLOS, *supra* note 29, art. 234 ("Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."); Scovazzi, *supra* note 38, at 175-177.

The freedom of the seas in the Arctic lies at the core of US national security policy.[177] The United States maintains that the Vilkitsky, Shokalsky, Sannikov, and Laptev Straits, which Russia claims as internal waters, are straits used for international navigation, and therefore are open for free transit passage by international vessels.[178] This leads to Russia's NSR regime is being seen as a violation of this right.[179] In 1965, a US Coast Guard icebreaker was ordered to sail through the Northern Sea Route, though it was aborted midway (probably due to Soviet diplomatic pressure) and, in 1967, the US attempted to traverse the Vilkitsky Straits with two vessels as a challenge to the USSR's claims, which was also abandoned when the Soviet Union denied the ships passage.[180]

The United States' point of view has been expressed in statements by government departments and officials.[181] In contrast to the Lomonosov Ridge disputes, there is no formal obstacle within UNCLOS that prevents the referral of this dispute to the compulsory dispute resolution mechanism – UNCLOS does not contain an exception for considering straight baselines or the question of the status of straits.[182] However, the US has signed the Agreement

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[177] U.S. DEP'T OF DEFENSE, ARCTIC STRATEGY (2019), https://media.defense.gov/2019/Jun/06/2002141657/-1/-1/1/2019-DOD-ARCTIC-STRATEGY.PDF. ("The Department will preserve the global mobility of US military and civilian vessels and aircraft throughout the Arctic, including through the exercise of the Freedom of Navigation program to challenge excessive maritime claims asserted by other Arctic States when necessary.") The document specifically mentions "the freedom of navigation [...] through strategic straits." *Id*. PAUL ARTHUR BERKMAN ET AL., BASELINE OF RUSSIAN ARCTIC LAWS 428 (2019).

[178] Paul Gudev, *The Northern Sea Route: A National or an International Transportation Corridor?*, RUSS. INT'L AFFS COUNCIL (Sept. 24, 2018), https://russiancouncil.ru/en/analytics-and-comments/analytics/the-northern-sea-route-a-national-or-an-international-transportation-corridor/.

[179] PAUL ARTHUR BERKMAN ET AL., BASELINE OF RUSSIAN ARCTIC LAWS 428 (2019).

[180] S.M. OLENICOFF, TERRITORIAL WATERS IN THE ARCTIC: THE SOVIET POSITION 13 (1972).

[181] The State Department sent a *note verbale* to Russia on May 29, 2015. Diplomatic Note to Russia, 29 May, 2015 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 526, 526 (Objecting to "the requirements to obtain Russia's permission to enter and transit the exclusive economic zone and territorial sea; persistent characterization of international straits that form part of the NSR as internal waters; and the lack of any express exemption for sovereign immune vessels"). It also disputes that there is such a concept as a historically established national transport communication route in international law and disputes that parts of the NSR are even ice-covered areas according to Art. 234, meaning covered in ice most of the year. *Id.* at 526-27. In the opinion of the United States, the provision to use Russian icebreakers violates the non-discrimination term in UNCLOS Art. 234. *Id.* at 527.

[182] See Id. In Excessive Maritime Claims, Roach has described two commonly accepted geographic conditions for the application of straight baselines: 1) localities where the coastline is deeply indented and cut into or 2) where there is a fringe of islands along the coast in its immediate vicinity. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 7 (3d ed. 2012).

to UNCLOS (which, in 1994, amended the treaty), but has not ratified it. Thus, if the dispute between Russia and the US came to court, it would either be tried based on customary international law or on the 1958 Law of the Sea Conventions, which the US ratified in 1961.[183] The situation is similar in the maritime boundary dispute between Bahrain and Qatar, where the ICJ found: "Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. Customary international law, therefore, is the applicable law."[184]

The law on straight baselines lacks precision. Russia has applied straight baselines along its shore, while the US is part of a minority of coastal states which have not claimed straight baselines.[185] The concept of straight baselines dates back to the Fisheries Case, in which the ICJ allowed Norway to apply them.[186] Straight baselines were then incorporated into the 1958 Convention on the Territorial Sea and the Contiguous Zone.[187] Now UNCLOS Article 7 provides for the application of straight baselines "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."[188] It is unclear whether a court would see Russia's application of straight baselines as justified. Despite the widespread practice among states to draw straight baselines, there are only a handful of rulings by international courts and tribunals in which they have decided on the application of straight baselines. The ICJ addressed this topic twice, in the cases United Kingdom v. Norway in 1951 (Fisheries Case) and Qatar v. Bahrain in 2001, as did the Permanent Court of Arbitration in the 2016 South China Sea Arbitration.[189] Of the three ITLOS cases dealing with maritime boundaries, none mentions straight baselines.[190]

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[183] *See 1958 Geneva Conventions on the Law of the Sea*, UNITED NATIONS HISTORIC ARCHIVES, https://legal.un.org/avl/ha/gclos/gclos.html (last visited Oct. 9, 2021).

[184] Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 167 (Mar. 16).

[185] Donat Pharand, *State practice on the use of state baselines*, *in* CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 147-158 (1988).

[186] Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).

[187] United Nations Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 , 516 U.N.T.S. 205.

[188] UNCLOS, *supra* note 29, art. 7.

[189] Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18); Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 167 (Mar. 16); South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award of July 12, 2016, ¶ ¶ 258-59 (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/7/.

[190] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, ¶ 229; Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, ITLOS Rep. 4; Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius v. Maldives), Case No. 28, https://www.itlos.org/en/main/cases/list-of-

In the Fisheries Case, the ICJ considered the straight baseline system Norway had applied to its northern coast in 1935.[191] This included straight baselines around a "skjærgaard," an archipelago of skerries and islets on the coast, which the Court found permissible; "[i]f the belt of territorial waters must follow the outer line of the 'skjærgaard', and if the method of straight baselines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay."[192] The court took into account factors "beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[193] This led to the practice of states drawing straight baselines connecting islands to the mainland.[194] In its ruling, the ICJ required that straight baselines must be applied in the "general direction of the coast."[195] Overall, this contradicts the Russian position, but ICJ's ruling lacks precision, as noted by the Committee on Baselines under the International Law of the Sea and by academics alike.[196]

Furthermore, in the South China Sea arbitration, ITLOS discussed the application of straight baselines as archipelagic baselines on the Spratly Islands by China.[197] The tribunal found that these were not applicable since UNCLOS Article 7 does not apply to an offshore archipelago, with the exception of archipelagic states.[198] However, the discussion of the matter does

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cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives/.

[191] Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).

[192] Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 3, 18 (Dec. 18).

[193] *Id.* at 21.

[194] Dr. Waseem Ahmad Qureshi, *State Practices of Straight Baselines Institute Excessive Maritime Claims*, 42 S. ILL. U. L. J., 421, 422 (2019); *See also*, Coalter G. Lathrop, *Baselines*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 69, 86 (Donald R. Rothwell, Alex G. Oude Elferink, Tim Stephens & Karen N. Scott eds., 2015).

[195] *Id.* at 30. *See also* UNCLOS, *supra* note 29, art. 7 (3) ("The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.").

[196] INTERNATIONAL LAW ASSOCIATION, BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA: FINAL REPORT ¶ 106 (2018); Gayl S. Westerman, *Straight Baselines in International Law: A Call for Reconsideration*, 82 AM. SOC'Y INT'L L. PROC. 260, 276 (1988).

[197] South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award of July 12, 2016, ¶ ¶ 258-59 (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/7/.

[198] The South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Decision of July 12, 2016, Permanent Court of Arbitration, https://pca-cpa.org/en/cases/7/ ("Although the Convention does not expressly preclude the use of straight baselines in other circumstances, the Tribunal considers that the grant of permission in Article 7 concerning straight baselines generally, together with the conditional permission in Articles 46 and 47

not apply to the Northern Sea Route since no archipelagic baselines were applied along the route. The Article would have applied to the offshore archipelago of Franz Josef Land; however, Russia did not apply straight baselines around that territory.[199] A similar case to the Northern Sea Route dispute is the case Bahrain v. Qatar, where the ICJ rejected the straight baselines claimed by Bahrain.[200] The case dealt with straight baselines applied from main islands to (other) islands with the consequence that the waters in between become internal waters. Bahrain stated that the Hawar Islands, which lay closer to Qatar than to the other Bahrain islands, should be connected to Bahrain because Bahrain was an archipelagic state.[201] The ICJ ruled, inter alia, that Bahrain was not an archipelagic state and therefore the Hawar Islands could not be connected by straight baselines.[202] The ICJ also noted that the Hawar Islands could not be qualified as a fringe of islands.[203]

As the ICJ has remained largely negative about the applicable scope of straight baselines, the US may have an advantage in the international adjudication of the Northern Sea Route dispute. Since several states argue that the application of straight baselines is excessive and that this practice by states is not within the frame of the law,[204] the United States fortifies its position by arguing that the Russian position violates the right to transit passage. The United States bases this claim on the concept of international straits,[205] as classified in the Corfu Channel Case.[206] Russia disputes that the NSR includes such straits and proposes that its application of straight baselines classifies the straits in question – the Vilkitsky, Shokalsky, Sannikov, and Laptev straits – as internal waters, therefore placing the straits under its jurisdiction.[207]

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for certain States to draw archipelagic baselines, excludes the possibility of employing straight baselines in other circumstances, in particular with respect to offshore archipelagos not meeting the criteria for archipelagic baselines."); UNCLOS, *supra* note 29, arts. 46, 47; *Id.*

[199] *Russia: Straight Baseline Claim*, U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, https://www.jag.navy.mil/organization/documents/mcrm/RussiaChart.pdf (last visited Dec. 14, 2021).

[200] Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 167 (Mar. 16).

[201] *Id.*

[202] *Id.* ¶ 214.

[203] INTERNATIONAL LAW ASSOCIATION, *supra* note 196, ¶ 105.

[204] *See, e.g.*, Qureshi, *supra* note 36.

[205] MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 129 (2013).

[206] Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Dec. 15).

[207] Paul Gudev, *The Northern Sea Route: A National or an International Transportation Corridor?*, RUSS. INT'L AFFS COUNCIL (Sept. 24, 2018), https://russiancouncil.ru/en/analytics-and-comments/analytics/the-northern-sea-route-a-national-or-an-international-transportation-corridor/.

V. LEGAL-POLITICAL EQUILIBRIA

The two Arctic conflicts outlined in this paper indicate the rise of different legal-political equilibria in maritime disputes that involve the distribution of natural resources and the delimitation of boundaries. We propose that Russia's competitive claims – against Denmark and Canada in the first dispute and against the United States in the second dispute – have facilitated the emergence of three possible solutions: *intergovernmental regulation, voluntary mediation,* and *international adjudication.* While international adjudication refers to the resolution of interstate disputes before the ICJ or an arbitration venue, intergovernmental regulation presumes the primacy of diplomacy over adjudication as the basis for the long-term resolution of territorial disputes. This legal-political equilibrium suggests that foreign policy interests are *more persistent* than treaty or customary international law and therefore offer the basis for a more sustainable solution from which the parties involved have fewer incentives to deviate compared to a judicial decision or an arbitral award. On the other hand, voluntary mediation recognizes the inability of the parties involved to evade international institutions and their incentive to opt for a set of self-enforcing rules provided through an interstate treaty. The advantage of international adjudication and voluntary mediation over intergovernmental regulation is the higher degree of formality and enforceability, as there are also third parties involved in the dispute, directly or indirectly. While intergovernmental regulation prioritizes long-run adherence, international adjudication and voluntary mediation prioritize formality and enforceability.

Of the Arctic countries, only Norway has received recommendations on an extended continental shelf in the Arctic. Norway made two submissions: the first in 2006 and the second in 2009, and received recommendations in 2009 and 2019, respectively.[208] The CLCS adjusted the 2006 submission, which Norway accepted.[209] The 2009 submission, with adjustments about

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[208] *Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Kingdom of Norway*, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS), https://www.un.org/depts/los/clcs_new/submissions_files/submission_nor.htm (last updated Aug. 20, 2009); *Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Kingdom of Norway*, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS), https://www.un.org/depts/los/clcs_new/submissions_files/submission_nor_30_2009.htm (last updated Aug. 20, 2019).

[209] *See* Thomas Nilsen, *Limits of Norway's Arctic Seabed Agreed*, BARENTS OBSERVER (Apr. 16, 2009), https://web.archive.org/web/20141215154636/https:/barentsobserver.com/en/node/19278.

claims around the island of Bouvetøya, was agreed on by the CLCS.[210] Norway never claimed the Lomonosov Ridge, and the submission did not include an area that was overlapping with Russian claims.

A. The Lomonosov Ridge: International Adjudication vs. Voluntary Mediation

As pointed out above, UNCLOS contains an exception to its compulsory dispute settlement regime for maritime boundary disputes (Art. 298).[211] This makes it possible for the twenty percent of states who have opted for this exception to avoid binding third-party dispute settlement; Russia and Canada are among those states.[212] Furthermore, Denmark and Norway do not accept Annex VII arbitration for this category of disputes.[213] This creates significant obstacles toward an international adjudication of the Lomonosov Ridge dispute. Nevertheless, states could change their course on their declaration, which has happened before.[214] In addition, Denmark has accepted judicial jurisdiction and could refer the dispute to a court, which could, in turn, find that it has jurisdiction despite the declaration of one of the parties under Article 298.[215] It may also rule on related issues, either geological or geographical. Last but not least, the option of non-binding dispute resolution

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[210] *See* N.F. Coelho, *CLCS: Bouvetøya Outer Continental Shelf Limits Clarified*, DE MARIBUS (May 13, 2019, 10:29 AM) https://demaribus.net/2019/05/13/clcs-bouvetoya-outer-continental-shelf-limits-clarified/.

[211] *See* UNCLOS, *supra* note 29, art. 298.

[212] Robin Churchill, *'Compulsory' Dispute Settlement Under the United Nations Convention on the Law of the Sea – How Has It Operated? Pt. 1*, PLURICOURTS BLOG (June 9, 2016, 8:00 AM), https://www.jus.uio.no/pluricourts/english/blog/guests/2016-06-09-churchill-unclos-pt-1.html.

[213] *See* United Nations Convention on the Law of the Sea, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (last visited Oct. 10, 2021).

[214] For example, Argentina withdrew its declaration made under Article 298 to bring a case against Ghana. Churchill, *supra* note 212.

[215] In the 2012 Bangladesh vs. Myanmar (Bay of Bengal) Case, ITLOS discussed whether it had jurisdiction to adjudicate the dispute before the CLCS made a recommendation to either of the two parties on their submissions. Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, ¶¶ 3-4. The ruling declared that there is a difference between the competences of the CLCS and the ITLOS Special Chamber, which comes down to the difference between delineation of the continental shelf and delimitation of maritime boundaries, *id.* ¶ 376, and therefore that ITLOS could proceed. *Id.* ¶ 393. The two parties disagreed about the maritime boundary in all zones. Therefore, the tribunal proceeded to delimit the maritime boundary in the territorial sea, the EEZ and the continental shelf beyond 200nm. However, it did not delineate the continental shelf, as the tribunal does not have jurisdiction over this. *Id.* ¶ 394.

is also possible. Denmark and Canada share one boundary, which is already agreed upon, and Russia has one agreed boundary with the US and one with Norway.[216] However, it is possible that if the Lomonosov Ridge dispute comes before ITLOS and a party disagrees about the location of the boundary – as was the situation between Ghana and Cote D'Ivoire – ITLOS would initiate the delimiting procedure and draw a new boundary.[217]

The *Timor-Leste v. Australia* compulsory conciliation may constitute a model for the resolution of the first Arctic conflict between Russia and both Canada and Denmark.[218] UNCLOS provides for the possibility that states can unilaterally refer a maritime boundary dispute to settlement: Articles 297(2)(b), 297(3)(b) and 298(1)(a)(i) provide for compulsory conciliation according to Annex V section 2.[219] The Timor Leste dispute was related to a maritime boundary and the exploitation of the Greater Sunrise oil field. The Australian Government wanted the dispute to be dealt with by negotiation and rejected proceedings before the ICJ.[220] The reason for this may have been that

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[216] See Østhagen & Schofield, *supra* note 59.

[217] The 2017 Ghana v. Cote D'Ivoire Case was the first maritime boundary case before an international court or tribunal in which one party had already received recommendations on the outer limits of its continental shelf by the CLCS. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Judgment of Sep. 23, 2017 ITLOS Rep. 4. The two countries had submitted their claims to the CLCS in 2009. Ghana received a recommendation in 2014, but at the time of the hearing Cote D'Ivoire had not yet received one. The ITLOS Special Chamber hearing this case had to establish whether a continental shelf existed for the parties. They decided in the affirmative. Since the CLCS had ruled that a continental shelf did exist for Ghana, the tribunal found that the geological conditions were identical for Cote D'Ivoire. *Id.* ¶ 491. Regarding the delimitation of the boundary, the Special Chamber decided that the same method for delimitation would have to be used to delimit the continental shelf within the 200nm zone as without, until it reaches the outer limits of the continental shelf and have the same direction. *Id.* ¶ 526. As is customary in boundary delimitation, the disproportionality test was the third part of the procedure. In the case against Cote D'Ivoire, Ghana held that "the disproportionality test consists of comparing the ratio of the parties' relevant coasts to the ratio of the allocated portions of the relevant maritime area to determine if they are significantly disproportionate." *Id.* ¶ 533. Regarding the continuation of the boundary beyond the EEZ, the ruling confirmed what ITLOS had found in the Bay of Bengal case. *Id.* ¶ 527.

[218] Timor Sea Conciliation (Timor-Leste v. Austl.), PCA Case Repository No. 2016-10, Report and Recommendation of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea of May 9, 2018, (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/132/.

[219] UNCLOS, supra note 29, art. 297-98. Timor Sea Conciliation (Timor-Leste v. Austl.), Case No. 2016-10, Decision of May 9, 2018, Permanent Court of Arbitration, https://pca-cpa.org/en/cases/132/.

[220] Timor Sea Conciliation (Timor-Leste v. Austl.), PCA Case Repository No. 2016-10, Report and Recommendation of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea of May 9, 2018, ¶ 3 (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/7/.

Australia wanted a certain type of delimitation mechanism, the natural prolongation method, which is not the one favored by international courts and tribunals.[221] On April 11, 2016, Timor Leste triggered the compulsory conciliation.[222]

When the Conciliation Commission found that there was no bar to its jurisdiction, Australia complied with the conciliation proceedings, as evidenced by its appointing two conciliators. This first application of the UNCLOS conciliation mechanism was successful and led to the parties signing a treaty in 2018. The reasons for the positive outcome of this mechanism include the low-risk nature of the conciliation mechanism, because it is non-binding, as well as the ability of the Conciliation Commission to put aside legal issues, such as established case law on boundary delimitation, and take into account other factors including economic concerns.[223] This is an example of why voluntary mediation may be a more likely and sustainable equilibrium than international adjudication in the Lomonosov Ridge dispute.

If the CLCS recommends that the Lomonosov Ridge is an extension of the continental shelf of each of the claiming states, delimitation could be referred to a court or tribunal. This could lead to Russia using its largest coast in the Arctic to claim an adjustment of the allocated maritime area. If, however, the CLCS recommends that the Russian continental shelf does not extend to the Lomonosov Ridge, Russia cannot refer its claim to a tribunal, since the latter can only decide upon a valid continental shelf. This is why voluntary mediation in the form of conciliation can be a useful dispute resolution mechanism. As shown in the *Timor Leste vs. Australia* case, the use of this mechanism allowed the parties to sidestep legal issues and positions and focus on finding common ground. This seems to be particularly relevant for a dispute with three parties.

If the equidistance line is used, Denmark would have the strongest arguments regarding the territorial status of the North Pole.[224] It is unlikely that Russia would accept a ruling which grants ownership of the North Pole to one of the other two states.[225] Canada and Denmark have already shown their cooperation on the issue when scientists of both countries undertook a

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[221] Dai Tamada, *The Timor Sea Conciliation: The Unique Mechanisms of Dispute Settlement*, 31 EUR. J. INT'L L. 321, 344 (2020).
[222] *Id.* at 324 n. 12.
[223] *Id.* at 344.
[224] BYERS, *supra* note 205, at 119; Richard Kemeny, *As Countries Battle for Control of North Pole, Science is the Ultimate Winner*, SCI. MAG. (Jun. 20, 2019, 2:25 PM), https://www.sciencemag.org/news/2019/06/countries-battle-control-north-pole-science-ultimate-winner.
[225] Nele Matz-Lück, *Planting the Flag in Arctic Waters: Russia's Claim to the North Pole*, 1 GÖTTINGEN J. PUB. INT'L L. 235, 251 (2009).

joint research trip to survey the sedimentary and crust layers of the Lomonosov Ridge.[226] This may involve a settlement of the dispute between the two states related to Hans Island.[227]

Conciliation can be defined as "structured involvement of outsiders in the settlement of international disputes"[228] as it "combines the elements of both inquiry and mediation."[229] The method can be regarded as "a kind of institutionalised negotiation."[230] Conciliation commissions can investigate the facts of the dispute, evaluate them, and make suggestions for the terms of dispute resolution.[231] Many conciliation cases deal in some part with legal claims, but reports of conciliation commissions remain proposals, rather than binding decisions.[232] Often, failed negotiations are a prerequisite for conciliation, and, sometimes, conciliation is a prerequisite for dispute settlement by legal means.[233] What is key for the Lomonosov Ridge dispute is the invocation of the voluntary conciliation procedure.[234] While there is precedent for compulsory, non-binding conciliation, the strong intergovernmental nature of this trilateral conflict makes voluntary conciliation much more likely. This would resolve the dispute efficiently because the conciliation commission would not have to stick to established delimitation methods and, instead, would have the freedom to find a solution acceptable to all three countries. A third (or in this case, fourth) party, such as the European Union or the United States, could facilitate negotiation between the three parties.

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[226] BYERS, *supra* note 205, at 105.
[227] Kevin McGwin, *Denmark, Canada Agree to Settle Hans Island Dispute*, ARCTIC TODAY (May 24, 2018), https://www.arctictoday.com/denmark-canada-agree-come-agreement-disputed-island/.
[228] J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 87 (6th ed. 2017).
[229] U.N. Office of Legal Affairs, Codification Div., Handbook on the Peaceful Settlement of Disputes Between States ¶ 140, U.N. Doc. ST/LEG(092.1)/H2, U.N. Sales No. 92.V.7 (1992).
[230] MERRILLS, *supra* note 228, at 69.
[231] MERRILLS, *supra* note 228.
[232] MERRILLS, *supra* note 228.
[233] U.N. Office of Legal Affairs, *supra* note 229, ¶ 146.
[234] *See* UNCLOS, *supra* note 29, art. 284, Annex V (describing the process of a voluntary conciliation procedure).

B. The Northern Sea Route: Voluntary Mediation vs. Intergovernmental Regulation

The Northern Sea Route dispute has two parties: the United States and Russia.[235] International adjudication of this conflict is not an option since the United States has not ratified UNCLOS and does not have a history of inviting third-party involvement in dispute resolution. Russia has brought one case before an international court or tribunal: the Volga Case, which concerned the prompt release of a Russian vessel accused of illegal fishing.[236] However, even if the dispute settlement is a political process, international law is likely to inform the outcome.

The main tradeoff here is between intergovernmental regulation and voluntary mediation. While Russia recognizes the NSR as internal waters based on its coastal jurisdiction, the United States claims the NSR as international waters. Canada is likely to stay neutral given its security alignment with the United States and its approximation to the Russian position regarding the Northwest Passage. The actual frequency of international navigation of the Northern Sea Route cannot form the basis of Russia's declaration as Russian internal waters. At the same time, Russia has an economic interest in keeping the route open to cargo ships.[237] Nevertheless, the extreme difference between the respective stances of Russia and the United States makes voluntary conciliation unlikely. Even if voluntary conciliation granted the status of international waters to the NSR while recognizing exclusive monitoring rights to Russia, it remains unlikely that Russia would abide by this legal-political equilibrium, as it would have incentives to deviate and reject *de facto* the enforcement of this outcome.

Intergovernmental regulation would entail an international treaty, and this relies on customary international law and international judicial precedent on the definition and delimitation of international waters. Some international agreements contain dispute resolution provisions, while others do not.[238] UNCLOS provides for extensive dispute settlement mechanisms. The agreement offers states a choice between different methods and provides

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[235] Gabriella Gricius, *Geopolitical Implications of New Arctic Shipping Lanes*, ARCTIC INST. CTR. CIRCUMPOLAR SEC. STUD. (March 18, 2021), https://www.thearcticinstitute.org/geopolitical-implications-arctic-shipping-lanes/.

[236] "Volga" Case (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002 ITLOS Rep. 10.

[237] Kathrin Keil, *Cooperation and Conflict in the Arctic: The Cases of Energy, Shipping and Fishing* 146 (2013) (unpublished Ph.D. dissertation, Freie Universität Berlin) (on file with author).

[238] Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. L. STUD. 1 (2007).

special methods for certain issues, such as the Seabed Chamber to deal with seabed disputes.[239] The different settlement methods correspond to the intensity of the disputes. Some methods are more popular with states than others, depending on the dispute and the relationship between the parties.[240] One factor that has an impact on the effectiveness of the settlement of maritime boundary disputes is the timing of the settlement.[241] Østhagen argues that the 2010 Russia-Norway Treaty regarding the Barents Sea would not have been negotiated a decade later, when relations between the parties had deteriorated due to Russia's annexation of Crimea in 2014.

The difference between voluntary mediation and intergovernmental regulation lies in the latter's inclusion of the overall political-economic environment into the proposed solution. Nevertheless, for this legal-political equilibrium to arise, a further institutionalization of the Arctic political economy is required. As early as in 1996, Finland, Iceland, Sweden, and the five Arctic states were able to create the Arctic Council, a soft-law institution that would work to guarantee cooperation among these states.[242] The Arctic Council ("AC") is organized in working groups on issues such as Arctic contaminants and emergency response.[243] The structure brings transparency to the issues it covers, but its decision-making powers are limited, requiring a consensus of all eight Arctic states. The Arctic Council also includes representatives of the indigenous people of the Arctic and 38 observers, which includes 13 non-Arctic states from Europe and Asia, various international organizations, and NGOs.[244]

The Arctic Council offers a forum where negotiations for an international treaty between the United States and Russia could take place. An increasing number of non-regional states are applying for observer status, which may undermine the cooperative dimension for Arctic states.[245] Another crucial issue for the AC regards security and military issues.[246] Ahead of its

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[239] Østhagen, *supra* note 78.

[240] JACOB BERCOVITCH & RICHARD JACKSON, CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES 165 (2009).

[241] Østhagen, *supra* note 78.

[242] LASSI HEININEN, ALEXANDER SERGUNIN & GLEB YAROVOY, RUSSIAN STRATEGIES IN THE ARCTIC: AVOIDING A NEW COLD WAR (2014).

[243] *Id.*

[244] *Id.*

[245] LASSI HEININEN ET AL., RUSSIAN STRATEGIES IN THE ARCTIC: AVOIDING A NEW COLD WAR (2014).

[246] *Compare* HEATHER A. CONLEY & MATTHEW MELINO, CTR. FOR STRATEGIC & INT'L STUD., AN ARCTIC REDESIGN: RECOMMENDATIONS TO REJUVENATE THE ARCTIC COUNCIL (2016) (arguing for the Arctic Council's involvement in security concerns such as China's involvement in the Arctic) *with* Ragnhild Groenning, *Why Military Security Should Be Kept out of the Arctic Council*, THE ARCTIC INST. (June 2, 2016)

chairmanship of the AC, Russia has called for the inclusion of security issues.[247]

An international treaty on the NSR must address compulsory pilotage. Compulsory pilotage has been seen as a useful concept for a long time, but it has not been incorporated into any treaty or international regulation.[248] Denmark implements this concept in Greenland, while Australia introduced it in the Torres Strait in 2006 (though this was opposed by the United States and Singapore).[249] Compulsory pilotage for reasons of environmental protection or protection against piracy has become prevalent.[250] Wolfrum criticized the involvement of these organizations since they effectively become lawmakers, but he acknowledged that coastal states understand the necessity of more tailored schemes:

> The reasons for such supplementary measures are dissatisfaction with the results achieved multilaterally and the desire for unilaterally tailored solutions. For vessels, this mixture of restrictions which seem to lack coherence is difficult to cope with. At present, the limitations faced may still be tolerable but if this trend prevails – and there are clear indications that it will – a reassessment may be called for.[251]

V. CONCLUSION

In the search for the most effective dispute settlement method, the tradeoffs between international adjudication, voluntary mediation, and

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https://www.thearcticinstitute.org/why-military-security-should-be-kept-out-of-the-arctic-council/ (arguing the opposite).

[247] Atle Staalesen, *Moscow Signals It Will Make National Security a Priority in Arctic Council*, BARENTS OBSERVER (Oct. 14, 2020), https://thebarentsobserver.com/en/security/2020/10/moscow-signals-it-will-make-security-situation-priority-arctic-council.

[248] *See* Jan Jakub Solski, *Navigational Rights of Warships Through the Northern Sea Route (NSR): All Bark and No Bite?*, NCLOS BLOG (May 31, 2019), https://site.uit.no/nclos/2019/05/31/navigational-rights-of-warships-through-the-northern-sea-route-nsr-all-bark-and-no-bite/.

[249] *Semaphore: Compulsory Pilotage in the Torres Strait*, ROYAL AUSTRALIAN NAVY, https://www.navy.gov.au/media-room/publications/semaphore-07-07 (last visited Sept. 17, 2021); *Mandatory Pilotage in Greenland*, DANISH MARITIME AUTHORITY, https://www.dma.dk/SikkerhedTilSoes/Sejladssikkerhed/BrugAfLods/LodspligtiGroenland/Sider/default.aspx (last visited Sept. 17, 2021).

[250] Rüdiger Wolfrum, *Freedom of Navigation: New Challenges*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf (last visited Sept. 17, 2021).

[251] *Id.*

intergovernmental regulation reveal both the intensity of legal and political constraints as well as the feasibility of the proposed legal-political equilibria. In the 1990s, scholars began discussing the proliferation of adjudication in light of the establishment of several permanent international courts and tribunals during the previous decade.[252] Several scholars criticized this trend due to its possible fragmentation of international law.[253]

Deteriorating U.S.-Russian relations and the contested definition of international waters, which can be remedied for the Russian side with compulsory pilotage or other exclusive monitoring rights, facilitate the rise of intergovernmental regulation as the legal-political equilibrium for the Northern Sea Route conflict. In contrast, the Lomonosov Ridge conflict involves Canada and Denmark, which do not have open military and diplomatic competition with Russia on a global scale. Thus, voluntary mediation in the form of voluntary conciliation may be the legal-political equilibrium with the highest probability of sustainability for this dispute. Finally, the institutionalization of the Arctic through initiatives such as the Arctic Council and the utilization of legal precedent of compulsory conciliation on the delimitation of the continental shelf may render these two legal-political equilibria sustainable in the long run, offering a novel framework for the legal resolution of interstate conflicts.

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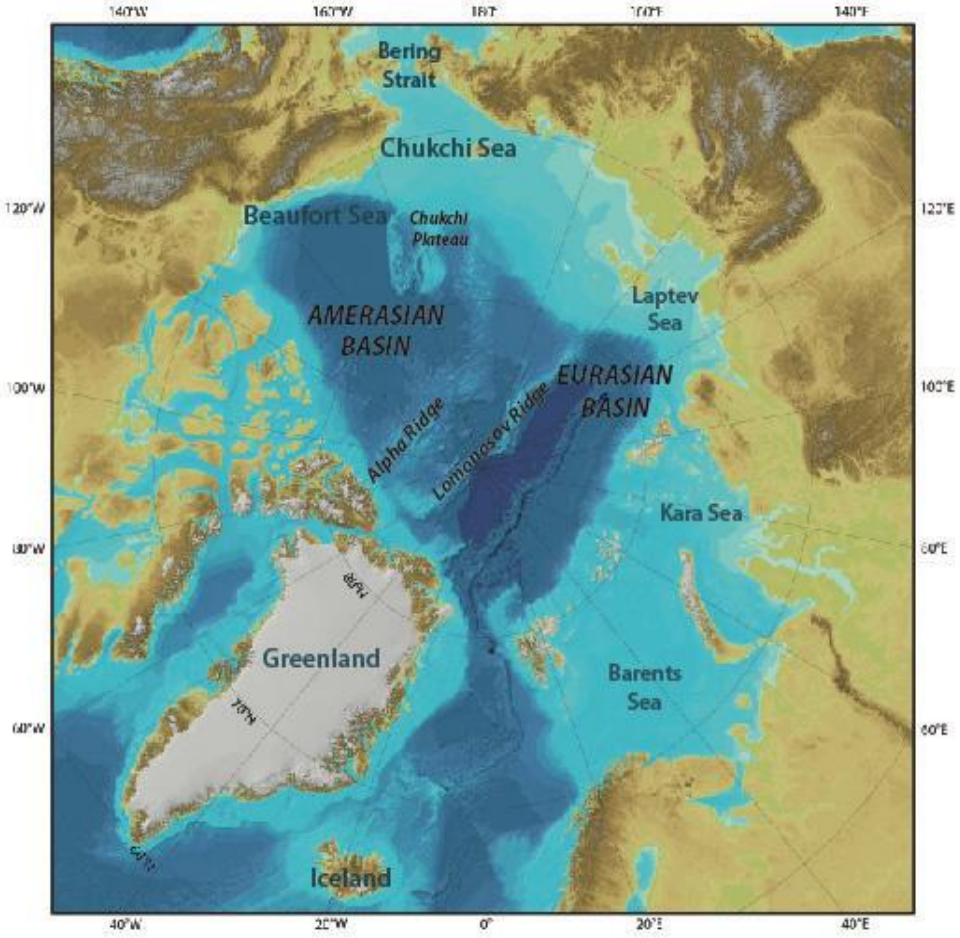
[252] *See, e.g.*, Arthur Watts, *Enhancing the Effectiveness of Procedures of International Dispute Settlement*, *in* 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 21, 21 (Jochen A. Frowein & Rüdiger Wolfrum eds., 2001); Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 698 (1999).

[253] *See, e.g.*, Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PENN. J. INT'L L. 1 (2010).

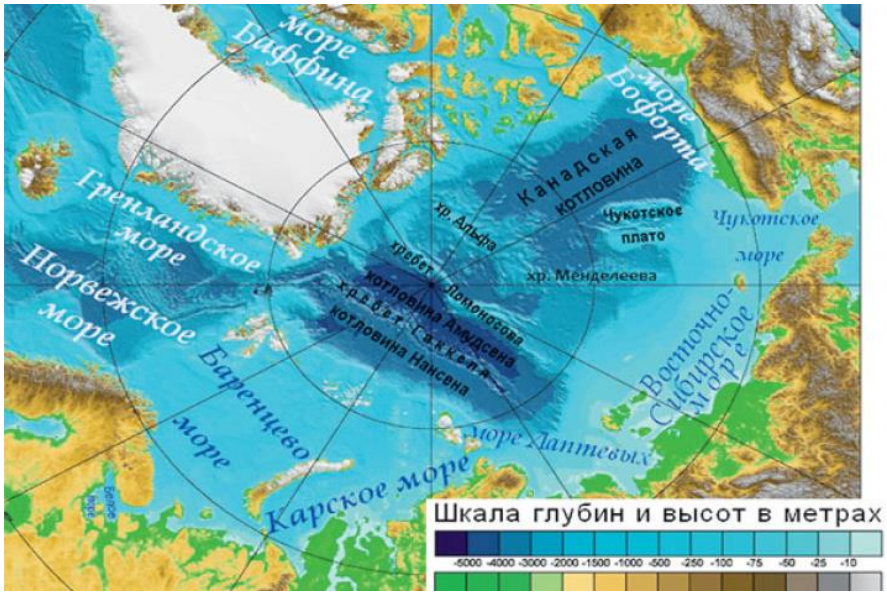
APPENDIX

Figure 1: Arctic Ocean



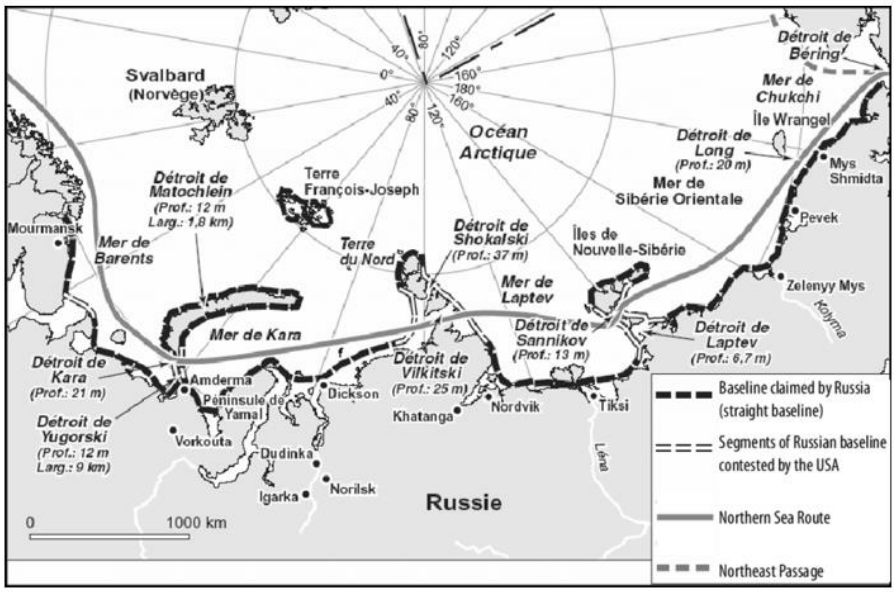
Source: International Bathymetric Chart of the Arctic Ocean, 2020.
Website: Map of Arctic Ocean, showing bathymetry and location of subsurface features and seas. Modified from International Bathymeteric Chart of the Arctic Ocean, courtesy of M. Jakobssen, Stockholm University, (Jakobsson, M., Mayer, L.A., Bringensparr, C. *et al.* The International Bathymetric Chart of the Arctic Ocean Version 4.0. *Sci Data* 7, 176 (2020). https://doi.org/10.1038/s41597-020-0520-9)

Figure 2: Lomonosov Ridge



Source: Russian Geographical Society 2020.
Website: https://www.rgo.ru/ru/article/hrebet-mendeleeva-imeet-kontinentalnyy-fundament

Figure 3: Russian Straight Baselines & the Northern Sea Route



Straight Baselines and the Northern Sea Route

Source: Lassere 2004: 410.
Website: https://www.erudit.org/fr/revues/cgq/2004-v48-n135-cgq996/011799ar/
Lasserre, Frédéric « Les détroits arctiques canadiens et russes : souveraineté et développement de nouvelles routes maritimes ». *Cahiers de géographie du Québec* 48, nº 135 (2004) : 397–425. https://doi.org/10.7202/011799ar==>
Sources: Cartes marines du Service hydrographique du Canada, 1972-1975; Pharand, 1988; Dunlap, 1996; Mulherin, 1985.