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# Oil, Gas & Energy Law Intelligence

## (Un)Frozen Frontiers: A Multilateral Dispute Settlement Treaty for Resolving Boundary Disputes in the Arctic by T.J. Lindsay

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(UN)FROZEN FRONTIERS: A MULTILATERAL DISPUTE SETTLEMENT TREATY FOR  
RESOLVING BOUNDARY DISPUTES IN THE ARCTIC

*Oil Gas Energy Law Journal*

Special Issue “Arctic Region: Boundaries, Resources and the Promise of Co-operation”

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(UN)FROZEN FRONTIERS: A MULTILATERAL DISPUTE SETTLEMENT TREATY FOR  
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Timothy J. Lindsay

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## Abstract

### (UN)FROZEN FRONTIERS: A MULTILATERAL DISPUTE SETTLEMENT TREATY FOR RESOLVING BOUNDARY DISPUTES IN THE ARCTIC

Timothy J. Lindsay

*The unanticipated melt of the Arctic ice pack over the past decade has highlighted and accelerated the claims of those nations with territories in the Arctic—Canada, Denmark (via Greenland), Norway, Russia and the US—to the region’s previously unnavigable trade routes, as well as the rich undiscovered deposits of resources that lie beneath the receding Arctic ice. Serious questions have arisen, however, whether there exists a suitable legal framework for resolving the competing claims to the Arctic’s territories and its resources.*

*There is and can be no serious argument that peaceful diplomatic resolution of any future Arctic frontier disputes would be in the best interests of the Arctic states, and the international community generally. Yet given the high stakes, disputes between the Arctic states may arise and may require the use of a third-party dispute resolution mechanism. This paper briefly reviews the existing dispute settlement mechanisms that may be available to assist in the settlement of any future Arctic frontier disputes. It suggests, however, that none of the current mechanisms provide the best possibility of peaceful, enduring resolution to any future Arctic frontier disputes.*

*As a possible mechanism for the resolution of any future boundary disputes in the Arctic, a multilateral Arctic dispute resolution treaty between the Arctic states is therefore proposed. That treaty would, among other things, create a mandatory and binding arbitration-based dispute resolution framework for the settlement of future Arctic frontier disputes. It is argued that, in the absence of a diplomatic solution, such a multilateral mechanism would provide the best foundation for the peaceful and enduring resolution of any such disputes, and a process which meets the needs of both the Arctic states and the international community generally.*

(UN)FROZEN FRONTIERS: A MULTILATERAL DISPUTE SETTLEMENT TREATY FOR  
RESOLVING BOUNDARY DISPUTES IN THE ARCTIC

Timothy J. Lindsay\*

*Introduction: (Un)Frozen Frontiers*

The editors of this issue of the *OGEL Journal* have turned their attention to one of the most important international issues of our time: how to allocate and manage the vast territories and natural resources in the Arctic region. The transformation of the Arctic, as the effects of global warming take hold to erode the Arctic ice cap,<sup>1</sup> raises critical questions for the international community. Foremost among these are the competing claims of the five Arctic states—Canada, Denmark (via Greenland), Norway, Russia and the US (the “Arctic Nations”)—to sovereignty over the Arctic itself, and how to manage the exploitation of the once inaccessible resources in the region. While debate about the management of those resources and the potential environmental impact of reaching further into the Arctic Circle is vocal, one of the primary concerns of the international community must be to delimit the lines of sovereignty in the region. It is difficult to see how other important issues relating to the Arctic can be determined, and practical steps taken, until those very fundamental issues of dominion are settled, both peacefully and in a manner that will endure. This paper seeks to contribute to the dialogue of how that result may be achieved.

International frontier disputes are notoriously difficult to resolve peacefully and enduringly,<sup>2</sup> and history is littered with the consequences of protracted differences that states are unable to resolve diplomatically. Among the many and complex reasons for this is that international boundary disputes uniquely raise vital issues of state sovereignty, national and international security interests, national and international environmental preservation and protection concerns, navigation issues and, of course, the ability to exploit natural resources (*e.g.* oil and gas, mineral and hydrocarbon resources, territorial use, fishing and living marine resources and other uses of the sea). Often, international boundary disputes are also set against the backdrop of deep historical divide, and perhaps cultural and ethnic divisions. All of these factors contribute to make the resolution of international boundary disputes an immensely difficult and sensitive task. Those difficulties are, unsurprisingly, exacerbated where the right to extract and exploit valuable natural resources motivates competing territorial claims. That is increasingly true as state security interests become increasingly intertwined with national financial interests.

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<sup>1</sup> For an illustrative map of the Arctic maritime boundaries, see the Arctic Maritime Jurisdiction Map from Durham’s International Boundary Resource Unit, at <http://www.dur.ac.uk/ibru/resources/arctic/> (last accessed September 2011)

<sup>2</sup> The Carter Center, *Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios and Suggestions*, (2010)

Yet 40 years ago the Arctic Ocean was described as “largely hypothetical.”<sup>3</sup> Indeed, a “peculiar combination of hypothetical waters and hypothetical islands which are, in large measure, rendered indistinguishable under the mantle of polar ice.”<sup>4</sup> Issues of frontier definition and resource rights in the region remained similarly hypothetical. The accuracy of those observations has, in the past decade, been shattered. The Arctic ice, German researchers declared in September 2011, is now at a “new historic minimum.”<sup>5</sup> Although it may be some time before the Arctic sheet ice sufficiently recedes on a consistent basis (and there have been the necessary technological advances) such that access to the Arctic’s resources can be regular and at a satisfactory level of risk (both to the resource explorers and the environment) to allow consistent access,<sup>6</sup> the potent mix of state sovereignty concerns and resource wealth tied up in the Arctic has prompted the Arctic Nations, multinational corporations and policy makers to focus increasing attention on the allocation and management of Arctic’s resources.

The significance of that resource wealth is highlighted by the US Geological Survey, which in 2008 estimated that the Arctic was likely to hold 30% of the world’s recoverable, but yet undiscovered, gas and 13% of its oil.<sup>7</sup> As the Survey

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<sup>3</sup> Smith, *Canadian and Soviet Arctic Policy: An Icy Reception for the Law of the Sea?*, 16 Va. J. Int’l Law 609 (1975-1976), citing Johnston, *Canada’s Arctic Marine Environment: Problems of Legal Protection*, 29 Behind the Headlines, 14 July 1970

<sup>4</sup> *Id.*

<sup>5</sup> For a recent animated video of the melting ice cap, see The Economist, *Melting Arctic Sea-Ice and Shipping Routes*, 22 September 2011, at <http://www.economist.com/blogs/dailychart/2011/09/melting-arctic-sea-ice-and-shipping-routes> (last accessed September 2011). See also, The Independent, *Arctic Ice Cover Hits Historic Low: Scientists*, 12 September 2011, at <http://www.independent.co.uk/environment/arctic-ice-cover-hits-historic-low-scientists-2353745.html> (last accessed September 2011) (“The area covered by Arctic sea ice reached its lowest point this week since the start of satellite observations in 1972, German researchers announced on Saturday [8 September 2011]. ‘On September 8 [2011], the extent of the Arctic sea ice was 4.240 million square kilometres (1.637 million square miles). This is a new historic minimum,’ said Georg Heygster, head of the Physical Analysis of Remote Sensing Images unit at the University of Bremen’s Institute of Environmental Physics”). The previous low was in 2007: see e.g., Joyner, *The Legal Regime for the Arctic Ocean*, 18 Jn’l Transnt’l Law & Policy 195 (2009); Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 Foreign Affairs 63 (2008) (“The Arctic Ocean is melting, and it is melting fast. This past summer, the area covered by sea ice shrank by more than one million square miles, reducing the Arctic icecap to only half the size it was 50 years ago. For the first time, the Northwest Passage—a fabled sea route to Asia that European explorers sought in vain for centuries—opened for shipping. Even if the international community manages to slow the pace of climate change immediately and dramatically, a certain amount of warming is irreversible. It is no longer a matter of if, but when, the Arctic Ocean will open to regular marine transportation and exploration of its lucrative natural-resource deposits.”)

<sup>6</sup> Financial Times, *The Arctic: Through Icy Waters*, 18 August 2011

<sup>7</sup> US Geological Survey, *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, 23 July 2008, at [http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss\\_home](http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home) (last accessed September 2011); US Geological Survey, *Fact Sheet: Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, at <http://pubs.usgs.gov/fs/2008/3049/> (last accessed September 2011); Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 Foreign Affairs 63, 69 (2008)

notes, “[t]he extensive Arctic continental shelves may constitute the geographically largest unexplored prospective area for petroleum remaining on Earth.”<sup>8</sup> A Russian National Security Council report in 2009 suggested that the Arctic would become Russia’s primary resource base by 2020, and its main source of oil and gas (as well as an important military outpost).<sup>9</sup> The recent failure of BP to secure a tie-up with the Russian state-owned oil producer Rosneft—which has extensive interests in the Arctic region—and Exxon-Mobil’s subsequent success, serves to highlight how strategically important securing access to the Arctic’s natural resources is to states and corporations alike.<sup>10</sup> At the same time important environmental choices as well as national and global security and other concerns arise in one of Earth’s least developed regions.<sup>11</sup>

Diplomatic resolution of the current set of Arctic boundary disputes is the stated aspiration of the Arctic Nations. Given the high stakes and the Arctic Nations’ current differences in the region, however, it is possible that the Arctic Nations may simply be unable to reach agreement on the lines of sovereignty in the region. Any resulting disputes, may then present very complex and unique challenges.

By contrast to typical “one-off” bilateral inter-state boundary disputes, it is possible in the Arctic context that several disputes could arise. They could be multi-state as opposed to bilateral. Adding further complexity, all but one of the Arctic Nations could in the future be party to not only one, but two or more Arctic frontier disputes. The international community also has substantial and material interests in seeing Arctic sovereignty disputes solved peacefully and enduringly (including global defence, environmental and energy supply and security interests).<sup>12</sup> While the international community will have an interest in seeing that any typical bilateral inter-state boundary dispute is resolved, in the Arctic context the stakes for the global community are of a different order altogether. Despite the importance of these issues, it is widely acknowledged that the present international legal frameworks governing the Arctic are fragmented and insufficient for dealing with

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<sup>8</sup> US Geological Survey, *Fact Sheet: Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*, at <http://pubs.usgs.gov/fs/2008/3049/> (last accessed September 2011)

<sup>9</sup> See BBC, *Russia Outlines Arctic Force Plan*, 27 March 2009, at <http://news.bbc.co.uk/2/hi/europe/7967973.stm> (last accessed September 2011). Of course, Russia provoked the ire of the other Arctic Nations and the international community (and irresponsible speculation about the prospects of a new “cold war”) when in August 2007 it sent a team of scientists in a submarine to the Arctic Ocean to collect data in support of Russia’s claim that the North Pole is part of the Russian continental shelf.

<sup>10</sup> See e.g., Bloomberg, *BP-Rosneft Share Swap Collapses as Billionaires Block Deal*, 17 May 2011, <http://www.businessweek.com/news/2011-05-17/bp-rosneft-share-swap-collapses-as-billionaires-block-deal.html> (last accessed September 2011); Financial Times, *The Arctic: Through Icy Waters*, 18 August 2011; Rosneft Press Release, *Rosneft and ExxonMobil to Join Forces in the Arctic and Black Sea Offshore*, 30 August 2011, <http://www.rosneft.com/news/pressrelease/30082011.html> (last accessed September 2011). Among other things, the Rosneft-Exxon-Mobil deal provides for the establishment of a joint “Arctic Research and Design Center for Offshore Development (ARC)” in St. Petersburg, Russia

<sup>11</sup> See e.g., BBC, *Fears in Arctic Over Rigged Energy Choices*, 24 May 2011 <http://www.bbc.co.uk/news/science-environment-13524846> (last accessed September 2011). See *infra*, Section IV(A)(1)

<sup>12</sup> See *infra*, Section IV(A)(3)

any future international boundary disputes between the Arctic states.<sup>13</sup> None of them were designed to deal with the situation that may eventuate in the Arctic, where multiple critically important interrelated international boundary delimitations could arise for resolution at more or less the same time.

This paper seeks to contribute to the dialogue of how future frontier disputes in the Arctic may best be resolved in the event they cannot be solved diplomatically. To that end it proposes that the Arctic Nations enter into a multilateral dispute resolution treaty, which would create a mandatory, binding, final and self-contained arbitration-based dispute resolution mechanism for frontier disputes concerning the Arctic. The proposed treaty would include a self-contained set of arbitral rules and procedures emphasising party-autonomy, an in-built control mechanism (such as a right of appeal or annulment facility), a reasoned award requirement, a facility for interveners and *amicus curiae*, and joinder rights for non-party Arctic Nations and non-Arctic states that may have substantive rights in the subject matter of any existing dispute. It is submitted that such a framework would not only result in binding delimitations of disputed Arctic boundaries in accordance with international law, but, equally importantly it is argued, also enhance the legitimacy of the proposed process and its outcomes (both among the Arctic Nations themselves, and between them and the international community) such that the prospects of compliance are strengthened and, ultimately, the resulting delimitations and demarcations of the Arctic boundaries are peaceful and enduring.

## I. OVERVIEW OF CURRENT ARCTIC SOVEREIGNTY ISSUES

As has been canvassed elsewhere, a number of international frontiers in the Arctic are currently disputed, or appear likely to be disputed in the future.<sup>14</sup> These frontier issues concern the various Lomonosov Ridge continental shelf claims, the territorial dispute between Canada and Denmark over Hans Island and the status of the Northwest Passage. Although outside the scope of this paper, the current set of Arctic frontier disputes highlight different theories invoked by the Arctic Nations as to how ownership of the Arctic should be determined.<sup>15</sup>

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<sup>13</sup> See *infra*, Section III

<sup>14</sup> These disputes have been detailed elsewhere, and are only summarised in this paper. See e.g. United Nations, *Submissions to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, UNCLOS*, at [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last accessed September 2011); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 Chi. J. Int'l L. 323, 336-337 (2008-2009); Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 Hous. J. Int'l L. 505, 513-517 (2010); Jres, *The Continental Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic*, 42 Vand. J. Transnat'l L. 1265 (2009); Isted, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 J. Transnat'l L. & Pol'y 343 (2008-2009); Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 Fordham Int'l L.J. 1587, 1592-1595 (2007); Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 Geo. Wash. Int'l L. Rev. 651 (2009)

<sup>15</sup> This paper does not seek to canvas these; but see e.g., Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 Geo. Wash.

It should be noted at the outset that the exact contours of the current set of Arctic sovereignty disputes remain to be defined. Indeed, it will likely be some time yet before the number and extent of overlapping claims in the region is known. While Russia submitted a claim pursuant to the United Nations Convention on the Law of the Sea (“UNCLOS”) to the United Nations Commission on the Limits of the Continental Shelf (“CLCS”) with respect to the Lomonosov Ridge on 20 December 2001,<sup>16</sup> it is to resubmit a revised claim in 2012.<sup>17</sup> Canada is to submit its claim to CLCS in respect of various Arctic territories (see below) by 2013.<sup>18</sup> Denmark, which intends to lay claim to the North Pole, will submit its claim to UNCLOS by 2014.<sup>19</sup> Relevantly, Denmark has recently noted in its “Strategy for the Arctic” that “[t]he Kingdom’s claim on the continental shelf will in a number of areas overlap with other countries’ continental shelf claims.”<sup>20</sup> Norway submitted a claim to the CLCS on 27 November 2006.<sup>21</sup> The US has not ratified the UNCLOS Convention, but if it does it will have 10 years from ratification to submit a claim to the CLCS. It will be a number of years yet before the extent and particulars of the Arctic Nations’ competing claims to the Arctic will crystallise.

It is also relevant to note the recent resolution of the 40-year dispute between Russia and Norway over the Barents Sea, a “marginal sea” in the Arctic Ocean located north of Norway and Russia.<sup>22</sup> Underlying the Barents Sea dispute were

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Int’l L. Rev. 651, 654-657 (2009)

<sup>16</sup> United Nations, *Submissions to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, UNCLOS*, at [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last accessed September 2011). See e.g., Colson, *The Delimitation of the Outer Continental Shelf Between Neighbouring States*, 99 Am. J. Int’l L. 91, 97-99 (2003)

<sup>17</sup> Barents Observer, *Russian Shelf Claim to UN in 2012*, 6 July 2011, noting that Deputy Premier Ivanov recently stated that the country’s claim will be handed in to the UN Commission on the Limits of the Continental Shelf in the course of 2012, at <http://www.barentsobserver.com/russian-shelf-claim-to-un-in-2012.4940700.html> (last accessed September 2011).

<sup>18</sup> With respect to Canada’s claims, see e.g. Dufresne, *Canada’s Legal Claims Over Arctic Territory and Waters*, Canadian Parliamentary Information and Research Service (2007), at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0739-e.pdf> (last accessed September 2011). See generally as regards Canada’s foreign policy with respect to the Arctic, Byers, *Cold Peace: Arctic Cooperation and Canadian Foreign Policy*, 65 Int’l J. 899 (2009-2010); McRae, *Arctic Waters and Canadian Sovereignty*, 38 Int’l J. 476 (1982-1983)

<sup>19</sup> Reuters, *Denmark Says Preparing North Pole claim*, 22 August 2011, at <http://af.reuters.com/article/commoditiesNews/idAFL5E7JM1YX20110822> (last accessed September 2011); New York Times, *Denmark: Leaked Document Reveals Plans to Claim Parts of the North Pole*, 17 May 2011, at <http://www.nytimes.com/2011/05/18/world/europe/18briefs-Denmark.html> (last accessed September 2011).

<sup>20</sup> Reuters, *Denmark Says Preparing North Pole claim*, 22 August 2011, at <http://af.reuters.com/article/commoditiesNews/idAFL5E7JM1YX20110822> (last accessed September 2011).

<sup>21</sup> United Nations, *Submissions to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, UNCLOS*, at [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last accessed September 2011).

<sup>22</sup> Norway and the Soviet Union reached agreement in Varangerfjord in 1957 on a partial maritime boundary, but were unable to reach agreement with respect to the Barents Sea.

rights to marine resources, in particular fishing rights, as well as the area's potentially rich oil and gas reserves—the Barents Sea is estimated to be home to more than 10 billion barrels of oil. The new boundary agreed by the Barents Sea Pact is a compromise between the two states' historical positions,<sup>23</sup> and also includes a provision for a “*special area*” where Russia is granted exclusive economic rights within 200 nautical miles of the Norwegian mainland.

The Barents Sea settlement is important because it demonstrates the willingness of each of Russia, one of the key Arctic players, and Norway to co-operate and diplomatically resolve Arctic boundary issues. As noted by the Norwegian Prime Minister at the time, it “sends an important signal to the rest of the world - the Arctic is a peaceful region where any issues that arise are resolved in accordance with international law.”<sup>24</sup> Similarly, Russian President Dmitry Medvedev described the Arctic as “a zone of peaceful economic cooperation.”<sup>25</sup> As a Kremlin source remarked, “[t]his is a practical illustration of the principle that all disputes in the Arctic must be tackled by the Arctic nations themselves by way of talks and on the basis of international law.”<sup>26</sup> Russia has also recently demonstrated its commitment to a constructive relationship with the US in the Arctic, by Presidents Medvedev and Obama issuing a joint statement recognising that their nations were “[c]onscious of the importance of cooperation to protect nature and natural resources in the Bering Strait region and to apply effective strategies aimed at sustainable development of the Arctic regions of our countries.”<sup>27</sup> A recent Canadian Arctic Foreign Policy Statement similarly states that the Canadian Government will seek to co-operate with its fellow Arctic Nations, noting that Canada will “*as a priority, seek to work with our neighbours to explore the possibility of resolving [these disputes] in accordance with international law.*”<sup>28</sup>

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See <http://www.dur.ac.uk/resources/ibru/arctic.pdf> (last accessed September 2011).

<sup>23</sup> A map of the new boundary can be found on the Norwegian Ministry of Foreign Affairs website: [http://www.regjeringen.no/upload/UD/kart/kart\\_100914\\_ny.gif](http://www.regjeringen.no/upload/UD/kart/kart_100914_ny.gif) (last accessed September 2011).

<sup>24</sup> Jens Stoltenberg (Norwegian Prime Minister), [http://www.norway.org/News\\_and\\_events/Policy/Norway-and-Russia-Sign-Maritime-Treaty/](http://www.norway.org/News_and_events/Policy/Norway-and-Russia-Sign-Maritime-Treaty/) (last accessed September 2011). Mr. Stoltenberg also commented that “[t]his is a confirmation that Norway and Russia, two large polar nations, do not have a policy about racing, but a policy about cooperation” (see New York Times, *Russia and Norway Reach Accord on Barents Sea*, 27 April 2010 at <http://www.nytimes.com/2010/04/28/world/europe/28norway.html> (last accessed September 2011)) and that “[t]he Arctic is a peaceful region where any issues that arise are resolved in accordance with international law” (see ABC News, *Russia, Norway OK Barents Sea Border in Arctic*, 15 September 2012, at <http://abcnews.go.com/Business/wireStory?id=11642888> (last accessed September 2011)).

<sup>25</sup> ABC News, *Russia, Norway OK Barents Sea Border in Arctic*, 15 September 2010, at <http://abcnews.go.com/Business/wireStory?id=11642888> (last accessed September 2011).

<sup>26</sup> The Guardian, *Russia and Norway Resolve Arctic Border Dispute*, 15 September 2010, at <http://www.guardian.co.uk/world/2010/sep/15/russia-norway-arctic-border-dispute> (last accessed September 2011).

<sup>27</sup> Joint Statement of the President of the United States of America and the President of the Russian Federation on Cooperation in the Bering Strait Region, 26 May 2011, at <http://www.whitehouse.gov/the-press-office/2011/05/26/joint-statement-president-united-states-america-and-president-russian-fe> (last accessed September 2011).

<sup>28</sup> Government of Canada, *Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad*, 2010, at

These statements of co-operation reflect the joint “Ilulissat Declaration” made by the Arctic Nations (or the “Arctic 5”) on 28 May 2008, where five Arctic states declared that they each “remain committed ... to the orderly settlement of any possible overlapping claims.”<sup>29</sup> As a leading Canadian commentator notes, at the moment there is an extraordinary amount of co-operation.<sup>30</sup> It is possible, however, that this sense of co-operation could be derailed if, for example, the politicians of Arctic countries reach for old nationalist symbols and sentiments concerning Arctic sovereignty and place their own nationalist interests ahead of international co-operation.<sup>31</sup>

Against this background, there are at present four key sovereignty disputes in the Arctic. These concern (a) the Northwest Passage, (b) the Lomonosov Ridge, (c) the Beaufort Sea, and (d) Hans Island. The only Arctic Nation not directly party to any of these disputes is Norway, the first Arctic Nation to settle its Arctic claim with CLCS in 2009<sup>32</sup> and which the following year resolved its dispute with Russia concerning the Barents Sea.

#### A. The Northwest Passage

For the past half-century, Canada and the international community (led by the US) have disagreed on the right to freely navigate through the fabled Northwest

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[http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP\\_booklet-PECA\\_livret-eng.pdf](http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP_booklet-PECA_livret-eng.pdf) (last accessed September 2011).

<sup>29</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011) (“... we 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.”). The Ilulissat Declaration also noted that the Arctic 5 did not see the “need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”

<sup>30</sup> Financial Times, *The Arctic: Through Icy Waters*, 18 August 2011, quoting Michael Bryers, Professor of International Law at the University of British Columbia, Canada. See also, the discussion of Hans Corell, former Ambassador and head of the Legal Department of the Swedish Ministry for Foreign Affairs from 1984-1994 and Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from 1994-2004, and Chair of the Arctic Nations’ meeting at Ilulissat, where the Ilulissat Declaration was made by Canada, Denmark, Norway, the Russian Federation and the United States of America (Arctic Ocean Conference, Ilulissat, Greenland, 28 May, 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>) (last accessed September 2011), at Corell, *The Arctic: An Opportunity to Cooperate and Demonstrate Statesmanship*, 42 Vand. J. Transnat’l L. 1065, 1066-1068 (2009).

<sup>31</sup> *Id.* It has been suggested elsewhere that “[t]he next few years will be critical in determining whether the region’s long-term future will be one of international harmony and the rule of law, or a Hobbesian free-for-all”: Borgerson, *The Great Game Moves North*, Foreign Affairs, 25 March 2009.

<sup>32</sup> Press Release of Ministry of Foreign Affairs of Norway, *Extent of Norway’s Continental Shelf in the High North Clarified*, 15 April 2009, at [http://www.regjeringen.no/en/dep/ud/press/news/2009/shelf\\_clarified.html?id=554718](http://www.regjeringen.no/en/dep/ud/press/news/2009/shelf_clarified.html?id=554718) (last accessed September 2011).

Passage, a complex series of waterways through the Arctic Ocean which span the northern coast of the North American Continent via waterways amidst the Canadian Arctic Archipelago, and connect the Atlantic and Pacific Oceans.<sup>33</sup> It represents by far the most direct shipping route from Europe to Asia.<sup>34</sup> Sought by explorers for centuries as a possible trade route, it was first navigated by Roald Amundsen (Norway) in 1903–1906, but regular marine shipping has historically been impossible throughout most of the year due to the Arctic ice pack. In 2007, however, the Northwest Passage was fully clear of ice for the first time since records began due to the effects of climate change.<sup>35</sup>

Canada claims the Northwest Passage is part of its Arctic Archipelago and forms part of its historic internal waters. Accordingly, so Canada argues, it has complete control over navigation in the passage.<sup>36</sup> On the other hand, the international community maintains that the Northwest Passage is an international strait, which gives foreign nations the right to navigate the passage without Canada's permission.<sup>37</sup> Problems first arose in the late 1950s when Canada claimed the Northwest Passage to be Canadian territorial waters after three American ice-breakers successfully navigated through the passage without the prior authorisation of the Canadian authorities. The problem escalated in 1969 when a further US ice-breaker, the S.S. Manhattan, was sent through the passage, again without prior permission.<sup>38</sup>

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<sup>33</sup> See generally, British Library Online Gallery, 'Northwest Passage', at <http://www.bl.uk/onlinegallery/features/northwpass/intro.html> (last accessed September 2011); Matt Roston, *The Northwest Passage's Emergence as an International Highway* 15 Sw. J. Int'l L. 449, 450 (2008-2009); Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 Cornell Int'l L. Jn'l 331 (1993)

<sup>34</sup> See e.g., Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 Foreign Affairs 63, 69 (2008) ("The shipping shortcuts of the Northern Sea Route (over Eurasia) and the Northwest Passage (over North America) would cut existing oceanic transit times by days, saving shipping companies—not to mention navies and smugglers—thousands of miles in travel.")

<sup>35</sup> BBC, *Warming 'Opens Northwest Passage'*, 14 September 2007, at <http://news.bbc.co.uk/1/hi/6995999.stm> (last accessed September 2011).

<sup>36</sup> The Premier of Canadian province Quebec, Jean Charest, recently claimed that the dispute over the Northwest Passage "is going to be one of the biggest geopolitical issues of our generation": Financial Times, *Canada Boosts Claim to Northwest Passage*, 11 May 2011, at <http://www.ft.com/intl/cms/s/0/9dbd8244-7b35-11e0-9b06-00144feabdc0.html#axzz1XrpLJZnP> (last accessed September 2011). See generally as regards the Northwest Passage issues: Byers, *Cold Peace: Arctic Cooperation and Canadian Foreign Policy*, 65 Int'l J. 899, 908-909 (2009-2010); Howson, *Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage*, 26 Colum. J. Transnat'l L. 337 (1987-1988); Roston, *The Northwest Passage's Emergence as an International Highway*, 15 Sw. J. Int'l L. 449, 453-454 (2008-2009)

<sup>37</sup> The Canadian response has been in three main parts. First, Canada implemented the Arctic Waters Pollution Prevention Act extending the Canadian maritime boundary by a further 97 miles, resulting in all waters within the Northwest Passage being within the scope of that Act. Second, they amended the Territorial Sea and Fishing Zones Act extending Canadian waters from three to twelve miles from its coast. Third, Canada withdrew their acceptance of the compulsory jurisdiction of the International Court of Justice regarding matters dealing with the Arctic. See Roston, *The Northwest Passage's Emergence as an International Highway*, 15 Sw. J. Int'l L. 449, 453-454 (2008-2009)

<sup>38</sup> Roston, *The Northwest Passage's Emergence as an International Highway*, 15 Sw. J. Int'l L. 449, 452-453 (2008-2009)

Although an agreement between the US and Canada, the Arctic Co-operation Agreement, was signed in 1988, they only “agreed to disagree on the status of the Northwest Passage.” There have, so far, been no bilateral (or international) discussions over the right of foreign passage through the Northwest Passage.<sup>39</sup>

### B. Lomonosov Ridge

Russia, Canada and Denmark (via Greenland) all lay claim to the Lomonosov Ridge, an unusual underwater ridge of continental crust in the Arctic Ocean spanning 1800 km across the North Pole from the New Siberian Islands in Russia over the Arctic Ocean to Ellesmere Island of the Canadian Arctic Archipelago. Not only is the Lomonosov Ridge rich in oil, gas and raw metals, it runs across the Arctic Ocean passing under the North Pole and would hugely extend the territorial waters of any country that can lay claim to it. As noted above, the competing claims of Russia, Canada and Denmark are at various stages of submission to the UN CLCS.

Under UNCLOS, in order for a country to establish a claim to an underwater structure, it must demonstrate that the underwater structure is a geologic extension of the land territory as opposed to an “oceanic ridge,” a free-standing geologic structure separated from the continental shelf. Russia is seeking to document that the Lomonosov Ridge is an extension of the Asian continental shelf, while Canada and Denmark are trying to establish that it is an extension of the North American continental shelf. Several expeditions have been undertaken by the three countries to substantiate their claims. Most notably, Russia in 2007 sent an ice-breaker to survey the Arctic region and take samples of the Lomonosov Ridge and planted a Russian flag on the seabed beneath the North Pole—to the outrage of the other Arctic Nations.<sup>40</sup>

So far, only Russia has made an application to have the Lomonosov Ridge officially recognised as part of its territory. In 2001 it submitted an application to the UN Commission on Continental Shelves, but was asked to conduct further surveys.<sup>41</sup> Subsequently in 2009 it then submitted the findings of its 2007 survey. Canada and Denmark have yet to submit any applications to the UN Commission on Continental Shelves, but the results of extensive research on the topic was presented by the two countries at the 2008 International Geological Congress and their final submissions to the Commission are due by 2013 and 2014 respectively.<sup>42</sup>

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<sup>39</sup> *Id.*, 454

<sup>40</sup> See e.g., *Id.*, 153; Mendez, *Thin Ice, Shifting Geopolitics: the Legal Implications of Arctic Ice Melt*, 38 *Denv. J. Int'l L. & Pol'y* 527, 537 (2009-2010)

<sup>41</sup> United Nations, *Submissions to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, UNCLOS*, at [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last accessed September 2011). See e.g., Colson, *The Delimitation of the Outer Continental Shelf Between Neighbouring States*, 99 *Am. J. Int'l L.* 91, 97-99 (2003). Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 *Hous. J. Int'l L.* 505, 514 (2010)

<sup>42</sup> With respect to Canada's claims, see e.g. Dufresne, *Canada's Legal Claims Over Arctic Territory and Waters*, Canadian Parliamentary Information and Research Service (2007), at

As discussed below, the CLCS cannot determine competing continental shelf claims.<sup>43</sup>

### C. Beaufort Sea

Canada and the United States have had an ongoing dispute concerning the precise location of their shared maritime boundary in the Beaufort Sea, which lies between the Canadian territory of Yukon and the US state of Alaska.<sup>44</sup> The disputed territory is a wedge-shaped area of about 21,000km<sup>2</sup> (8,100 sq<sup>2</sup>) that is claimed by both states, and which contains highly exploitable fishing resources and possibly large natural resource reserves.

The differences between the US and Canada intensified when the US imposed a fishing moratorium in the disputed area pending further research. This move was rejected by Canada, which has yet to unequivocally agree to the moratorium.<sup>45</sup> However, although the issue has not yet been resolved, in 2010 the US and Canada started negotiations in an attempt to resolve the issue, and a joint geological survey was initiated. A further meeting is due to take place late 2011.

### D. Hans Island

Hans Island, a small island between Greenland and Canada's Ellesmere Island, has been the subject of a longstanding dispute between Denmark and Canada. The two countries first attempted to delimitate their maritime boundary in the region in a 1973 treaty, which plotted 127 points through the Nares Strait. Hans Island, which potentially holds important oil reserves and lies at the centre of the Kennedy Channel—a potentially important shipping lane—has remained in dispute, however.<sup>46</sup> While Canada bases its claim to the island on the historic use of the

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<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0739-e.pdf> (last accessed September 2011). See generally as regards Canada's foreign policy with respect to the Arctic, Byers, *Cold Peace: Arctic Cooperation and Canadian Foreign Policy*, 65 Int'l J. 899 (2009-2010); McRae, *Arctic Waters and Canadian Sovereignty*, 38 Int'l J. 476 (1982-1983); Reuters, *Denmark Says Preparing North Pole claim*, 22 August 2011, at <http://af.reuters.com/article/commoditiesNews/idAFL5E7JM1YX20110822> (last accessed September 2011); New York Times, *Denmark: Leaked Document Reveals Plans to Claim Parts of the North Pole*, 17 May 2011, at <http://www.nytimes.com/2011/05/18/world/europe/18briefs-Denmark.html> (last accessed September 2011); Mendez, *Thin Ice, Shifting Geopolitics: the Legal Implications of Arctic Ice Melt*, 38 Denv. J. Int'l L. & Pol'y 527, 537-538 (2009-2010)

<sup>43</sup> See *infra*, Sections II(A), III

<sup>44</sup> See generally, Epstein, *New Approach to an Old Problem: Managing Fish Resources in the Beaufort Sea*, 11 Chi. J. Int'l L. 755, 758-759 (2010-2011); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 Chi. J. Int'l L. 323, 336-337 (2008-2009); Jres, *The Continental Shelf beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic*, 42 Vand. J. Transnat'l L. 1265 (2009); Isted, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 J. Transnat'l L. & Pol'y 343 (2008-2009); Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 Geo. Wash. Int'l L. Rev. 651 (2009)

<sup>45</sup> See Epstein, *New Approach to an Old Problem: Managing Fish Resources in the Beaufort Sea*, 11 Chi. J. Int'l L. 755, 760 (2010-2011)

<sup>46</sup> Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 Fordham Int'l L.J. 1587, 1593-1594 and 1624-1630 (2007)

Queen Elizabeth Islands (which it claims includes Hans Island) by the Inuit,<sup>47</sup> Denmark claims the island on the basis of “effective occupation” (indigenous communities of Greenland have been hunting on the island and used it to monitor ice flows) and Denmark has been flying its flag over the island for several years.<sup>48</sup>

Although Denmark and Canada had agreed to disagree on the territorial issues surrounding it, the conflict escalated in 2004 when Canada carried out military exercises near the island. The following year the two countries reached an agreement regarding the management of Hans Island, but left the territorial dispute unresolved.<sup>49</sup> The nations have been in regular negotiations since and have recently commenced a joint survey of the area with a view to mapping it. Both appear confident that they will manage to resolve the issue in the future.

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The most peaceful, enduring and efficient manner in which inter-state disputes of this sensitive, important nature can be resolved is through diplomacy. This was the course favoured expressly by Russia and Norway in resolving their Barents Sea dispute, and reflects the current policy positions of the Arctic Nations generally. Diplomatic ends undoubtedly should and will continue to be pursued by the Arctic states as the contours of their differences over the limits of their territorial sovereignty in the Arctic become refined.

Notwithstanding the current chorus of co-operation, vital state interests are at play in the Arctic. Co-operation could become derailed as national interests in the Arctic come closer to realisation, and intractable disputes may arise. It is entirely foreseeable that diplomacy may fail given the high economic and political stakes involved in the Arctic, and it is unlikely that any of the Arctic Nations will simply cede territory potentially worth billions of dollars.<sup>50</sup>

At the same time, negotiated outcomes may be more likely against the backdrop of mandatory formal dispute resolution mechanisms. “It is also possible that a day in court providing the opportunity to argue openly the parties’ respective cases will lead more readily to an amicable settlement or open the door to compromise solutions.”<sup>51</sup> Even absent an immediate threat of boundary litigation, the mere existence of a mandatory and binding dispute resolution mechanism may promote peaceful, diplomatic, settlement.

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<sup>47</sup> Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 *Ocean & Coastal L.J.* 307, 320-321 (2008-2009)

<sup>48</sup> *Id.*, 324

<sup>49</sup> *Id.*, 331

<sup>50</sup> Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, *Global Energy Review*, 29 March 2011

<sup>51</sup> Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 *Law & Prac. Int’l Cts. & Tribunals* 133, 133-134 (2006)

## II. OVERVIEW OF EXISTING AVAILABLE LEGAL MECHANISMS FOR RESOLVING ARCTIC SOVEREIGNTY DISPUTES

Against this background, there are a number of existing legal frameworks that may be of assistance in resolving Arctic sovereignty issues. These have been addressed at length elsewhere by numerous other commentators and, save for a brief overview below, this paper does not seek to deal with these mechanisms at length.<sup>52</sup> As discussed further in Section III, there is at present no adequate framework for the resolution of the multiple possible future Arctic sovereignty disputes.<sup>53</sup>

In any event, even if one or a combination of the mechanisms canvassed below could be used to resolve future disputes concerning Arctic frontiers, they do not present the best mechanism for achieving a peaceful and enduring resolution of future Arctic sovereignty issues. At most, the current tools would provide for a piecemeal set of solutions. Sections III and IV of this paper therefore propose a multilateral dispute resolution treaty between the Arctic Nations, the aspiration of which is to provide a framework for the lasting resolution of Arctic sovereignty disputes.

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<sup>52</sup> See e.g., Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 Chi. J. Int'l L. 323, 349-351 (2008-2009); Clote, *Implications of Global Warming*, 8 Rich. J. Global L. & Bus. 195, 218-221 (2009); Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 Hous. J. Int'l L. 505 (2009-2010); Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 Fordham Int'l L.J. 1587, 1631 *et. seq.* (2007)

See also, Harrison, *A Chilling Effect? – Geopolitical Incentivizing and the Environmental Ramifications for the Arctic Region*, 17 U. Miami Int'l & Comp. L. 67 (2009); Epstein, *New Approach to an Old Problem: Managing Fish Resources in the Beaufort Sea*, 11 Chi. J. Int'l L. 755 (2010-2011); Kolcz-Ryan, *An Arctic Race: How the United States' Failure to Ratify the Law of the Sea Convention Could Adversely Affect its Interests in the Arctic*, 35 U. Dayton L. Rev. 149 (2009-2010); Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 Ocean & Coastal L.J. 307 (2008-2009); Gordy, *Dire Straits: the Necessity for Canadian Sovereignty in the Arctic Waterways*, 20 Fordham Env'tl. L. Rev. 551 (2009-2010); Clote, *Implications of Global Warming on State Sovereignty and Arctic Resources Under the United Nations Convention on the Law of the Sea: How the Arctic is No Longer Communis Omnium Naturali Jure*, 8 Rich. J. Global L. & Bus. 195 (2008-2009); Van Wagner, *Its Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at a Melting Arctic and the Hot Competition for its Resources*, 21 Vill. Env'tl. L.J. 189 (2010); Dresser, *Safeguarding the Arctic from Accidental Oil Pollution: the Need for a Binding Regionspecific Shipping Regime*, 16 Sw. J. Int'l L. 507 (2010); Roston, *The Northwest Passage's Emergence as an International Highway*, 15 Sw. J. Int'l L. 449 (2008-2009); Mendez, *Thin Ice, Shifting Geopolitics: the Legal Implications of Arctic Ice Melt*, 38 Denv. J. Int'l L. & Pol'y 527 (2009-2010)

<sup>53</sup> See *infra* at Section III, e.g., Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 Foreign Affairs 63, 71 (2008) ("The situation is especially dangerous because there are currently no overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes")

### A. UNCLOS/CLCS

The primary international legal regime for addressing maritime boundary and continental shelf claims is UNCLOS (“the constitution of the ocean”), which was enacted in 1982 and has so far been ratified by over 160 nations.<sup>54</sup> UNCLOS governs almost all aspects of maritime law<sup>55</sup> and establishes an international legal framework for resolving disputes relating to the world’s oceans. While four of the five Arctic Nations have ratified UNCLOS, the United States has so far failed to do so.<sup>56</sup>

Where a maritime boundary or continental shelf is claimed by more than one nation, UNCLOS provides several potential avenues for dispute resolution. The CLCS is not one of them, however—it does not have jurisdiction to resolve competing continental shelf claims. Foremost, UNCLOS promotes the informal diplomatic settlement of conflicting maritime claims.<sup>57</sup> If that is not possible, then the Convention includes a *non-mandatory* dispute resolution framework.<sup>58</sup> Article 287 provides that a state, when signing, ratifying or acceding to UNCLOS, “shall

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<sup>54</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1883 U.N.T.S. 397; [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) (last accessed September 2011). See generally, Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, 40 *et. seq.* (2<sup>nd</sup> ed., 2010); Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 *Hous. J. Int’l L.* 505, 520-530 (2010); King, *Thawing a Frozen Treaty*, 34 *Hastings Const. L.Q.* 329, 332-338 (2007); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 *Chi. J. Int’l L.* 323 (2008-2009); Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 *Fordham Int’l L.J.* 1587, 1640 *et. seq.* (2007)

<sup>55</sup> UNCLOS’ coverage includes rules on international maritime sovereignty limits, navigation, seabed mining and environmental protection of the world’s oceans. See e.g., Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 *Chi. J. Int’l L.* 323, 330-337 (2008-2009); Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 *Hous. J. Int’l L.* 505 (2009-2010).

<sup>56</sup> See [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) (last accessed September 2011); Caron & Schieber, *The United States and the 1982 Law of the Sea Treaty*, 11 *ASIL Insights* 11 June 2007, at <http://www.asil.org/insights070611.cfm> (last accessed September 2011); Kolcz-Ryan, *An Arctic Race: How the United States’ Failure to Ratify the Law of the Sea Convention Could Adversely Affect its Interests in the Arctic*, 35 *U. Dayton L. Rev.* 149 (2009-2010); Ashfaq, *Something for Everyone: Why the United States Should Ratify the Law of the Sea Treaty*, 19 *J. Transnat’l L. & Pol’y* 357 (2009-2010); Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 *Hous. J. Int’l L.* 505, 521 (2010); Clote, *Implications of Global Warming*, 8 *Rich. J. Global L. & Bus.* 195, 265 *et. seq.* (2009); The Economist, *An Awkward Absence*, 14 May 2009, at <http://www.economist.com/node/13649247> (last accessed September 2011). Cf. Howard, *Don’t be Left Out in the Cold: An Argument for Advancing American Interests in the Arctic Outside the Ambits of the United Nations Convention on the Law of the Sea*, 42 *Ga. L. Rev.* 833 (2008); King, *Thawing a Frozen Treaty*, 34 *Hastings Const. L.Q.* 329, 332-338 (2007). See also, Sands, *The Future of International Adjudication*, 14 *Conn. J. Int’l L.* 1 (1999)

<sup>57</sup> UNCLOS, Article 83; Article 279 (“States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means ... ”)

<sup>58</sup> UNCLOS, Part XV, at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (last accessed September 2011).

be free to choose” by means of a written declaration for the settlement of disputes concerning the interpretation or application of UNCLOS by (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI of UNCLOS; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; or (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.<sup>59</sup> At the same time, Article 298 of UNCLOS allows states and entities to escape any compulsorily binding disputes mechanism by permitting them to declare that they exclude the application of UNCLOS’ compulsory binding procedures in respect of certain specified categories of disputes.<sup>60</sup> To this end, Canada, Denmark and Russia have all opted out of the UNCLOS dispute resolution mechanisms as they relate to sea boundary delimitations.<sup>61</sup> The US has not yet even ratified the Convention and is not subject to UNCLOS dispute resolution. (Norway has no current frontier disputes in the Arctic).

Accordingly, as has been recognised elsewhere, UNCLOS and the CLCS do not provide a forum—less still a mandatory and binding one—for resolving future Arctic frontier disputes.<sup>62</sup>

### B. The International Court of Justice

The International Court of Justice (“ICJ”), the successor to the Permanent Court of International Justice, was established in 1945 by the Charter of the United Nations and began work in 1946.<sup>63</sup> It is the principal judicial organ of the UN, and has adjudicated on a wide range of matters—chief among which have been frontier disputes.<sup>64</sup> Indeed, the ICJ has already dealt with a number of cases involving

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<sup>59</sup> UNCLOS, Article 287

<sup>60</sup> UNCLOS, Article 298

<sup>61</sup> United Nations, *The Law of the Sea: Declarations and Statements with Respect to the United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (last accessed September 2011).

<sup>62</sup> See e.g., Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, *Global Energy Review*, 29 March 2011 (“For a number of reasons, the UNCLOS is an ineffective way of resolving pending and potential disputes relating to territorial claims in the Arctic. This is mainly due to the lack of a binding dispute resolution procedure.”); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 *Chi. J. Int’l L.* 323, 336-337 (2008-2009); Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 *Geo. Wash. Int’l L. Rev.* 651, 668 *et. seq.* (2009)

<sup>63</sup> See generally, e.g., Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Chapter 1 (2003); Brownlie, *Principles of Public International Law*, 707-725 (2008); Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, 4 *et. seq.* (2<sup>nd</sup> ed., 2010); Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 *Loy. L.A. Int’l & Comp. L.J.* 1, 4-11 (1998); Jennings, *The International Court of Justice after Fifty Years*, 89 *Am. J. Int’l L.* 493 (1995); Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 *Fordham Int’l L.J.* 1587, 1631 *et. seq.* (2007)

<sup>64</sup> See e.g., Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, 216-217 (2003); Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, 1 (2<sup>nd</sup> ed., 2010);

conflicting continental shelf claims: the *North Sea Continental Shelf Cases*, which were decided before UNCLOS came into force (and where the ICJ applied general principles of international law to resolve the issues in those cases),<sup>65</sup> and *Tunisia v Libya*<sup>66</sup> and *Libya v Malta*,<sup>67</sup> which were both decided after UNCLOS came into force and where the ICJ applied UNCLOS as customary international law.<sup>68</sup>

Although each of the five Arctic Nations are parties to the ICJ Statute (as are all states who are members of the UN), the majority have not conferred jurisdiction on the ICJ to resolve any future Arctic frontier disputes.<sup>69</sup> Canada and Russia have specifically rejected the jurisdiction of the ICJ for resolving maritime boundary disputes, pursuant to Article 298 of UNCLOS.<sup>70</sup> As noted above, the US has not ratified UNCLOS and has thus yet to declare how it might seek to resolve disputes subject to UNCLOS in the event it ratifies. As regards its stance to the ICJ generally, the US has an uneasy and at times cool attitude. It does not accept the Court's compulsory jurisdiction pursuant to Article 36 of the ICJ Statute, and only submits to ICJ jurisdiction on a case-by-case basis.<sup>71</sup> (Moreover, the US Supreme Court recently held that ICJ decisions are not binding upon US courts.<sup>72</sup>) By contrast, Denmark has declared (pursuant to Article 287 of UNCLOS) its choice of the ICJ for the settlement of disputes concerning the interpretation or application of the Convention.<sup>73</sup>

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Sharma, *Territorial Acquisition, Disputes and International Law* (1997)

<sup>65</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Reports 4

<sup>66</sup> *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, [1982] ICJ Reports 18

<sup>67</sup> *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)*, [1985] ICJ Reports 13

<sup>68</sup> See *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)*, [1985] ICJ Reports 13, 33. See also, Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 Hous. J. Int'l L. 505, 537-538 (2009-2010); Mendez, *Thin Ice, Shifting Geopolitics: the Legal Implications of Arctic Ice Melt*, 38 Denv. J. Int'l L. & Pol'y 527, 541 (2009-2010); Gordy, *Dire Straits: the Necessity for Canadian Sovereignty in the Arctic Waterways*, 20 Fordham Envtl. L. Rev. 551, 577 (2009-2010)

<sup>69</sup> For a discussion of the perceived weaknesses of the ICJ jurisdiction, see e.g. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 Loy. L.A. Int'l & Comp. L.J. 1, 20-24 (1998)

<sup>70</sup> United Nations, *The Law of the Sea: Declarations and Statements with Respect to the United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (last accessed September 2011).

<sup>71</sup> ICJ, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last accessed 17 September 2011).

<sup>72</sup> *Medellin v. Texas*, 552 US Sup. Ct. 491 (2008)

<sup>73</sup> United Nations, *The Law of the Sea: Declarations and Statements with Respect to the United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (last accessed September 2011).

Thus, as the matter presently stands (and in particular given the express and specific declarations of Russia and Canada, together with the cool attitude of the US toward the ICJ), the ICJ is very unlikely to be utilised to resolve any of the potential Arctic frontier disputes surveyed in Section I.

### C. *Sui Generis Boundary Commissions*

There are a number of examples of states agreeing to send their frontier disputes to custom designed *sui generis* boundary commissions. A recent example of such a body is the “Abyei Boundaries Commission,” constituted by the Government of Sudan and the Sudan People’s Liberation Movement/Army pursuant to their 2005 Comprehensive Peace Agreement<sup>74</sup> and which preceded the widely publicised arbitration between the two parties in 2009 at the Hague.<sup>75\*\*</sup>

Boundary commissions can play a unique role in seeking to resolve inter-state frontier disputes. One of the attributes of boundary commissions—unlike national courts, the ICJ or traditional arbitral tribunals—is that they can be configured in such a way as to foster and maintain good bilateral relations between neighbouring states, facilitate appropriate and effective border management and promote borderland development rather than marginalisation.<sup>76</sup> To that end, *sui generis* boundary commissions may be composed not of international lawyers but, for example, of political, regional, historical or cultural experts (or a mixture). They may also be mandated to delimit the disputed boundary pursuant not strictly according to legal principles, but to specially agreed rules of procedure and be given broad, independent, investigative authority. This flexibility allows the parties to take into account the particular practical and political exigencies of their differences and each state’s own domestic political or other self-interests. As such, resorting to *sui generis* boundary commissions may draw on a much wider mandate than the ICJ or an arbitral tribunal, and can be tremendously useful in permitting agreement on how a frontier dispute may be resolved, when no agreement would otherwise be possible.

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<sup>74</sup> The Comprehensive Peace Agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army, The Protocol on the Resolution of Conflict in Abyei, The Abyei Appendix, Article 1, 31 December 2004, at <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> (last accessed September 2011). (While the Eritrea-Ethiopia Boundary Commission shares that title, it was in substance an arbitral tribunal. See [http://www.pca-cpa.org/showpage.asp?pag\\_id=1150](http://www.pca-cpa.org/showpage.asp?pag_id=1150)) (last accessed September 2011).

<sup>75</sup> See Permanent Court of Arbitration, *Arbitration between the Government of Sudan and the Sudan People’s Liberation Movement/Army*, (the “Abyei Arbitration”), at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last accessed September 2011); Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn’l Int’l Disp. Settlement 313 (2010)

\*\* The author was a member of the counsel team that represented the Sudan People’s Liberation Movement/Army in its arbitration against the Government of Sudan. The views in this paper are the writer’s alone, and do not in any way represent the views of the Sudan People’s Liberation Movement/Army or Wilmer Cutler Pickering Hale & Dorr LLP.

<sup>76</sup> Donaldson, *Boundary Commissions: Functions & Structures*, Durham University International Boundaries Research Unit, at [http://www.dur.ac.uk/resources/ibru/conferences/thailand/ibru\\_2.pdf](http://www.dur.ac.uk/resources/ibru/conferences/thailand/ibru_2.pdf) (last accessed September 2011).

Practical difficulties can arise with international or intra-state boundary commissions, however. As highlighted by the Abyei dispute in Sudan, where the Government of Sudan and the Sudan People's Liberation Movement/Army initially referred the delimitation of the "Abyei Area" to the "Abyei Boundaries Commission," the decisions of boundary commissions may be practically unenforceable and not the final solution the parties had initially envisaged. As they are by definition creatures of political compromise, boundary commissions also rely heavily on the political will of the parties for compliance with their determinations and even more so where a commission is not mandated to apply legal principles. Thus, if a boundary commission is not seen as independent, it lacks rigour, does not garner respect from the parties, is perceived as having erred, or that it has disregarded or exceeded its mandate, then there may arise a risk of non-implementation of the boundary commission's delimitation.

While it is possible that the Arctic Nations may agree to refer future Arctic frontier disputes to a "boundaries commission" in name, they are very unlikely to mandate such a body to determine those disputes otherwise than in accordance with principles of international law.<sup>77</sup>

#### *D. International Arbitration*

In recent decades international arbitration has become the preferred method for resolving international commercial disputes.<sup>78</sup> It provides a neutral, centralised,

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<sup>77</sup> See The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011) ("... we 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.") See also *infra*, Section V(H)

<sup>78</sup> David, *Arbitration in International Trade*, 1 *et. seq.* (1985) ("The development of arbitration for the settlement of commercial disputes, more specially in international trade, is however a phenomenon of recent date. Arbitration is a most ancient device, but until the middle of the 19<sup>th</sup> century such a device was resorted to in order to settle disputes arising between people who were obliged to live together ... this type of arbitration has not disappeared, but next to it a new type has been developed ..."). See also, Born, *International Commercial Arbitration*, Chapter 1(B)(3), 71 *et. seq.* (2009); C Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 *Duke J. Comp. & Int'l L.* 259, 260-265 (2007-2008); Born, *Arbitration and the Freedom to Associate*, 38 *Ga. J. Int'l & Comp. L.* 7 (2009); A. van den Berg, *The New York Convention of 1958* (1981); A. van den Berg (ed.), *50 Years of the New York Convention*, 14 *ICCA Congress Series*, 649-711 (2009); Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 *Ga. J. Int'l & Comp. L.* 25 (2009); Lindsay, *London as a Centre for International Commercial Arbitration*, ICLG (2010), at <http://www.iclg.co.uk/khadmin/Publications/pdf/3790.pdf> (last accessed September 2011); Queen Mary University International Arbitration Study 2008, *Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards* (2008), at <http://www.arbitrationonline.org/research/Corpattitempirical/2008.html> (last accessed September 2011); Queen Mary University International Arbitration Study 2010, *Choices in International Arbitration* (2010), at <http://www.arbitrationonline.org/research/2010/index.html> (last accessed September 2011).

flexible, party-driven dispute resolution procedure where expert tribunals are appointed and mandated by *the parties* to render final, binding awards that enjoy near global enforceability pursuant to the New York Convention. These features are compelling in the case of international commercial disputes, where arbitration's potential speed and cost-efficiency are also highlighted.<sup>79</sup> But while the popularity of international commercial arbitration is comparatively recent, arbitration has been utilised for centuries by states to resolve international disputes.<sup>80</sup> In the public international law context, international arbitration has unique characteristics that states perceive as important, and which are particularly germane in the context of international boundary disputes. Three of these are briefly outlined.<sup>81</sup>

First, territorial and sovereignty disputes can assume enormous national importance, and raise extremely sensitive political issues both domestically and internationally. The ability to mandate that decision to an independent, neutral third-party panel of arbitrators enables states "to avoid making unpopular decisions and 'lose face' before their public opinion."<sup>82</sup> It follows that the responsibility for an unpopular decision may conveniently fall on the arbitral tribunal and not the

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<sup>79</sup> See e.g., Born, *Arbitration and the Freedom to Associate*, 38 Ga. J. Int'l & Comp. L. 7, 11 (2009) ("In truth, for those who have had experience with different forms of international dispute resolution, international arbitration is—as a general matter—often quicker and less expensive than litigation"), citing C. Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in C. Drahozal & R. Naimark (eds.), *Towards A Science of International Arbitration*, 25, 32, 35 (2005)

<sup>80</sup> See e.g., Jay's Treaty (Great Britain & the United States of America) (1794); Convention for the Pacific Settlement of International Disputes, 29 July 1899; Convention for the Pacific Settlement of International Disputes, 18 October 1907; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"); Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 ("ICSID Convention" or "Washington Convention"); Energy Charter Treaty, 17 December 1994; UNCITRAL Model Law on International Commercial Arbitration 2006; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, 1992; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, 1993. See generally, Ralston, *International Arbitration, From Athens to Locarno* (1929); Brownlie, *Principles of Public International Law*, 702-703 (2008); Born, *International Commercial Arbitration*, Chapter 1(A) (History of International Arbitration), 7-64 (2009); Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133 (2006); Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, Chapter 4 (2<sup>nd</sup> ed., 2010)

<sup>81</sup> See e.g., Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133 (2006); Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn'l Int'l Disp. Settlement 313 (2010); Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, Global Energy Review, 29 March 2011

<sup>82</sup> Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133 (2006); See also, Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn'l Int'l Disp. Settlement 313, 333 (2010) ("In deeply rooted and emotive disputes, where parties' positions are based on fear, resentment, grief and/or ambition, this can make a dispute in which the parties are simply unable to compromise, politically possible")

relevant government.<sup>83</sup> The advantage of international arbitration in dealing with political disputes was expressly contemplated by the designers of the Permanent Court of International Justice in 1920, where it was emphasised that arbitration would remain a more suitable forum than litigation for controversies with strong “political” dimensions.<sup>84</sup>

Second, international arbitration—unlike a *sui generis* boundary commission composed of lay appointees, and save for the rare circumstances where parties mandate a tribunal to assess their claims *ex aequo et bono*—is a process which is conducted in accordance with law, and where awards are made by applying relevant legal principles and rules. Submitting inter-state disputes to be settled according to law ensures vital neutrality, independence and legitimacy of the process, particularly so where states have sought a third-party dispute settlement mechanism for the very purpose of avoiding negative political consequences that may arise from taking a decision or reaching a compromise themselves.

Third, international arbitration has procedural advantages for states over international adjudication, say at the ICJ. Arbitration is often faster than international adjudication,<sup>85</sup> particularly so if the parties specifically design a procedure to ensure speedy progress. For example, parties can mandate an arbitral tribunal to deliver an award within a certain defined time period if there exist political or practical exigencies. In the case of the Abyei Arbitration, for instance, the pending deadlines for implementing their 2005 Comprehensive Peace Agreement prompted the Government of Sudan and the Sudan People’s Liberation Movement/Army to agree a condensed briefing and hearing schedule, and to require the Tribunal to render its award within 90 days of the closing of proceedings.<sup>86</sup> Critically, states can choose their arbitral tribunal (which is not possible in the case of the ICJ), and thereby constitute a tribunal they feel comfortable before, or which understands and has deep knowledge of the issues in dispute or otherwise has specialised skills.<sup>87</sup> They can also design the procedure of the arbitration, and take into account any practical or political considerations that may arise.

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<sup>83</sup> Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int’l Cts. & Tribunals 133 (2006), and at 140-141

<sup>84</sup> *Meeting of the Advisory Committee of Jurists*, 1 League of Nations O.J. 226, 236 (1920)

<sup>85</sup> See e.g., Born, *Arbitration and the Freedom to Associate*, 38 Ga. J. Int’l & Comp. L. 7, 11 (2009) (“In truth, for those who have had experience with different forms of international dispute resolution, international arbitration is—as a general matter—often quicker and less expensive than litigation”), citing C. Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in C. Drahozal & R. Naimark (eds.), *Towards A Science of International Arbitration*, 25, 32, 35 (2005)

<sup>86</sup> Permanent Court of Arbitration, *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award, ¶19, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last accessed September 2011) (Article 9.1 refers specifically to the award, stating: “Subject to Article 8(7) ... the final award shall be rendered by the Tribunal within a maximum of ninety days from the closure of submissions.”)

<sup>87</sup> Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int’l Cts. & Tribunals 133, 142 (2006)

For these reasons, among others, international arbitration has for centuries been a commonly utilised dispute settlement mechanism for international disputes between states. This includes, in particular, the resolution of frontier disputes,<sup>88</sup> with well-known examples of frontier disputes being determined by international arbitration tribunals including the India-Pakistan *Rann of Kutch* arbitration (1968),<sup>89</sup> the Chile-Argentina *Beagle Channel* case,<sup>90</sup> the *Taba* arbitration between Israel and Egypt,<sup>91</sup> the Eritrea-Ethiopia Boundary Commission (“EEBC”),<sup>92</sup> and the “Abyei Arbitration” between the Government of Sudan and the Sudan People’s Liberation Movement/Army concerning the disputed Abyei region in central Sudan (and intra-state dispute).<sup>93</sup> Yet it should be noted that the ICJ has in recent decades seen a busy caseload—probably at the expense of international arbitration. That increase in caseload has been criticised as heavily reliant on the ICJ’s compulsory jurisdiction, however,<sup>94</sup> and it is suggested that state parties more and more see international arbitration as the preferred method of resolving inter-state disputes.<sup>95</sup>

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<sup>88</sup> See generally, Ralston, *International Arbitration, From Athens to Locarno* (1929); Brownlie, *Principles of Public International Law*, 702-703 (2008); Born, *International Commercial Arbitration*, Chapter 1(A) (History of International Arbitration), 7-64 (2009); Sharma, *Territorial Acquisition, Disputes and International Law*, (1997); Gray and Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 Brit. Y.B. Int’l L., 97 (1992); Munkman, *Adjudication and Adjustment: International Judicial Decision and Settlement of Territorial and Boundary Disputes*, 46 Brit. Y.B. Int’l L., 1 (1972-1973); Fox, *Arbitration*, in Luard (ed.), *The International Regulation of Frontier Disputes*, (1970); Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, Chapter 4 (2<sup>nd</sup> ed., 2010); Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int’l Cts. & Tribunals 133 (2006)

<sup>89</sup> *The Indo-Pakistan Western Boundary (Rann of Kutch) Between India and Pakistan*, 17 Reports of International Arbitral Awards 1-576 (1968), at [http://untreaty.un.org/cod/riaa/cases/vol\\_XVII/1-576.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XVII/1-576.pdf) (last accessed September 2011).

<sup>90</sup> *Beagle Channel Arbitration (Argentina v. Chile)* 52 I.L.R. 39

<sup>91</sup> *Arbitral Award in the Dispute Concerning Certain Boundary Pillars Between the Arab Republic of Egypt and the State of Israel*, 80 I.L.R. 225 (1989)

<sup>92</sup> See generally, Permanent Court of Arbitration, *Eritrea-Ethiopia Claims Commission*, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151) (last accessed September 2011).

<sup>93</sup> See generally, Permanent Court of Arbitration, *The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last accessed September 2011).

<sup>94</sup> See e.g., C Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 Duke J. Comp. & Int’l L. 259 (2007-2008). That increase in caseload has been criticised as heavily reliant on the ICJ’s compulsory jurisdiction, however, in circumstances where there was in fact no genuine will of the parties to be before the ICJ. See also discussion in Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EJIL 815, 818-820 (2007)

<sup>95</sup> C Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 Duke J. Comp. & Int’l L. 259, 292 (2007-2008) (“arbitration involving states has experienced a revival on two fronts. Beginning in mid-1990s, demand for the PCA’s services and those of its International Bureau increased dramatically. A decade later, the list of pending arbitrations hovered at ten to twelve per year, marking one of the busiest periods in the PCA’s history. In a related field, the number of arbitrations brought against states under investment treaties also jumped from single digits to scores of pending claims.”)

For all of the above reasons, international arbitration is an appropriate and compelling mechanism for the resolution of future Arctic sovereignty disputes.<sup>96</sup> Indeed, the benefits of utilising international arbitration to resolve Arctic boundary disputes have recently been promoted elsewhere.<sup>97</sup>

#### E. An Arctic Treaty?

Some commentators have suggested that the Arctic Nations (perhaps together with the international community) should enter into a grand compact with respect to the Arctic region, such as a wide-ranging “Arctic Treaty” in similar scope to the Antarctic Treaty of 1961 which governs sovereignty and resource use in Antarctica.<sup>98</sup> Underpinning the Antarctic Treaty is the declared recognition of the state parties that it is in the “*interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes.*”<sup>99</sup> A similar suggestion is to create an “international park” in the Arctic.<sup>100</sup>

It is argued that such a treaty would be a first step in developing the Arctic, while preserving the environment and the welfare of its native populations.<sup>101</sup> It is proposed that territorial sovereignty, the level of economic activity within the region (including the acceptable level of resource extraction and who profits from such extractions), environmental standards to preserve the environment and the indigenous people living in the area, and security concerns would all be dealt with.<sup>102</sup> It is also suggested as essential that such a treaty include provisions on enforcement, penalties for breach of its terms and dispute resolution.<sup>103</sup>

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<sup>96</sup> See *infra*, Section V(A)

<sup>97</sup> See e.g., Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, *Global Energy Review*, 29 March 2011; Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 *Hous. J. Int'l L.* 505 (2010)

<sup>98</sup> See e.g., Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 *Ocean & Coastal L.J.* 307, 324 (2008-2009); Young, *Whither the Arctic? Conflict or Cooperation in the Circumpolar North*, 45 *Polar Rec.* 73, 73 (2009); Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, *Foreign Affairs*, 63, 75 (2008) (“The ideal way to manage the Arctic would be to develop an overarching treaty that guarantees an orderly and collective approach to extracting the region’s wealth.”); Wade, *A Warmer Arctic Ocean Needs Shipping Rules*, *Financial Times*, 15 January 2008, at [http://www.ft.com/cms/s/0/1c415b68-c374-11dc-b083-0000779fd2ac.html?nclick\\_check=1](http://www.ft.com/cms/s/0/1c415b68-c374-11dc-b083-0000779fd2ac.html?nclick_check=1) (last accessed September 2011); Jarashow, Runnels & Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 *Fordham Int'l L.J.* 1587, 1637 *et. seq.* (2007)

<sup>99</sup> Antarctic Treaty, 1 December 1959, Preamble, 402 U.N.T.S. 71, and Article 1(1) (“Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons”), at [http://www.ats.aq/devAS/ats\\_parties.aspx?lang=e](http://www.ats.aq/devAS/ats_parties.aspx?lang=e) (last accessed September 2011). See Taubenfeld, *A Treaty for the Antarctic?*, 33 *Int'l Conciliation* 243 (1959-1961)

<sup>100</sup> Dubner, *On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 *Mo. Envtl. L. & Pol'y Rev.* 1, 17-18 (2005)

<sup>101</sup> Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 *Ocean & Coastal L.J.* 307, 329 (2008-2009)

<sup>102</sup> *Id.*, 328-332 (2008-2009); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic*

While some commentators have been in favour of basing an eventual Arctic treaty on the Antarctic Treaty,<sup>104</sup> there is broad consensus that the Arctic and Antarctica are too different for the Antarctic Treaty approach to be transported north to the opposite pole.<sup>105</sup> Indeed, the Arctic and Antarctica are (aside from their geographical location) in the most practical terms the exact opposite—the Antarctic is a land mass surrounded by ice, whereas the Arctic is ice surrounded by land. Moreover, not only does the Antarctic lack the promise of readily accessible hydrocarbon resources, but the southern polar reaches are also removed from valuable trade routes and are far from any other continent. Thus, as has been noted, “conditions of geography, glaciology, oceanography, and politics among the eight littoral states in the polar north seem likely to complicate such a comprehensive legal system being created for the Arctic Ocean within the foreseeable future.”<sup>106</sup>

Tellingly, by their Ilulissat Declaration in 2008 the Arctic Nations expressly rejected the possibility of a wide-ranging treaty to deal with sovereignty, resource allocation and exploitation, the environment and security interests in the Arctic.<sup>107</sup> The Declaration states expressly that the Arctic Nations “remain committed to this [existing] legal framework [governing the Arctic] and to the orderly settlement of any possible overlapping claims” but that they did not see the “need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”<sup>108</sup>

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*Sovereignty*, 9 Chi. J. Int'l L 323, 349-351 (2008-2009)

<sup>103</sup> Watson, *An Arctic Treaty: A Solution to the International Dispute over the Polar Region*, 14 Ocean & Coastal L.J. 307, 332 (2008-2009)

<sup>104</sup> Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 Chi. J. Int'l L 323, 348 (2008-2009); Harrison, *A 'Chilling' Effect? – Geopolitical Incentivizing and the Environmental Ramifications for the Arctic Region*, 17 U. Miami Int'l & Comp. L. Rev. 67, 86 *et. seq.* (2009)

<sup>105</sup> See e.g., Isted, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 J. Transnat'l L. & Pol'y 343, 373-374 (2008-2009); Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 Chi. J. Int'l L 323, 348 (2008-2009)

<sup>106</sup> Joyner, *The Legal Regime for the Arctic Ocean*, 18 Jn'l Transnt'l Law & Policy 195, 199 (2009)

<sup>107</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011) (“... we 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. ***This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.*** We will keep abreast of the developments in the Arctic Ocean and continue to implement appropriate measures.”) (emphasis added)

<sup>108</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September

While a wide-ranging multilateral treaty for the Arctic may be an admirable goal, it is almost certainly not going to be adopted by the Arctic Nations in the near future (if at all).

#### *F. Joint Development Agreements*

While not a mechanism for resolving international boundary disputes in the Arctic *per se*, some commentators have suggested that in the absence of agreement on boundary delimitation (and therefore the right to exploit resources in the disputed territory), states could resolve to enter joint development agreements to exploit natural resources within disputed territories while efforts to resolve the underlying dispute are ongoing.<sup>109</sup> That approach could of course be adopted in the Arctic, as elsewhere, and there is merit to it as a short-term solution.<sup>110</sup> To settle any future Arctic sovereignty issues enduringly they must in fact be resolved, however.

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2011).

<sup>109</sup> See e.g., Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation*, in Lagoni & Vignes (eds.), *Maritime Delimitation*, 143-151 (2006); Noussia, *On International Arbitrations for the Settlement of Boundary maritime Delimitation Disputes and Disputes from Joint Development Agreements for the Exploitation of Offshore Natural Resources*, 25 *Int'l Jn'l Marine & Coastal Law* 63-80 (2010); Becker-Weinberg, *Joint Development Agreements of Offshore Hydrocarbon Deposits: an Alternative to Maritime Delimitation in the Asia-Pacific Region*, paper presented to the 2011 ILA Asia-Pacific Regional Conference, 29 May to 1 June 2011, Taipei

<sup>110</sup> See e.g., Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, *Global Energy Review*, 29 March 2011

### III. THE CURRENT AVAILABLE LEGAL FRAMEWORK FOR RESOLVING ARCTIC BOUNDARY DISPUTES IS UNSATISFACTORY

As highlighted by the discussion in Section II above, the current international legal framework for the Arctic (or even more generally) does not provide any adequate binding mechanism for the resolution of inter-state frontier disputes in the region.

At the same time, however, the claim for diplomatic settlement of issues arising in the Arctic region is strong.<sup>111</sup> That is particularly so where there are interests that may be extrinsic to the legal framework for resolving international boundary disputes, such as the rights of indigenous peoples or environmental concerns, that can arguably be better recognised and accommodated diplomatically by the states concerned. State interest in resolving disputes promptly so they can seek to maximise resource exploitation may also motivate diplomatic resolution.<sup>112</sup> Yet given the high stakes it would seem almost inevitable that some disputes between the Arctic Nations will at some point require the use of a third-party dispute resolution mechanism. At the same time, a peacefully negotiated outcome may be more likely against the background of a mandatory dispute settlement procedure, which provides for the final and binding resolution of any persisting dispute that cannot be resolved by diplomatic means.<sup>113</sup>

As a starting point, the present configuration of the UNCLOS regime will be of no aid in resolving any future Arctic boundary disputes. The US is not a party, and the other major Arctic players—Russia, Canada and Denmark—have opted-out of the treaty’s compulsory dispute resolution regime. The jurisdiction of the ICJ has similarly been rejected by Russia and Canada (and the US is unlikely to submit to it), with the Court exercising no compulsory jurisdiction over them. Given their present stances it would seem highly unlikely that any of them would submit to the jurisdiction of the ICJ in the event that an Arctic frontier dispute arises in the future. The Arctic Nations have also, as discussed above, by the 2008 Ilulissat Declaration specifically rejected the possibility of a wide-ranging “Arctic Treaty” to deal with territorial disputes, navigation, security, environmental and other concerns. Such a compact, however well intentioned, is highly unlikely to eventuate.<sup>114</sup> Joint development agreements are a good practical stop-gap but offer no long-term solution to issues of sovereignty, and past experience suggests that a *sui generis* boundary commission is unlikely to meet the claim for legal certainty

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<sup>111</sup> See, the Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011).

<sup>112</sup> See also *infra*, Section II(F)

<sup>113</sup> Similarly, “it is also possible that a day in court providing the opportunity to argue openly the parties’ respective cases will lead more readily to an amicable settlement or open the door to compromise solutions”: Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int’l Cts. & Tribunals 133, 133-134 (2006)

<sup>114</sup> See e.g., Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, Global Energy Review, 29 March 2011

and finality that the Arctic Nations, and the international community, will demand given the enormous importance of the Arctic region.<sup>115</sup>

Finally, although *ad hoc* bilateral (or multilateral) international arbitration would be the best presently available dispute resolution mechanism for addressing Arctic frontier disputes, this paper suggests that it is unlikely to provide the best mechanism for their long-term, enduring resolution. While international arbitration has historically been (and will continue to be) utilised effectively for the resolution of inter-state frontier disputes,<sup>116</sup> it is, like most things, not perfect. One of the key practical advantages of international commercial arbitration is the near global enforceability of international arbitral awards,<sup>117</sup> but at the supranational state-to-state level international arbitration awards pertaining to international boundaries are not enforceable at all.<sup>118</sup> This is not to undermine *ad hoc* arbitration as a powerful tool for the resolution of international boundary and other international disputes, but to understand properly the limitations of arbitrating inter-state public international law controversies (or indeed, referring them to international adjudication generally<sup>119</sup>)—and to minimise them as far as possible.<sup>120</sup> As the UK Supreme Court recently recognised in *Jivraj v Hashwani*,<sup>121</sup> the reality is that international arbitration is frequently chosen not because of its inherent advantages, but rather because it is the only dispute resolution procedure which is acceptable to all the parties, and because the contracting parties are not prepared to have their claims brought before any other forum. As the Supreme Court noted:

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<sup>115</sup> A number of these solutions to resolving future Arctic frontier disputes have substantial merit. However, none of the current range of mechanisms or potential solutions provides a co-ordinated, consistent, global or in most cases even adequate legal framework to resolve future Arctic frontier disputes.

<sup>116</sup> See *supra*, Section II(D)

<sup>117</sup> *Id.*

<sup>118</sup> See Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133, 158-159 (2006) (“It should be stressed that, if one of the [state] parties does not comply with the arbitral tribunal’s decision, there are no enforcement proceedings available to a party who wishes to have the award enforced. ... In reality, the practice shows that arbitral awards maintain legal, moral and diplomatic force, and that in most instances states will respect an arbitral award rendered pursuant to an arbitration agreement which they have freely negotiated and entered into.”); Miles, Mallett, *The Abyej Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn'l Int'l Disp. Settlement 313, 335 (2010) (“the subject matter of an award resulting from an intra-state or inter-state conflict is by its very nature likely to be difficult to enforce. Unlike a monetary award which is capable of enforcement through national courts and the attachment of assets, an award specifying rights and obligations of a state or intra-state party is likely to be difficult to impose upon a recalcitrant party. Such awards generally require the good faith of the parties to implement.”); Jibril, *The Binding Dilemma: From Bakassi to Badme-Making States Comply with Territorial Decisions of International Bodies*, 19 Am. Univ. Int'l Law Rev. 633 (2004)

<sup>119</sup> As discussed above, while Article 94 of the UN Charter provides that recourse may be had to the Security Council in the event of non-compliance with a decision of the ICJ, the Security Council will in practice be loath to interfere in such issues—and in the Arctic context the provision is near meaningless, with Russia and the US holding veto rights as permanent members of the Security Council. See *supra*, Section II(B)

<sup>120</sup> See *supra*, Section II(D)

<sup>121</sup> *Jivraj v Hashwani* [2011] UKSC 40

“The *raison d’être* of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (e.g. because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties’ positions, culture, or perspectives).”<sup>122</sup>

The point has already been made that international arbitration is often favoured by parties to international boundary disputes for exactly the reason that they cannot agree on any other forum, or are unwilling to take a politically unpopular decision themselves.<sup>123</sup>

*Ad hoc* international arbitration should, and will, continue to play a vitally (and increasingly) important role in the resolution of international boundary dispute. For all of the reasons cited in Section II(D), it remains a compelling dispute resolution tool for states unable to resolve their differences.<sup>124</sup> To be sure, this paper maintains and proposes that the Arctic Nations should arbitrate any future frontier disputes, given that it is the best, most appropriate manner in which to resolve them. Rather than *ad hoc* one-time proceedings, however, for the reasons discussed below this paper argues that the globally important, multilateral and international character of the Arctic frontier issues that could arise in the future may necessitate a more structured response than *ad hoc* bilateral international arbitration so as to optimise the prospect of peaceful and enduring settlement. It therefore proposes a self-contained multilateral arbitration framework for the resolution of future Arctic frontier disputes which is specifically designed to *inter alia* minimise the risks of non-compliance with any resulting arbitral awards.

#### IV. THE CASE FOR A MULTILATERAL DISPUTE RESOLUTION TREATY FOR RESOLVING ARCTIC SOVEREIGNTY DISPUTES

The preceding overview highlights that there is no mechanism providing for the organised, global resolution of future Arctic sovereignty disputes. Does that matter? Emphatically, yes.<sup>125</sup>

It matters to all parties with an interest in the resolution of Arctic sovereignty issues that they are resolved peacefully and enduringly. That is plainly so as regards the Arctic Nations themselves, who each have crucial national, economic and security interests in achieving enduring, long-term solutions to these issues. This much was reflected in the Ilulissat Declaration, where the Arctic Nations declared that they each “remain committed to ... the orderly settlement of any

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<sup>122</sup> *Id.*, ¶ 61

<sup>123</sup> *See supra*, Section II(D)

<sup>124</sup> *See e.g.* the current Indus Waters Kishenganga Arbitration between Pakistan and India under the auspices of the Permanent Court of Arbitration, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1392](http://www.pca-cpa.org/showpage.asp?pag_id=1392) (last accessed September 2011).

<sup>125</sup> *See e.g.*, Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 *Foreign Affairs* 63, 73 (2008) (“The region’s remarkable untapped resource wealth and unrealized potential to become a fast lane between the Atlantic and Pacific Oceans makes it a key emerging pressure point in international affairs.”)

possible overlapping claims.”<sup>126</sup> In the first place that means resolving any disputes by peaceful, rather than forceful, means. But it also means solving future differences in a lasting manner that will be respected and complied with, and also withstands the scrutiny of future generations. At the same time, it is very much in the interests of the wider international community that Arctic sovereignty disputes are resolved peacefully, enduringly and in a manner recognised as principled and affording long-term legitimacy.

#### A. *The Importance and Multilateral and International Character of Arctic Sovereignty Issues*

One of the unique features of the Arctic is that, because of the dual effects of global warming and advances in technology, state and international attention on the Arctic region has become concentrated both relatively recently and more or less at once. At the same time, state and international interests in the Arctic are multifaceted and deeply complex—much more so than typical bilateral inter-state boundary disputes.

##### 1. The Importance of Arctic Sovereignty Issues

It is a truism that international frontier disputes invoke the very essence and bounds of a state’s sovereignty.<sup>127</sup> The result is that, even where armed conflict is not at the centre of the controversy, inter-state boundary disputes are invariably of a politically sensitive, critically important character for states.<sup>128</sup>

The Arctic is no exception; at the heart of any future Arctic frontier disputes lie immense conceptions of state sovereignty. Russia and Canada in particular have made strong and overt statements about the importance of the Arctic to their nations’ livelihoods.<sup>129</sup> Denmark (Greenland) is no different—it is a small

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<sup>126</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011). The Ilulissat Declaration also noted that the Arctic 5 did not see the “need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”

<sup>127</sup> See e.g., Brownlie, *Principles of Public International Law*, 105 (7<sup>th</sup> ed., 2008) (“*The state territory and its appurtenances (airspace and territorial sea)*, together with the government and population *within its frontiers*, comprise the physical and social manifestations of the primary type of legal person, the state.”)

<sup>128</sup> As Brownlie observes, “[t]he pressures of national sentiment, new forms of exploitation of barren and inaccessible areas, the strategic significance of areas previously neglected, and the pressures of population on resources, give good cause for belief that territorial disputes will increase in significance.” The Arctic, of course, is a case in point. *Ibid.*, 123. See also, United Nations, *Handbook on the Delimitation of Maritime Boundaries*, 3 (2000); Paulsson, *Boundary Disputes into the Twenty-First Century: Why, How... and Who?*, 95 Am. Soc. Int’l Law Proceedings 122 (2001)

<sup>129</sup> As noted above, Russia expects the Arctic to be the main source of its oil and gas within a decade, and it has courted international oil majors to achieve this objective. Canada’s Prime Minister Stephen Harper has made “Northern Issues” a key plank of his Government’s policy: see e.g., Financial Times, *Canada Boosts Claim to Northwest Passage*, 11 May 2011, at <http://www.ft.com/intl/cms/s/0/9dbd8244-7b35-11e0-9b06-00144feabdc0.html#axzz1XrpLJZnP> (last accessed September 2011). The US has also increased its Arctic focus: US White House, *NSTC to Coordinate Certain Arctic Research Policy Committee Activities*, 23 August 2010, at <http://www.>

Scandinavian nation, but with enormous national interest in its claim to the Arctic. As well as purely nationalistic motivations, there are numerous further vital national and also international interests invoked in the Arctic context.

The most readily identifiable of these is the Arctic's potential oil and gas wealth. But those resources are not only important at a domestic level. Given their estimated scale, security of their supply will be vitally important for the international community as a whole. As already noted, it is estimated that the Arctic may hold 30% of the world's recoverable, but yet undiscovered, gas and 13% of its oil.<sup>130</sup> In addition, the Arctic holds a potential bounty of other economic resources. Arctic deep sea mining and mineral extraction, fisheries, navigation, shipping and logistics,<sup>131</sup> tourism and other industries will undoubtedly flourish in the future. But for fisheries and tourism, for example, to succeed as sustainable resources in the long term, careful ocean management of finite marine resources, as well as the marine environment generally, will be necessary.<sup>132</sup>

At the same time, vital national security interests arise in the Arctic Circle.<sup>133</sup> These interests will only continue to gain in importance as the Arctic pack ice continues to recede, and as the Arctic Ocean and the northern waters and territories of the Arctic Nations become more accessible. Thus, in a sign of the growing military and security importance of the Arctic each of the Arctic Nations have increased their activities in the Arctic region.<sup>134</sup> Canada has for the past several years conducted increasingly large scale military exercises in its northern territories in the Arctic Circle. Most notably, in August 2007 Canada announced that it was setting up an Arctic military training centre in Resolute Bay, on the Arctic, to be

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[whitehouse.gov/blog/2010/08/23/nstc-coordinate-certain-arctic-research-policy-committee-activities](http://whitehouse.gov/blog/2010/08/23/nstc-coordinate-certain-arctic-research-policy-committee-activities). A recent Wikileaks cable suggested, however, that the US government views Stephen Harper's talk about Canadian Arctic sovereignty as "little more than empty chest-thumping designed to win votes": see <http://www.cbc.ca/news/canada/story/2011/05/12/wikileaks-cable-arctic-harper.html> (last accessed September 2011).

<sup>130</sup> US Geological Survey, *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, 23 July 2008, at [http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss\\_home](http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home) (last accessed September 2011).

<sup>131</sup> See e.g., Molenaar, *Arctic Marine Shipping: Overview of the International Legal Framework, Gaps, and Options*, 18 J. Transnat'l L. & Pol'y 289 (2008-2009)

<sup>132</sup> See e.g., Joyner, *The Legal Regime for the Arctic Ocean*, 18 Jn'l Transnt'l Law & Policy 195, 205 et. seq. (2009)

<sup>133</sup> See e.g., Byers, *Cold Peace: Arctic Cooperation and Canadian Foreign Policy*, 65 Int'l J. 899, 902-904 (2009-2010); Corell, *The Arctic: An Opportunity to Cooperate and Demonstrate Statesmanship*, 42 Vand. J. Transnat'l L. 1065 (2009); West, *Arctic Warming: Environmental, Human, and Security Implications*, 42 Vand. J. Transnat'l L. 1081, 1096-1102 (2009); Joyner, *The Legal Regime for the Arctic Ocean*, 18 Jn'l Transnt'l Law & Policy 195, 238 (2009); Ebinger, Zambetakakis, *The Geopolitics of Arctic Melt*, 85 International Affairs 1215 (2009), at [http://www.brookings.edu/~media/Files/rc/papers/2009/11\\_arctic\\_melt\\_ebinger\\_zambetakakis/11\\_arctic\\_melt\\_ebinger\\_zambetakakis.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/11_arctic_melt_ebinger_zambetakakis/11_arctic_melt_ebinger_zambetakakis.pdf) (last accessed September 2011).

<sup>134</sup> See e.g., Ebinger, Zambetakakis, *The Geopolitics of Arctic Melt*, 85 International Affairs 1215 (2009), at [http://www.brookings.edu/~media/Files/rc/papers/2009/11\\_arctic\\_melt\\_ebinger\\_zambetakakis/11\\_arctic\\_melt\\_ebinger\\_zambetakakis.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/11_arctic_melt_ebinger_zambetakakis/11_arctic_melt_ebinger_zambetakakis.pdf) (last accessed September 2011).

used year-round for both winter warfare, Arctic training and routine operations.<sup>135</sup> More recently in August 2011, the Canadian military conducted the largest military exercise to-date—Operation NANOOK—with some 1,000 troops, air and naval assets and unmanned drones.<sup>136</sup> Russia has also greatly expanded its military presence in the Arctic, declaring an intention to create a special Arctic armed forces.<sup>137</sup> Denmark in July 2009 approved a plan to set up an Arctic military command and task force by 2014.<sup>138</sup> In August 2009 Norway, which has half of its waters north of the Arctic Circle, moved its centre of military operations from Jättå, in the south of the country, to Reitan, in the north.<sup>139</sup> The US Navy in November 2009 disclosed its first Arctic ‘road map’ to guide its policy, strategy and investments in the Arctic.<sup>140</sup> These national security interests also sit alongside the international community’s interest in the Arctic being a secure region.<sup>141</sup> Those international interests would obviously be heightened were the Northwest Passage to be declared an international waterway, in which circumstances the international community will have a vital interest in the security of the passage and the region generally.

Management of the Arctic environment and pollution prevention is a further important consideration, and has attracted substantial attention from some commentators.<sup>142</sup> As has been suggested by Peter Wadhams, Professor of Ocean

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<sup>135</sup> Canada National Defence, The Canadian Forces in the North, at <http://www.canadacom.forces.gc.ca/nr-sp/bg-do/09-002a-eng.asp> (last accessed September 2011). See also, Eyre, *Forty Years of Military Activity in the Canadian North, 1947-87*, 40 *Arctic* 292, 294 (1987)

<sup>136</sup> Center for New American Security, *In the Arctic, Difficult Choices Loom about U.S. Military Capability*, 24 August 2011, at <http://www.cnas.org/blogs/naturalsecurity/2011/08/arctic-difficult-choices-loom-about-us-military-capability.html> (last accessed September 2011).

<sup>137</sup> RT, *Russia to Create Arctic Armed Forces*, 28 March 2009, at <http://rt.com/news/sci-tech/russia-to-create-arctic-armed-forces/> (last accessed September 2011).

<sup>138</sup> The Copenhagen Post, *Arctic Rivalry Heating Up*, 15 July 2009, at <http://www.cphpost.dk/news/national/88-national/46275-arctic-rivalry-heating-up.html> (last accessed September 2011).

<sup>139</sup> Financial Times, *Battle Hots Up For Arctic Resources*, 4 July 2011 (“Norway’s decision to move its military command centre 1,000 km north from its former location last year highlights the rising stakes in the Arctic amid predictions that global warming will unlock icebound resources and shipping routes”); Foreign Policy Association, *Nordic Military Developments*, 9 June 2009, at <http://foreignpolicyblogs.com/2009/06/09/nordic-military-developments/> (last accessed September 2011); Ebinger, Zambetakis, *The Geopolitics of Arctic Melt*, 85 *International Affairs* 1215 (2009), at [http://www.brookings.edu/~media/Files/rc/papers/2009/11\\_arctic\\_melt\\_ebinger\\_zambetakis/11\\_arctic\\_melt\\_ebinger\\_zambetakis.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/11_arctic_melt_ebinger_zambetakis/11_arctic_melt_ebinger_zambetakis.pdf) (last accessed September 2011); Barents Observer, *Operational Command Moves to the Arctic*, 2 June 2009, at <http://www.barentsobserver.com/index.php?id=4599841> (last accessed September 2011).

<sup>140</sup> US Navy, Chief of Naval Operations, *U.S. Navy Arctic Roadmap*, Oct. 2009, at [http://www.navy.mil/navydata/documents/USN\\_arctic\\_roadmap.pdf](http://www.navy.mil/navydata/documents/USN_arctic_roadmap.pdf) (last accessed September 2011).

<sup>141</sup> See e.g., Byers, *Cold Peace: Arctic Cooperation and Canadian Foreign Policy*, 65 *Int’l J.* 899, 902-904 (2009-2010); Kraska, *International Security and International Law in the Northwest Passage*, 42 *Vand. J. Transnat’l L.* 1109 (2009)

<sup>142</sup> See e.g., Rothwell, *International Law and the Protection of the Arctic Environment*, 44 *ICLQ* 280-312 (1995); Isted, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 *J. Transnat’l L. & Pol’y* 343 (2008-2009);

Physics at the University of Cambridge in the UK, “[i]f there is a serious oil spill under ice in the Arctic it will be very hard, if not impossible to stop it becoming an environmental catastrophe ... [which] will be very much harder to deal with than a major spill in open water.” Several factors are at play. First, the oil is caught underneath the ice, meaning it cannot be immediately cleaned up or burnt off. Second, the oil cannot be located readily under the pack ice, but rather gets encapsulated in new ice which grows underneath, creating a “kind of oil sandwich” inside the ice. Third, that encapsulated oil is then transported around the Arctic, and released in spring when it may be several hundred or even a thousand miles from the source of the spill. The net effect is that “you can have a huge area of the Arctic becoming polluted by oil without it initially being clear where that oil is.”<sup>143</sup> These concerns were reflected in the recent advice from the British Foreign Office to the British Energy Secretary, Chris Huhne:

“The impact of such a spill in the Arctic would be proportionately higher [than the 2010 Macondo spill in the Gulf of Mexico] due to the lower temperatures and (in winter) lack of sunlight that will inhibit oil eating bacteria (which played a large role in cleaning up the Macondo spill). The Arctic ecosystem is particularly vulnerable, and emergency responses would be slower and harder than the Gulf of Mexico due to the area’s remoteness and the difficulty of operating in sub-zero temperatures. A situation compounded by response lag resulting from the vast distances between points of habitations and at certain times, winter ice.”<sup>144</sup>

The Arctic Nations themselves acknowledged the environmental fragility of the Arctic in their 2008 Ilulissat Declaration:

“The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of

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West, *Arctic Warming: Environmental, Human, and Security Implications*, 42 Vand. J. Transnat’l L. 1081, 1083-1090 (2009); The Independent, *John Sauven: ‘I Want to Claim the Arctic Region for all of Mankind,’* 12 September 2011, at <http://www.independent.co.uk/environment/john-sauven-i-want-to-claim-the-arctic-region-for-all-of-mankind-2353171.html> (last accessed September 2011); Financial Times, *A Warmer Arctic Ocean Needs Shipping Rules*, 15 January 2008, at [http://www.ft.com/cms/s/0/1c415b68-c374-11dc-b083-0000779fd2ac.html?nclink\\_check=1#axzz1Y3b4TT7C](http://www.ft.com/cms/s/0/1c415b68-c374-11dc-b083-0000779fd2ac.html?nclink_check=1#axzz1Y3b4TT7C) (last accessed September 2011) (“Shipping poses dangers to the ecosystem of the Arctic, which is even more vulnerable than more southerly environments. The biggest danger is from accidents, because oil and other organic substances decompose more slowly in cold water and ice, and ice can interfere with clean-up. Also, emissions from fossil-fuelled vessels may cause greying of the ice cap, accelerating melting. On the other hand, shorter shipping routes could significantly cut fuel consumption and greenhouse gas emissions, especially if engines use hydrogen or nuclear fuel”); Dresser, *Safeguarding the Arctic from Accidental Oil Pollution: the Need for a Binding Region Specific Shipping Regime*, 16 Sw. J. Int’l L. 507 (2010)

<sup>143</sup> The Independent, *Oil Exploration Under Arctic Ice Could Cause ‘Uncontrollable’ Natural Disaster*, 6 September 2011, at <http://www.independent.co.uk/environment/oil-exploration-under-arctic-ice-could-cause-uncontrollable-natural-disaster-2349788.html> (last accessed September 2011).

<sup>144</sup> The Guardian, *Danish Warship Sails into Greenpeace Arctic Oil Protest*, 24 May 2011, at <http://www.guardian.co.uk/environment/2011/may/24/danish-commandoes-greenpeace-arctic-oil> (last accessed September 2011).

local inhabitants and indigenous communities. We will take steps in accordance with international law both nationally and in cooperation among the five states and other interested parties to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean. In this regard we intend to work together including through the International Maritime Organization to strengthen existing measures and develop new measures to improve the safety of maritime navigation and prevent or reduce the risk of ship-based pollution in the Arctic Ocean.”<sup>145</sup>

As a practical matter, however, it is difficult to see how any wide-scale, meaningful and lasting attempt to address environmental concerns in the Arctic (in particular in the region of the North Pole, which appears to be claimed by each of Russia, Canada and Denmark) could be successful until the lines of statehood in the Arctic are delimited. In any event, as the Arctic Nations themselves state expressly in the Ilulissat Declaration, they “see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.” That is to say, they do not see any need for any further environmental obligations pertaining specifically to the Arctic region.

Finally, but by no means least, are the vital interests of the indigenous peoples of the Arctic region, who are intimately tied to the environment.<sup>146</sup> As has been suggested elsewhere, the effects of climate change on the region are a double-edged sword for these communities. On the one hand, melting ice will risk their traditional way of life, based on hunting and fishing. On the other, an Arctic region that is more accessible to lucrative activities such as the exploitation of hydrocarbons, fish and minerals will necessarily attract increased governmental attention, and this could benefit the indigenous communities of the region.<sup>147</sup>

Taken separately or together, these considerations plainly highlight the importance of resolving any Arctic sovereignty disputes both peacefully, and enduringly. To achieve this, the dispute resolution mechanism utilised to resolve any such disputes must work, its outcomes must be legitimate in the eyes of all stakeholders and, ultimately, they must be complied with for generations to come.

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<sup>145</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011).

<sup>146</sup> The Arctic Nations (albeit only partially) recognise the interests of the Arctic’s indigenous peoples in the Ilulissat Declaration: “The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities. We will take steps in accordance with international law both nationally and in cooperation among the five states and other interested parties to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean.” *Ibid.* See also, Lynge, *Indigenous Peoples between Human Rights and Environmental Protection - An Arctic Perspective*, 64 *Nordic J. Int’l L.* 489 (1995); McIvor, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?* 10 *Geo. Int’l Env’tl. L. Rev.* 147 (1998)

<sup>147</sup> Ebinger & Zambetakis, *The Geopolitics of Arctic Melt*, 85 *International Affairs* 1215 (2009), at [http://www.brookings.edu/~media/Files/rc/papers/2009/11\\_arctic\\_melt\\_ebinger\\_zambetakis/11\\_arctic\\_melt\\_ebinger\\_zambetakis.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/11_arctic_melt_ebinger_zambetakis/11_arctic_melt_ebinger_zambetakis.pdf) (last accessed September 2011).

## 2. The Multilateral Character of Arctic Territorial Sovereignty Issues

As discussed above, the current set of competing Arctic sovereignty claims of the Arctic Nations include disputes over the Lomonosov Ridge, the Beaufort Sea and Hans Island, as well as the competing claims of Canada and the international community with respect to the Northwest Passage. It is readily apparent that these disputes are of a unique multilateral character, as compared to the archetypal bilateral territorial or maritime boundary delimitation disputes arising between two neighbouring states.

First of all, it is immediately apparent that two of the presently anticipated Arctic frontier disputes are as they stand of a multi-party nature. The Lomonosov Ridge will be claimed by Canada, Denmark (via Greenland), and Russia, while the Northwest Passage will be claimed as Canadian waters on the one hand, and international waters by the international community on the other.

Not only are several of the competing frontier claims of a multi-party nature, but all of the Arctic Nations (save for Norway) have an interest in at least two of the presently anticipated Arctic frontier issues. Canada (Northwest Passage, Lomonosov Ridge, Hans Island, Beaufort Sea), Denmark (Northwest Passage, Hans Island), Russia (Northwest Passage, Lomonosov Ridge) and the US (Northwest Passage, Beaufort Sea) are directly interested in two or more of the four existing Arctic frontier issues. (Following the resolution of the Barents Sea dispute with Russia, Norway continues to have an interest in the Northwest Passage issue only.)

Almost all of the Arctic Nations have interests in multiple territorial disputes in the Arctic. Again, all of this is in stark contrast to a typical bilateral territorial or maritime boundary delimitation dispute arising between two neighbouring states.

## 3. The International Character of Arctic Territorial Sovereignty Issues

As well as the Arctic Nations, the wider international community has a material interest in how disputed Arctic territories are allocated and how the Arctic is managed generally. Particular concern will be directed to the Arctic's navigation rights, its resources and their management, ocean management and environmental protection, and global security. It is likely that the international community will also look to safeguard the interests of the Arctic's indigenous peoples.

China provides a good illustration of the international community's economic interest in the Arctic. Because China's economy is so heavily reliant on foreign trade (nearly half of China's gross domestic product (GDP) is thought to be dependent on shipping), securing navigation and shipping rights to utilise during the summer months the much faster route through the Northwest Passage will have substantial commercial implications. The trip from Shanghai to Europe via the Arctic is thousands of kilometres shorter than the current route via the Strait of Malacca and the Suez Canal. Moreover, due to piracy, the cost of insurance for ships travelling via the Gulf of Aden towards the Suez Canal increased more than tenfold between September 2008 and March 2009.<sup>148</sup> In turn, reduced costs will

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<sup>148</sup> Jakobsen, *China Prepares for an Ice-Free Arctic*, 2 SIPRI Insights on Peace and

provide that the goods China sells on the global markets will be cheaper for global consumers. As this simple example demonstrates, governments, companies and consumers all have an interest in regulating and managing future Arctic navigation rights.

*B. Enhancing Legitimacy of Outcomes and Compliance with Decisions*

The ultimate objective of any dispute resolution mechanism must be to achieve outcomes that are legitimate and enforceable. That is particularly so where vital interests are at stake, as they plainly are in the Arctic.

If a dispute resolution process generates outcomes that are both legitimate and enforceable, then those outcomes will stand a strong chance of resolving the parties' dispute finally and enduringly. Compliance will be more forthcoming (or ultimately compelled), and the likelihood of the seemingly resolved issues being reopened will be substantially diminished or altogether eliminated. Legitimacy of the outcome from any dispute resolution mechanism (including, as a necessary part of that, the process by which that outcome was achieved) must be achieved not only in the eyes of the participants, however, but also in the view of the wider community. If an outcome is legitimate to both the parties and the wider community, then it stands the best chance of compliance by the parties to the dispute and of being a lasting, enduring resolution of the matters in contention.

In the context of international inter-state dispute resolution procedures, legitimacy has, it is suggested, two broad components. A process and its outcome will be measured by both its "internal" and "external" legitimacy. Internal legitimacy requires that the process and outcome must be seen as legitimate by the participating state and its domestic constituencies, such that compliance is practically possible in the context of the participating state's political interests. If there is no political will to comply, a state may well not do so. External legitimacy is the recognition by the international community that the dispute resolution process is legitimate and upholds legitimate outcomes. Where there is legitimacy, the international community will sanction the process and insist on compliance with its outcomes. The greater the claim to legitimacy, the greater will be the demand by the international community that compliance be forthcoming.

It would of course, in the context of reviewing compliance with dispute resolution mechanisms, be usual to also address the ability of a party to enforce the outcome of the dispute resolution process (whether it be a negotiated settlement agreement, decision of a boundary commission, arbitral award or judgment). If an outcome is enforceable by formal legal means, then it naturally increases the likelihood of voluntary compliance. It also permits formal enforcement with predictable results, if compliance is not volunteered. Thus, substantial attention has historically and in recent times been given to the international enforceability of foreign arbitral awards pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"). The decisions of international adjudicators of a public international law character as between states—most

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Security (2010), at <http://books.sipri.org/files/insight/SIPRIInsight1002.pdf> (last accessed September 2011).

specifically essential issues of statehood such as the delimitation of international maritime or territorial boundaries—are, however, of an entirely different character from international commercial arbitral awards subject to the New York Convention or national court judgments. They are as between states, and by their nature boundary awards on international boundary delimitation cannot be enforced against financial or physical assets.<sup>149</sup>

The result is that there have been a number of examples of states choosing to disregard determinations made against them by international tribunals. A familiar example is the refusal of the US to pay reparations to Nicaragua pursuant to an ICJ ruling, which held in 1986 that the US had violated international law by supporting the Contras in their rebellion against the Nicaraguan government.<sup>150</sup> While decisions of the ICJ can be referred to the United Nations Security Council in the event of non-compliance (Article 94<sup>151</sup>), in reality the Security Council will be very slow to get involved in non-compliance issues. A further dimension arises in the Arctic context due to the status of Russia and the US as permanent members of the UN Security Council, who each in their own right hold veto power. As has been noted, in signing the UN Charter, the US was “undoubtedly aware” that it “retained the unqualified right to exercise its veto of any Security Council resolution.”<sup>152</sup>

Although voluntary compliance with inter-state awards is the norm, a similar fate to the *Contra* litigation has awaited several high-profile arbitration awards that have been concerning international frontier disputes. For example, Ethiopia

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<sup>149</sup> See e.g., Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133, 158 (2006); Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn'l Int'l Disp. Settlement 313, 335 (2010) (“the subject matter of an award resulting from an intra-state or inter-state conflict is by its very nature likely to be difficult to enforce. Unlike a monetary award which is capable of enforcement through national courts and the attachment of assets, an award specifying rights and obligations of a state or intra-state party is likely to be difficult to impose upon a recalcitrant party. Such awards generally require the good faith of the parties to implement.”); Jibril, *The Binding Dilemma: From Bakassi to Badme-Making States Comply with Territorial Decisions of International Bodies*, 19 Am. Univ. Int'l Law Rev. 633 (2004)

<sup>150</sup> *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicargaua v United States of America)(Merits)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at <http://www.icj-cij.org/docket/files/70/6503.pdf> (last accessed September 2011); Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 Loy. L.A. Int'l & Comp. L.J. 1, 2-4 (1998)

<sup>151</sup> UN Charter, Chapter XIV, Article 94 (“1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment”), at <http://www.un.org/en/documents/charter/chapter14.shtml> (last accessed September 2011). See Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EJIL 815 (2007)

<sup>152</sup> Smith, *Frozen Assets: Ownership of Arctic Mineral Rights Must be Resolved to Prevent the Really Cold War*, 41 Geo. Wash. Int'l L. Rev. 651, 675 (2009), citing *Medellin v Texas*, 552 US Sup. Ct. at 509-510

rejected the decision of the Eritrea-Ethiopia Boundary Commission (“EEBC”) (in substance an arbitral tribunal) concerning its territorial dispute with Eritrea.<sup>153</sup> The focal point of that dispute was the town of Badme—where a two-and-a-half year war started when Eritrean forces arrived in the Ethiopian administered village in May 1998, claiming it to be Eritrean territory. Ethiopia’s rejection of the award arose notwithstanding the Parties’ stipulation in their agreement to arbitrate signed at Algiers in December 2000<sup>154</sup> that “the delimitation and demarcation determinations of the [Eritrea-Ethiopia] Commission shall be *final and binding*” and agreed that “each Party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other Party.”<sup>155</sup> Presently, the Government of Sudan continues to refuse to implement the delimitation of the “Abyei Area” in Sudan pursuant to the arbitral award rendered by an international tribunal of eminent jurists in the 2009 Abyei Arbitration.<sup>156</sup> That case was also preceded by armed conflict; two civil wars spanning forty years where over two million lives were lost.

The practical difficulty in enforcing international delimitation decisions against states emphasises the critical role of legitimacy in the legal processes utilised for resolving frontier disputes. In circumstances where the inter-state legal outcomes are not capable of direct enforcement, it is only through the legitimacy of the dispute resolution process and its outcomes that the political and diplomatic environment for compliance is created. It is, therefore, absolutely necessary that the processes and outcomes of any dispute resolution mechanism for future Arctic boundary disputes must be legitimate in the eyes of the participants *and* the wider international community, *i.e.* both internally and externally legitimate.

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<sup>153</sup> See generally, Permanent Court of Arbitration, *Eritrea-Ethiopia Claims Commission*, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151) (last accessed September 2011).

<sup>154</sup> Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (“Algiers Agreement”), at [http://www.pca-cpa.org/upload\\_files/Algiers%20Agreement.pdf](http://www.pca-cpa.org/upload_files/Algiers%20Agreement.pdf) (last accessed September 2011).

<sup>155</sup> Algiers Agreement, Article 4 (15), at [http://www.pca-cpa.org/upload\\_files/Algiers%20Agreement.pdf](http://www.pca-cpa.org/upload_files/Algiers%20Agreement.pdf) (last accessed September 2011); Eritrea-Ethiopia Boundaries Commission, *Statement by Commission*, 27 November 2006, at [http://www.pca-cpa.org/upload\\_files/Statement%20271106.pdf](http://www.pca-cpa.org/upload_files/Statement%20271106.pdf) (last accessed September 2011); Jibril, *The Binding Dilemma: From Bakassi to Badme-Making States Comply with Territorial Decisions of International Bodies*, 19 Am. Univ. Int’l Law Rev. 633 (2004)

<sup>156</sup> See e.g., Al Jazeera, *Rival Sudans Agree to Pull Out From Abyei*, 9 September 2011, at <http://english.aljazeera.net/news/africa/2011/09/20119923749650177.html> (last accessed September 2011); BBC, *Sudan: Why Abyei is Crucial to North and South*, 23 May 2011, at <http://www.bbc.co.uk/news/world-africa-13502845> (last accessed September 2011). See generally, Permanent Court of Arbitration, *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last accessed September 2011); Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn’l Int’l Disp. Settlement 313 (2010)

C. *The Case for a Multilateral Dispute Resolution Treaty for the Settlement of Arctic Frontier Disputes*

As discussed above, one of the fundamental and distinguishing features of the current set of Arctic frontier disputes is their multilateral character, and that they have also arisen for resolution more or less at the same time. That context is markedly different from that of a typical bilateral inter-state boundary dispute. In the circumstances, it is suggested that there is a compelling case for seeking to resolve any future Arctic frontier disputes within a multilateral treaty framework binding on all of the Arctic Nations, rather than by one-off *ad hoc* reference.<sup>157</sup>

First, where the multiple and multilateral Arctic sovereignty issues have arisen more or less at the same time there is considerable practical and moral force in seeking to resolve those disputes in the same manner, rather than by different processes that may lead to fragmented results that may be of differing degrees of legitimacy.

Second, by entering into a new treaty regime specifically for the purpose of resolving Arctic sovereignty disputes the Arctic Nations would be positively consenting to the jurisdiction of the process as well as directly and expressly acknowledging the validity and legal and moral force of its outcomes. Such a voluntary consent to arbitrate would enhance the legitimacy of the process and its outcomes, both internally and externally, and strengthen the prospects of peaceful and enduring compliance with its outcomes.

Third, because there may arise multiple frontier disputes in the Arctic between the same small number of states, subjecting all future Arctic frontier disputes to the same dispute resolution process will ensure that there is “one rule for all.” This will further enhance both the internal and external legitimacy of the dispute resolution process and its outcomes. As to internal legitimacy, where a multilateral context requires “one rule for all,” the process and its outcomes are yet further removed from the responsibility of state governments of the day, allowing them to save face before their domestic constituents.<sup>158</sup> At the same time, it is likely that these domestic constituencies would be more accepting of negative decisions against them in circumstances where the constituencies of all of the Arctic Nations are subject to the same rules and system of law. Critically, the external legitimacy of a dispute resolution process is likely to be materially enhanced in a multilateral context, where multiple other state participants in the regime have committed to complying with its outcomes (no less than on the basis that the other Arctic Nations had committed to complying with the process and its outcomes also). Compliance will more likely be diplomatically compelled by the international community in such circumstances—not least the other Arctic Nations subject to the regime.

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<sup>157</sup> Such a treaty would pertain exclusively to the resolution of Arctic boundary disputes, and not wider resource management issues. *See supra*, Section II(E)

<sup>158</sup> *See* Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 *Law & Prac. Int’l Cts. & Tribunals* 133 (2006); Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 *Jn’l Int’l Disp. Settlement* 313, 333 (2010)

Fourth, a multilateral dispute settlement regime for the Arctic would also enhance the legitimacy of the disputes settlement process and its outcomes by improving their consistency, and in turn predictability. The first point in this regard is that resolving future Arctic frontier disputes in the same way and within the same legal framework will give states some (although admittedly not complete) comfort that similar factual and/or legal issues which arise in one of the Arctic frontier disputes, will be addressed in a consistent manner in another. The importance of this is emphasised when the same state, for example Canada, may be party to several disputes. Enhancing consistency will, in turn, increase the predictability of outcomes. Assuming (as one must) that the result of an adjudicative process will be within the range of predicted outcomes, then it will generally be seen and accepted by the parties to it as legitimate. Consistency and predictability will enhance both the legitimacy of the process as a whole and, in turn, voluntary compliance with its outcomes. As a practical matter, enhancing predictability will also increase the possibility of diplomatic settlement.

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As the preceding discussion highlights, the unique importance and multilateral character of the Arctic sovereignty issues is such that any dispute resolution process engaged to resolve them must, to enhance the likelihood of peaceful and enduring resolution, optimise its legitimacy, both in the eyes of the participating states (and their constituents) and the international community generally. Such legitimacy, it is argued, is best achieved by the entry into a multilateral dispute resolution treaty between the Arctic Nations.

#### V. PROPOSED FEATURES OF A MULTIATERAL TREATY FOR RESOLVING ARCTIC BOUNDARY DISPUTES

In Section IV it was argued that, because of the unique character of the Arctic and the current range of sovereignty issues raised in the region, the settlement of any future Arctic frontier disputes should be within the context of a multilateral treaty for the settlement of Arctic frontier disputes. This paper now turns to consider the features such a multilateral dispute settlement treaty should include to optimise the legitimacy of its disputes settlement process, and therefore best meet the demands for peaceful, enduring resolution of any future Arctic boundary disputes.

First, it is proposed that the treaty should create a mandatory, final and binding self-contained arbitration system such that it would be a “one-stop shop” for the resolution of Arctic boundary disputes, without possible reference to domestic or international courts. Second, that the proposed framework would include a built-in control mechanism (such as a right of appeal or annulment facility) to ensure the final consistency and legitimacy of the arbitral process. Third, the treaty would include a mandatory reasons requirement for arbitral awards made pursuant to it. Fourth, the treaty would permit interested third parties to participate in the nature of interveners or *amicus curiae*, so that their interests are represented and, if appropriate, taken account of. Fifth, the treaty should create a right of joinder for non-party Arctic Nations who may have substantive rights in the subject matter of any existing dispute and, sixth, joinder rights for any non-Arctic states who may similarly have substantive rights in the subject matter of an existing dispute (for example the Northwest Passage).

What follows is a sketch of the framework for the proposed Arctic frontier dispute settlement treaty. The exact details and contours of these features should of course be debated and discussed, but for present purposes the paper seeks to attempt an outline framework for a disputes system that aims to maximise the legitimacy of its outcomes.

#### A. *A Self-Contained International Arbitration Framework*

For the reasons set out above, it is suggested that the dispute settlement methodology most likely to be accepted by all of the Arctic Nations is international arbitration.

##### 1. International Arbitration

As discussed above, Canada, Russia and the US are very likely to reject the jurisdiction of the ICJ over future Arctic sovereignty disputes. It is also likely that a *sui generis* boundary commission would not provide the legitimacy and finality that will be demanded if Arctic frontier disputes arise. At the same time, international arbitration has for centuries been an internationally accepted dispute settlement mechanism for the resolution of frontier disputes,<sup>159</sup> and provides important advantages to states over other forms of dispute settlement.<sup>160</sup> Arbitration is also, in the case of each Arctic Nation, an accepted procedure for the resolution of international disputes.

First, each of the Arctic Nations has national arbitration laws sanctioning and promoting international arbitration.<sup>161</sup> Second, and more relevantly, each of the Arctic Nations appears supportive of international arbitration as a means of resolving inter-state and other international disputes. For example, Denmark, Norway and the US are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (“ICSID Convention” or “Washington Convention”), which provides for the arbitration of international investment disputes between foreign investors and the states that “host” their investment.<sup>162</sup> Canada and Russia have both signed but are yet to ratify the ICSID Convention. Of the Arctic Nations, Denmark and Norway are parties to the Energy Charter Treaty (“ECT”) which provides for arbitration of disputes,<sup>163</sup> and, until October 2009, provisionally Russia was too.<sup>164</sup> Canada and the US signed the 1991 Energy Charter, but are officially observers to the Energy

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<sup>159</sup> See *infra*, Section II(D)

<sup>160</sup> *Id.*

<sup>161</sup> Commercial Arbitration Act 1985 (Canada); Arbitration Act 2005 (Denmark); Arbitration Act 2004 (Norway); Law of the Russian Federation on International Commercial Arbitration 1993 (Russia); Federal Arbitration Act (9 U.S.C) (US)

<sup>162</sup> See ICSID Website, at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last accessed September 2011).

<sup>163</sup> Energy Charter Treaty, 17 December 1994

<sup>164</sup> On 20 August 2009 the Russian Federation officially declared that it did not intend to become a Contracting Party to the Energy Charter Treaty. See <http://www.encharter.org/index.php?id=414#c1338> (last accessed September 2011).

Charter Conference.<sup>165</sup> Both of Canada and the US however are parties to the North American Free Trade Agreement (“NAFTA”), where Chapter Eleven permits investors to initiate arbitration against the NAFTA Party state under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) or the Arbitration (Additional Facility) Rules of ICSID.<sup>166</sup>

Against this background, international arbitration has, unsurprisingly, elsewhere been proposed as an appropriate dispute resolution mechanism for resolving Arctic frontier disputes.<sup>167</sup> At the same time, however, this paper suggests that while *ad hoc* international arbitration is a powerful tool for resolving typical bilateral international border disputes, the Arctic context is so different from that of a typical bilateral inter-state boundary dispute that a more robust arbitration system is required, so as to enhance the legitimacy of the process and to minimise the risk of non-compliance.

## 2. A Self-Contained Arbitration System

Given the importance and multilateral character of the existing Arctic frontier issues, it is suggested that a mandatory, final and binding self-contained arbitration system would best meet the aspirational goal of a peaceful, final, binding and ultimately enduring dispute resolution mechanism for future Arctic frontier disputes.

The leading example of such a self-contained, delocalised arbitration framework is the arbitration system created by the ICSID Convention of 1965.<sup>168</sup> As has been noted of the ICSID regime by a past ICSID Secretary General, it creates “[a] forum for conflict resolution in a framework that carefully balances the interests and requirements of all the parties involved, and attempts in particular to ‘depoliticise’ the settlement of investment disputes.”<sup>169</sup> Thus, the Washington Convention sets out an institutional and detailed procedural framework for the settlement of investment disputes by arbitration<sup>170</sup> (Chapter IV, Articles 36-63, as well as other

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<sup>165</sup> See <http://www.encharter.org/index.php?id=61> (last accessed September 2011).

<sup>166</sup> NAFTA, Chapter 11, Article 1120, at [http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtp\\_iID=142#A1116](http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtp_iID=142#A1116) (last accessed September 2011).

<sup>167</sup> Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, Global Energy Review, 29 March 2011; Wilder, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 Hous. J. Int’l L. 505, 536 *et. seq.* (2010), where the author suggests that UNCLOS member nations agree to delete the opt-out exception at Article 298 of UNCLOS, thereby providing for binding reference to the ICJ or to international arbitration

<sup>168</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965 (“ICSID Convention” or “Washington Convention”). See generally, ICSID, *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID Rep. 23; Mackenzie, Romano, Shany & Sands, *The Manual on International Courts & Tribunals*, Chapter 5 (2<sup>nd</sup> ed., 2010); Newcombe & Paradell, *Law and Practice of Investment Treaties*, ¶121 (2009)

<sup>169</sup> Shihata, *Towards a Greater Depoliticization of Investment Disputes*, 1 ICSID Rev. 1 (1986). Ibrahim Shihata was the Secretary General of the ICSID between 1983 and 1998

<sup>170</sup> See *e.g.*, Mackenzie, Romano, Shany & Sands, *The Manual on International Courts &*

auxiliary provisions in the Convention), augmented by the 56 Rules of the ICSID's Rules of Procedure for Arbitration Proceedings.<sup>171</sup> These constitutional documents provide the complete procedures for a self-contained arbitration system at the ICSID.<sup>172</sup>

Given the importance and multilateral and international characteristics of the existing Arctic sovereignty issues, together with the interests of states in ensuring final and binding outcomes without the possibility of reference to domestic or international courts, there is a strong case for the promulgation of a similarly detailed, self-contained and delocalised standing set of arbitration rules for any dispute(s) between the Arctic Nations. Among other things, the legitimacy of the proposed Arctic dispute treaty system would be enhanced by requiring any arbitral proceedings pursuant to it conducted in accordance with the same procedural rules. At the same time, an arbitration system specifically designed to meet the needs of states party to sensitive, internationally vital frontier disputes will assist in the peaceful and enduring settlement of any such disputes.

To that end, this paper now turns to consider several outstanding features of the proposed Arctic disputes treaty. It then details in brief terms a number of other features of the proposed Arctic disputes treaty, which it is suggested would strengthen the legitimacy of the proposed framework and its awards.

### *B. In-Built Control Mechanism*

Notwithstanding that international arbitration, or for that matter any adjudicative process, may be considered legitimate, things can and do go wrong. Adjudicators can overreach their mandate, for example permitting or requiring improper parties to appear before them or deciding issues not within their reference. They can also act improperly in other ways, for example by failing to comply with their duties, being improperly influenced or otherwise failing to ensure that minimum requirements of procedural fairness and due process are met in the conduct of the

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*Tribunals*, ¶ 5.3 (2<sup>nd</sup> ed., 2010)

<sup>171</sup> ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), see [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (last accessed September 2011).

<sup>172</sup> The ICSID Arbitration Rules are subject, however, to any other agreement the Parties may reach with respect to the procedure of the arbitration. See Washington Convention, Article 44 ("Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question"). The Energy Charter Treaty ("ECT") provides another example of a multilateral treaty with arbitration at the centre of its dispute resolution mechanism (ECT, Part V). By contrast to the Washington Convention, however, the ECT does not create a self-contained arbitral framework. Instead, with respect to inter-state disputes, Article 27 of the ECT provides for *ad hoc* arbitration under the UNCITRAL Rules of Arbitration, in the absence of an agreement to the contrary between the Contracting Parties. (For Investor-State disputes, the ECT gives parties the choice of the courts or administrative tribunals of the Contracting Party to the dispute or any applicable, previously agreed dispute settlement procedure, or to arbitrate at ICSID, under the UNCITRAL Rules of Arbitration or under the auspices of the Stockholm Chamber of Commerce Rules of Arbitration.)

proceedings. They can also come to the wrong answer, and one that is indefensible. As Ronald Dworkin famously stated, “it matters how judges decide cases.”<sup>173</sup> Ultimately, adjudicators must, at a minimum, uphold the rule of law.<sup>174</sup>

Where an adjudicative process or its outcome is inconsistent with the rule of law or the parties’ expectations when they submitted to it, then that process will lose—to a greater or lesser degree—its legitimacy. That process’ internal legitimacy is likely to be substantially eroded in the case of the losing party in particular, increasing the likelihood of non-compliance. A disputes system’s external legitimacy will be substantially affected too where the process or its outcome is not consistent with the rule of law—adjudicative processes are seen as legitimate by the wider community because (among other things) adjudicators stick to the rules that govern them, and apply correctly the legal or other principles pursuant to which the dispute is to be decided.

To overcome potential attacks on the legitimacy of an adjudication process and its outcomes, domestic legal regimes typically contrive systems to deal with sub-optimal results. Broadly conceived, these are “controls” designed to ensure the dispute resolution mechanisms work in the manner they are designed to, and that parties expect them to.<sup>175</sup> The most obvious mechanism, used in both common and civil law domestic legal systems alike, is to build in appellate structures.<sup>176</sup> Similarly, in the case of arbitral awards, domestic courts exercise supervisory jurisdiction over international arbitrations seated within their jurisdiction and also

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<sup>173</sup> Dworkin, *Law’s Empire*, 1 (1986), and at 1-2 (“Lawsuits matter in [a] way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated their to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because is has stamped on him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.”) In the international context, the severity of an ill-conceived adjudicative decision are grave indeed when interests of state territorial and maritime sovereignty are concerned.

<sup>174</sup> See generally, Crawford, *Continuity and Discontinuity in International Disputes Settlement*, 1 *Jn’l Int’l Disp. Settlement* 3, 24 (2010) (“After all it is the rule of law which must be the ultimate aim of a regular system of dispute settlement to institute”); Crawford, *International Law and the Rule of Law*, 24 *Adel. L. Rev.* 3, 4 (2003); Briner, *The Role of International Tribunals in the Context of the Rule of Law*, 23 *Int’l Bus. Law* 354 (1995)

<sup>175</sup> Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, 2 (1992) (“Controls are techniques or mechanisms ... whose function is to ensure that an artefact works in the way it was designed to work”); Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197, 198 (2009)

<sup>176</sup> As has been noted, “[i]n national judicial bureaucracies, key parts of the control system may be lodged in the hierarchical network of courts hearing appeals”: Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, 8 (1992). As Reisman notes, however, appeal processes are not to be equated with “control”; the latter is concerned with decision process of adjudicators and the continued efficient operation of the disputes process, as opposed to the mere correctness of outcomes. Appeal is an effective, if expensive control mechanism: Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197, 205 (2009)

review arbitral awards for the same reason: to maintain the legitimacy of the arbitration system by ensuring arbitral proceedings and arbitral awards meet minimum requirements of procedural fairness and due process, and to ensure that tribunals have complied with and not exceeded their mandate.<sup>177</sup> By contrast, the investor-state ICSID arbitration framework creates an entirely self-contained control system, which includes a limited annulment facility. The ICSID arbitration system permits a party to seek annulment of an award on grounds that (a) the Tribunal was not properly constituted; (b) the Tribunal has manifestly exceeded its powers; (c) there was corruption on the part of a member of the Tribunal; (d) there has been a serious departure from a fundamental rule of procedure; or (e) the award has failed to state the reasons on which it is based.<sup>178</sup> This limited exception to the finality of ICSID awards does not, therefore, permit an appeal against the substantive correctness of the arbitral award, but only a narrow scope of review concerned with the legitimacy of the process of decision.<sup>179</sup>

Against this background, one of the outstanding features of the Arctic disputes treaty proposed by this paper would be a self-contained control mechanism, such as a review or annulment system with an in-built forum competent to decide challenges to the award. Such a facility would provide an important safety valve by which arbitral awards rendered pursuant to the treaty could be overturned or corrected in the event of procedural or adjudicative error and, accordingly, substantially enhance the legitimacy of the process and its outcomes.

But to what standard of review should any future arbitration awards made by tribunals constituted under the proposed Arctic disputes treaty be held? The choice made by the drafters of the ICSID Convention (Article 52) was to provide for a narrow right of review on defined circumscribed grounds, rather than a wider right of appeal against the original arbitral award. While there was initially some disquiet about the ICSID annulment jurisdiction (both as to whether it was too wide, or conversely too narrow), the generally perceived success of the ICSID arbitration system suggests that it establishes an acceptable balance between the binding and final character of awards in investor-state disputes, with the need to maintain some check on unjust and unacceptable arbitral decisions.<sup>180</sup> As has been

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<sup>177</sup> See generally, Park, *Why Courts Review Arbitral Awards*, in Briner, Fortier, Berger, Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century (Liber Amicorum Karl-Heinz Bockstiegel)*, 595 (2001); Park, *Arbitrators and Accuracy*, 1 *Jn'l Int'l Disp. Settlement* 25 (2010); Lalive, *On the Reasoning of International Arbitral Awards*, 1 *Jn'l Int'l Disp. Settlement* 55 (2010); Pierre Lalive, *Absolute Finality of Arbitral Awards?*, 1 *Revista Internacional de Arbitragem e Conciliação*-Año 109 (2009)

<sup>178</sup> ICSID Convention, Article 52(1). See e.g., Schreuer, Malintoppi, Reinisch & Sinclair, *The ICSID Convention: A Commentary*, 890, 898-903 (2<sup>nd</sup> ed., 2009); Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, Chapter 3 ('The ICSID Experiment: The Breakdown of International Institutional Control Mechanisms'), 48 *et. seq.* (1992); Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197 (2009)

<sup>179</sup> See e.g., Schreuer, Malintoppi, Reinisch & Sinclair, *The ICSID Convention: A Commentary*, 890, 898-903 (2<sup>nd</sup> ed., 2009)

<sup>180</sup> Lalive, *On the Reasoning of International Arbitral Awards*, 1 *Jn'l Int'l Disp. Settlement* 55, 58 (2010); Schreuer, Malintoppi, Reinisch & Sinclair, *The ICSID Convention: A Commentary*, 890, 907-915 (2<sup>nd</sup> ed., 2009) ("The modern law of annulment has the appearance of being more settled")

recalled by one senior public international lawyer, it is manifest that the Washington Convention would not have been ratified by so many states without its annulment system.<sup>181</sup>

The question in the Arctic context is whether the same limited right of review strikes the correct balance between the importance of resolving any future Arctic sovereignty disputes correctly and enduringly, and the desire to avoid excessive litigiousness concerning the Arctic.<sup>182</sup> In this regard, there would appear to be considerable force in suggesting that, because of the vital importance of the Arctic to the present and future generations of the Arctic Nations and the international community, that a control mechanism stronger than is provided for at Article 52 of the Washington Convention may be appropriate. A wider appeal mechanism, in addition to strengthening the prospects of correct outcomes, may also achieve a level of finality (albeit delayed) that could not be achieved otherwise.<sup>183</sup>

Against this, it is useful to recall the reasons why international commercial arbitration has adopted its “anti-appeal” stance. As has been noted elsewhere, “the control mechanism of international commercial arbitration has not eschewed appeal because appeal is somehow ‘inherently’ incompatible with arbitration. It is not.”<sup>184</sup> Rather, the control mechanism designed for international commercial arbitration intentionally does not include appeal because of the conviction that such a mechanism, with an inherently far-reaching scope, would reduce the attractiveness of international commercial arbitration and its utility to the world economy.<sup>185</sup> Those considerations do not apply in the same way or have the same weight in public international law disputes, particularly those with such important consequences as do international boundary delimitation proceedings.

This paper proposes that the Arctic disputes treaty should include a self-contained control mechanism, such as an appeal or annulment system. At a minimum that system should provide for annulment of arbitral awards in the same circumstances provided for by Article 52 of the ICSID Convention. There is, however, a case for permitting full-blown *de novo* appeal rights, given the importance of Arctic sovereignty concerns, and the demand to achieve peaceful, enduring settlement of any future Arctic frontier disputes.

### C. *Reasons Requirement*

Reasoned awards contribute in vitally important respects to the legitimacy of international arbitration proceedings, particularly of a public international law

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<sup>181</sup> Lalive, *Concluding Remarks*, in Gaillard & Banifatemi (eds.), *Annulment of ICSID Awards*, 297-313 (2004); Lalive, *On the Reasoning of International Arbitral Awards*, 1 *Jn'l Int'l Disp. Settlement* 55, 58 (2010)

<sup>182</sup> As has been noted elsewhere, devising control mechanisms for inter-state arbitration has proved to be particularly difficult: Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197 (2009)

<sup>183</sup> *Id.*, 252

<sup>184</sup> *Id.*, 218

<sup>185</sup> *Id.*

nature.<sup>186</sup> As has been cogently elucidated elsewhere, the statement of reasons in arbitral awards fulfils a number of roles:<sup>187</sup> it makes it possible for the parties to ensure that the judge did not exceed his/her jurisdiction; *it seeks to convince the parties that the decision is well founded* (rather than, say, an unreasoned, unjustified “split the difference” compromise<sup>188</sup>); it establishes legal rules which could eventually guide the future action of others; and it guarantees a fair trial. Accordingly, as has been compellingly elucidated in the context of investor-state arbitration awards:

“The reasons upon which an award is based are particularly and distinctively important in the area of international investment law, for they affect the very acceptability of investment arbitration. Unlike international commercial arbitration, which is conducted entirely by and for professionals and whose awards are only rarely published, international investment awards are published and may have a major political impact on an entire country. In some cases, the economic consequences of investment awards may have long-term implications for the economic vitality of the State concerned. The citizens of the respondent State, as the ultimate ‘stakeholders’ who will bear

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<sup>186</sup> See e.g., Washington Convention, Article 48(3) (“(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”). See Landau, *Reasons for Reasons: the Tribunal’s Duty in Investor-State Arbitration*, 14 ICCA Congress Series 187 (2008); Lalive, *On the Reasoning of International Arbitral Awards*, 1 Jn’l Int’l Disp. Settlement 55 (2010) (“The specific nature of Investor-State arbitration, particularly under the ICSID Regime, greatly increases the importance of careful (and possibly lengthy) explanation of the reasons on which the decision is based”); and the extensive discussion in Gaillard (ed.), *The Review of International Arbitral Awards* (2009). See also the statement of the arbitral tribunal in the Abyei Arbitration as to the minimum reasoning requirement at international law: Permanent Court of Arbitration, *The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, Final Award, ¶ 531, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1306](http://www.pca-cpa.org/showpage.asp?pag_id=1306) (last accessed September 2011) (“As the standards endorsed by the ICJ and the more recent ICSID annulment committees significantly converge, it is possible to draw a tentative conclusion regarding the ‘general principles of law and practices’ applicable to the setting aside of arbitral awards on the ground of failure to state reasons. To meet the minimum requirement, an award should contain sufficient ratiocination to allow the reader to understand how the tribunal reached its binding conclusions (regardless of whether the ratiocination might persuade a disengaged third party that the award is substantively correct). As to the substantive issue, awards may be set aside for failure to state reasons where conclusions are not supported by any reasons at all, where the reasoning is incoherent or where the reasons provided are obviously contradictory or frivolous.”)

<sup>187</sup> Former President of the ICJ, Gilbert Guillaume, *Failure to State Reasons in ICSID Awards*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 271, 280-281 (2009)

<sup>188</sup> See e.g., Gray & Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 Brit. Y.B. Int’l Law 97, 117 (1992); Lauterpacht, *The Taba Case: Some Recollections & Reflections*, 23 Israel L. Rev. 443, 451 (1989) (“It is, it need hardly be said, a persistent feature of international boundary litigation that tribunals, though required to decide in accordance with the law, in practice exercise a considerable discretion to adjust the boundary in a manner which they think fair in all of the circumstances”); Park, *Arbitrators and Accuracy*, 1 Jn’l Int’l Disp. Settlement 25, 33 (2010); Keer, Naimark, *Arbitrators Do Not ‘Split the Baby’: Empirical Evidence from International Business Arbitrations*, 18 Jn’l Int. Arb. 573 (2001); Kapelik, *The Repeat Arbitrator Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell Law Review (2010)

the consequences of an award, are entitled to know why a decision was made.”<sup>189</sup>

Because of the importance of these very considerations, the drafters of the Washington Convention expressly and carefully drafted its terms to make the need for reasons an explicit and invariable requirement.<sup>190</sup> These justifications for importing a reasons requirement—in particular the legitimacy of and the very acceptability of the arbitration process to its stakeholders—apply directly in the context of inter-state boundary dispute arbitration, indeed even more so given the unavailability of any practical enforcement mechanism with respect to awards made in those proceedings.

For all of these reasons, the proposed Arctic disputes treaty should include a requirement for the tribunal to state the reasons upon which its award is based. Indeed, the coupling of a reasons requirement with an ability to review or annul an award for lack of reasons (as discussed above, and as provided for by the ICSID system) would be a powerful tool for strengthening the legitimacy of the proposed Arctic disputes treaty’s outcomes.

#### *D. Facility for Interveners and Amicus Curiae*

As noted above, aside from the state interests of the five Arctic Nations, both indigenous groups (whose interests may differ from state interests) and the wider international community have strong interests in how future Arctic frontier issues will be resolved (particularly in the case of the Northwest Passage). In those circumstances, there are compelling reasons to build in to the proposed Arctic disputes treaty some ability for interested third parties to participate as interveners or *amicus curiae* in the arbitration proceedings, so that important third-party interests are represented and, if appropriate, taken account of. In the first place, permitting all relevant information to go before the arbitral tribunal will lend credibility and legitimacy to the process. Second, allowing interested third-parties to participate will have the important effect of involving them in the disputes settlement process, not only recognising their role in the solution to the dispute, but

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<sup>189</sup> Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197, 223-224 (2009)

<sup>190</sup> *Id.*, 223-224 (2009) (“The legislative history of the Convention suggests that requiring reasons was an important issue for the drafters from the very genesis of the Convention. The preliminary draft of Article 52(1) (Document 24) simply reproduced Georges Scelle’s formula in the International Law Commission’s (TLC’s) Draft Code on International Commercial Arbitration, which required a reasoned award as a part of minimum procedural standards. The first ICSID draft (Document 43) disaggregated the minimum procedure requirement by turning a “failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated” into an express ground for annulment. In other words, at that stage, the drafters were sufficiently concerned about the need for reasoned awards to require them explicitly but they treated the elaboration of reasons as a default requirement: reasons would be required in ICSID arbitrations unless the parties decided to dispense with them. ***The Revised Draft (Document 123), which became Article 52(1) of the Convention, discarded the default option and transformed the need for reasons to an explicit and invariable requirement. Hence, even if general international law allows parties to waive reasons, the text of the ICSID Convention makes the requirement of a reasoned award a peremptory lex specialis***”) (emphasis added);

also give them some ownership of that solution. In each case, the acceptance of the decision and the likelihood of compliance with it will be enhanced.

Accordingly, as has been suggested elsewhere, “given the increasing role of indigenous people concerning issues and areas related to natural resources in the Arctic, it is worthwhile to consider an appropriate mechanism for including representatives of such groups. Parties may agree, for example, to permit a representative of an indigenous population impacted by the dispute to make a written or oral statement during the course of the arbitration.”<sup>191</sup> The standing of indigenous groups is complex, however, and their role as interveners is not straightforward or assured. The Arctic Nations themselves, who exercise sovereignty over those indigenous groups, may owe them obligations under domestic law which in turn could be inconsistent with granting them intervener or *amicus* status. On the other hand, there will likely be strong claims by non-Arctic states (and perhaps non-governmental organisations) that they have legitimate interests in participating in the solution to these issues (particularly in the case of the Northwest Passage).

#### *E. Joinder Rights for Non-Party Arctic Nations*

It is possible that an Arctic Nation may not initially be joined as a party to a dispute, notwithstanding that it may have substantive rights in the disputed area. For example, if Canada and Russia sought to arbitrate the Lomonosov Ridge issue bilaterally. Rather than seeking intervener status, Denmark would presumably wish to be joined as a party to the arbitration with equal rights before the tribunal. That result, it is submitted, is necessary if the proposed Arctic treaty system is to meet the demands for legitimacy outlined above.

A notice requirement, combined with a right to join to the proceeding, would address this issue. For example, on the commencement of any proceedings the treaty would require the claimant Arctic Nation to serve on all of the other Arctic Nations a notice of dispute, with any non-party Arctic Nation then having a defined time period by which to appear and join the proceedings as a party. If an Arctic State did not so appear, then it would be deemed to have waived any substantive rights which it may later seek to assert.

#### *F. Opt-In Jurisdiction for Non-Arctic Nation States with Substantive Rights: Northwest Passage*

The position of the international community is that all nations have substantive rights in the Northwest Passage due to its status as an international waterway. Canada rejects that view.<sup>192</sup> While the US has been the most vocal state other than Canada on the status of the Northwest Passage, non-Arctic Nation states may also have a substantive interest in the resolution of its status. Those states would not be party to the proposed Arctic dispute resolution treaty, however.

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<sup>191</sup> Hobér & Fellenbaum, *The Melting of the Ice and Arctic Disputes*, Global Energy Review, 29 March 2011

<sup>192</sup> See *supra*, Section I(A)

A possible solution to address these concerns could be for the Arctic Nations to include in their disputes treaty a standing offer to arbitrate with interested non-Arctic Nation states. That would give non-Arctic states a right to opt-in to an existing dispute (it being assumed that the Arctic Nations would not agree to grant a standing right to arbitrate to non-Arctic states) commenced pursuant to the proposed Arctic dispute resolution treaty. Such provision would provide a practical alternative to the ICJ, which in any event does not have compulsory jurisdiction over these matters. Of course, even were such an offer extended in the Arctic treaty, it would always be open to the interested states to subsequently agree a reference to the ICJ or other adjudicative body if they saw fit.

#### *G. Party Autonomy to Nominate Arbitral Tribunal*

The ability to nominate members of the arbitral tribunal is an important feature of international arbitration. It is also a point of distinction to the ICJ, for example, and a feature that will likely be favoured by the Arctic Nations.

It is suggested that any arbitral tribunal formed pursuant to the proposed Arctic disputes treaty would consist of a minimum of five members. In the context of a purely bilateral dispute, the Arctic Nation parties would be free to nominate two appointees each, with the Chair to be agreed between those four appointees. In a multiparty context, a different tribunal structure, or at least appointment process, would be appropriate. There may be a case for, in the instance of the trilateral Lomonosov Ridge dispute (Canada, Denmark, Russia) for a seven member tribunal, with each state appointing two arbitrators and the Chair by consensus of those appointees. In the context of non-Arctic-Nation joinder (as discussed immediately above), the appointment (say of a seven member tribunal) could be left, in the absence of consensus among the states, to an appointing authority. More elaborate systems can be imagined, however.

As the preceding discussion highlights, the proposed treaty would also need to mandate an appointing authority to make appointments in the absence of consensus. Given the international importance of the Arctic issues, it is suggested that the appointment authority be located outside the Arctic Nations at an independent international organisation, such as the Permanent Court of Arbitration.<sup>193</sup>

#### *H. Further Procedural Features of a Self-Contained Arctic Disputes Treaty*

In addition to the above, certain other procedural features, including several features of the ICSID Convention and Arbitration Rules, are compelling in the context of sensitive, internationally vital frontier disputes, and would usefully be incorporated into the proposed multilateral Arctic disputes treaty.<sup>194</sup> It is proposed

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<sup>193</sup> Permanent Court of Arbitration, Arbitration Services, Appointment and Selection of Arbitrators and other Adjudicators, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1048](http://www.pca-cpa.org/showpage.asp?pag_id=1048) (last accessed September 2011).

<sup>194</sup> On a related note, *see generally* the list of factors suggested for inclusion in arbitration agreements concerning intra- and inter-state boundary disputes in Miles, Mallett, *The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 *Jn'l Int'l Disp. Settlement* 313, 337 (2010)

that the following key features would be incorporated into the proposed Arctic disputes treaty:

- a. *Irrevocable Offer to Arbitrate.* As with each of ICSID and the Energy Charter Treaty arbitration systems, the offer to arbitrate contained in the proposed Arctic disputes treaty would be irrevocable, and operate to exclude any other remedy.<sup>195</sup> Thus, an Arctic Nation could not unilaterally withdraw from the proposed treaty, or extant disputes raised pursuant to it, once a dispute had been raised against it.
- b. *Delocalised Arbitration.* The arbitration system would be “delocalised,” and not subject to any domestic (or international) court jurisdiction. This is on the assumption that the Arctic Nations would be loath to submit to the jurisdiction of any domestic court, or indeed any international court.<sup>196</sup> At the same time it enhances consistency in the resolution of future Arctic disputes by subjecting them all to the same self-contained framework.
- c. *Applicable Law.* As noted above, in 2008 the Arctic Nations collectively committed to resolving any disputes concerning the Arctic in accordance with international law.<sup>197</sup> This would include the international

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<sup>195</sup> Washington Convention, Article 25(1) (“(1) ... When the parties have given their consent, no party may withdraw its consent unilaterally”), and Article 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. ...”)

<sup>196</sup> Reisman, *Reflections on the Control Mechanism of the ICSID System*, in Gaillard (ed.), *The Review of International Arbitral Awards*, 197, 221 (2009)

<sup>197</sup> The Ilulissat Declaration by Canada, Denmark, Norway, the Russian Federation and the United States of America, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (last accessed September 2011) (“... *we 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*”) (emphasis added). The Ilulissat Declaration also noted that the Arctic 5 did not see the “need to develop a new comprehensive international legal regime to govern the Arctic Ocean.” The most recent Canadian Arctic Foreign Policy Statement similarly states that the Canadian Government will seek to co-operate with its fellow Arctic Nations, noting that Canada will “as a priority, seek to work with our neighbours to explore the possibility of resolving [these disputes] in accordance with international law”: Government of Canada, *Statement on Canada’s Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada’s Northern Strategy Abroad*, 2010, at [http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP\\_booklet-PECA\\_livret-eng.pdf](http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP_booklet-PECA_livret-eng.pdf) (last accessed September 2011). Norway has similarly signalled its commitment to applying international law to Arctic frontier issues, Jens Stoltenberg (Norwegian Prime Minister) stating at the time of the Barents Sea Pact with Russia that “[t]he Arctic is a peaceful region where any issues that arise are resolved in accordance with international law” (see ABC News, *Russia, Norway OK Barents Sea Border in Arctic*, 15 September 2010, at <http://abcnews.go.com/Business/wireStory?id=11642888>) (last accessed September 2011). As a Kremlin source stated at the time, “[t]his is a practical illustration of the principle that all disputes in the Arctic must be tackled by the Arctic nations themselves by way of talks and on the basis of international law”: The Guardian, *Russia and Norway Resolve Arctic Border Dispute*, 15 September 2010, at

law of the sea and international principles of delimitation. The choice of international law should be made mandatory and exclusive in the proposed Arctic disputes treaty, so as to ensure as far as possible the legal legitimacy, predictability and consistency of outcomes.

d. *Final and Binding Nature of the Award.*<sup>198</sup> Notwithstanding that inter-state boundary determinations are for all intents and purposes unenforceable, to emphasise the final and binding nature of the arbitral award and the moral imperative for compliance, the proposed Arctic dispute resolution treaty should include a provision to the effect that the arbitral awards rendered pursuant to it are final and binding, and will be implemented by the parties.

In addition to these specific key features, it is proposed that any treaty would set out, as does the ICSID Convention or UNCITRAL Rules, a self-contained but broad and flexible procedural framework for the conduct of the arbitral proceedings generally. Other features may of course be incorporated to meet the needs of the Arctic Nations.

## VI. CONCLUSION

The purpose of this paper has been to contribute an outline for a disputes settlement framework that would, if multiple intractable sovereignty disputes in the Arctic region do eventuate, best provide for the resolution of those controversies in a peaceful, legitimate and enduring manner.

It is argued that international arbitration provides the best and likely most acceptable third-party dispute settlement process for resolution of any future Arctic frontier disputes. This paper has then sought to identify those features of an arbitration system that best enhance the legitimacy of the arbitral process and its outcomes in the context of inter-state frontier disputes (where there is no enforcement mechanism to compel compliance), and in the potential multilateral context of future Arctic boundary disputes.

To that end, the multilateral Arctic disputes treaty proposed would have several key features aimed at enhancing its internal (domestic) and external (international) legitimacy and, therefore, ultimately strengthening the prospects of voluntary, peaceful and enduring compliance with its outcomes. First, the proposed treaty would create a self-contained, delocalised arbitration system providing the exclusive remedy for Arctic frontier disputes. That system would be detailed (applicable law, tribunal appointment) but flexible, and contain certain features

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<http://www.guardian.co.uk/world/2010/sep/15/russia-norway-arctic-border-dispute> (last accessed September 2011). *C.f.*, Washington Convention, Article 42(1) (“(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”)

<sup>198</sup> See Miles, Mallett, *The Abye Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts*, 1 Jn'l Int'l Disp. Settlement 313 (2010); Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States go to Arbitration Rather than Adjudication*, 5 Law & Prac. Int'l Cts. & Tribunals 133, 158-161 (2006)

(such as exclusive remedy, enforcement and tribunal appointment provisions) to strengthen compliance. It would also permit the involvement of interveners, *amicus curiae* or even states as substantive parties to the arbitral proceedings, so as to ensure that the interests of indigenous groups and the wider international community are represented and, if appropriate, taken account of, and any substantive rights they have recognised. The proposed framework would include a mandatory reasons requirement for arbitral awards made pursuant to it and, ultimately, a built-in control mechanism (such as a right of appeal or annulment facility) to fortify the final consistency and legitimacy of the arbitral process and its outcomes.

This paper suggests that these broad features would enhance the legitimacy of the proposed multilateral Arctic disputes treaty and its processes, such that the prospects of compliance are strengthened and, in the end, resulting delimitations and demarcations of the Arctic boundaries peaceful and enduring. Given the vital importance of the Arctic region, such an outcome would be in the interests of both the Arctic Nations and the wider international community for generations to come.

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