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Resolving Arctic Sovereignty from a Scandinavian Perspective

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**RESOLVING ARCTIC SOVEREIGNTY FROM A SCANDINAVIAN
PERSPECTIVE**

*Helena Traner**

Smaller Scandinavian states are at a distinct disadvantage as a result of the current framework governing the Arctic. In order to better preserve their interests in the environment, the rights of their indigenous groups, and their security interests, these states should lead the push to develop a working group within the Arctic Council with a view toward the creation of an Arctic treaty.

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I. INTRODUCTION

The effort to secure sovereignty over continental shelves in the Arctic has at once been described as a “land grab,”¹ a “gold rush,”² and, “a race to claim Arctic resources.”³ Russia sparked this frenzy when it planted a flag at the bottom of the Arctic seafloor in 2007, claiming a vast section of the Arctic continental shelf as Russian territory.⁴ The event brought international attention to its prior 2001 claim to sovereignty over a large region of the Arctic as part of a natural extension of Russian territory.⁵ Russia advanced this claim under the auspices of Article 76 of the United Nations Convention for the Law of the Sea (UNCLOS) for review by the Commission on the Limits of the Continental Shelf (CLCS).⁶ In 2002, the CLCS recommended Russia resubmit the claim with more supportive scientific evidence.⁷

Such headlines paint the Arctic Circle as a lawless “wild west” in which the “Arctic Five” (Russia, Canada, United States, Denmark, and Norway) jockey for control over what is perhaps the world’s last remaining unexplored and undeveloped frontier. The Arctic Five reject this notion, insisting instead upon the need to arrive at, “[an] orderly settlement of any possible overlapping claims” by adhering to international law, the existing law of the sea framework, and remaining committed to working together within international fora such as the Arctic Council.⁸

¹ Jessa Gamble, *Polar Meltdown Triggers International Arctic Landgrab*, SCIENTIFIC AMERICAN, Apr. 13, 2009, available at <http://www.scientificamerican.com/article.cfm?id=polar-meltdown-triggers-landgrab>.

² Paul Reynolds, *The Arctic’s New Gold Rush*, BBC (Oct. 25, 2005), <http://news.bbc.co.uk/2/hi/business/4354036.stm>.

³ Doug Mellgren, *Technology, Climate Change Spark Race to Claim Arctic Resources*, USA TODAY (Mar. 24, 2007), http://www.usatoday.com/money/world/2007-03-24-arcticbonanza_N.htm.

⁴ *Russia Plants Flag Under N Pole*, BBC (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/europe/6927395.stm> (noting Russia’s flag plant in 2007 and suggesting the stunt was intended to bring attention to its 2001 claim).

⁵ *Id.*

⁶ See *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (Oct. 22, 2010), http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (stating Russia’s submission date in December of 2001).

⁷ See U.N. Secretary-General, *Oceans and the Law of the Sea*, ¶ 38–41, U.N. Doc. A/57/57/Add. 1 (October 8, 2002) (summarizing the findings of the CLCS, and recommending that Russia revise and resubmit its claim regarding the Central Arctic Ocean).

⁸ Ilulissat Declaration, May 28, 2008, 48 I.L.M. 362. At this meeting, hosted by Denmark, several relevant actors represented within the Arctic Council were notably not invited to participate, including Sweden, Finland, Iceland, and all of the indigenous constituencies which enjoy “permanent participant” status on the Council. *Id.*

The current international legal framework is ill-equipped to settle conflicting continental shelf claims and ensure that each state's interests, particularly those of smaller Scandinavian states, are fully respected.⁹ The present Note therefore examines this legal framework governing the Arctic from a Scandinavian perspective. To that end, the Note will first provide background on various motivations and interests at stake for establishing sovereignty over an extended continental shelf in light of environmental concerns, explore the existing mechanism for resolving overlapping continental shelf disputes under UNCLOS, and identify some of the particular disputes in which the interests of Scandinavian states may be at risk. Next, the Note further examines some of the key national interests of Scandinavian states, and suggests that the mechanism for resolving claims to an extended continental shelf in the Arctic is insufficient, on its own, to protect these interests. Finally, the Note argues that Scandinavian states should lead the effort to strengthen the Arctic Council and recommends modifications by which to accomplish this objective.

II. BACKGROUND

A. *Motivations for Staking a Claim vs. Environmental Risks*

The Arctic Five seek to establish sovereignty over and extend their continental shelves despite environmental risk. A primary motivation for the Arctic Five to do so is the perceived economic development prospects of oil and natural gas resources; for as much as, "90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids may remain to be found in the Arctic."¹⁰ Advancements in offshore oil and gas extraction technologies render these opportunities possible.¹¹ Nevertheless, harsh Arctic conditions pose significant obstacles to the extraction of these resources and increase the risk of disastrous oil spills.¹² Icy conditions

⁹ Throughout this note "Scandinavian states" will be used to refer to the group of states that collectively represent themselves as such, including Denmark, Norway, and Sweden. However, emphasis will be placed on the states of Denmark and Norway as these states have tangible claims to the continental shelf. "Nordic states" will be used to refer collectively to the states of Denmark, Norway, Sweden, Iceland, and Finland.

¹⁰ KENNETH BIRD ET. AL, CIRCUM-ARCTIC RES. APPRAISAL ASSESSMENT TEAM, U.S. GEOLOGICAL SURVEY, CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE 1 (2008), available at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

¹¹ ROYAL DUTCH SHELL, TECHNOLOGY IN THE ARCTIC 2 (2010), available at http://www-static.shell.com/static/innovation/downloads/arctic/technology_in_the_arctic.pdf (commenting on advances in oil and gas exploration and production technologies).

¹² WORLD WILDLIFE FUND, OIL SPILL RESPONSE CHALLENGES IN ARCTIC WATERS 3 (2007); see also Kristin Noelle Casper, *Oil and Gas Development in the Arctic: Softening of Ice Demands Hardening of International Law*, 49 NAT. RES. J. 825, 832-34 (2009) (summariz-

inhibit the ability to clean up and effectively respond to such a spill.¹³ For example, oil trapped beneath ice takes much longer to naturally biodegrade and mitigation strategies such as the use of dispersants and in-situ burning are ineffective under such conditions.¹⁴

Environmental degradation of the ozone layer via global climate change is also influencing the motivation to establish sovereignty and complicating the balance between environment and industry. Scientists predict ice free summers in the Arctic by the year 2030.¹⁵ Freeing up shipping lanes in the Arctic year-round would still be impossible due to the unsuitable winter conditions.¹⁶ However, establishing sovereignty over an extended continental shelf is now a forward looking approach for Arctic states. This is especially true given that expanded shipping lanes such as the Northern Sea Route and Northwest Passage reduce the time and cost necessary to deliver oil, gas, and other resources, and can provide substantial benefits to the state that controls regulation of its use.¹⁷ Moreover, technological improvements in the ability of icebreakers to handle this terrain suggest that this possibility could eventually become viable for the long term.¹⁸ This increase in shipping traffic will include large icebreaking vessels which destroy and break apart the ice and further influence climate change by releasing carbon emis-

ing the detrimental impacts of oil and gas exploration and exploitation at each stage of the process).

¹³ WORLD WILDLIFE FUND, *supra* note 12, at 7–9, 27 (WWF advises against any further oil and gas exploration in the Arctic until this “response gap” can be closed). In addition to the problems presented by the “response gap,” stopping a leak at an extraction site, as attempted in the recent British Petroleum crisis in the Gulf of Mexico, is exponentially more difficult to do in a frigid Arctic environment. Challenges unique to oil spill response in the Arctic include sea ice, wind, temperature, limited visibility, and sea state. *Id.* at 15–19; *see also* Elizabeth Weise & Doyle Rice, *How Bad Could BP Oil Spill Get for the Gulf and the Nation?* USA TODAY, June 9, 2010, http://www.usatoday.com/tech/science/environment/2010-06-09-1Aoilhowbad09_CV_N.htm (describing the difficulties associated with oil spill response in the Gulf of Mexico).

¹⁴ WORLD WILDLIFE FUND, *supra* note 12, at 7, 16.

¹⁵ *Arctic Ice Could be Gone by 2030*, THE TELEGRAPH, Sept. 16, 2010, <http://www.telegraph.co.uk/earth/earthnews/8005620/Arctic-ice-could-be-gone-by-2030.html>.

¹⁶ The Arctic Council maintains that shipping in the region will continue to remain seasonal. ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 86 (2009).

¹⁷ *See Id.* at 115–17 (discussing fees charged by Russia with respect to passage through the Northern Sea Route). The Arctic Council does not predict the Northwest Passage to become a viable shipping route until after 2020, but does note that destination shipping along this route is expected to increase. *Id.* at 5. The transport of oil and gas via the Northern Sea Route is predicted to reach as high as 40 million tons a year by 2020. *Id.*

¹⁸ *See Norway: Double-acting Ships Make Arctic Oil Export Routes Competitive*, WORLD OIL, Apr. 1, 2001 (describing advances in icebreaker technology, particularly “oblique icebreakers” which have been developed to break through heavy ice ridging during the winter in the eastern end of the Gulf of Finland).

sions and other contaminants into the Arctic marine environment.¹⁹ The Arctic cruise tourism industry represents another economic motivator for the Arctic Five, while at the same time contributing to an increase in ship traffic and presenting additional environmental risks to Arctic marine life.²⁰

Climate change also impacts the Arctic fishing industry. Fish stocks in Arctic waters respond by altering their migratory routes.²¹ As fishing seasons grow longer due to summer Arctic ice melt and fish head farther north to international waters, this natural resource will become increasingly vulnerable to over-exploitation.²² Though the extension of a state's continental shelf under UNCLOS would not award any additional rights to the exploitation of fish present in such waters, economic and environmental considerations are still of concern to Arctic states. Conflicting resource management strategies are at the center of the struggle to maintain a balance between preservation of the marine environment and sustaining local economies and domestic industries.²³

B. *UNCLOS and Sovereignty*

The United Nations Convention on the Law of the Sea (UNCLOS) governs the relationships between states seeking to “stake a claim” to the Arctic continental shelf. UNCLOS governs both the procedural mechanisms

¹⁹ The Arctic Council has acknowledged these environmental impacts as having potentially detrimental consequences, as the destruction of the ice impacts Arctic residents dependent on over-ice travel, and an increase in the release of pollutants may require new IMO regulations. ARCTIC COUNCIL, *supra* note 16, at 5.

²⁰ See, e.g., WORLD WILDLIFE FUND, CRUISE TOURISM ON SVALBARD: A RISKY BUSINESS? 3–4 (2004) (noting that this industry has grown steadily in popularity among tourists, while increasing the chances for an oil spill, contributing to Arctic pollution, and potentially exposing otherwise pristine Arctic environments to such contaminants and risks).

²¹ Recognizing that climate change may impact the migration routes of fish stocks, the Arctic Council claims these stocks have always been affected by fluctuation in climate and circumstances. However, the Arctic Council acknowledges that this does not mitigate the fact that changes in the migratory patterns of fish stocks lead to conflicts between states over how this resource should be managed. The Arctic Council recommends a precautionary approach to such management. See Hjalmar Vilhjalmsón & Alf Hakon Hoel, et al., *Fisheries and Aquaculture, in* ARCTIC CLIMATE IMPACT ASSESSMENT 706–07 (2005).

²² See E. CARINA H. KESKITALO, CLIMATE CHANGE AND GLOBALIZATION IN THE ARCTIC: AN INTEGRATED APPROACH TO VULNERABILITY ASSESSMENT 174 (2008) (discussing impact of climate change on salmon); see also *Climate Change Extends Arctic Fishing*, CBC NEWS (Oct. 25, 2010), <http://www.cbc.ca/canada/north/story/2010/10/25/arctic-climate-change-baffin-fisheries.html> (noting impact of climate change on fishing industry off the northern coast of Baffin Island).

²³ For example, Norway and Russia have conflicted over this issue, and even when these two states were able to reach an agreement, other states can intervene and weaken such bilateral arrangements when fish move to international waters. Vilhjalmsón et al., *supra* note 21, at 707.

for the assertion of such claims and the substantive determinations of existing maritime boundary lines.²⁴ With regard to the latter, maritime boundaries consist of four zones: a territorial sea, a contiguous zone, an exclusive economic zone (EEZ), and the continental shelf.²⁵

Beyond the 200 nautical mile mark of the EEZ, a state must submit formal claims founded upon scientific evidence to the Commission on the Limits of the Continental Shelf (CLCS) in order to demonstrate that its continental shelf is a natural extension of its territory.²⁶ States must submit such a claim within 10 years of the entry into force of UNCLOS for that State.²⁷ These claims may extend from the same baseline used to measure the territorial sea up to a maximum of 350 nautical miles.²⁸

Where a state successfully establishes a claim over its continental shelf, Article 77 of UNCLOS provides: “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”²⁹ In contrast to a state’s territorial sea, contiguous zone, and EEZ, a state’s sovereign rights over its continental shelf are limited to only the exploration and exploitation of natural resources. Unlike Article 56 (describing a state’s sovereign rights on the EEZ), Article 77 does not address the exclusive right to the protection and preservation of

²⁴ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Despite the media portrayal of the Arctic as a lawless wild west, there is a legal mechanism for establishing a claim under UNCLOS. Articles 2, 3, and 33 of UNCLOS pertain to the setting of maritime boundaries, whereas Article 76 pertains to the delimitation of the continental shelf. *Id.* While the United States has not yet ratified UNCLOS, it observes the demarcation of zones promulgated by UNCLOS as part of international customary law. Canada, Russia, Norway, and Denmark have all signed and ratified UNCLOS. *Id.* The issue of whether or not the United States may participate in submitting a claim is beyond the scope of this Note.

²⁵ A state’s territorial sea extends 12 nautical miles measured from its baseline, and states may exercise complete sovereignty in this zone. *Id.* art. 2–3. The only limitation upon a state’s sovereignty in this zone is that it must afford other states the right to innocent passage. Between 12 and 24 nautical miles is the contiguous zone, in which states may prevent infringement of customs, fiscal, immigration, or sanitary laws and regulations, as well as pursue any violations of these laws committed within the territorial sea. *Id.* art. 33. In the exclusive economic zone (EEZ), which extends to 200 nautical miles, states maintain the sovereign right to exploration and exploitation, conservation, and management of natural resources and jurisdiction over the protection and preservation of the marine environment. *Id.* art. 56–57.

²⁶ *Id.* art. 76.

²⁷ *Id.* annex II, art. 4. Respectively, Denmark therefore has until 2014 to submit its claim and Canada until 2013. Russia plans to resubmit its claim in 2014. *Russia Uses New Research Data to Enhance Arctic Territorial Claim*, RIA NOVOSTI (Nov. 13, 2010), <http://en.ria.ru/russia/20101113/161323182.html>.

²⁸ UNCLOS, *supra* note 24, art. 76.

²⁹ *Id.* art. 77.

the marine environment on the continental shelf.³⁰ The omission of this language from Article 77 therefore leaves uncertainty as to what series of international environmental legal frameworks will apply to newly extended continental shelves in terms of conservation and protection of the marine environment.³¹ This uncertainty increases as a result of the conflicting development and resource management approaches taken by the various members of the Arctic Five (a subject of further examination in Section III of this Note).

C. *Deficiencies in CLCS Procedure*

The Commission on the Limits of the Continental Shelf (CLCS) is a scientific commission comprised of 21 members selected on the basis of equitable geographical representation. The CLCS advances recommendations as to where states should draw their boundary lines based upon a scientific analysis of a state's claim, with reference to their expertise in geology, geophysics, and hydrography.³² As a scientific body, the CLCS does not have the authority to rule on a state's legal interpretation of UNCLOS, however, there are multiple permissible methods under Article 76 for calculating and measuring the outer limits of the continental shelf.³³ A submitting state can choose whichever method is most advantageous to its interests, and can even alternate between methods in one submission to make the most of a claim.³⁴

³⁰ Compare UNCLOS, *supra* note 24, art. 56 ("In the exclusive economic zone, the coastal State has... (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to... (iii) the protection and preservation of the marine environment"), with UNCLOS, *supra* note 24, art. 77 ("The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.").

³¹ UNCLOS, *supra* note 24, art. 77. The right of a state to exploration and exploitation of natural resources on its continental shelf is exclusive in the sense that no one may develop such resources without consent of the sovereign state. However, mention of the responsibility for natural resource management is notably absent from this article. *Id.*

³² *Id.* art. 76, para. 8 and annex II; *Members of the Commission, CLCS* (Apr. 8, 2009), http://www.un.org/Depts/los/clcs_new/commission_members.htm#Members. Norway and Russia are the only states with claims to the Arctic continental shelf currently represented on the CLCS. *Id.*

³³ These two methods include the Irish, or Gardiner formula, and the Hedberg formula. Both methods involve a reference point, known as the "foot of the slope," the point at which the continental shelf drops off and the deep ocean floor begins. The Gardiner formula uses geological analysis of the foot of the slope to establish the outermost fixed points at which the thickness of sedimentary rocks is at least one percent of the shortest distance to the foot of the slope. In contrast, the Hedberg formula uses hydrographical or geomorphological criteria to establish the outermost fixed points. Kristin Bartenstein, *Flag-Planting*, 65 INT'L J. 187, 194-95 (2009).

³⁴ *Id.* at 196 (noting that these scientific methods can be alternated within the same submission as Norway did in 2006).

In addition to these problems, there are crucial ambiguities surrounding the terms “submarine elevations” and “submarine ridges,” which states may exploit to claim sovereignty beyond the 350 nautical mile limit.³⁵ Furthermore, the CLCS’s proceedings lack transparency, such that states cannot rely on CLCS precedent when developing claims.³⁶ States seeking to submit a claim must conduct expensive, time consuming research with very little guidance, only to run the risk of being required to resubmit the claim.³⁷ This process therefore provides very little incentive among states to cooperate. States with the necessary financial means and expertise to conduct Arctic continental shelf research derive no benefit from sharing or cooperating in gathering such information with other states.³⁸ Finally, while UNCLOS stipulates that the CLCS recommendations are “final and binding,”³⁹ it is ultimately for the submitting state to declare its own boundary line, to which it will be required to adhere.⁴⁰

D. Resolving Simultaneous Conflicting Claims to the Continental Shelf

The CLCS has no mechanism for resolving two simultaneously submitted scientifically accurate yet conflicting claims. States must therefore turn to the other provisions of UNCLOS for assistance when attempting to resolve continental shelf disputes. Article 279 of UNCLOS obligates states to resolve disputes in a peaceful manner.⁴¹ If states cannot agree, they may submit the dispute to either the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or one of two arbitral tribunals.⁴²

³⁵ *Id.* at 196–97 (Submarine ridges are subject to the 350 nautical mile limit. Submarine elevations that are “natural components of the continental margin” are not, and it is quite difficult to distinguish between the two, both physically and according to the language of UNCLOS.); *see also* UNCLOS, *supra* note 24, art. 76.

³⁶ Tavis Potts & Clive Schofield, *Current Legal Developments in the Arctic*, 23 INT’L J. MARINE AND COASTAL L. 151, 165–67 (2008) (CLCS proceedings are conducted in secret to protect the confidentiality of the submitting state’s methods).

³⁷ *Id.* at 166. For example, Russia was asked by the CLCS to resubmit its claim with more scientific evidence in 2002. *Supra* note 7 and accompanying text.

³⁸ Potts & Schofield, *supra* note 36, at 167. While Potts and Schofield suggest cooperation may be beneficial for states, it has not politically materialized. *See infra* note 52 and accompanying text.

³⁹ UNCLOS, *supra* note 24, art. 76, para. 8.

⁴⁰ Bartenstein, *supra* note 33, at 193 (stating that the state will be bound by its own pronouncement of the extent of its boundary).

⁴¹ UNCLOS, *supra* note 24, art. 279.

⁴² *Id.* art. 287, para. 1 (explaining that states may choose any of these forums upon signing, ratifying or acceding to UNLCOS, or anytime thereafter by specifying in a written declaration).

When states involved in a dispute have elected different forums, UNCLOS generally requires the use of arbitration, unless the parties otherwise reach an agreement.⁴³ The Arctic Five have all selected different forums by written declaration.⁴⁴ However, Arctic continental shelf disputes may be advanced pursuant to Article 298 of UNCLOS, which provides that states may reject all dispute resolution mechanisms as to boundary delimitation.⁴⁵ This exception will provide the opportunity for Arctic states to deny to be bound by any tribunal if the dispute involves the delimitation of the continental shelf.⁴⁶ Therefore, the only recourse the Arctic states will be left with to resolve conflicting continental shelf disputes is international diplomacy and negotiation.⁴⁷

E. Challenges to Resolution by Diplomacy

The CLCS process affords the Arctic members of UNCLOS the ultimate respect for their sovereignty and territorial integrity by allowing them

⁴³ *Id.* art 287, para. 5. States party to UNCLOS that have selected different forums may submit to arbitration unless they otherwise agree, but are not required to do so. However, Article 288 states that one of these forums must have jurisdiction over disputes arising under UNCLOS. Thus when reading Articles 287 and 288 in conjunction, arbitration is the fallback forum. *See id.* art. 288.

⁴⁴ Stephanie Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHI. J. INT'L L. 323, 336 n.102 (2008) (citing U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, 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 98–101, U.N. Sales No. E.97.V.3 (1996)).

Canada elected to resolve disputes in the International Court of Justice or by special arbitration under Annex VII. Denmark and Norway elected the International Court of Justice. Russia elected arbitration under Annex VII, except for disputes related to fisheries, the environment, scientific research, and navigation, for which it elected arbitration under Annex VII; and disputes related to detained vessels and crews, for which it elected the International Tribunal for the Law of the Sea.

Id. Again, the subject of whether or not the United States may submit a claim at all under UNCLOS is outside the scope of this Note. However, States that accept provisions of UNCLOS as customary international law—as the U.S. has—may be subject to ICJ jurisdiction. *See* Lakshman Guruswamy, *Environment and Trade: Competing Paradigms in International Law*, in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 543, 549 (Antony Anghie & Garry Sturgess, eds., 1998) *but see infra* note 56 and accompanying text (noting that lack of standing may be a challenge necessary to overcome even for states party to UNCLOS).

⁴⁵ UNCLOS, *supra* note 24, art. 298 (permitting states to opt out of any of the suggested forums when a dispute relates to boundary delimitation.)

⁴⁶ Holmes, *supra* note 44, at 336–37 (Canada, Denmark, and Russia all opted not to be bound by any tribunal for disputes involving boundary delimitation via Article 298 of UNCLOS).

⁴⁷ UNCLOS, *supra* note 24, art. 279 (Obliging states to resolve their disputes peacefully).

to resolve disputes regarding the extension of continental shelves via international diplomacy. Yet with respect to the Arctic, this serves as a significant advantage for geopolitically well-positioned states, such as Canada and Russia, to the disadvantage of smaller Scandinavian states, such as Denmark and Norway.⁴⁸ Moreover, bargaining away the Arctic in this manner leaves uncertainty as to how and which international environmental regulations will apply to the newly expanded boundary lines.⁴⁹ Some of the Scandinavian states' interests, such as environmental policies, the rights of their respective indigenous peoples, and security concerns will not be secured as a result of this process.

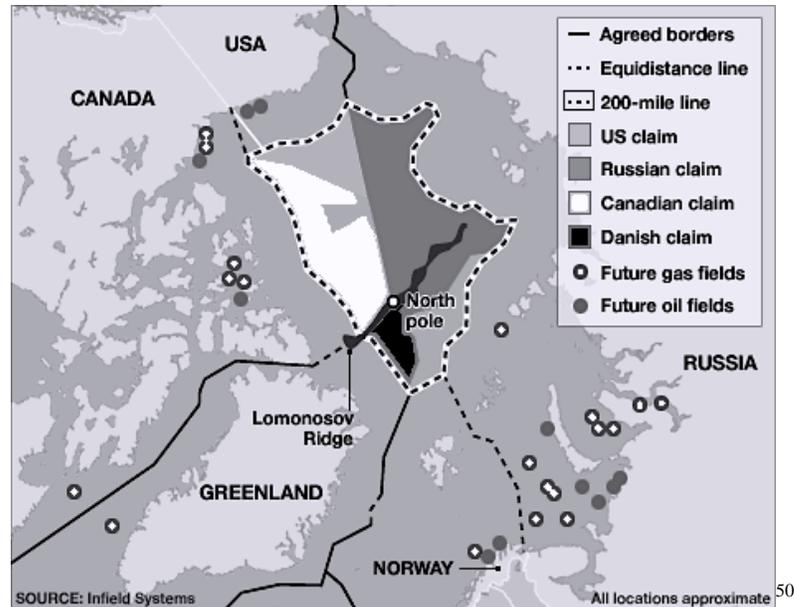
⁴⁸ See Nikolaj Petersen, *The Arctic as a New Arena for Danish Foreign Policy: The Ilulissat Initiative and its Implications*, DANISH FOREIGN POLICY YEARBOOK 35, 44–48 (2009) (noting that Russia stands the most to gain in seeking to re-establish its former superpower status and is increasing its Arctic military capacities; Canada has also increased such military capabilities).

⁴⁹ See Casper, *supra* note 12, at 865–66 (“There is no consensus in the legal/academic community as to what the existing arrangements are and if they can provide sufficient protection for the Arctic.”).

III. INTERNATIONAL DIPLOMACY AND PROTECTION OF SCANDINAVIAN INTERESTS

A. *Disputes in Which the Interests of Scandinavian States May Be at Risk*

1. Lomonosov Ridge dispute



Denmark, Canada, and Russia will soon be faced with the problem of resolving a dispute over the Lomonosov Ridge because the CLCS process provides no mechanism for resolving simultaneously submitted conflicting claims.⁵¹ Though Canada and Denmark have been cooperating in the data collection process, these states still send their own national scientists and maintain their own national programs.⁵² Russia is not a part of this

⁵⁰ Richard Galpin, *The Struggle for Arctic Riches*, BBC (Sept. 22, 2010), <http://www.bbc.co.uk/news/world-11381773> (edited by author to improve clarity in reprint).

⁵¹ The choice of different dispute resolution forums and the rejection of any tribunal by Canada, Denmark, and Russia leave this dispute without a forum. *See supra* notes 44–46 and accompanying text.

⁵² *See Danish-Canadian Bathymetric and Gravimetric Survey of the Arctic Ocean, CONTINENTAL SHELF PROJECT* (Mar. 17, 2009), <http://a76.dk/cgi-bin/nyheder-m-m.cgi?id=1237357596|cgifunction=form> (describing these operations as “part of the Danish and Canadian national UNCLOS programmes” and stating, “the UNCLOS programme is in Denmark managed by the Geological Survey of Denmark and Greenland (GEUS), and in Canada by the Geological Survey of Canada (GCS) and the Canadian Hydrographic Service (CHS)”). *But see* DANISH INST. FOR INT’L STUDIES, *DANISH FOREIGN POLICY YEARBOOK* 53 (Nanna Hvidt & Hans Mouritzen, eds., 2009) (noting Danish-Canadian cooperation).

process, and has its own data collection team.⁵³ Thus, even if Canada and Denmark submit a joint claim, it is still likely to directly conflict with Russia's.

In the event that Russia or Canada pronounce an aggressive claim or boundary line based upon their interpretation of the CLCS scientific recommendations, Denmark will seek to challenge such a claim before the ICJ.⁵⁴ Denmark may be able to challenge a claim made by Canada since Canada and Denmark have elected the same forum, but Russia cannot be drawn in, nor can arbitration serve as a fallback mechanism.⁵⁵ Notwithstanding this problem, there is still a possibility that Denmark may lack standing to challenge both the boundary pronouncements of Russia *and* Canada based upon the CLCS's recommendations.⁵⁶ The only recourse Denmark could be left with is international diplomacy and negotiation, which, as the next scenario illustrates, still may not meet a small Scandinavian state's needs and interests, and leaves open the potential for exploitation.

2. Norway-Russia Treaty

On September 15, 2010, Norway and Russia signed a treaty resolving their maritime boundary in the Barents Sea via international diplomacy.⁵⁷

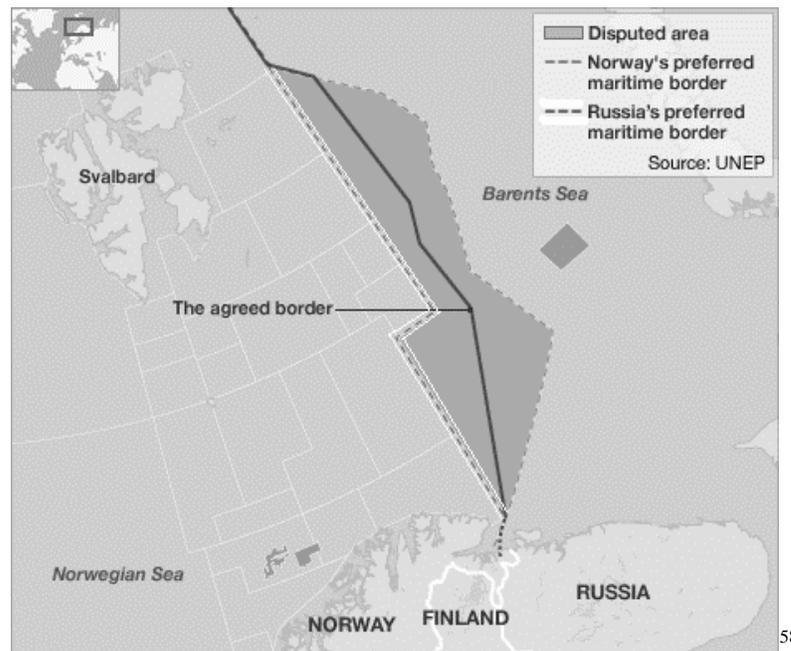
⁵³ Russia claims it invested \$50 million in researching its continental shelf claim in 2010. *Russia, Canada Back Science to Resolve Dispute Over Arctic Claims (Update 1)*, RIA NOVOSTI, Sept. 16, 2010, available at <http://en.rian.ru/world/20100916/160615112.html>.

⁵⁴ DECLARATIONS OF THE KINGDOM OF DENMARK TO UNCLOS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, Vol. III, pt. I, ch. XXI at 451, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (April 1, 2009) (noting Danish selection of the ICJ as its venue for UNCLOS-related dispute resolution). *See supra* notes 44–46 and accompanying text (showing that Denmark and Canada chose the ICJ and Russia chose arbitration, yet all three have rejected the arbitration procedures under Article 298 for boundary delimitation disputes).

⁵⁵ Denmark and Canada chose the ICJ, Russia chose arbitration, and all three rejected Article 298's arbitration procedures for boundary delimitation disputes. Holmes, *supra* note 44, at 336–37.

⁵⁶ *See* H.E. Judge Rüdiger Wolfrum, President, Int'l Tribunal for the Law of the Sea, Statement at the 73rd Biennial Conference of the International Law Association, Rio de Janeiro, Brazil: The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea 12–15 (Aug. 21, 2008), available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ila_rio_210808_eng.pdf (describing several difficulties associated with maintaining standing in a continental shelf dispute).

⁵⁷ Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean art. 1, Nor.-Russ., Sept. 15, 2010, available at http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf [hereinafter Nor.-Russ. Treaty].



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While the treaty between Russia and Norway tends to indicate a willingness to cooperate, Norway still faces some challenges and disadvantages as a result of this agreement that could prove detrimental to its national interests.⁵⁹ For example, under Article 4 of the treaty, the parties have agreed to collaborate regarding fishing activities, applying a precautionary approach to conservation, management, and exploitation of straddling fish stocks.⁶⁰ Yet the entire article regarding fisheries management is vague and does not stipulate what may happen if either party over-exploits migratory fish stocks or how such a dispute would be resolved in the event of third party exploitation.⁶¹ In addition, while Article 5 of the treaty addresses hydrocarbon exploitation and stipulates that any trans-boundary resources are to be developed jointly, it is silent as to how responsibility should be apportioned in the event of an oil spill or accident.⁶² Finally, the rights of indigenous peoples of both Russia and Norway to exploit these resources are not mentioned at all within this treaty.⁶³

⁵⁸ *Russia and Norway Sign Maritime Border Agreement*, BBC (Sept. 15, 2010), <http://www.bbc.co.uk/news/business-11316430> (edited by author to improve clarity in reprint).

⁵⁹ Nor.-Russ. Treaty, *supra* note 57, at pmbl.

⁶⁰ *Id.* art. 4.

⁶¹ *Id.*

⁶² *Id.* art. 5.

⁶³ The Sami people inhabit the northernmost regions of Russia, Sweden, Finland, and Norway. To supplement their traditional livelihood of reindeer herding, many work as full-

B. *Scandinavian Interests*

The Scandinavian states maintain several key policy concerns in the Arctic which are of critical national importance and are at odds with those of other members of the Arctic Five. Specifically, the Scandinavian concerns include: (1) an approach to resource and environmental management at odds with Russian development expectations, (2) an increased obligation to respect the rights of indigenous peoples, particularly the Greenland Inuit and the Sami, and, (3) a heightened security interest in ensuring denuclearization of the Arctic. Under the current international legal framework governing the Arctic, these interests are insufficiently protected, particularly in light of the Lomonosov Ridge dispute and the area of the Barents Sea governed by the Norwegian-Russian treaty.

1. Conflicting approaches: Scandinavian environmental protection arrangements vs. Russian development expectations

The Scandinavian states favor a sustainable and precautionary approach to any new oil and natural gas exploration and exploitation in the Arctic.⁶⁴ At the international level, there is currently no regulatory instrument governing offshore hydrocarbon activities in the Arctic,⁶⁵ though all of the Arctic states party to UNCLOS must fulfill a general obligation regarding protection and conservation of the Arctic marine environment.⁶⁶ The Scandinavian states of Denmark and Norway have demonstrated an in-

time commercial fisherman in this region. DEBORAH B. ROBINSON, *THE SAMI OF NORTHERN EUROPE* 4, 25 (2002).

⁶⁴ Denmark and Norway maintain a notably visible foreign policy presence in this regard. *See, e.g.*, Per Stig Møller, Foreign Minister of Denmark, Speech at the Arctic Council in Tromsø (Apr. 29, 2009) (“We must safeguard continued sustainable development”); Arne Walther, Norwegian Ambassador to Japan, Presentation at the National Press Club of Japan: Norway in the Forefront for Sustainable Global Development (July 20, 2010) (“Our policy is to safeguard Norwegian economic, environmental and security policy interests by means of a coherent policy that integrates the three.”).

⁶⁵ *See* TIMO KOIVUROVA & ERIK J. MOLENAAR, WORLD WILDLIFE FUND, *INTERNATIONAL GOVERNANCE AND REGULATION OF THE MARINE ARCTIC: I. OVERVIEW AND GAP ANALYSIS* 31–33 (2009) (noting that there are some limited regional and multilateral mechanisms for such regulation, including UNCLOS, International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), and the Convention for the Protection of the Marine Environment in the North-East Atlantic (OSPAR)). While these multilateral arrangements governing the regulation of hydrocarbon exploitation exist, not all states are parties to these agreements; the United States is not a party to UNCLOS, and Canada, Russia, and the United States are not parties to OSPAR. *Id.*

⁶⁶ *See* Casper, *supra* note 12, at 845–47 (discussing the general framework for environmental protection under UNCLOS). The extent of states’ obligation to cooperate under UNCLOS depends upon a determination of whether or not the Arctic Ocean can be considered an enclosed or semi-enclosed area and is beyond the discussion of this Note. *Id.*

creased interest in cooperative protection of the Arctic marine environment by voluntarily committing to treaties placing tighter regulations on pollution of Arctic waters by oil and gas exploration.⁶⁷ For example, Denmark, Norway, Finland, Iceland, and Sweden are all party to the Convention for the Protection of the Marine Environment in the North-East Atlantic (OSPAR) which requires these states to:

Take all possible steps to prevent and eliminate pollution and...take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve ecosystems and, when practicable, restore marine areas which have been adversely affected.⁶⁸

OSPAR has both a full time Secretariat and the ability to impose recommendations and binding decisions.⁶⁹ Moreover, the Scandinavian states party to this treaty are under obligations to apply the precautionary principle, the polluter pays principle, best available techniques, and best environmental practices, and utilize the latest developments in technology to minimize negative impacts on the environment.⁷⁰ In addition, OSPAR requires these states to cooperate regarding trans-boundary pollution issues,⁷¹ and provides for an arbitration mechanism for the settling of disputes arising under the convention.⁷²

⁶⁷ See Convention for the Protection of the Marine Environment in the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1072 [hereinafter OSPAR], available at http://www.ospar.org/html_documents/ospar/html/OSPAR_Convention_e_updated_text_2007.pdf; Agreement between Denmark, Finland, Iceland, Norway, and Sweden Concerning Cooperation in Measures to Deal with Pollution of the Sea by Oil or Other Harmful Substances, Mar. 29, 2003, 2084 U.N.T.S. 324 [hereinafter 1993 Agreement].

⁶⁸ OSPAR, *supra* note 67, art. 2(1)(a).

⁶⁹ Article 10 of OSPAR establishes a commission which monitors implementation of OSPAR and makes recommendations. *Id.* art 10. Article 13 mandates the commission's ability to issue binding decisions, requiring at least a three-quarters majority vote. *Id.* art. 13.

⁷⁰ Article 2(2)(a) of OSPAR defines the precautionary principle. *Id.* art. 2. This principle requires, "preventative measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly, or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationships between the inputs and effects." *Id.* (emphasis added). Under article 2(2)(b), the polluter bears the costs of pollution prevention, control, and reduction measures. *Id.* Additionally, article 2(3) requires that when implementing OSPAR, parties consider using the best available techniques and environmental practices, as well as utilize the latest technological developments. *Id.*

⁷¹ Whenever pollution from one party is likely injure the interests of any other party, the injured party can request consultation in order to reach a cooperation agreement. *Id.* art. 21.

⁷² Issues may be submitted to arbitration by any requesting party. *Id.* art 32(1). The award of the arbitral tribunal is binding. *Id.* art. 32(10)(a).

The Scandinavian states have further agreed to cooperate among one another to protect the Arctic marine environment against pollution by oil or other harmful substances which present a grave and imminent danger to their material interests.⁷³ The 1993 Agreement between Denmark, Finland, Iceland, Norway and Sweden (1993 Agreement), establishes a monitoring, investigatory, and reporting scheme that requires these states to notify one another of substantial pollution within their territorial seas, fishing grounds, EEZs, and continental shelves, and to provide mutual assistance to one another in the event of an emergency.⁷⁴ These agreements between the Scandinavian and Nordic states indicate a preference for a cooperative and cautionary approach to new oil and gas development at odds with the development expectations of other members of the Arctic Five.

All members of the Arctic Five, including Russia, are party to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), but fundamental difficulties with its implementation may still place the Scandinavian states' environmental interests in the Arctic at risk.⁷⁵ For example, though a Scandinavian state may report violations of this treaty occurring outside its jurisdiction to the offending vessel's flag state, flag states may refuse to take action against their own vessels.⁷⁶ MARPOL 73/78 applies to oil rigs as well as ships, but it does not protect Scandinavian states from pollution by oil and gas development occurring outside its jurisdiction.⁷⁷ Such pollution may still affect the environmental interests of Scandinavian states as outputs by offshore oil rigs of oil, water, and gas can inject "chemical cocktails of active ingredients" into ocean streams.⁷⁸ Moreover, national governments bear the burden of investigating and prosecuting violations of MARPOL 73/78, which may prove difficult for Scandinavian states considering complex requirements and limited re-

⁷³ 1993 Agreement, *supra* note 67, art. 1.

⁷⁴ *Id.* art. 2–8.

⁷⁵ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 61 [hereinafter MARPOL 73/78] (modified by the Protocol of 1978 relating thereto (MARPOL 73/78) on Feb. 17, 1978, entered into force Oct. 2, 1983).

⁷⁶ See CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 32450, CRUISE SHIP POLLUTION: BACKGROUND, LAWS AND REGULATIONS, AND KEY ISSUES, 9 (2008) (noting that the Government Accountability Office of the United States has documented a poor response to action taken based on such referrals by the United States).

⁷⁷ See MARPOL 73/78, *supra* note 75. In the case of Denmark's claim to the Lomonosov ridge, this could have serious repercussions, as the extent of Denmark's jurisdiction with respect to this region is currently unknown.

⁷⁸ JUAN FERNANDO CAICEDO RESTREPO, ENVIRONMENTAL LEGISLATION CONCERNED WITH OFFSHORE PLATFORM DISCHARGES 5, *available at* <http://www.oilandgasforum.net/management/paperlegisl.pdf> (last visited Jan. 2, 2012).

sources.⁷⁹ Compounding these difficulties, Russia has increased shipping traffic on the Northern Sea Route, and more ships will be taking this route in coming years.⁸⁰

Considering both the Lomonosov Ridge dispute between Denmark and Russia, and Norway's new agreed upon treaty with Russia, these gaps in the existing environmental legal framework should be cause for concern. Of particular concern is that Russia, the world's leading exporter of oil and natural gas, is acting aggressively to secure its interests with respect to hydrocarbon exploitation despite environmental risks.⁸¹ For example, in the Shtokman field located in the Barents Sea near the newly delineated Norwegian-Russian boundary, Russia is hurriedly approving oil and gas drilling without adhering to proper environmental protocol.⁸² In addition, Russian scientists predict that by 2020 the exploration and development of this field will be "critical for sustainability and further development of Russia's oil and gas complex and national economy," increasing pressure on Russia to develop and establish sovereignty in the Arctic, in places such as the Lomonosov Ridge and the Barents Sea.⁸³ Russia is also constructing floating nuclear power plants in order to exploit these resources, compounding the

⁷⁹ See INT'L MAR. ORG., MARPOL-HOW TO DO IT: MANUAL ON THE PRACTICAL IMPLICATIONS OF RATIFYING, IMPLEMENTING, AND ENFORCING MARPOL 73/78, 91-106 (2003) (detailing some of the difficulties with technical aspects of enforcing MARPOL 73/78, such as collecting highly evanescent evidence and the need to inspect every ship).

⁸⁰ Paul Goble, *Increasing Traffic on the Northern Sea Route Sparks Security Concerns in Moscow*, GEORGIAN DAILY (Oct. 21, 2010), http://georgiandaily.com/index.php?option=com_content&task=view&id=20247&Itemid=72.

⁸¹ See Owen Matthews, *So Long, Salad Days*, NEWSWEEK (Feb. 23, 2010), <http://www.newsweek.com/2010/02/23/so-long-salad-days.html> (noting Russia's past conduct with respect to gas cutoffs to Ukraine and Europe, status as a leading energy supplier, and its attempts to assert control over Arctic development of oil and natural gas via state-run oil companies); see also Julia Werdigier, *BP Forms Partnership to Explore in Russia*, N.Y. TIMES, Jan. 14, 2011 at B1 (describing \$7.8 billion deal between Russian-owned Rosneft and British Petroleum to exploit oil on Russia's continental shelf as well as plans to establish an Arctic technology center).

⁸² WORLD WILDLIFE FUND, *WWF Calls for Investigation into Russian Hydrocarbon Extraction Project* (Sept. 19, 2010), http://wwf.panda.org/what_we_do/where_we_work/arctic/news/?195030. The CEO of Statoil, a Norwegian partner in the Shtokman field has also reportedly indicated fears of corruption regarding the project and that, "a number of other serious challenges [exist], including lack of local infrastructure." *Statoil Sees "Serious" Shtokman Risks-Wikileaks*, REUTERS (Jan. 7, 2011), <http://af.reuters.com/article/energyOilNews/idAFLDE70611620110107>.

⁸³ A.E. Kontorovich, et. al, *Geology and Hydrocarbon Resources of the Continental Shelf in Russian Arctic Seas and the Prospects of Their Development* 51 RUSSIAN GEOLOGY & GEOPHYSICS 10 (2010).

environmental risks associated with drilling for oil and natural gas in this region.⁸⁴

2. Increased obligations to indigenous peoples

The Scandinavian states have an increased obligation to respect and integrate the wishes of their indigenous peoples into Arctic policy in comparison to the other members of the Arctic Five. For example, Denmark and Norway are party to the International Labor Organization (ILO) Convention 169 on Indigenous and Tribal Peoples and members of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁸⁵ Article 15 of ILO Convention 169 requires states party to allow indigenous groups to participate in the use, management and conservation of resources and requires states to consult indigenous peoples *prior* to undertaking or permitting resource exploitation.⁸⁶ Though UNDRIP is a United Nations General Assembly Resolution, Article 32(2) of UNDRIP affirms that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.⁸⁷

The United States and Russia are not members of either of these instruments, and Canada only recently adopted UNDRIP.⁸⁸ As the treaty de-

⁸⁴ While these floating nuclear plants are currently only being placed within Russia's sovereign exclusive economic zone, they have potential for use on an extended continental shelf. Richard Galpin, *The Struggle for Arctic Riches*, BBC (Sept. 22, 2010), <http://www.bbc.co.uk/news/world-11381773>; see also Karl Grossman, *Floating Chernobyls*, HUFFINGTON POST (Sept. 3, 2010), http://www.huffingtonpost.com/karl-grossman/floating-chernobyls_b_698550.html (noting the environmental risks).

⁸⁵ International Labour Organization [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Convention C169 (Jun. 27, 1989), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [hereinafter ILO Convention 169]; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]; see also Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 SW. J. INT'L L. 251, 275–78 (2009) (noting that the ILO Convention was the first legally binding recognition of indigenous rights to self-governance).

⁸⁶ ILO Convention 169, *supra* note 85, art. 15.

⁸⁷ UNDRIP, *supra* note 85, art. 32(2).

⁸⁸ ILO Convention 169, *supra* note 85; UNDRIP, *supra* note 85. Upon adopting UNDRIP, Canada specifically noted, “the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws.” Press Release, Aboriginal Affairs & N. Dev. Can., *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (Nov. 12, 2010), <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>.

limiting the maritime boundary line between Norway and Russia demonstrates, the rights of indigenous peoples are at risk of being disregarded by international diplomacy when negotiating the Arctic continental shelf boundary and trans-boundary resource management issues with states that do not have the same obligations. Two groups in particular, the Greenland Inuit and the Sami, reside within Scandinavian territories and will be at risk for such neglect.

a. Greenland Inuit

Denmark's claim to the Lomonosov Ridge stems entirely from its connection to Greenland. After a period of colonial rule, Greenland became a part of the Danish state in 1953.⁸⁹ The Home Rule Act of 2009 now grants Greenland autonomy over all domestic affairs, including natural resources, but excluding defense and international affairs.⁹⁰ Denmark continues to pay subsidies to Greenland, but these payments will eventually diminish as Greenland begins to earn revenue related to its mineral resource activities.⁹¹ In addition, the new Home Rule Act provides Greenland the opportunity to gain independence from Denmark. However, this would require an agreement between Denmark and Greenland, ratified by referendum in Greenland and by the Danish Folketing.⁹²

Denmark has a significant duty to ensure that the indigenous peoples of Greenland are afforded the opportunity to participate in resource management decisions and decisions affecting their territory.⁹³ Greenlanders have a demonstrated interest in developing offshore oil to sustain their local economy, but they may be reluctant to abandon the safety net of their status as a Danish protectorate, unless they believe their interests are not adequately being represented in the international arena.⁹⁴ If Denmark has any inten-

⁸⁹ GARTH NETTHEIM, GARY D. MEYERS & DONNA CRAIG, *INDIGENOUS PEOPLES AND GOVERNANCE STRUCTURES: A COMPARATIVE ANALYSIS OF LAND AND RESOURCE MANAGEMENT RIGHTS* 191 (2002).

⁹⁰ The Home Rule Act of 2009 replaced the 1979 version. Prior to the establishment of Home Rule in 1979, Greenland had limited involvement in its own governmental affairs. United Nations, Econ. & Soc. Council, Permanent Forum on Indigenous Issues, ¶ 1, U.N. Doc. E/C.19/2009/4/Add.4 (Mar. 3, 2009).

⁹¹ *Id.* Annex I, Chapter 3.

⁹² *Id.* Annex I, Chapter 8.

⁹³ See Bratspies, *supra* note 85, at 277 (Construing obligations under ILO 169 and UNDRIP together).

⁹⁴ See Andrew Ward & Sylvia Pfeifer, *Greenland Sees Oil as Key to Independence*, *FINANCIAL TIMES* (Aug. 26, 2010), <http://www.ft.com/cms/s/0/5ae57664-b134-11df-b899-00144feabdc0.html?ftcamp=rss#axzz15bHHb9As> (noting the tension between the desire of Greenlanders to develop for oil and the notion that independence at the present moment could create reliance upon oil companies in place of Denmark).

tion of retaining sovereignty over Greenland, striving to protect the rights of its indigenous inhabitants will be critical.

Denmark's retention of Greenland and protection of indigenous rights is also essential in another dispute. Canada and Denmark both claim ownership of a tiny island, Hans Island, in the Kennedy Channel.⁹⁵ Oil and gas reserves may be present in the surrounding seabed, though it is likely the island's true significance lies in its relative proximity to the Northwest Passage and the ability to regulate the entry of ships into this passage.⁹⁶ While some scholars have downplayed the significance of this island, the two states have often made outward political demonstrations of ownership, and have, for the time being, agreed to disagree.⁹⁷ Nonetheless, Denmark's best argument for establishing sovereignty in this dispute is that the Greenland Inuit use the island as part of their traditional hunting grounds.⁹⁸ Should these states enter negotiations as to the island's ownership, Denmark is under an obligation to include and will have a strong interest in including the Greenland Inuit that Canada does not.⁹⁹

b. Sami people of Norway, Sweden, Finland and Russia

Norway is also a member of ILO Convention 169 and UNDRIP.¹⁰⁰ The Sami people, whom these instruments have been ratified to protect, inhabit the northernmost reaches of not only Norway, but also Sweden, Finland, and Russia.¹⁰¹ These people rely primarily on reindeer herding;¹⁰² a traditionally nomadic way of life vulnerable to the effects of climate change and globalization, and interdependent upon the stability of the natural environment.¹⁰³

⁹⁵ MICHAEL BYERS, WHO OWNS THE ARCTIC? 22–24 (2009). Hans Island is the last remaining territorial based dispute in the entire Arctic. *Id.*

⁹⁶ See Christopher Stevenson, *Hans Off! : The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution* 30 B.C. INT'L & COMP. L. REV. 263, 268 (2007) (Noting the potential lucrative benefits of such regulation).

⁹⁷ BYERS, *supra* note 95, at 28–30.

⁹⁸ See *id.* at 24–25. (Citing statements made by Danish officials).

⁹⁹ See Aboriginal Affairs & N. Dev. Can., *supra* note 88. Though it is party to UNDRIP, Canada has noted the nature of this treaty as a non-binding “aspirational document” and including the Greenland Inuit in this discussion would be directly adverse to its interests.

¹⁰⁰ *Alphabetical List of ILO Member Countries*, ILO, <http://www.ilo.org/public/english/standards/reim/country.htm> (last updated May 19, 2011); U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

¹⁰¹ NETTHEIM, MEYERS & CRAIG, *supra* note 89, at 209.

¹⁰² *Id.* (stating that reindeer herding is one principal aspect of the Sami livelihood).

¹⁰³ KESKITALO, *supra* note 22, at 138–43 (discussing the vulnerability of reindeer herding to a variety of factors associated with global climate change and globalization, including the ability to adapt).

In order to fulfill its obligations under these international documents, Norway must ensure the rights of the Sami to political participation in resource management decisions.¹⁰⁴ To a certain extent Norway has sought to do so by implementing the Sami Act, which requires consultation by all levels of the Norwegian government with the Sami Parliament in decisions affecting Sami affairs.¹⁰⁵ However, the extent of Sami rights to dominion over natural resources is still unclear, and remains contested.¹⁰⁶ Norway, Sweden, and Finland have established mutual cooperation with respect to Sami issues since 2001, but Russia has not participated in such efforts.¹⁰⁷ Russia has done very little to ensure national political participation of Sami and other indigenous peoples of the Arctic in resource management decisions.¹⁰⁸

States such as Russia and Canada are likely to take positions with respect to the inclusion of indigenous groups in resource management decisions directly at odds with those of the Scandinavian states. The Norwegian-Russian treaty demonstrates that bilateral negotiations regarding Arctic delimitation are insufficient to adequately incorporate the interests and rights of indigenous peoples, and this approach should be avoided with respect to division of the Lomonosov Ridge. Scandinavian states should seek to support and promote a stable forum for indigenous participation, with a view to upholding ILO Convention 169 and UNDRIP. The Arctic Council provides

¹⁰⁴ Bratspies, *supra* note 85, at 275–78 (stating that Articles 32 of UNDRIP and ILO Convention 169 both require member states to honor many indigenous rights, including those in resource management decision on or affecting their territories).

¹⁰⁵ NETTHEIM, MEYERS & CRAIG, *supra* note 89, at 217. (explaining that the Sami Act requires all national, regional and local authorities to consult with the Sami parliament before making any decisions that may affect the Sami people). Finland and Sweden also have Sami parliaments. *Id.*

¹⁰⁶ *Id.* at 217–19 (summarizing the differences in recognized land ownership and natural resource rights between the Sami and Norwegian parliaments).

¹⁰⁷ *Nordic Sami Cooperation*, MINISTRY OF GOV'T ADMIN., REFORM AND CHURCH AFFAIRS, <http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/nordic-sami-cooperation.html?id=24390> (last visited Dec. 23, 2011).

¹⁰⁸ *See ASS'N OF INDIGENOUS PEOPLES OF THE RUSS. N. AND INST. FOR ECOLOGY AND ACTION ANTHROPOLOGY, PARALLEL INFORMATION: DISCRIMINATION AGAINST INDIGENOUS SMALL-NUMBERED PEOPLES OF THE RUSSIAN NORTH, SIBERIA AND THE RUSSIAN FAR EAST* 3–4 (Johannes Rohr et al. eds., 2008) (noting the lack of inclusion of indigenous groups in decision making regarding use of natural resources and the vulnerability of such groups); *see also* United Nations, Econ. & Soc. Council, Permanent Forum on Indigenous Issues, at 13–18, U.N. Doc. E/C.19/2009/4/Add.7 (Apr. 2, 2009) (generalizing minimal steps taken to protect the rights of indigenous peoples in Russia).

one such forum in which Scandinavian states can ensure this interest will be protected, as will be discussed in more detail in Part IV.¹⁰⁹

3. Denuclearization

Scandinavian interests in security are also at risk of being disregarded by the current legal framework governing the Arctic. Scandinavian states have long demonstrated an interest in ensuring a nuclear-free Arctic and have recently advanced support for such proposals.¹¹⁰ Under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Canada, Denmark, and Norway are committed to remain non-nuclear weapons states (NNWS), whereas the United States and Russia are designated as nuclear weapons states (NWS).¹¹¹ This treaty obligates NNWS not to produce or receive nuclear weapons, while allowing NWS to possess them.¹¹² Of particular relevance to this discussion is Article VI, which encourages states to develop nuclear weapons free zones (NWFZ).¹¹³

In addition to being NNWS, another reason states such as Denmark and Norway have a particular interest in the creation of a NWFZ in the Arctic is a conscious memory of the Danish experience during the height of the Cold War at Thule Air Base in 1968.¹¹⁴ This incident involved an American B-52 bomber carrying four nuclear bombs as part of an airborne alert mission.¹¹⁵ A cabin fire onboard caused the bomber to crash, releasing radioactive uranium and plutonium, although the explosion itself was not nucle-

¹⁰⁹ See *Permanent Participants*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/permanentparticipants> (last visited Jan. 2, 2012) (describing the participatory role of indigenous peoples).

¹¹⁰ See generally DANISH INST. FOR INT'L STUDIES, CONFERENCE ON AN ARCTIC NUCLEAR-WEAPON-FREE ZONE (Cindy Vestergaard, ed., 2010) (calling for the establishment of a nuclear weapon free zone in the Arctic). See Torbjørn Graff Hugo, *An Arctic Nuclear-Weapon-Free Zone: A Norwegian Perspective*, in CONFERENCE ON AN ARCTIC NUCLEAR-WEAPON-FREE ZONE 39, 41 (Cindy Vestergaard, ed., 2010) (noting the Nordic Council suggested a nuclear weapon free zone in the Arctic as early as 1993).

¹¹¹ Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] (explaining the duties and obligations of both nuclear weapons states and non-nuclear weapons states under the treaty).

¹¹² *Id.* art. I, II. While allowing NWS to possess nuclear weapons, the preamble to the NPT notes the intention of states party to, "achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament." *Id.*

¹¹³ *Id.* art. VI.

¹¹⁴ See generally Jens Zinglensen, *Nuclear-Weapon-Free Zone in the Arctic* in DANISH INST. FOR INT'L STUDIES, CONFERENCE ON AN ARCTIC NUCLEAR-WEAPON-FREE ZONE 113–17 (Cindy Vestergaard, ed., 2010) (describing the Danish experience with respect to the Thule nuclear accident).

¹¹⁵ *Id.* at 114.

ar.¹¹⁶ Many Danish and Thule workers involved in the massive clean-up operation suffered radiation poisoning.¹¹⁷

There are several challenges to the creation of a NWFZ in the Arctic.¹¹⁸ For example, Denmark, Norway, Canada, and the United States are members of the North Atlantic Treaty Organization, which includes a nuclear role as part of its strategic alliance.¹¹⁹ Mustering political will from Russia and the United States to ban nuclear submarine transit will also be a significant obstacle.¹²⁰ However, the Cold War is long over and NATO and Russia are beginning to cooperate very positively. The two recently signed a partnership agreement, specifically stating, “the NATO nations and Russia have, today, agreed, in writing, that while we face many security challenges, we pose no threat to each other.”¹²¹ If there truly is no longer any perceived security threat between the Arctic Five, then the need for nuclear weapons in the Arctic becomes moot. Furthermore, there is no reason why NNWS cannot begin discussion of a NWFZ at this stage.¹²²

IV. A SCANDINAVIAN MODEL

A. *The Arctic Council*

The UNCLOS dispute resolution system currently leaves the conflicting claim issue up to international diplomacy, which has the potential for putting the interests of Scandinavian states directly at odds with other members of the Arctic Five. To protect their interests in the environment, the rights of their indigenous peoples, and their security concerns, the Scandinavian states should develop a comprehensive strategic approach. The most appropriate forum in which these states will be able to pursue such an approach is within the Arctic Council. The Arctic Council evolved as a high level intergovernmental forum from the 1991 Arctic Environmental Protec-

¹¹⁶ *Id.* at 114–15.

¹¹⁷ *Id.* at 115–16.

¹¹⁸ See MICHAEL WALLACE & STEVEN STAPLES, RIDDING THE ARCTIC OF NUCLEAR WEAPONS: A TASK LONG OVERDUE 10–14 (2010) (Identifying nuclear submarine transit by NWS, the location of Russian naval bases, and the political position of the United States as major obstacles to negotiating a NWFZ).

¹¹⁹ See North Atlantic Treaty art. 5–8, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (providing for the collective defense of member states, this provision could allow NWS to station nuclear weapons in a NNWS in the event of an armed attack).

¹²⁰ WALLACE & STAPLES, *supra* note 118.

¹²¹ *NATO-Russia Set on Path Towards Strategic Partnership*, N. ATL. TREATY ORG. (Nov. 20, 2010), http://www.nato.int/cps/en/SID-F267F097-DC26FE3A/natolive/news_68876.htm.

¹²² The negotiation of a NWFZ can effectively begin piecemeal. WALLACE & STAPLES, *supra* note 118, at 14–17.

tion Strategy and is “the only major intergovernmental initiative for the Arctic involving all eight Arctic states.”¹²³

The Arctic Council already includes participation for indigenous peoples and has six working groups devoted to environmental issues.¹²⁴ However, the Arctic Council lacks the ability to impose any binding environmental regulation based on its scientific studies, a permanent source of funding, and legal status as an international organization.¹²⁵ Scandinavian states have often been footing the bill for the projects undertaken by the Arctic Council.¹²⁶ Considering the complex web of international treaties pertaining to the Arctic, the Arctic Council is in need of a legal mandate to avoid becoming a defunct body, and to prevent unorganized and uncoordinated approaches to oil and natural gas development as continental shelf boundaries are negotiated and extended and the Arctic continues to melt.¹²⁷

B. *Leading the Charge: Proposal*

Norway, Denmark, and Sweden have announced common interests in chairing the Arctic Council, and consecutively hold the chairmanship until 2012.¹²⁸ The Nordic Council, of which all three of these states are members, has already recommended moving toward an expanded role for the Arctic Council as the primary model of Arctic governance.¹²⁹ In addi-

¹²³ Members of the Arctic Council are: the United States, Canada, Russia, Denmark, Sweden, Norway, Finland, and Iceland. Evan T. Bloom, *Establishment of the Arctic Council*, 93 AM. J. INT'L. L. 712 (1999).

¹²⁴ These working groups include: the Arctic Contaminants Action Program (ACAP), Arctic Monitoring and Assessment Programme (AMAP), Conservation of Arctic Flora and Fauna (CAFF), Emergency Prevention, Preparedness and Response (EPPR), Protection of the Arctic Marine Environment (PAME), and the Sustainable Development Working Group (SDWG). *Working Groups*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/working-groups> (last visited Jan. 2, 2012).

¹²⁵ See Bloom, *supra* note 123, at 718–22 (describing these impotencies).

¹²⁶ *Id.* at 718–19 (“Norway pays the secretariat for AMAP, Iceland for PAME, Iceland and the United States for CAFF, and Denmark provides most of the funding for the Indigenous Peoples’ Secretariat.”).

¹²⁷ Timo Koivurova, *Alternatives for an Arctic Treaty: Evaluation and a New Proposal* 17 REV. EUR. CMTY. & INT'L ENVTL. L. 14, 26 (2008).

¹²⁸ *Norwegian, Danish, and Swedish Common Objectives for their Arctic Council Chairmanships 2006–2013*, ARCTIC COUNCIL (Apr. 7, 2011), <http://www.arctic-council.org/index.php/en/about-us/chairmanship/89-resources/about>.

¹²⁹ See NORDIC COUNCIL, COMMITTEE PROPOSAL ON JURISPRUDENTIAL RESEARCH IN THE MARINE AREAS IN THE NORTH AND AN ARCTIC TREATY § 6 (2006) (“The Nordic Council recommends to the Nordic Council of Ministers that efforts be made, in co-operation with the Arctic Council, to establish an Arctic treaty.”), available at <http://www.norden.org/en/nordic-council/cases/a-1392-medborger>. The Nordic Council is an inter-parliamentary union and also includes Finland, Iceland and the territories of Greenland, the Faroe Islands, and the Åland Islands. In 2006 it proposed, “The Nordic Council recommends to the Nordic Council

tion, these states have already taken the initiative to make the financial resources available for a permanent secretariat until the end of 2012.¹³⁰

The inclusion of Scandinavian interests in environmental protection, indigenous rights, and security in a proposal regarding the Arctic is key for several reasons. The Scandinavian states have much to contribute to informing sound policy for managing Arctic resources. For example, implementing the Scandinavian approach to sustainable development under agreements such as OSPAR and the 1993 Agreement can serve as a balancing mechanism to offset aggressive hydrocarbon exploration and exploitation. Ensuring the enforcement of precautionary measures and promoting a sustainable development approach in the Arctic is of interest to states outside the Arctic Five as well.¹³¹

The international community also has an interest in the inclusion of the rights of indigenous groups in resource management decisions. Supporting the incorporation of traditional knowledge of indigenous groups into resource management policies may help slow the effects of global climate change.¹³² In addition, preserving the livelihoods of indigenous groups such as the Greenland Inuit and Sami are essential to enriching the world's cultural diversity.¹³³

Scandinavian states can also lead the discussion of Arctic denuclearization. Danish and Norwegian membership in NATO as well as the Danish experience at Thule air base can assist in providing the political will necessary for the establishment of a NWFZ in the Arctic. The creation of a NWFZ in the Arctic will assist NWS in rising to the challenge set forth by

of Ministers that efforts be made, in co-operation with the Arctic Council, to establish an Arctic treaty." *Nordic Council*, NORDEN, <http://www.norden.org/en/nordic-council> (last visited Jan. 2, 2012).

¹³⁰ See ARCTIC COUNCIL, *supra* note 128.

¹³¹ See Neva Collins, *Environment*, in U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES, at 95–97, U.N. Doc. ST/ESA/328, U.N. Sales No. 09.VI.13 (2009) (summarizing the impacts of global climate change upon the environment and the world's indigenous peoples).

¹³² See *id.* at 94, 102, 115 (noting the important role traditional knowledge of biodiversity can play and recognition of indigenous groups in sustainable development by the Johannesburg Plan of Implementation); see also KESKITALO, *supra* note 22, at 104–07 (discussing mechanization of reindeer herding).

¹³³ Despite being a numerical minority, indigenous groups speak a majority of the world's languages and are in danger of extinction. See Naomi Kipuri, *Culture*, in U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES, at 57–67, U.N. Doc. ST/ESA/328, U.N. Sales No. 09.VI.13 (2009) (acknowledging the value of indigenous language, spiritual belief systems, social institutions, and traditional knowledge in enriching the world's culture).

the NPT to rid the world of nuclear weapons, and provide a more secure, transparent, and accountable environment for the entire globe.¹³⁴

A lack of political will from other members of the Arctic Council may inhibit the creation of any type of binding treaty framework to govern the Arctic, but strengthening the capacity of the Arctic Council to address the issues it already deals with is not beyond the scope of viability.¹³⁵ Moreover, enhancing the capacity of the Arctic Council provides the distinct advantages of: formalizing and integrating an already existing web of treaties; a short time frame; low cost; and manageable structural changes, which can assist in developing the consensus needed for this initiative. In addition, indigenous groups could retain their status as permanent participants within the working groups of the Council, ensuring that their consultation continues to play an important role in decision making about resource management.

The Scandinavian states should lead the Arctic Council to establish a working group designed specifically to audit and consider proposals for a comprehensive Arctic treaty, that have already been made by observers within the Arctic Council.¹³⁶ The Scandinavian states should lead this push to protect their interests in the Arctic, as they are directly involved in regions where the potential for conflicting resource management strategies to develop is high, such as the Lomonosov Ridge and the Barents Sea.¹³⁷ Any treaty proposal should not seek to supplant the work of other international treaties such as UNCLOS, OSPAR, the 1993 Agreement between Denmark, Finland, Iceland, Norway and Sweden, or MARPOL 73/78, but rather, to harmonize these approaches to regulating oil and natural gas exploration and development on the extended continental shelves.

Drawing upon OSPAR, an Arctic treaty should at minimum require states to implement the precautionary principle, the polluter pays principle, and to utilize best available techniques, best environmental practices, and

¹³⁴ NPT, *supra* note 111 (The preamble to the NPT was written in the spirit of “desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.”).

¹³⁵ See Oran Young, *Whither the Arctic? Conflict or Cooperation in the Circumpolar North* 45 POLAR RECORD 73, 79–81 (2009) (suggesting that a lack of political will inhibit the Arctic Council from transitioning into a formal regulatory organization).

¹³⁶ See Koivurova, *supra* note 127, at 23 (discussing such proposals made by WWF Arctic, Linda Nowlan, and Rosemary Rayfuse).

¹³⁷ See generally *supra* Part III.A (describing the potential for conflict in the Lomonosov region and the Barents Sea). See KOIVUROVA & MOLENAAR, *supra* note 65 and accompanying text (noting the conflicting obligations of states party to UNCLOS and OSPAR with respect to hydrocarbon exploitation).

the latest developments in technology to minimize negative impacts on the environment.¹³⁸ A mechanism for resolving disputes arising under the treaty regarding the application of these principles must be clearly designated and agreed to by all parties. In order to avoid technical problems, such as those encountered with the enforcement of MARPOL 73/78,¹³⁹ an Arctic treaty should also include a monitoring, investigatory, and reporting regime modeled after that of the 1993 Agreement, providing for mutual assistance and protocols for emergency disaster response.¹⁴⁰ Such provisions serve to ensure the sustainable development of Arctic resources in a manner consistent with the current Scandinavian approach.

An Arctic Treaty that formalizes the current Arctic Council into a formal international organization with a legal mandate is a proposal that may be well suited to Scandinavian interests, as the Arctic Council already includes participation for indigenous groups. Whether or not such a proposal is adopted, the Arctic treaty working group should invite the participation of indigenous groups as permanent participants. Consistent with ILO Convention 169 and UNDRIP, an Arctic treaty should involve indigenous groups in drafting and provide for their consultation on decisions regarding international resource management.¹⁴¹ Finally, alongside the Arctic treaty working group, a specific working group should be designated to facilitate openness and dialogue as to the development of a NWFZ, in accordance with obligations under the NPT and the North Atlantic Treaty.

V. CONCLUSION

This Note stops just short of suggesting the appropriate treaty regime for Arctic governance. However, the Arctic Council is more than sufficiently equipped at this time to establish a working group to begin discussion of such a treaty. What remains to be seen is which states will take the initiative to do so.

The UNCLOS continental shelf delimitation framework leaves the resolution of disputes up to international diplomacy. The interests of Scandinavian states in environmental resource management, indigenous inclusion, and security are at risk for neglect and exploitation in both the Lomonosov Ridge dispute and the Norwegian-Russian maritime delimitation

¹³⁸ See *supra* note 70 and accompanying text (defining these principles).

¹³⁹ See *supra* Part III.B.1 (noting the technical difficulties associated with enforcement of MARPOL 73/78).

¹⁴⁰ 1993 Agreement, *supra* note 67, art. 2–8.

¹⁴¹ ILO Convention 169, *supra* note 85, art. 15 (requiring the rights of these indigenous and tribal peoples to be specially safeguarded and requiring that “governments shall establish or maintain procedures through which they shall consult these peoples”); UNDRIP, *supra* note 85, art. 32.2 (requiring states to “consult and cooperate in good faith with the indigenous peoples concerned . . .”).

treaty. As pressure to develop the Arctic's resources mount, conflicting development strategies between the Arctic Five threaten a sustainable and precautionary approach to natural resource exploitation. Scandinavian indigenous groups, while included in the Arctic Council and Scandinavian governments, face exclusion from natural resource management decisions in the Arctic that directly influence their livelihood and survival. Finally, the security interests of the Arctic Five are not at odds, and the creation of a NWFZ is long overdue.

Considering the gaps in the current legal framework governing the Arctic, Scandinavian states have a strong incentive to lead the way toward the creation of a comprehensive multilateral Arctic treaty. Such a treaty could provide Scandinavian states with a mechanism for ensuring a sustainable approach to Arctic resource management, honoring the rights of their respective indigenous groups, and achieving denuclearization of the Arctic. Because UNCLOS ultimately leaves the resolution of conflicting continental shelf claims up to international diplomacy, Scandinavian states must develop a strategic approach to ensure these national interests are protected and that this important region does not devolve into a lawless frontier. The best route to resolving Arctic sovereignty, from a Scandinavian perspective, is the creation of a working group within the Arctic Council to consider proposals for an Arctic treaty.