

# AN EVALUATION OF RUSSIA'S IMPENDING CLAIM FOR CONTINENTAL SHELF EXPANSION: WHY RULE 5 WILL SHELVE RUSSIA'S SUBMISSION

## INTRODUCTION

In August of 2007, a Russian ship, after plowing for over a week through layers of Arctic ice, released a mini-submarine, which dropped a titanium cast of the Russian flag onto the Arctic floor.<sup>1</sup> Although the actual act of planting the flag has been dismissed as irrelevant,<sup>2</sup> the underlying motivation is not. In effect, the dropping of the titanium cast is a symbol of Russia's legal claim under the United Nations Convention on the Law of the Sea (UNCLOS) to a triangular area (the Region) of the Arctic Circle, the area located between Russia's Kola Peninsula to the west and the Chutoka Peninsula to the east, with the tip stretching to the North Pole.<sup>3</sup> The total area measures about 460,000 square miles and is believed to contain almost ten billion tons of gas and oil deposits.<sup>4</sup>

This land grab is not unprecedented, nor unexpected. Rather, the claim is actually a resubmission of Russia's initial 2001 claim for territorial expansion in the Arctic Circle, which was considered by the governing body of continental shelf expansion, the U.N. Commission on the Limits of the Continental Shelf (CLCS or Commission),<sup>5</sup> and subsequently dismissed with a recommendation that Russia produce a revised filing.<sup>6</sup>

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<sup>1</sup> Adrian Blomfield, *Russian Submarine Plants Flag at North Pole*, DAILY TELEGRAPH (London), Aug. 3, 2007, <http://www.telegraph.co.uk/news/worldnews/1559264/Russian-submarine-plants-flag-at-North-Pole.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Luke Harding, *Kremlin Lays Claim to Huge Chunk of Oil-Rich North Pole*, GUARDIAN (London), June 28, 2007, International, at 19.

<sup>5</sup> Marc Benitah, *Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS*, ASIL INSIGHTS (Am. Soc'y of Int'l Law, Washington, D.C.), Nov. 8, 2007, available at <http://www.asil.org/insights071108.cfm>.

<sup>6</sup> The Secretary-General, *Oceans and the Law of the Sea: Report of the Secretary General, Addendum*, ¶ 41, delivered to the General Assembly, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002).

While Russia's 2001 claim was the first of its kind,<sup>7</sup> the years since the 2001 dismissal have seen a drastic increase in international activity relating to territorial acquisition in the Arctic region. Unsurprisingly, with the amount of territory and natural resources at stake, Russia is not without competition. Four other nations also have various territorial interests due to their geographic proximities to the Arctic Circle—the United States (through Alaska), Denmark (through Greenland), Canada, and Norway.<sup>8</sup> Indeed, Russia's 2001 claim for territorial expansion was based on the Lomonosov Ridge,<sup>9</sup> which passes through Greenland to Canada's Ellesmere Island.<sup>10</sup> Canada and Denmark have taken actions to suggest that Russia's claim will not go unchallenged. Recently, Denmark announced that it would submit its own claim for territorial expansion, while Canada has announced plans to build eight armed ships capable of cutting through ice.<sup>11</sup> In 2006, Canada and Denmark undertook a dual scientific expedition known as "The Continental Shelf Project" to collect the bathymetric, seismic, and gravity data of the Lomonosov Ridge to establish claims to territorial expansion under UNCLOS.<sup>12</sup> The same year, Norway went one step further when it officially submitted its own claim for continental shelf expansion, including an express reservation of the right to claim additional territory.<sup>13</sup>

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<sup>7</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 956, 969 (2002).

<sup>8</sup> Blomfield, *supra* note 1.

<sup>9</sup> The claim was based on the assertion that the Lomonosov Ridge was actually a natural extension of the Eurasian continent. Benitah, *supra* note 5.

<sup>10</sup> Blomfield, *supra* note 1.

<sup>11</sup> *Id.*

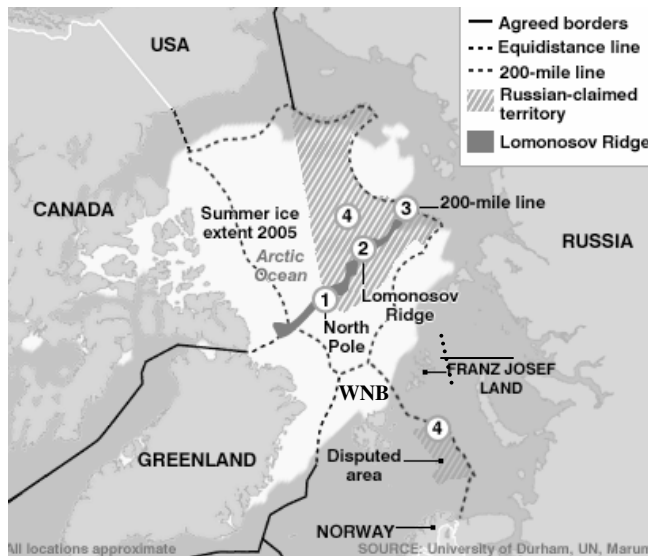
<sup>12</sup> The Continental Shelf Project, LORITA-1 (Lomonosov Ridge Test of Appurtenance): Fieldwork During April/May 2006 North of Canada/Greenland, [http://a76.dk/expeditions\\_uk/lorita-1\\_uk/](http://a76.dk/expeditions_uk/lorita-1_uk/) (last visited June 18, 2009) [hereinafter The Continental Shelf Project]. Bathymetry measures water depth relative to sea level in a given area. U.S. Geological Survey, Coastal & Marine Geology InfoBank, "Bathymetry" Definition, <http://walrus.wr.usgs.gov/infobank/programs/html/definition/bath.html> (last visited June 18, 2009). Seismic data uses sound-wave reflection to map an ocean floor. U.S. Geological Survey, Woods Hole Science Center, Seismic Profiling Systems, <http://woodshole.er.usgs.gov/operations/sfmapping/seismic.htm> (last visited June 18, 2009). Gravity studies measure the attraction of a geologic entity by the Earth. U.S. Geological Survey, Coastal & Marine Geology InfoBank, "Gravity" Definition, <http://walrus.wr.usgs.gov/infobank/programs/html/definition/grav.html> (last visited June 18, 2009).

<sup>13</sup> Norwegian Royal Ministry of Foreign Affairs, *Continental Shelf Submission of Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea: Executive Summary*, at 6, delivered to the Comm'n on the Limits of the Continental Shelf (Nov. 27, 2006), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_exec\\_sum.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf) [hereinafter *Norwegian Submission*]. For further discussion of the Norwegian claim, see *infra* Part II.B.2.

Though virtually all of the relevant information regarding continental shelf expansion claims remains confidential,<sup>14</sup> Figure 1 provides a general estimate of Russia's claim produced by the University of Durham.<sup>15</sup>

Part I of this Comment discusses UNCLOS mechanisms for continental shelf expansion, as well as the non-treaty-based obstacles Russia must overcome to see its revised filing ripen into a territorial acquisition about half the size of Western Europe. To accomplish this, Part II looks at Russia's 2001 submission, as well as the subsequent reactions of concerned nation-states to try to predict what a revised Russian claim would contain.

FIGURE 1: PREDICTED AREA OF RUSSIAN CLAIM (SOURCE: UNIVERSITY OF DURHAM)



<sup>14</sup> Comm'n on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Annex II, U.N. Doc. CLCS/40/Rev.1 (July 2, 2004) [hereinafter *CLCS Rules of Procedure*].

<sup>15</sup> This figure was published in *Canada to Strengthen Arctic Claim*, BBC NEWS, Aug. 10, 2007, <http://news.bbc.co.uk/2/hi/americas/6941426.stm>. The label for the Western Nansen Basin (WNB), which is discussed in Part II.B.2, has been added by the author.

Using this prediction, Part III shows that without outside delimitation agreements between all of the countries concerned, the current structure of the CLCS makes any decision on Arctic sovereignty meaningless for resolving territorial disputes.

Finally, this Comment concludes that current assessments of the CLCS's effectiveness as a mediator of maritime boundary disputes drastically overestimate the benefits of the Commission in such situations, and that unless Article 76 of UNCLOS and Rule 5(a) of Annex I of the CLCS Rules of Procedure<sup>16</sup> are modified, a successful Russian submission will not legally expand the country's continental shelf.

## I. THE BACKGROUND OF CONTINENTAL SHELF EXPANSION

Though the notions of continental shelves and their expansion are relatively modern ideas,<sup>17</sup> both concepts have been reformulated numerous times since their inception.<sup>18</sup> Nevertheless, as this Comment will discuss, one of the problems that the reformulations intended to remedy still exists, and will likely render Russia's future claim fruitless.

### A. *The History of Continental Shelf Expansion*

The continental shelf doctrine was created for the purpose of resource exploitation. In 1945, President Harry S. Truman proclaimed that the resources underneath the U.S. continental shelf were the sole property of the United States.<sup>19</sup> Thirteen years later, the international community sought to codify the law of the sea through four multilateral treaties produced by the first U.N. Conference on the Law of the Sea.<sup>20</sup> In its initial formulation, the 1958 Convention on the Continental Shelf (1958 Convention) defined the term "continental shelf" as the area "outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent

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<sup>16</sup> The relevant provision is paragraph 5 of the Annex of the Rules of Procedures. The term "Rule 5" will be used in this Comment to refer to that provision.

<sup>17</sup> See John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back From Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 3-4 (2006) (discussing the first attempt at continental expansion by President Harry S. Truman in 1945).

<sup>18</sup> *Id.* at 3-6.

<sup>19</sup> Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945). Truman's claim was in response to "rapidly develop[ing]" improvements in technology that made it "apparent that vast sources of economic goods and uses lay off the coasts of the U.S." Duff, *supra* note 17, at 3.

<sup>20</sup> Duff, *supra* note 17, at 4.

waters admits of the exploitation of the natural resources of the said areas.”<sup>21</sup> In this early model, there was no mention of continental shelf expansion through any type of geological claim.

Furthermore, two critiques were leveled at this initial formulation, one attacking the definition's practicality and the other its equity.<sup>22</sup> The practicality critique attacked the phrase “exploitation of the natural resources”<sup>23</sup> as being too imprecise, while the equity critique stated that basing the definition of “continental shelf” on the ability to exploit resources “naturally favoured developed States with more advanced technical capabilities.”<sup>24</sup> Under the equity objection, states with advanced technology could not only extend their continental shelves well past those of less advanced states, but could theoretically extend the shelves indefinitely as well.<sup>25</sup>

Eleven years after the 1958 Convention, the International Court of Justice (ICJ) handed down an opinion that contained one of the earliest official recognitions of the concept of natural prolongation.<sup>26</sup> In the *North Sea Continental Shelf* cases, the ICJ articulated the fundamental principle “that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.”<sup>27</sup> This idea that a nation could extend its rights to harvest resources through a “prolongation” of that nation's territory would become the basis of UNCLOS Article 76, the modern doctrine of continental shelf expansion.<sup>28</sup>

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<sup>21</sup> Convention on the Continental Shelf art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

<sup>22</sup> Huw Llewellyn, *The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain, and the United Kingdom*, 56 INT'L & COMP. L.Q. 677, 680 (2007).

<sup>23</sup> Convention on the Continental Shelf, *supra* note 21, art. 1.

<sup>24</sup> Llewellyn, *supra* note 22, at 680.

<sup>25</sup> I D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 493–94 (I.A. Scheerer ed., 1982).

<sup>26</sup> *Id.* at 495.

<sup>27</sup> *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 31 (Feb. 20).

<sup>28</sup> UNCLOS states that “[t]he continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the *natural prolongation* of its land territory to the outer edge of the continental margin . . . .” U.N. Convention on the Law of the Sea art. 76(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (emphasis added).

*B. The Current Status of UNCLOS in Nations with Potential Claims to the Arctic Circle*

As mentioned above, the 1958 Convention was an attempt by the international community to codify the emerging international law of the sea. However, because the treaty's provisions were "ambiguous in some areas and completely deficient in others," a second U.N. Conference on the Law of the Sea was convened, but "[e]fforts to close some of the gaps and clarify some of the ambiguities . . . failed."<sup>29</sup> In 1973, due to strong international support, a third U.N. Conference on the Law of the Sea began with the intention of creating a "comprehensive law of the sea treaty."<sup>30</sup> Nine years later, in 1982, UNCLOS opened for signature.<sup>31</sup>

On June 24, 1996, Norway was the first nation with a potential claim to the Arctic region to ratify UNCLOS.<sup>32</sup> On March 12, 1997, Russia also ratified UNCLOS.<sup>33</sup> It was another six years before Canada ratified the Convention on November 7, 2003, and Denmark ratified the Convention the following year.<sup>34</sup> As of publication, the United States has not ratified UNCLOS.

Following ratification, each nation has a ten-year period to submit its claims for territorial expansion.<sup>35</sup> The ten-year limit for claims does not apply to all filings, just the "particulars" of the claim to expansion.<sup>36</sup> Re-filings are covered by a separate provision, whereby a country may re-file a claim within

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<sup>29</sup> Duff, *supra* note 17, at 4.

<sup>30</sup> *Id.* at 5. At the time of the convention, President Richard Nixon advocated a very simple mechanism for continental shelf expansion whereby all countries would renounce all claims to resources beyond the point at which the high seas reached a depth of 200 meters. *Id.* at 5–6.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, United Nations Convention on the Law of the Sea, <http://treaties.un.org/Pages/Treaties.aspx?id=21&subid=A&lang=en> (follow "United Nations Convention on the Law of the Sea" hyperlink (last visited June 18, 2009) [hereinafter UNTC Database].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2.

<sup>35</sup> UNCLOS, *supra* note 28, Annex II, art. 4. The provision states:

Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

*Id.*

<sup>36</sup> *Id.*

a “reasonable time.”<sup>37</sup> Consequently, Russia’s future claim, although likely to fall outside the ten-year limit imposed, will not be barred from submission.

However, subsequent rules adopted by the CLCS have slightly altered the ten-year time limit. Under the new rules, states that ratified the treaty before May 13, 1999, were given a uniform deadline for submissions of May 13, 2009.<sup>38</sup> For example, Brazil, having ratified UNCLOS on Dec. 22, 1988,<sup>39</sup> was not barred from submitting a claim in May 2004, over six years after the expiration of its ten-year period.<sup>40</sup> On the other hand, since the United States has not yet ratified the treaty, its ten-year period has yet to begin.

### C. *The U.N. Commission on the Limits of the Continental Shelf*

Assuming a country files its submission within the appropriate time limit, if it seeks to extend its continental shelf under the provisions of Article 76, it must submit a very specific request to the CLCS.<sup>41</sup>

The CLCS derives its authority from Annex II, Article 1 of UNCLOS, which, in addition to creating the CLCS, also lays out that body’s composition.<sup>42</sup> The enabling provisions state that the CLCS shall consist of 21 members, each elected by the states parties to the convention.<sup>43</sup> Each member must be an expert in the field of geophysics, geology, or hydrography.<sup>44</sup>

<sup>37</sup> *Id.* Annex II, art. 8 (“In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission.”).

<sup>38</sup> *CLCS Rules of Procedure*, *supra* note 14, Rule 45(a).

<sup>39</sup> UNTC Database, *supra* note 32, at 2.

<sup>40</sup> Chairman of the CLCS, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, ¶ 4(f), U.N. Doc. CLCS/52 (Oct. 6, 2006) [hereinafter *Statement by the CLCS Chairman*].

<sup>41</sup> UNCLOS, *supra* note 28, Annex II, art. 4.

<sup>42</sup> *Id.* Annex II, art. 1 (“In accordance with the provisions of article 76, a Commission on the Limits of the Continental Shelf beyond 200 nautical miles shall be established in conformity with the following articles.”).

<sup>43</sup> *Id.* Annex II, art. 2.1 (“The Commission shall consist of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities.”).

<sup>44</sup> *Id.* UNCLOS provides that a “list of experts shall be established and maintained in respect of . . . the field[] of . . . marine scientific research” and that such a list “shall be drawn up and maintained . . . by the Inter-governmental Oceanographic Commission.” *Id.* Annex VIII, art. 2(1)–(2); *see also* Intergovernmental Oceanographic Commission, IOC/ABE-LOS List of Experts, [http://ioc3.unesco.org/abelos/index.php?option=com\\_content&task=view&id=14&Itemid=28](http://ioc3.unesco.org/abelos/index.php?option=com_content&task=view&id=14&Itemid=28) (follow “View the list” hyperlink) (last visited June 18, 2009) (containing a list of the Advisory Body of Experts on the Law of the Sea, a list of one legal and one marine science expert from each member state).

Members are elected for five-year terms,<sup>45</sup> which means that the Commission that decided Russia's 2001 claim will not have the same composition as the one that decides its future submission. In the years since Russia's 2001 claim was dismissed, five members of the Commission—the representatives from Zambia, New Zealand, Germany, France, and Egypt—have been replaced by five new members from Australia, Togo, Romania, Portugal, and Oman.<sup>46</sup>

Following the completion of elections for a given term, the CLCS “shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.”<sup>47</sup> When a proposal is put before the Commission, “unless the Commission decides otherwise,” the proposal is sent to a seven-member sub-commission to evaluate the claim.<sup>48</sup> The sub-commission, which cannot include a member of the petitioning

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<sup>45</sup> *CLCS Rules of Procedure*, *supra* note 14, Rule 7. Elections are held at a “meeting of State Parties convened by the Secretary-General,” at which two-thirds of member states would constitute a quorum. UNCLOS, *supra* note 28, Annex II, art. 2(3). After hearing nominations of various nations, the assembled states elect the nominees that receive a two-thirds majority of the voting states with the provision that each U.N. geographic region must have at least three members on the commission at all times. *Id.* The relevant geographic regions are Africa, the Americas, Asia, Europe and Oceania. U.N. Statistics Division, Composition of Macro Geographical (Continental) Regions, Geographical Sub-Regions, and Selected Economic and Other Groupings, <http://unstats.un.org/unsd/methods/m49/m49regin.htm> (last visited June 18, 2009).

<sup>46</sup> See U.N. Div. for Ocean Affairs & the Law of the Sea, Comm'n on the Limits of the Continental Shelf, Membership of the Commission from 1997 to 2007, [http://www.un.org/Depts/los/clcs\\_new/commission\\_members\\_1997\\_2002.htm](http://www.un.org/Depts/los/clcs_new/commission_members_1997_2002.htm) (last visited June 18, 2009).

<sup>47</sup> UNCLOS, *supra* note 28, art. 76(8). The full provision states:

Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

*Id.*

<sup>48</sup> *Id.* Annex II, art. 5. The full provision states:

Unless the Commission decides otherwise, the Commission shall function by way of sub-commissions composed of seven members, appointed in a balanced manner taking into account the specific elements of each submission by a coastal State. Nationals of the coastal State making the submission who are members of the Commission and any Commission member who has assisted a coastal State by providing scientific and technical advice with respect to the delineation shall not be a member of the sub-commission dealing with that submission but has the right to participate as a member in the proceedings of the Commission concerning the said submission. The coastal State which has made a submission to the Commission may send its representatives to participate in the relevant proceedings without the right to vote.

*Id.*

country,<sup>49</sup> then develops and submits its recommendation to the full 21-member body.<sup>50</sup> The full Commission then votes on the sub-commission's recommendation; a two-thirds majority of members present and voting is required to extend the nation's continental shelf beyond the standard limits.<sup>51</sup>

If a country disagrees with the recommendation of the CLCS, it may offer a revised submission to the Commission "within a reasonable time."<sup>52</sup> Since the Commission has no power to explicitly reject a country's claim, commentators have compared the situation to a potential game of "ping pong between the Commission and the coastal State," in which the State and Commission volley the proposal back and forth without any hope for resolution.<sup>53</sup> While the Commission's power thus appears purely advisory, and may only be exercised in response to official submissions,<sup>54</sup> Article 76(8) provides that should a state choose to comply with the limits recommended by the CLCS, such limits will become "final and binding."<sup>55</sup>

Thus, the dynamic between a submitting country and the CLCS differs from a game of ping-pong in the sense that a submitting country can never lose. Rather, the nation seeking continental shelf expansion may offer as many submissions as it wishes until one produces the desired recommendation. If the recommendation does not prejudice any other nation's boundary interests,<sup>56</sup> the recommendation may become binding.<sup>57</sup>

The potential for prejudice in a given submission could effectively destroy the binding nature of any recommendation produced by the Commission. Rule 5(a) of Annex I of the CLCS Rules of Procedure states that "[i]n cases where a land or maritime dispute exists the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute."<sup>58</sup> However,

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

<sup>50</sup> *Id.* Annex II, art. 6(1).

<sup>51</sup> *See id.* Annex II, art. 6(2).

<sup>52</sup> *Id.* Annex II, art. 8.

<sup>53</sup> Llewellyn, *supra* note 22, at 682.

<sup>54</sup> *See* UNCLOS, *supra* note 28, Annex II, art. 3(1).

<sup>55</sup> *Id.* art. 76(8).

<sup>56</sup> *See infra* notes 59–60 and accompanying text.

<sup>57</sup> *See supra* note 55 and accompanying text.

<sup>58</sup> *CLCS Rules of Procedure*, *supra* note 14, Annex I, Rule 5(a). Rule 5 provides:

(a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

the concerned country may waive its Rule 5 protection on the grounds that “recommendations approved by the Commission . . . shall not prejudice the position of States which are parties to a land or maritime dispute.”<sup>59</sup> UNCLOS Article 76(10) provides that “[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”<sup>60</sup> According to Rule 5, a country submitting a proposal for continental shelf expansion that affects an unresolved maritime dispute would not be able to extend its continental shelf into any of the areas concerning that dispute because the CLCS could not offer such a recommendation.

As Huw Llewellyn has pointed out, the fact that the CLCS cannot prejudice the interests of feuding states means that the Commission “has neither a mandate to determine shelf boundaries between coastal States nor to settle disputes.”<sup>61</sup> However, after offering this rather bleak assessment of the Commission, Llewellyn explained that the brief history of the CLCS offers reason for hope. Because Rule 5 protects the interests of non-submitting nations, states have commented on submissions relating to their own interests, but because they “consider their positions sufficiently protected by Article 76(10),” they have not objected to the exercise of the Commission’s jurisdiction.<sup>62</sup> Llewellyn believes that the current situation, in which countries will always consent to Commission jurisdiction based on the knowledge that they are protected by Article 76(10), allows the CLCS to play an important role in treaty negotiations, even in situations involving contentious maritime disputes.<sup>63</sup> As a result, the “Commission’s Rules and practice in fact allow it to help create greater certainty over disputed areas, and thereby promote the conditions in which the interested/disputing States may be able to reduce the points of contention between them.”<sup>64</sup> Although Llewellyn’s analysis of CLCS power is logically sound, for the reasons discussed in the Conclusion, it is

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(b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute.

*Id.* Annex I, Rule 5.

<sup>59</sup> *Id.* Annex I, Rule 5(b).

<sup>60</sup> UNCLOS, *supra* note 28, art. 76(10).

<sup>61</sup> Llewellyn, *supra* note 22, at 684.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

sorely misplaced.<sup>65</sup> Furthermore, it is likely that the Rule 5 block will prove the greatest obstacle to an extended Russian continental shelf.<sup>66</sup>

#### *D. The Limits on State Control and Expansion of the Continental Shelf*

As a general standard, Article 76 establishes that each nation's continental shelf extends 200 nautical miles "from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."<sup>67</sup> The area covered by the shelf is crucial to a coastal nation because UNCLOS gives the controlling country exclusive rights to explore the shelf and exploit its natural resources.<sup>68</sup> However, when a nation wishes to extend its continental shelf beyond the standard 200 nautical miles, it can do so by showing that the claimed area is a "natural prolongation" of the country's land territory.<sup>69</sup>

The Article 76 limits on a nation's continental shelf are based on two different, but closely related geologic entities: the continental shelf and the continental margin. Article 76(1) defines the continental shelf either as 200

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<sup>65</sup> See *infra* Conclusion.

<sup>66</sup> See *infra* Part III.C.

<sup>67</sup> UNCLOS, *supra* note 28, art. 76(1). The relevant portion of the provision states:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

*Id.*

<sup>68</sup> *Id.* art. 77. Article 77 states:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

*Id.*

<sup>69</sup> *Id.* art. 76(1).

nautical miles from the nation's baselines, or "throughout the natural prolongation of its land territory to the outer edge of the continental margin."<sup>70</sup> Similarly, Article 76(3) defines the continental margin as the "submerged prolongation of the land mass of the coastal State."<sup>71</sup> Thus, since a country may not extend its continental shelf past the limits of its continental margin, the limits on its continental margin serve as the absolute extent to which it may extend its continental shelf.<sup>72</sup>

Article 76(4), which is called the "affirmative" provision of Article 76, represents the "maximum potential extent of entitlement" the petitioning country may claim.<sup>73</sup> The provision states that the continental shelf shall not extend beyond the point where, measured from the foot of the continental slope, "the thickness of the sedimentary rocks" measures less than 1% or extends past 60 nautical miles.<sup>74</sup> The CLCS Guidelines explain that these two limits form a disjunctive, whereby the satisfaction of one of the two criteria—the thickness of the sedimentary rocks or 60 nautical miles from the foot of the continental slope—"suffices to provide the basis for entitlement to delineate the outer limits of an extended continental shelf."<sup>75</sup> Thus, as long as a line may be drawn such that a given point does not extend past the point of required sedimentary cover, or 60 nautical miles from the foot of the continental slope, that line will represent the furthest possible points to which a nation may extend its continental shelf.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* art. 76(3). Article 76(3) explains further that the continental margin "consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." *Id.*

<sup>72</sup> *Id.* art. 76(3)–(5); CLCS, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, ¶¶ 2.2.3–2.2.4, U.N. Doc. CLCS/11 (May 13, 1999) [hereinafter *CLCS Guidelines*].

<sup>73</sup> See *CLCS Guidelines*, *supra* note 72, ¶¶ 2.1.4–2.1.6. The relevant portion of Article 76(4) reads:

(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

UNCLOS, *supra* note 28, art. 76(4)(a)(i)–(ii).

<sup>74</sup> UNCLOS, *supra* note 28, art. 76(4)(a)(i)–(ii).

<sup>75</sup> *CLCS Guidelines*, *supra* note 72, ¶ 2.3.2.

Conversely, the limits in Article 76(5) serve as a constraint.<sup>76</sup> This provision states that the continental shelf shall not extend beyond “350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath.”<sup>77</sup> Again, the CLCS Guidelines identify this formulation as a disjunctive where the line may be drawn as long as one of the limits is satisfied.<sup>78</sup> Thus, according to Article 76(5), a nation’s continental shelf is valid as long as a given point does not fall beyond either 350 nautical miles from the country’s baseline, or 100 nautical miles from its 2,500-meter isobath.<sup>79</sup>

Figure 2 demonstrates the relationship between the affirmative and negative provisions through the use of a bird’s eye view of a hypothetical country’s shoreline.<sup>80</sup> In the top box, the 1% thickness line and the foot of the continental slope plus the 60-nautical-mile line are used together to form the affirmative provisions described. In the middle box, the “distance constraint” (generated only with the 350-nautical-mile limit) operates in conjunction with the “depth constraint” (generated with the 2,500 meter isobath plus the hundred-nautical mile constraint) to form the constraint line of the continental shelf. Finally, in the bottom box, the continental shelf limits from the middle box combines with the lines from Article 76(4) in the top box to create the outer limits of a country’s continental shelf. However, this is not the end of the analysis.

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<sup>76</sup> *Id.* ¶ 2.1.7.

<sup>77</sup> UNCLOS, *supra* note 28, art. 76(5). The provision states, in full:

The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

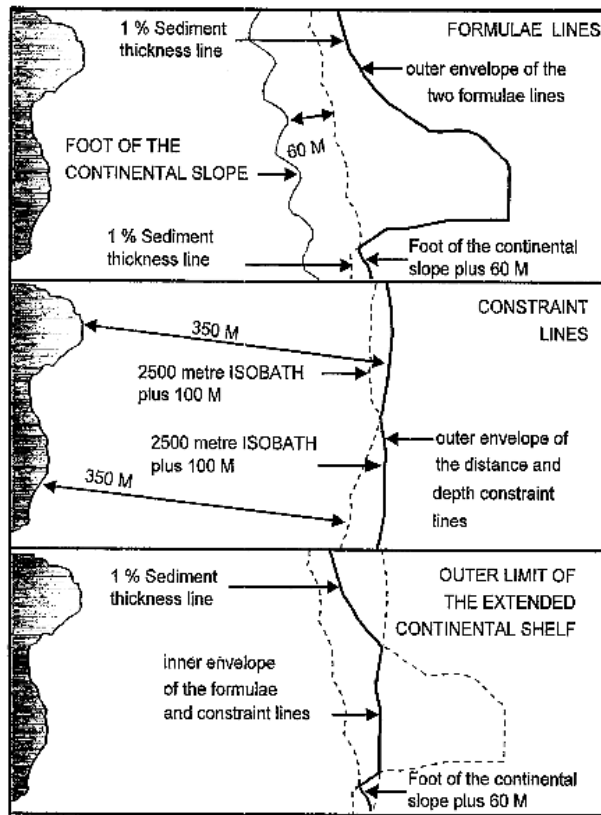
*Id.*

<sup>78</sup> *CLCS Guidelines*, *supra* note 72, ¶¶ 2.1.4–2.1.5.

<sup>79</sup> *Id.*

<sup>80</sup> Figure 2 is reproduced from *CLCS Guidelines*, *supra* note 72, at 22 fig. 2.7.

FIGURE 2: HYPOTHETICAL APPLICATION OF ARTICLE 76 CONSTRAINTS  
(SOURCE: CLCS SCIENTIFIC GUIDELINES)



Article 76(6) states that constraint lines drawn in accordance with Article 76(5) may not exceed the 350-nautical-mile distance constraint shown in Figure 2, except where “submarine elevations . . . are natural components of the continental margin.”<sup>81</sup> Therefore, while a constraint line stemming from a

<sup>81</sup> UNCLOS, *supra* note 28, art. 76(6). The full provision states:

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

submarine elevation would operate as described above, all other natural prolongations would be subject to the distance limit, even when the depth constraint would allow the shelf to extend further. As such, for non-submarine elevation natural prolongations, the 350-nautical-mile limit may be used to extend the constraint line beyond the point allowed by the depth constraint, but the depth constraint could not be used to extend the constraint line beyond the distance limit.<sup>82</sup> This would result in a different constraint line in the middle box, whereby the hyphenated line representing the distance constraint would also serve as the outer envelope.

Removed entirely from the shelf expansion discussion, “oceanic ridges” play no role in the extension of a continental shelf.<sup>83</sup> UNCLOS Article 76(3) provides that the “continental margin . . . does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.”<sup>84</sup> Since “oceanic ridges” are beyond the continental margin, they cannot be thought of as natural prolongations, and as such, cannot be used to extend a country’s continental shelf.<sup>85</sup> Thus, for a country to claim continental shelf expansion under the “natural prolongation” provision of Article 76(1), it must first show that the prolongation claimed is not an oceanic ridge according to the CLCS Guidelines.<sup>86</sup> However, the CLCS Guidelines reflect a good deal of confusion within the CLCS Rules of Procedure as to what circumstances may distinguish oceanic and submarine ridges.

The CLCS Guidelines identify two separate regimes for classifying underwater ridges. One would define oceanic ridges only as “oceanic spreading ridges.”<sup>87</sup> Under this strict formulation, only masses caused by fracture zones in the ocean floor would be considered oceanic ridges.<sup>88</sup> The

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*Id.* UNCLOS discusses three types of marine elevations: oceanic ridges, submarine ridges, and submarine elevations. Oceanic ridges are undersea mountains formed through tectonic processes. *Id.* art 76(3). Submarine ridges consist of non-natural elevations of the continental shelf, but are not treated as part of the continental shelf for purposes of the Convention. *Id.* art 76(6). Submarine elevations, in contrast, are “natural components of the continental margin such as its plateaux, rises, caps, banks, and spurs.” *Id.*; see *CLCS Guidelines, supra* note 72, ¶¶ 7.2.1, 7.2.3.

<sup>82</sup> See Benitah, *supra* note 5, at 3.

<sup>83</sup> *Id.* For the UNCLOS definition of oceanic ridges, see *supra* note 81.

<sup>84</sup> UNCLOS, *supra* note 28, art. 76(3).

<sup>85</sup> See Benitah, *supra* note 5, at 2–3.

<sup>86</sup> See *id.*; UNCLOS, *supra* note 28, art. 76(1).

<sup>87</sup> *CLCS Guidelines, supra* note 72, ¶ 7.2.3.

<sup>88</sup> The U.S. Geological Survey, Visual Glossary—Oceanic Spreading Ridge, <http://earthquake.usgs.gov/learning/glossary.php?term=oceanic%20spreading%20ridge> (last visited June 18, 2009), defines “oceanic spreading ridge” as a fracture zone where a break on the ocean floor allows molten material to come to the surface.

second, broader formulation would label all ridges “composed of oceanic basaltic rock” as oceanic ridges.<sup>89</sup> The CLCS Guidelines do not adopt either the strict or broad definition of oceanic ridges. Instead, they state that such considerations should be made on a case-by-case basis,<sup>90</sup> “based on such scientific and legal considerations as natural prolongation of land territory and land mass, morphology of ridges and their relation to the continental margin.”<sup>91</sup> As will be discussed in Part III, this distinction will be crucial to a future Russian claim.

The CLCS Guidelines provide two tests for determining whether a geologic entity should be considered a submarine elevation under the meaning of UNCLOS, both of which relate to the types of rocks found on the claimed area.<sup>92</sup> The first test, relating to the “active margins” of a submarine elevation, compares the “sediments and crustal material” attached to the continental margin with those found on the geological formation in question.<sup>93</sup> The second test, dealing with the “passive margins,” assesses whether the geologic formation was caused by the “breakup process” of the continent.<sup>94</sup> Since the CLCS Guidelines recognize that submarine elevations are “natural components of the continental margin,” tests that measure the similarity between the composition of the claimed elevation and the continental margin from which it arises are relevant to the overall determination of a submarine elevation.<sup>95</sup>

Attempts to characterize a geologic formation as either a submarine elevation or a submarine ridge based on dictionary definitions have been fruitless.<sup>96</sup> The better method of differentiation between the two concepts focuses on the rocks that comprise each geologic formation. Virtually all of the methods used to classify ridge formations listed in the CLCS Guidelines involve some type of volcanic or tectonic activity, rather than the breaking

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<sup>89</sup> *CLCS Guidelines*, *supra* note 72, ¶ 7.2.3. This would have the effect of labeling all ridges formed by volcanic activity “oceanic ridges.” *See id.* ¶¶ 7.2.1, 7.2.3.

<sup>90</sup> *Id.* ¶ 7.2.11.

<sup>91</sup> *Id.* ¶ 7.2.10.

<sup>92</sup> *Id.* ¶ 7.3.1.

<sup>93</sup> *Id.* ¶ 7.3.1(a).

<sup>94</sup> *Id.* ¶ 7.3.1(b).

<sup>95</sup> *Id.* ¶ 7.3.1.

<sup>96</sup> One commentator has suggested that a submarine ridge is “an elongated elevation of the sea floor, with irregular or relatively smooth topography and steep sides,” while a submarine elevation is a “submarine feature that stands above the surrounding or adjacent level of the seafloor.” Philip A. Symonds, Mike F. Coffin, George Taft & Hideo Kagami, *Ridge Issues*, in *CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE* 285, 287 (P.J. Cook & Chris Carleton eds., 2000).

apart of the continental margin that is characteristic of submarine elevations.<sup>97</sup> Therefore, if the rock composition of the claimed prolongation is volcanic in nature, it almost certainly falls under the ridge analysis described above. If, however, the composition lies closer to the continental margin of the submitting state, the analysis would likely be one of submarine elevation.

Part III will discuss these scientific requirements, in conjunction with the various responses of the concerned nations to Russia's 2001 submission, to determine the potential content of Russia's future claim.

## II. RUSSIA'S INITIAL CLAIM

Due to strict rules of confidentiality within the CLCS,<sup>98</sup> it is impossible to determine exactly which provisions Russia invoked in its original 2001 claim. However, this part will use the responses of each of the concerned countries to infer the contents of Russia's original submission and predict the nature of a future Russian claim.

### A. *Prior Attempts to Determine the Contents of Russia's Claim*

Marc Benitah used information that Russia chose not to include in its initial proposal to deduce the information it did include.<sup>99</sup> Pointing out that the 2001 Russian claim did not include the geographic maps traditionally used to show compliance with the 350-nautical-mile distance constraint, Benitah posited that "[i]f Russia's claim was based on the 'submarine ridges' clause, it likely would have felt the need to give this distance since it knew that Article 76(6) forbids the use of points on submarine ridges beyond 350 miles from the baselines of its coast."<sup>100</sup> But since the Russian proposal did not include a mention of 350 nautical miles, Benitah speculated that the 2001 claim did not include submarine ridges.<sup>101</sup>

If only analyzing the publicly released information accompanying Russia's 2001 claim, such a theory seems reasonable. However, when analyzed together with the national responses to the 2001 claim, Benitah's assertion seems less plausible.

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<sup>97</sup> See *CLCS Guidelines*, *supra* note 72, ¶ 7.2.1.

<sup>98</sup> See *CLCS Rules of Procedure*, *supra* note 14, Annex II.

<sup>99</sup> Benitah, *supra* note 5, at 287.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

## B. Norway's 2006 Submission and Response to Russia's 2001 Claim

Since Russia's initial submission, Norway has issued two official documents which, taken together, offer a great deal of information as to the content of Russia's 2001 claim and the chances of success for a future Russian submission. Norway's first response in 2002 hinted at the type of natural prolongation Russia claimed in 2001 and will likely claim in the future.<sup>102</sup> The second, Norway's own CLCS submission, offers insight on a series of maritime disputes that have the potential to eviscerate Russia's claim.<sup>103</sup>

### 1. Norway's Official Response

Norway's main point of contention in its response to Russia's 2001 filing was that Russia's claim interfered with an ongoing maritime dispute between Russia and Norway concerning the continental shelf in the Barents Sea.<sup>104</sup> However, Norway waived its right to block consideration of Russia's submission so long as the recommendation did not "prejudice matters relating to the delimitation of the continental shelf between Norway and the Russian Federation."<sup>105</sup> Furthermore, in a move not replicated by any of the other responses, Norway stated that its comments were "submitted in agreement with the Russian Federation."<sup>106</sup>

Regarding the disputed area in the Barents Sea—part of Russia's Arctic claim—Norway stated that

a sizeable area is located beyond 200 nautical miles from the respective baselines of Norway and the Russian Federation. Bathymetric and seismic data show this area to be . . . landward of the foot of the continental slope. Furthermore, no part of this area extends beyond 350 nautical miles from the baselines of either of the two coastal states.<sup>107</sup>

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<sup>102</sup> See *Norway: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf* (Apr. 2, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_\\_NORtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__NORtext.pdf) [hereinafter *Norwegian Response*].

<sup>103</sup> See *Norwegian Submission*, *supra* note 13, at 11–12.

<sup>104</sup> *Norwegian Response*, *supra* note 102, at 1, 3.

<sup>105</sup> *Id.* at 3. Although the motivations for this waiver were not discussed, the fact that every nation permitted CLCS consideration of the submission suggests that the Commission's inability to render a decision against any concerned nation's boundary interest provided sufficient protection against an adverse decision.

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.* at 3.

Given that Norway submitted these comments with Russia's knowledge and agreement, it seems likely that at least part of Russia's claim could have been subject to a 350-nautical-mile limitation. Therefore, at least part of Russia's claim likely relies on the submarine ridges clause discussed in UNCLOS Article 76(6). The basis for this inference lies in the Article 76(6) requirement that all natural prolongations claimed under the submarine ridge provision of UNCLOS fall within a 350-nautical-mile distance constraint.<sup>108</sup> If the relevant area relied on a submarine elevation, Russia would not have been subject to the distance constraint, and Norway would not have pointed out the submission's compliance with the standard. Five years later, the motivation for the particular wording of the Norwegian response became clear when Norway submitted its own proposal for continental shelf expansion to the CLCS.

## 2. *Norway's 2006 Submission*

On November 27, 2006, Norway submitted an official proposal for continental shelf expansion to the CLCS.<sup>109</sup> In the officially released summary of its proposal, Norway claimed territory beyond the 200-mile baselines in three different bodies of water: the Barents Sea, the Arctic Ocean, and the Norwegian Sea.<sup>110</sup> Though the submission claimed three different areas of seabed in the Arctic region, only two correspond to a future Russian claim.<sup>111</sup> The first area, located in the Barents Sea, referred to in the summary as the "Loop Hole,"<sup>112</sup> is marked on the map in Figure 1 as the "Disputed area." The second area, located in the Arctic Sea, referred to as the "Western Nansen Basin,"<sup>113</sup> is marked in Figure 1 as "WNB."

The Norwegian Loop Hole claim comprises at least some of the territory included in Russia's 2001 submission.<sup>114</sup> In its response to the Norwegian submission, Russia invoked its Rule 5 protection against any prejudicial decisions to Russian maritime boundaries.<sup>115</sup> No doubt recognizing the possibility of endless Rule 5 exercises between the two countries, the CLCS

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<sup>108</sup> See UNCLOS, *supra* note 28, art. 76(6).

<sup>109</sup> See *Norwegian Submission*, *supra* note 13, at 6.

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* at 6–8, 12–14.

<sup>112</sup> *Id.* at 12.

<sup>113</sup> *Norwegian Submission*, *supra* note 13, at 14.

<sup>114</sup> See *Norwegian Submission*, *supra* note 13, at 12.

<sup>115</sup> *Russia: Reaction to Submission Made by Norway to the Commission on the Limits of the Continental Shelf 2* (Feb. 21, 2007), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/rus\\_07\\_00325.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf).

recommended that prior to the resolution of any submissions relating to the Loop Hole, Norway and Russia should agree upon a delimitation boundary for the disputed area and submit such coordinates to the Commission.<sup>116</sup> As of publication, no such agreement had been made.

Like the Loop Hole, the Norwegian Western Nansen Basin constitutes a Russian-Norwegian maritime dispute.<sup>117</sup> However, instead of attempting to work out a delimitation, Russia and Norway agreed to submit to a decision by the CLCS as to where the “easternmost fixed . . . point of the outer limit of the Norwegian continental shelf will be connected to a westernmost fixed . . . point of the outer limit of the Russian Federation to be established on the basis of the relevant recommendations of the Commission.”<sup>118</sup> Under this scheme, the recommendations of the CLCS would be binding for the area of the Western Nansen Basin, effectively eliminating the boundary dispute.<sup>119</sup>

These two boundary disputes may lead to two separate conclusions regarding the future of Russian claims in relation to Norwegian interests. First, any claim and subsequent recommendation relating to the Loop Hole would not be binding unless Russia and Norway submit an official boundary delimitation to the CLCS. If Russia and Norway have not settled the Loop Hole dispute as of the time of the submission, a Rule 5 issue will arise, preventing the Commission from issuing a recommendation that would prejudice Norwegian claims.<sup>120</sup> Second, although the portion of a potential Russian claim relating to the Western Nansen Basin could possibly become an official extension of Russia’s continental shelf, any decision made by the Commission would require a resolution of the 2006 Norwegian submission. Because the agreement between Russia and Norway relating to the Western Nansen Basin relies on CLCS recommendations based on both the Russian and Norwegian submissions, a hypothetical Russian recommendation relating to

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<sup>116</sup> *Oceans and the Law of the Sea: Report of the Secretary-General*, *supra* note 6, ¶ 39.

<sup>117</sup> *See Norwegian Submission*, *supra* note 13, at 14. The dispute is based on fishing rights stemming from the Svalbard Treaty, which has produced overlapping claims between Russia and Norway in the Western Nansen Basin area. ALEX G. OUDE ELFERINK, *THE LAW OF MARITIME BOUNDARY DELIMITATION: A CASE STUDY OF THE RUSSIAN FEDERATION* 226–32 (1994).

<sup>118</sup> *Norwegian Submission*, *supra* note 13, at 14.

<sup>119</sup> *See id.* at 14–16 (“Norway and the Russian Federation have agreed that a recommendation by the Commission with regard to the latter two fixed points will not prejudice the bilateral delimitation of the continental shelf between the two parties.”).

<sup>120</sup> *See CLCS Rules of Procedure*, *supra* note 14, Annex I, Rule 5.

the Basin cannot become binding unless paired with a matching recommendation from the Norwegian claim.<sup>121</sup>

### C. *U.S. Response to Russia's 2001 Claim*

The U.S. Response to Russia's 2001 claim offered a series of objections to the Russian submission, all of which, if true, would severely hamper any subsequent Russian claims.<sup>122</sup> While the United States is not a party to UNCLOS, American objections could still severely damage the Russian submission because the objections challenge the scientific merits of the Russian claim.<sup>123</sup> In its response, the United States claimed that: (1) the Russian submission required an objective source of data as to the location of the 2,500-meter isobath and the foot of the continental slope;<sup>124</sup> (2) oceanic ridges cannot be considered natural prolongations under Article 76;<sup>125</sup> (3) the Alpha-Mendeleev Ridge System on which Russia partially based its claim was a product of a submerged "hot spot," and thus an oceanic ridge;<sup>126</sup> (4) the Lomonosov Ridge was unconnected to Russia's continental margin, and thus another oceanic ridge;<sup>127</sup> and (5) since its initial submission made no mention of submarine ridges, Russia cannot assert the existence of any submarine ridges as the basis for its revised claim.<sup>128</sup>

#### 1. *The Need for an Objective Evaluation of the Locations of the 2,500-Meter Isobath and Foot of the Continental Slope*

The U.S. Response pointed out the absence of two pieces of information that are critical to any claim of expansion under Article 76. According to the United States, Russia's initial submission contained no information in its

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<sup>121</sup> See *Norwegian Submission*, *supra* note 13, at 14, 16.

<sup>122</sup> See *United States of America: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf* (Mar. 18, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_USAtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_USAtext.pdf) [hereinafter *U.S. Response*].

<sup>123</sup> The CLCS rules do not prevent non-party nations from submitting responses. See *CLCS Rules of Procedure*, *supra* note 14, Annex I, Rule 5(a) (permitting submissions by any state affected by a maritime dispute, regardless if the state is a party to UNCLOS, as long as there is prior consent of all parties in the dispute).

<sup>124</sup> *U.S. Response*, *supra* note 122, at 1–2.

<sup>125</sup> *Id.* at 2.

<sup>126</sup> *Id.* "A 'hot spot' is a magma source rooted in the Earth's mantle that is persistent for at least a few tens of millions of years and intermittently produces volcanoes on the overlying earth's crust as it drifts across the hot spot during continental drift." *Id.*

<sup>127</sup> *Id.* at 3.

<sup>128</sup> *Id.*

Executive Summary—the only portion of the document released to the concerned nations—regarding the relevant 2,500-meter isobath on the ocean floor or the location of the foot of the continental slope.<sup>129</sup> UNCLOS demands accuracy on these two data points because unlike the 350-nautical-mile element of a claim, the permanent requirement of 100 nautical miles from the 2,500-meter isobath cannot be ignored under any of the provisions of Article 76.<sup>130</sup>

While the CLCS Guidelines do not require that the 2,500-meter isobath points are included in a submission's executive summary,<sup>131</sup> the U.S. concern was that the confidential Russian submission as to the 2,500-meter isobath and foot of the continental slope could differ from a database used to prepare the Intergovernmental Bathymetric Chart of the Arctic Ocean (IBCOA).<sup>132</sup> For this reason, the United States called on the CLCS to undertake an "objective evaluation" of the Russian points.<sup>133</sup>

If, as the U.S. Response seems to suggest, Russia's secrecy intimated a difference between Russia's submitted points and its objective estimates, the Russian submission likely would be rejected on the grounds that the CLCS has recognized that conflicts of interest relating to continental shelf proposals may produce inequitable results.<sup>134</sup> As such, if Russia's revised claim differs markedly from established international estimates produced by the International Oceanographic Commission,<sup>135</sup> such a discrepancy would be resolved against Russia, and the international data points would be used. If this occurs, Russia's revised submission would have to reduce the claimed area to comply with the restrictions of UNCLOS Article 76(6). Specifically, since the 2,500-meter isobath acts to constrain the expansion of a continental shelf,

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<sup>129</sup> *Id.* at 1–2.

<sup>130</sup> See UNCLOS, *supra* note 28, art. 76(5)–(6). Article 76 does not exempt any types of claims from the 2,500-meter isobath plus 100-nautical-mile requirement. See *id.* art. 76(6).

<sup>131</sup> *CLCS Guidelines*, *supra* note 72, ¶ 9.1.4.

<sup>132</sup> *U.S. Response*, *supra* note 122, at 1–2.

<sup>133</sup> See *id.* at 3–4. Although the U.S. Response does not explicitly state the requirements for an "objective evaluation," based on the United States' reliance on IBCAO data, the International Oceanographic Commission, the source responsible for the data, would likely play a role in the analysis. See *id.* at 1–2.

<sup>134</sup> For example, UNCLOS does not allow members of the submitting state to hold a seat on the deciding sub-commission. UNCLOS, *supra* note 28, Annex II, art. 5.

<sup>135</sup> The Intergovernmental Oceanographic Commission (IOC) is a product of the U.N. Education, Scientific and Cultural Organization (UNESCO) and the Intergovernmental Conference on Oceanic Research. UNESCO, Intergovernmental Oceanographic Comm'n [IOC], *Report on the First Session of the Commission*, ¶ 1, U.N. Doc. UNESCO/NS/176 (Feb. 1, 1962).

even with a showing of natural prolongation, the use of the new data points would necessarily shrink the amount of expansion claimed.

2. *The Character of Oceanic Ridges in the Context of the Alpha-Mendeleev and Lomonosov Geological Formations*

The next U.S. contention dealt with the ability of nations to extend their continental shelves through oceanic ridges.<sup>136</sup> As mentioned above, Article 76(3) states that the continental margin, while comprising “the submerged prolongation of the land mass of the coastal State . . . does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.”<sup>137</sup> Though the United States did not mention directly any part of Russia’s submission within the context of its discussion on oceanic ridges, the mere fact that the response included a discussion of the inadmissibility of the oceanic ridges is strong evidence that at least part of Russia’s submission as to natural prolongation of its continental shelf may be subject to a claim that the natural prolongation is in fact not a natural prolongation at all, but an oceanic ridge.

The next two sections of the U.S. Response strengthened this contention, as they dealt with two different geologic formations on which Russia presumably had based its claim, the Alpha-Mendeleev and Lomonosov Ridges.<sup>138</sup> Figure 3, below, shows the geographic contours of the two ridges.<sup>139</sup>

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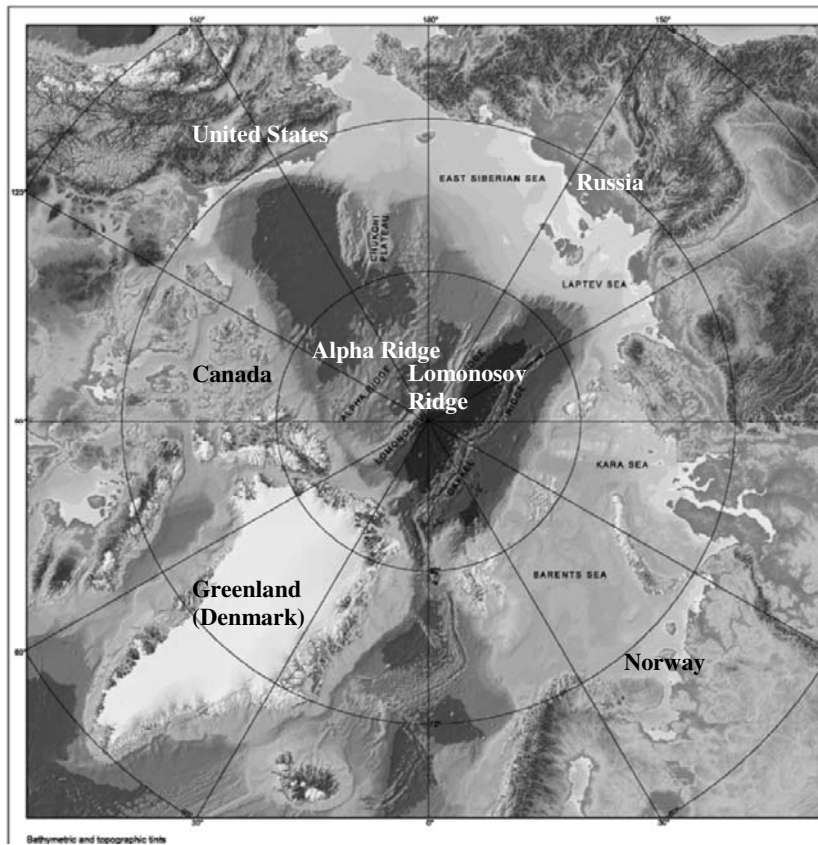
<sup>136</sup> *U.S. Response*, *supra* note 122, at 2.

<sup>137</sup> UNCLOS, *supra* note 28, art. 76(3).

<sup>138</sup> *U.S. Response*, *supra* note 122, at 2–3.

<sup>139</sup> Figure 3 is reproduced from National Geophysical Data Center, International Bathymetric Chart of the Arctic Ocean, available at [http://www.ngdc.noaa.gov/mgg/image/IBCAO\\_betamap.jpg](http://www.ngdc.noaa.gov/mgg/image/IBCAO_betamap.jpg) (last visited June 18, 2009). The geographic labels have been added by the author.

FIGURE 3: TOPOGRAPHIC MAP OF THE ARCTIC CIRCLE (SOURCE: NATIONAL GEOPHYSICAL DATA CENTER)



The United States contended that “[m]ounting geologic and geophysical evidence indicates the Alpha-Mendeleev Ridge System is . . . a single continuous geologic feature that formed . . . by volcanism over a ‘hot spot.’”<sup>140</sup> This contention is problematic for the Russian submission because the Guidelines suggest that it is possible that “ridges formed by volcanic activity

<sup>140</sup> *U.S. Response*, *supra* note 122, at 2.

related to the movement of crust over a hot spot” are in fact oceanic ridges and not natural prolongation of the continental shelf or continental margin.<sup>141</sup>

As discussed above, the CLCS Guidelines articulate two separate regimes for classifying underwater ridges; one would allow the Russians to claim the Alpha-Mendelev Ridge System as a natural prolongation of Russian territory, and the other would not.<sup>142</sup> The strict formulation, limiting the definition of oceanic ridges to geological formations created by “oceanic spreading ridges,”<sup>143</sup> would likely result in a finding for Russia on the grounds that the “hot spot” claim leveled by the United States does not propose that the Alpha-Mendelev Ridge was formed by an oceanic spreading ridge.<sup>144</sup>

However, the use of the second, broader formulation, labeling all formations “composed of oceanic basaltic rocks” as oceanic ridges,<sup>145</sup> would result in a contrary holding. Following this definition, the CLCS would treat ridges formed above a hot spot—as the United States claims the Alpha-Mendelev Ridge System was formed—as oceanic ridges incapable of being labeled natural prolongations.

The CLCS Guidelines state that a decision of which definition to use should be made on a case-by-case basis.<sup>146</sup> Such decisions should be made “based on such scientific and legal considerations as natural prolongation of land territory and land mass, morphology of ridges and their relation to the continental margin.”<sup>147</sup> Thus, Russia would have to advocate the use of the stricter definition by showing a strong relationship between the Alpha-Mendelev Ridge and Russia’s continental margin. Such a showing would prove difficult because part of the U.S. Response—employing scientific methods far beyond the scope of this paper—introduced bathymetric evidence that the Alpha-Mendelev Ridge was not connected to Russia’s continental margin.<sup>148</sup> To gain the advantage of the strict definition of oceanic ridges, Russia would have to offer evidence relating to the morphology of the ridges tending to prove that the Alpha-Mendelev Ridge is a natural prolongation of the Russian land mass.

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<sup>141</sup> See *CLCS Guidelines*, *supra* note 72, ¶ 7.2.1.

<sup>142</sup> See *id.* ¶¶ 7.2.3–7.2.11.

<sup>143</sup> *Id.* ¶ 7.2.3.

<sup>144</sup> See *U.S. Response*, *supra* note 122, at 2.

<sup>145</sup> *CLCS Guidelines*, *supra* note 72, ¶ 7.2.3.

<sup>146</sup> *Id.* ¶ 7.2.11.

<sup>147</sup> *Id.* ¶ 7.2.10.

<sup>148</sup> *U.S. Response*, *supra* note 122, at 2.

Addressing the Lomonosov Ridge claim, the U.S. Response stated that the ridge is a “freestanding feature in the deep, oceanic part of the Arctic Ocean Basin, and not a natural component of the continental margins of . . . Russia.”<sup>149</sup> As with the Alpha-Mendeleev Ridge, to be classified as a submarine ridge, as opposed to an oceanic ridge, Russia would have to show a relationship between the Lomonosov Ridge and the Russian continental margin.

3. *The Rocks in the Alpha-Mendeleev Ridge Do Not Meet the Requirements to Be Labeled a Submarine Elevation*

The U.S. response made two separate claims regarding the rocks found in the Alpha-Mendeleev Ridge. First, the United States claimed that the rocks found throughout the ridge “are typical of oceanic ridges and the deep ocean far from land, rather than the more rapidly deposited, typically coarser-grained current-bedded deposits found on continental shelves.”<sup>150</sup> Second, the United States asserted that both of the types of bedrock found in the Alpha-Mendeleev Ridge “originated in northwestern Canada, and [were] distributed widely in the Amerasian Basin of the Arctic Ocean.”<sup>151</sup> These distinctions, if true, would render any Russian claims relying on submarine elevations virtually impossible to prove.

As discussed above, the CLCS Guidelines advocate two tests for submarine elevations, both dealing with the types of rocks found on the claimed submarine elevation of the submitting country’s continental margin.<sup>152</sup> The first test, analyzing the “active margins” of the claimed elevation looks to the “sediments and crustal material” attached to the continental margin and compares those to the geologic formation in question.<sup>153</sup> The second test, focusing on the “passive margins,” seeks to determine whether the geologic formation was created by the “breakup process” of the country’s continental shelf.<sup>154</sup>

The first contention of the U.S. Response relates to the passive margins test. According to the United States, the Alpha-Mendeleev Ridge could not be a submarine elevation because the rocks found on the ridge are not the types

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<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *supra* notes 92–94 and accompanying text.

<sup>153</sup> *CLCS Guidelines*, *supra* note 72, ¶ 7.3.1(a).

<sup>154</sup> *CLCS Guidelines*, *supra* note 72, ¶ 7.3.1(b).

found on continental shelves and, as such, could not be a product of the breakup process of the continental shelf.<sup>155</sup> The second contention of the U.S. Response relates to the active margins test, claiming that the rocks attached to the Alpha-Mendeleev Ridge are similar to rocks all over the Arctic Circle, not just those of the Russian continental shelf.<sup>156</sup> Therefore, if the rocks found on the Alpha-Mendeleev Ridge are not specific to the Russian continental shelf, the factors under the active margins tests are not met, and the Alpha-Mendeleev Ridge is not a submarine elevation.

#### 4. *Russia's Omission of the Term "Submarine Ridges" from Its Initial Submission*

The final contention in the U.S. Response is that since the term "submarine ridges . . . was not used by Russia in establishing the outer limit of the continental shelf . . . that provision could not be so applied."<sup>157</sup> While the CLCS Guidelines require that a submission contain a statement of the Article 76 provisions invoked,<sup>158</sup> there is no mention in either the CLCS Guidelines or Rules of Procedure of the consequences for omission. Furthermore, due to the fact that the U.S. Response dealt only with the Executive Summary, it is unclear whether the Russian submission actually violated the provision.

The U.S. Response does not claim that Russia did not invoke Article 76(6). Instead, the U.S. Response argues that the initial claim did not include the specific term submarine ridges in its Executive Summary.<sup>159</sup> Given that the United States did not claim that Russia omitted Article 76(6) entirely, it seems unlikely that Russia did in fact violate the provision requiring the invocation of all relevant articles. As such, the CLCS would almost certainly not prevent Russia from claiming submarine ridges as a basis for the natural prolongation of the continental shelf.

#### D. *Canada and Denmark's Responses to Russia's 2001 Claim*

Interestingly, the two states with the strongest possible claims to the Lomonosov Ridge area provided the shortest responses to Russia's initial

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<sup>155</sup> See *U.S. Response*, *supra* note 122, at 2–3.

<sup>156</sup> *Id.* at 3.

<sup>157</sup> *Id.*

<sup>158</sup> *CLCS Guidelines*, *supra* note 72, ¶ 9.1.4.

<sup>159</sup> *U.S. Response*, *supra* note 122, at 3.

claim.<sup>160</sup> The Canadian Response simply stated that “Canada is not in a position to determine whether it agrees with the Russian Federation’s Arctic continental shelf submission.”<sup>161</sup> Similarly, Denmark stated that it was “not able to form an opinion on the Russian submission.”<sup>162</sup> Both responses repudiated “agreement or acquiescence” with Russia’s submission.<sup>163</sup> The responses did indicate that, following Rule 5, the CLCS’s recommendation could not prejudice the delimitation of boundaries between the respective nations and Russia.<sup>164</sup>

Since Denmark and Canada are in the process of collecting geologic data on the Lomonosov Ridge for their own CLCS submissions,<sup>165</sup> a potential recommendation extending Russia’s continental shelf would violate both nations’ Rule 5 rights, and thus would not be issued. Furthermore, based on the IBCAO topographic map in Figure 3, the Alpha-Mendeleev Ridge runs from the claimed Russian territory to very near the waters of both Canada and Greenland. Though neither Canada nor Denmark has done anything to suggest a territorial interest in the Alpha-Mendeleev Ridge, such proximity may be enough to trigger a Rule 5 boundary dispute.

However, it is possible that the area of the Lomonosov Ridge claimed by Russia does not conflict with either Canadian or Danish interests, and thus would not trigger a Rule 5 block. Nevertheless, based on the complete lack of information provided by the Canadian and Danish Responses, a Rule 5 block is impossible to predict.

### III. RUSSIA’S FUTURE CLAIMS

Based on the preceding discussion, Russia would have to overcome two separate hurdles to obtain a binding recommendation from the Commission.

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<sup>160</sup> The Canadian Response is only one page long. See *Canada: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf* (Feb. 26, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_CANtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_CANtext.pdf) [hereinafter *Canadian Response*]. The Danish Response is about one and a half pages long. See *Denmark: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf* (Feb. 26, 2002), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/rus01/CLCS\\_01\\_2001\\_LOS\\_DNKtext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_DNKtext.pdf) [hereinafter *Danish Response*]. The U.S. Response is five pages total. See *U.S. Response*, *supra* note 122.

<sup>161</sup> *Canadian Response*, *supra* note 160, at 1.

<sup>162</sup> *Danish Response*, *supra* note 160, at 1.

<sup>163</sup> *Canadian Response*, *supra* note 160, at 1; *Danish Response*, *supra* note 160, at 1.

<sup>164</sup> *Danish Response*, *supra* note 160, at 1; *Canadian Response*, *supra* note 160, at 1.

<sup>165</sup> The Continental Shelf Project, *supra* note 11.

First, the future submission must meet the scientific standards discussed in Part II.C and must do so in light of the U.S. geologic critiques of the 2001 submission. Second, and more improbably, the submission must not involve any unresolved maritime disputes. Part III.A will briefly outline the projected content of the future Russian submission. Part III.B will discuss the scientific showings that should be included in the submission. Part III.C will analyze the likelihood that a claim meeting the requisite scientific standards will result in a favorable recommendation by the CLCS. Finally, Part III.D will discuss the possibility of the CLCS recommendation facilitating the resolution of Russian maritime disputes.

#### A. *Predictions for Russian Claims*

As discussed above, because Norway's Response explicitly mentioned that both Russian and Norwegian claims fall within the 350-nautical-mile distance from the baseline in the Barents Sea,<sup>166</sup> Russia's claim to the areas connected to the Barents Sea is partially based on submarine ridges, and thus not exempt from the 350-nautical-mile limit. This inference is based on the U.S. assertion that Russia could not exercise a submarine ridge claim because its initial submission made no mention of that term.<sup>167</sup> The United States would not have objected to a claim that Russia did not make.

As to the Alpha-Mendelev Ridge, because the United States offered substantial evidence that the ridge formed as the result of volcanic activity over a hot spot,<sup>168</sup> Russia must show that the formation is a submarine ridge as described in Article 76(6). Regarding the Lomonosov Ridge, Russia has more leeway with its potential claim for continental shelf expansion. The only objection dealing with the Lomonosov Ridge in the U.S. Response claimed that the ridge was not a part of Russia but was an oceanic ridge and not appropriate for a natural prolongation claim.<sup>169</sup> Furthermore, the Lomonosov Ridge is not a product of volcanic activity and is not made of basaltic rock.<sup>170</sup>

Benitah has pointed out that given a choice, countries may choose to claim a continental shelf extension by means of a submarine elevation claim because

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<sup>166</sup> See *Norwegian Response*, *supra* note 102, at 3.

<sup>167</sup> *U.S. Response*, *supra* note 122, at 3.

<sup>168</sup> *Id.* at 2.

<sup>169</sup> *Id.* at 3.

<sup>170</sup> See *CLCS Guidelines*, *supra* note 72, ¶¶ 7.2.1, 7.2.3; *cf.* *U.S. Response*, *supra* note 125, at 2–3 (providing extensive analysis regarding this topic in the Alpha-Mendelev Ridge section, though not in the Lomonosov Ridge section).

these types of claims are not subject to the 350-nautical-mile limit under Article 76(6).<sup>171</sup> Therefore, it seems that Russia's claim to the Lomonosov Ridge will be made as a submarine elevation claim not subject to the distance constraint.

*B. Facts Russia Must Prove to Extend Its Continental Shelf to the Region It Has Announced It Intends to Claim*

Based on the responses of the concerned countries to the initial submission, Russia's revised claim must meet several requirements to satisfy the guidelines of the CLCS.

To determine whether a geologic formation is a submarine elevation of a country's continental shelf, the CLCS will look at the types of rocks on the claimed elevation and the submitting country's continental margin within the context of two tests.<sup>172</sup> To meet the requirements of the active test, Russia must show that the rocks found on the Alpha-Mendeleev Ridge are similar to those found on the current Russian continental shelf, or that the rocks deposited on the Alpha-Mendeleev Ridge were deposited there as a result of a breakup process of the Russian continental shelf.<sup>173</sup>

The fact that the United States offered a large amount of evidence as to the source of the rocks found in the Alpha-Mendeleev Ridge, but made no mention of the rocks on the Lomonosov Ridge, suggests either that the United States did not have any evidence relating to the source of the Lomonosov rocks or that the evidence it possessed did not lend itself to an objection. Regardless of the reason, it means that concerned nations have submitted more evidence opposing Russia's potential submarine elevation claim in the Alpha-Mendeleev Ridge than opposing its claim in the Lomonosov Ridge.<sup>174</sup>

If the arguments for submarine elevations fail, Russia may make a submarine ridge claim relating to both the Alpha-Mendeleev and Lomonosov Ridge Systems. First, since the leniency of the CLCS guidelines depend on geologic similarities between the claimed prolongation and the continental margin, Russia must establish a strong geologic relationship between the Alpha-Mendeleev Ridge System and the Russian continental margin in order

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<sup>171</sup> Benitah, *supra* note 5.

<sup>172</sup> *CLCS Guidelines*, *supra* note 72, ¶ 7.3.1; *see supra* notes 151–53 and accompanying text.

<sup>173</sup> *See CLCS Guidelines*, *supra* note 72, ¶ 7.3.1.

<sup>174</sup> The United States is the only concerned nation whose response contained evidence regarding either the Alpha-Mendeleev Ridge or the Lomonosov Ridge.

to have the CLCS narrow its working definition of oceanic ridges to exclude ridges formed over hot spots.<sup>175</sup> With this narrow definition, Russia would then be able to claim the Alpha-Mendelev Ridge as a submarine ridge and a natural prolongation of Russian territory. If the revised submission cannot sufficiently narrow the definition, and the Alpha-Mendelev Ridge becomes classified as an oceanic ridge, a large portion of Russia's claim will disappear. Similarly, to claim the Lomonosov Ridge as a submarine ridge would require the same showing: a relationship between the Ridge and the Russian continental shelf sufficient to avoid the Commission's finding that the Ridge is in fact an oceanic ridge.

Finally, although not directly related to the technical aspects of a potential claim, a future Russian claim should carefully consider the boundaries used so as not to unwittingly accede to a delimitation treaty with the United States. In 1990, the United States and the then-USSR entered into a maritime delimitation treaty regarding maritime boundaries in the Arctic region.<sup>176</sup> The two sides agreed that the treaty would not be self-executing and would only enter into force with the agreement's ratification in each country's legislature.<sup>177</sup> While the U.S. Senate ratified the treaty within a year of the original agreement,<sup>178</sup> the Russian government still has not done so.

However, according to the United States, Russia, in its 2001 submission, used the delimitation boundaries provided for in the 1990 U.S.-Russian agreement.<sup>179</sup> While Russia's use of these boundaries may have little bearing on the actual submission and may well have been included to avoid dragging the CLCS into a delimitation dispute, it could unwittingly create an international obligation that Russia observe the terms of the 1990 agreement. If the United States can show that Russia followed the terms of the 1990 agreement as a "general practice," and that such observation was done due to a "sense of legal obligation or necessity,"<sup>180</sup> Russia may be bound by the terms

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<sup>175</sup> See *supra* notes 145–48 and accompanying text.

<sup>176</sup> Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, U.S.-U.S.S.R, June 1, 1990, S. TREATY DOC. NO. 101-22 (1991). The boundaries proposed in the treaty are shown roughly as the solid line between Russia and the United States in Figure 1.

<sup>177</sup> See *id.* art. 6.

<sup>178</sup> OUDE ELFERINK, *supra* note 117, at 273.

<sup>179</sup> U.S. Response, *supra* note 122, at 1.

<sup>180</sup> See DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16–17 (2d ed. 2006) (discussing "general practice" and "sense of legal obligation or necessity," also known as *opinio juris*, as the two key elements to the formulation of a customary international law rule); see Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (defining custom as "evidence of a general practice accepted as law").

of the treaty without its ratification.<sup>181</sup> What could be better evidence of following a general practice out of a sense of legal obligation than including such terms as the official maritime line in a UNCLOS document?

If Russia does not wish to be bound by custom to the terms of the 1990 agreement, then it should not use the 1990 delimitation boundaries in its revised submission. If Russia uses delimitation boundaries other than those included in the 1990 agreement, this will provide strong evidence that Russia did not view itself as legally bound by the agreement. However, by using boundaries other than those agreed to in 1990, Russia would create another Rule 5 situation, which would severely hamper the binding effect of any Commission recommendation. Ironically, a finding that Russia observed the 1990 agreement as a general practice but took no other action has the potential to produce the only binding decision relative to the Russian submission.

### *C. The Binding Effects of Future Claims*

As discussed in Part II, due to Rule 5, Russia cannot make any assertion that would prejudice the potential claims of other nations with which Russia is currently entangled in a maritime dispute.<sup>182</sup> Based on the national responses to Russia's 2001 claim, as well as the fact that news outlets have suggested Russia's impending claim relies, at least partially, on the Lomonosov Ridge,<sup>183</sup> it appears that a fairly large portion of the claim will be subject to maritime delimitation disputes, as Canada and Denmark intend to assert maritime boundaries through the Lomonosov Ridge.<sup>184</sup> With potentially three countries submitting claims to the same area, there is very little chance that the CLCS could issue a binding resolution without a preceding delimitation agreement.

Furthermore, based on the current unresolved maritime dispute over the Loop Hole,<sup>185</sup> Norway has a Rule 5 block to the projected Russian claims in the Barents Sea. However, if the Western Nansen Basin portion of the 2006 Norwegian Submission is settled by the time Russia produces its future submission, the CLCS recommendations concerning that area will become binding.

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<sup>181</sup> Bederman states that "custom and treaties are co-equal sources of international law." BEDERMAN, *supra* note 182, at 30. Thus, "[e]ven though a country rejects a treaty provision containing a rule, if it fails to object as that same norm is renewed in State practice, it will later become bound to it as a custom." *Id.*

<sup>182</sup> See *supra* note 120 and accompanying text.

<sup>183</sup> Blomfield, *supra* note 1.

<sup>184</sup> The Continental Shelf Project, *supra* note 12.

<sup>185</sup> See *Norwegian Submission*, *supra* note 13, at 12.

Finally, because the 2001 Russian submission relied on an unresolved boundary with the United States, the portion of the claim dealing with that dispute would be subject to a Rule 5 block. If every Arctic nation possesses Rule 5 protection against a future Russian claim, the only potentially binding aspects of the Commission's recommendation, should it support Russia's submission, would be in the few areas free from Rule 5 blocks.

### *1. Methods of Delimitation*

In the shadow of this uncertainty, a number of possible boundary delimitations have emerged. While these proposals can help eliminate disputes, they cannot give the nations territory that they could not have claimed under Article 76.<sup>186</sup> Instead, certain methods would resolve the areas of the sea that each nation could potentially claim.<sup>187</sup> Therefore, countries would still be subject to all of the requirements discussed above, but Rule 5 would no longer hold any relevance to Arctic claims because there would be no delimitation disputes.

#### *a. Bilateral Delimitations*

The Norwegian-Russian boundary disputes discussed in Part II.B offer examples of the two primary types of delimitation available to Arctic nations. First, as is the case with the Loop Hole in the Barents Sea, countries may simply agree to negotiate the delimitation boundaries amongst themselves.<sup>188</sup> Alternatively, as with the dispute in the Western Nansen Basin, countries may agree to abide by the delimitation recommendations of the CLCS.<sup>189</sup>

Under the current formulation of UNCLOS Article 76, Rule 5 may actually discourage bilateral negotiations. The Commission's inability to reject claims gives countries additional negotiating leverage by allowing countries with weak claims to effectively block CLCS submissions from becoming binding through Rule 5.<sup>190</sup> Such a situation would force a country with a valid CLCS

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<sup>186</sup> See Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

<sup>187</sup> See Krauss, *supra* note 186.

<sup>188</sup> See *Norwegian Submission*, *supra* note 13, at 12.

<sup>189</sup> See *id.* at 14.

<sup>190</sup> See *CLCS Rules of Procedure*, *supra* note 14, Annex I, Rule 5. Each member of the Commission has one vote, and a majority vote is required to accept a proposal; if a majority is not reached or the vote is equally divided on a matter, the proposal shall be regarded as rejected. *Id.*

claim to make concessions to a blocking country that would not be necessary under other circumstances.

In light of the potential issues with bilateral delimitations, the CLCS serving as an official arbitrator over maritime disputes involving continental shelf expansion becomes a viable option. However, the same problem inherent in bilateral negotiations exists with CLCS arbitration; countries with weaker claims have strong incentives not to submit a claim to the Commission. As such, until the Commission is given some type of binding authority to settle claims, neither bilateral delimitation option seems likely to produce any type of resolution.

*b. Median Line Method*

A second option, advocated by Canada and Denmark, has been labeled the “median line method.”<sup>191</sup> Under this proposal, the territorial and mineral rights to the Arctic Circle would be divided up amongst the five concerned countries by reference to each nation’s Arctic coastlines.<sup>192</sup> The two countries with the largest amount of Arctic coastline, Canada and Denmark, would gain the largest amounts of territory.<sup>193</sup> Conversely, the United States and Iceland would be left with the second smallest and smallest pieces, respectively.<sup>194</sup> Russia’s proposed continental shelf would not be drastically affected.<sup>195</sup>

Along with Canada and Denmark, Article 15 of UNCLOS supports the median line method, stating, “Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line . . . of the territorial seas of each of the two States.”<sup>196</sup> However, Article

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<sup>191</sup> Paul Reynolds, *Russia Ahead in Arctic ‘Gold Rush,’* BBC NEWS, Aug. 1, 2007, [http://news.bbc.co.uk/2/hi/in\\_depth/6925853.stm](http://news.bbc.co.uk/2/hi/in_depth/6925853.stm).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Krauss, *supra* note 186. The nation of Iceland has a claim to territory in the Arctic Ocean, and not the Arctic Circle. *Id.* As such, the resolution of Russia’s claim would not affect Iceland’s borders.

<sup>195</sup> See Reynolds, *supra* note 191. The median line method would give Denmark the North Pole, but Canada would gain as well. *Id.* Russia’s continental shelf would not change. *Id.*

<sup>196</sup> UNCLOS, *supra* note 28, art. 15. Article 15 provides, in full:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other

83 of UNCLOS seems to remove all continental shelf delimitations entirely from the language of Article 15 when it states, “The delimitation of the continental shelf between States . . . shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”<sup>197</sup> While the median line mechanism is certainly a part of the broad concept of international law, it is not the only means of delimitation, and thus, Article 15 cannot apply. Assuming that the median line method is optional rather than required by Article 15, the United States would not agree to this proposal, as doing so would reduce the amount of territory the United States could claim absent some other agreement.

*c. Sector Method*

The third option, called the “sector method,” divides the Arctic Circle by drawing longitudinal lines from the North Pole.<sup>198</sup> Under this plan, Norway would gain the most territory, while Russia’s territory would increase slightly.<sup>199</sup> The United States and Iceland would still be left with the smallest portions, although the United States would be granted a slightly larger territory than it currently has or would receive under the median line method.<sup>200</sup> Canada would have rights to less territory than it currently has, and less than it would receive under the median line method, absent any delimitation agreement between the Arctic nations.<sup>201</sup> Like the median line method, the sector method would preserve most of the expected area of Russia’s revised claim.<sup>202</sup>

Although Canada would lose a large amount of potential territory under the sector method, the Canadian government is virtually certain to support its use because it would place the Northwest Passage in Canadian control.<sup>203</sup> In 1909,

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special circumstances to delimit the territorial seas of two States in a way which is at variance therewith.

*Id.*

<sup>197</sup> *Id.* art. 83.

<sup>198</sup> Reynolds, *supra* note 191.

<sup>199</sup> *Id.*

<sup>200</sup> Krauss, *supra* note 186. Iceland’s territory would stay largely unchanged from the boundaries apportioned under the median method. *Id.*

<sup>201</sup> Reynolds, *supra* note 191.

<sup>202</sup> *Id.* Russia would gain under the sector method, although to a lesser extent than other nations.

<sup>203</sup> Mark Jarashow, Michael B. Runnels & Tait Svenson, *UNCLOS and the Arctic: The Path of Least Resistance*, 30 *FORDHAM INT’L L.J.* 1587, 1613–14 (2007).

Canada officially advocated the use of the sector method to gain control over the Northwest Passage.<sup>204</sup> However, even if Russia, Denmark, Norway, and Canada agreed to employ the sector method as a means of resolving the boundary disputes, it is highly unlikely that the United States would become a party to such a treaty. In a 1965 correspondence, the U.S. State Department officially opposed the sector method.<sup>205</sup> More recently, “the sector principle has been expressly rejected by Denmark, Norway and the USA.”<sup>206</sup>

Given the expected opposition from these three nations, combined with the fact that there is no basis in international law for use of the sector method,<sup>207</sup> it is highly unlikely that the sector method will ever be a realistic alternative for delimiting the Arctic maritime boundaries.

#### *d. Antarctic Treaty Option*

Beyond the three delimitation theories, a fourth, less attractive option can be found on the opposite side of the world. Created in 1959, the Antarctic Treaty<sup>208</sup> stands as what may be the least beneficial scenario for the five countries vying for Arctic sovereignty. Signed by twelve countries that had sought to claim the Antarctic through sometimes wild schemes,<sup>209</sup> the Antarctic Treaty froze all territorial claims to Antarctica for the duration of the treaty.<sup>210</sup> In doing so, “the Antarctic Treaty System demilitarized the region and established a unique . . . regime to manage activities and resources there.”<sup>211</sup> However, in ratifying the treaty, both the United States and Russia reserved the right to make claims to the Antarctic continent.<sup>212</sup>

A 2007 law journal article identified the creation of a similar treaty system concerning the Arctic as one of the primary ways to resolve the current

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<sup>204</sup> *Id.* at 1613.

<sup>205</sup> *Id.* at 1613 n.131.

<sup>206</sup> ALEX G. OUDE ELFERINK & DONALD R. ROTHWELL, *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 123 (2001).

<sup>207</sup> Commentators have further observed that the sector principle is in direct opposition to numerous multilateral treaties. *Id.*

<sup>208</sup> Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

<sup>209</sup> Such schemes include Argentina’s practice of flying pregnant women to a facility on the Antarctic continent for child-birth. BEDERMAN, *supra* note 180, at 121.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Antarctic & S. Ocean Coal., *The Antarctic Treaty System*, at 1, available at [http://www.asoc.org/Portals/0/The\\_Antarctic\\_Treaty\\_System052107.pdf](http://www.asoc.org/Portals/0/The_Antarctic_Treaty_System052107.pdf) (last visited June 18, 2009).

dispute.<sup>213</sup> However, such a proposal likely would be rejected by Russia, and all of the other countries involved, because while the Antarctic Treaty froze territorial claims, those potential claims were not nearly as solid as those held by the five countries vying for Arctic rights. The claims of the various countries leading up to the Antarctic Treaty were based purely on wild attempts to meet the “effective occupation” standard by running post offices or having children on Antarctic soil.<sup>214</sup> Conversely, the claims of the five Arctic countries, having their bases in their own coastlines through the accepted international law of UNCLOS, rest on much more solid ground.

While the signatories to the Antarctic Treaty gave up claims that were predominantly speculative and shared by many nations, the claims of the Arctic countries are shared by a relatively small number of nations and have a specific avenue and mechanism for their espousal. Furthermore, while technology in the 1950s would have made it difficult, if not impossible, to harvest the oil resources beneath Antarctica's frozen surface, in recent years, “advances in ship design, drilling equipment and remote sensing [have] combine[d] to open up opportunities to exploit these reserves.”<sup>215</sup> These advances in technology, combined with rising oil prices, have created the perception that the Arctic is “a new economic frontier.”<sup>216</sup> Further, for such a treaty to have effect, it would need to be adopted without any nation entering reservations. This is an unlikely scenario.

Given that Russia's legal claims to the Arctic are stronger than any claims the country had to Antarctica, and that such claims can actually be exploited through modern technology, it would make very little sense for Russia, or any Arctic country, to sign an Antarctic Treaty-type agreement. Perhaps the strongest indicator of the relative weakness of Russia's potential Antarctic claim, and strength of its Arctic claim, lies in the fact that while Russia submitted its 2001 claim for continental shelf expansion in the Arctic, it has never espoused a claim to Antarctic territory despite explicitly reserving the right to do so.<sup>217</sup> The very fact that there was such a reservation suggests Russia's unwillingness to freeze any territorial claims.

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<sup>213</sup> Jarashow, Runnels & Svenson, *supra* note 203, at 1596.

<sup>214</sup> BEDERMAN, *supra* note 180, at 123.

<sup>215</sup> See Robert Wade, *A Warmer Arctic Needs Shipping Rules*, FIN. TIMES (Asia ed.), Jan. 16, 2008, at 11.

<sup>216</sup> See *id.*

<sup>217</sup> Antarctic & S. Ocean Coal., *supra* note 212, at 1.

*e. Compulsory Boundary Delimitation Under UNCLOS*

As a possible resolution to the problem identified in Part II.B, where one nation refuses to resolve a maritime dispute as a means to gain negotiating power, UNCLOS included a compulsory mechanism for resolving disputes arising under the treaty.<sup>218</sup> Unfortunately for Russia, when it signed UNCLOS, it eliminated its best possible means for resolving the Rule 5 blocks by explicitly exempting itself from the “compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations.”<sup>219</sup> Thus, Russia may not utilize the compulsory dispute resolution mechanism under Article 286 unless it withdraws its reservation.<sup>220</sup> However, even if Russia were to withdraw its reservation, it still would not be able to instigate compulsory delimitation disputes because Canada, Norway, and Denmark all rejected the use of arbitral tribunals for resolving maritime delimitation disputes.<sup>221</sup> Compulsory dispute resolution under UNCLOS does not appear to be a realistic option for resolving possible Rule 5 blocks.

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<sup>218</sup> UNCLOS, *supra* note 28, art. 286 (“Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”).

<sup>219</sup> UNCLOS, Russian Federation: Declaration upon Signature (Dec. 10, 1982), *available at* [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Russian%20Federation%20Upon%20signature](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20signature). The exemption is allowed under Article 298(1), which provides:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to . . . disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations.

UNCLOS, *supra* note 28, art. 298(1). While UNCLOS Articles 15, 74, and 83 deal with various types of boundary disputes, the exemption of Article 83, relating to boundary delimitations of continental shelves, would effectively prevent Russia from using the compulsory delimitation clause against a reserving country in order to avoid the application of Rule 5.

<sup>220</sup> While Article 298(1) allows a country to exempt itself from the compulsory resolutions of Article 286, Article 298(2) states that “[a] State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.” UNCLOS, *supra* note 28, art. 298(2).

<sup>221</sup> UNCLOS, Canada: Declarations Upon Ratification (Dec. 7, 2003), *available at* [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Canada](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Canada); UNCLOS, Norway: Declarations Upon Ratification (June 24, 1996), *available at* [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Norway%20Upon%20ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Norway%20Upon%20ratification); UNCLOS, Denmark: Declarations Upon Ratification (Nov. 16, 2004), *available at* [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Denmark%20Upon%20ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%20ratification).

*D. The Possibility That a CLCS Recommendation on a Future Russian Claim May Facilitate Boundary Delimitation*

As the previous section suggests, it may be difficult, if not impossible, to work out any type of delimitation agreement that would secure the approval of all five of the Arctic nations. In light of the low odds of reaching such an agreement, Russia's best option is to submit its proposal to the CLCS, without concern for the Rule 5 effects, and then, as Llewellyn has suggested, use the Commission's findings as support in delimitation negotiations with the other Arctic countries.

A Commission finding that the Lomonosov or Alpha-Mendeleev Ridge is part of the Russian continental shelf would drastically change the calculus employed by Arctic nations in boundary delimitation negotiations. If the Commission finds that the Lomonosov Ridge is a part of the Russian continent and is not connected to either the Canadian or Danish continental shelves, any potential border disputes could vanish, and Russia could make a revised submission, absent any Rule 5 blocks.

Unfortunately for the future Russian submission, such a scenario seems many years, if not decades, off. As discussed previously, submissions are never rejected, so nations remain free to submit virtually the same claims repeatedly, without fear of losing them. Since Canada and Denmark both issued reservations to the compulsory boundary dispute resolution, neither nation ever has to abandon its claim to the Lomonosov Ridge. Rule 5 may continue to hang over Russian claims forever.

The above situation shows why Llewellyn's image of the CLCS as an arbitration facilitator is inaccurate. While the Commission's rules may, as Llewellyn has suggested, "allow it to help create greater certainty over disputed areas,"<sup>222</sup> the only certainty that the Commission can create is in what a ridge or elevation at the bottom of the sea *is*. It cannot say what a ridge or elevation is not. For example, while the Commission may find that the Lomonosov Ridge is a part of the Russian continental shelf, it cannot say that the ridge is also not a part of the Canadian continental shelf. This dynamic makes bilateral delimitations less likely because parties with the weakest claims are given disproportionate bargaining power.

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<sup>222</sup> Llewellyn, *supra* note 22, at 684.

Russia's relations with Norway lend some credence to Llewellyn's conception of CLCS power. The CLCS is already mediating the competing claims of Russia and Norway over the Loop Hole in the Barents Sea.<sup>223</sup> Depending on the success of the Russia-Norway dispute, this official arbitrator role could expand as the other Arctic nations submit their own claims for continental shelf expansion. Absent such an occurrence, it is likely that Russia's future claim will be subject to the maritime boundary disputes discussed herein.

### CONCLUSION

The boundary disputes blocking Russia's claim will not be resolved at the time of Russia's future submission, and thus will prevent the CLCS from issuing a binding recommendation even if Russia can make the necessary scientific showing. As a whole, Russia's future submission is a perfect example of the current strengths and weaknesses of the Commission. Specifically, when there is no boundary dispute, the Commission serves a purpose; when there is a boundary dispute, it does not.

Although the Commission may find that Russia made the necessary scientific showings to prove that the Lomonosov and Alpha-Mendeleev Ridges are part of the Russian continent, that finding would almost certainly have no binding effect due to the series of maritime disputes potentially arising from the recommendation.<sup>224</sup>

This is not to say that the CLCS is completely without use. Where there are no competing interests at stake, as with the portion of Russia's claim dealing with the uncontested regions of the Alpha-Mendeleev Ridge, or where countries agree to abide by the Commission's ruling, the CLCS may be able to produce a legally binding recommendation if the countries can make the requisite scientific showings.

If this procedure was what the framers of UNCLOS had in mind, then Article 76 should not be altered. However, if the Arctic countries, including Russia, wish to have their continental shelves set, then the five nations are left with two choices: sit down and work out boundary delimitations or amend UNCLOS.

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<sup>223</sup> *Norwegian Submission*, *supra* note 13, at 12–13.

<sup>224</sup> The exception to this result is the Western Nansen Basin. *See id.* at 14.

Since neither of the above scenarios is likely, the CLCS mechanisms will be the same as at the time of the 2001 Russian submission. Given this, the amount of territory Russia could gain through the CLCS may not contain enough oil to replace the gasoline that was used to power its flag-dropping submarine to the North Pole.

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\* Notes & Comments Editor, *Emory International Law Review*; J.D., with Honors, Emory University School of Law (2009); B.A., *magna cum laude*, Wheaton College (2006). I would like to thank Professor David Bederman for his years of guidance at Emory, and the staff of the *Emory International Law Review* for their efforts on this Comment. All mistakes are mine, and mine alone. Finally I would like to thank my grandfather, Harold Spielman, and my parents, Dr. Sandra Rose and Dr. Steven Spielman, without whom this Comment would not exist.

