

Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?

Pourquoi le Canada a-t-il autant de différends non résolus concernant ses frontières maritimes?

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Abstract

Canada has five unresolved maritime boundaries. This might seem like a high number, given that Canada has only three neighbours: the United States, Denmark (Greenland), and France (St. Pierre and Miquelon). This article explores why Canada has so many unresolved maritime boundaries. It does so through a comparison with Norway, which has settled all of its maritime boundaries, most notably in the Barents Sea with Russia. This comparison illuminates some of the factors that motivate or impede maritime boundary negotiations. It turns out that the status of each maritime boundary can only be explained on the basis of its own unique geographic, historic, political, and legal context. Canada's unresolved maritime boundaries are the result of circumstances specific to each of them and not of a particular policy approach in Ottawa.

Résumé

Le Canada a cinq frontières maritimes qui n'ont pas encore été délimitées. Ce nombre peut paraître élevé étant donné que le Canada n'a que trois voisins: les États-Unis, le Danemark (Groënland) et la France (St. Pierre et Miquelon). Cet article cherche à découvrir pourquoi le Canada a tant de frontières maritimes irrésolues. Pour ce faire, l'article se penche sur le cas de la Norvège, qui a réussi à délimiter toutes ses frontières maritimes, y compris dans la mer de Barents avec la Russie. Cette comparaison met en relief certains des facteurs qui favorisent ou entravent les négociations pour la résolution de différends maritimes frontaliers. Il s'avère que le statut des frontières maritimes ne peut s'expliquer qu'en prenant en considération leurs particularités géographiques, historiques, politiques et légales. Ainsi, le fait que le Canada n'ait pas encore réussi à fixer nombre de ses frontières maritimes est le résultat de circonstances uniques à chacune d'elles plutôt que d'une approche politique particulière véhiculée par Ottawa.

Keywords

Canada; Norway; maritime boundaries; international disputes; law of the sea; treaty negotiation.

Mots-clés

Canada; Norvège; frontières maritimes; différends internationaux; droit de la mer; négociation de traités.

INTRODUCTION

In September 2010, the Norwegian and Russian foreign ministers co-authored an op-ed article in a Canadian newspaper, the *Globe and Mail*, clearly directed at the Canadian government.¹ They celebrated the conclusion of a Norway–Russia boundary treaty in the Barents Sea as a “notable milestone” and expressed “hope that the agreement will inspire other countries in their attempts to resolve their maritime disputes, in the High North and elsewhere, in a way that avoids conflict and strengthens international co-operation.” The two ministers then offered the following “lesson”:

[E]normous value can be created — both for individual countries and for the international community at large — when states consider their interests in a long-term perspective, aiming for sustainable solutions. This is exactly the case for the boundary in the Barents Sea and Arctic Ocean. The value unlocked for each country by settling this boundary now will far exceed the potential advantage one country could have gained by holding out for a larger gain in maritime space for itself.

With their choices of publishing venue and message, the Norwegian and Russian ministers were expressing an assumption widely shared among outside observers of Canadian foreign policy — namely, that the country lags behind when it comes to the resolution of maritime boundary disputes.

Canada has five unresolved (or only partially resolved) maritime boundaries within the 200 nautical miles of its shores in the Gulf of Maine, Beaufort Sea, Lincoln Sea, Dixon Entrance, and seaward of Juan de Fuca Strait. It also has two fully resolved boundaries in the waters between Canada and Greenland (Denmark) and around the French islands of St. Pierre and Miquelon.² Significantly, four of the five unresolved or only partially resolved disputes are with the United States. In 2000, the situation prompted Australian observers Victor Prescott and Grant Boyes to write: “It is interesting that two countries which have considerable experience in negotiating maritime boundaries and which possess excellent technical services have not been able to delimit one of their four potential maritime boundaries.”³

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¹ Sergei Lavrov & Jonas Gahr Støre, “Canada, Take Note: Here’s How to Resolve Maritime Disputes,” *Globe and Mail* (21 September 2010), online: <<http://www.theglobeandmail.com/commentary/canada-take-note-heres-how-to-resolve-maritime-disputes/article4326372/>>.

² Canada also has unresolved boundaries beyond 200 nautical miles from shore — between adjacent or opposing “extended continental shelves” — in the Beaufort Sea (with the United States), central Arctic Ocean (Denmark and Russia), Gulf of Maine (United States), and potentially off St. Pierre and Miquelon (France). Last but not least, it has a dispute with the United States over the status of the Northwest Passage. However, this article considers these disputes only insofar as they are relevant to the maritime boundary disputes within 200 nautical miles from shore.

³ Victor Prescott & Grant Boyes, “Undelimited Maritime Boundaries in the Pacific Ocean Excluding the Asian Rim” (International Boundaries Research Unit, Durham University) (2000) 2:8 *Maritime Briefings* 11.

In this article, we explore the reasons why Canada has so many unresolved maritime boundary disputes. We do so, in part, through a direct comparison with Norway, which has resolved all of its maritime boundary disputes, including a major dispute with Russia. We seek to understand whether, ultimately, the two countries' different records of maritime boundary dispute settlement result from different assumptions or policy preferences within the two governments rather than from factors specific to any particular dispute, such as its geography, legal history, political context, or the existence and commercial viability of resources. Norway is well suited for such a comparison. Canada and Norway both have long coastlines and large exclusive economic zones (EEZ), significant portions of which are located in the Arctic. Both share at least one maritime boundary with a much more powerful neighbour as well as boundaries involving more equal power relationships. Both are developed countries with sophisticated, well-staffed foreign ministries. Both have significant offshore oil and fishing industries, with activities taking place, or interest having been expressed, in areas close to some of their maritime boundaries. And both recently put new emphasis on Arctic foreign policy, beginning with Norway's Foreign Minister Jonas Gahr Støre in 2005 and Canada's Prime Minister Stephen Harper in 2006.

Of course, there are significant differences between the two countries. Canada's much more powerful neighbour is the United States, a close trading partner and military ally. Norway's much more powerful neighbour is Russia, an antagonist during the Cold War and an ongoing source of military concern. Canada's Arctic is often difficult to access due to the presence of year-round sea ice; most of Norway's Arctic remains ice free throughout the year. Still, the similarities provide room for comparison and, therefore, for new insights into why Canada has so many unresolved maritime boundary disputes. Examining these two countries also enables us to generate some general observations about maritime boundary disputes and the factors that contribute to their resolution.

This article does not examine boundaries that were fully resolved in the distant past, such as the boundary between the San Juan Islands of Washington State and the Southern Gulf Islands of British Columbia. Nor does it examine boundaries more than 200 nautical miles from shore — between adjoining or opposing “extended continental shelves” — except insofar as they are relevant to boundaries within 200 nautical miles from shore. The first section of this article examines each of Canada's maritime boundary disputes in turn, explaining: (1) the dispute; (2) the resolution efforts; and (3) the drivers behind those efforts. The second section takes the same approach to each of Norway's maritime boundaries, all of which are now resolved. A third and final section then compares and contrasts the two countries' approaches to maritime boundary dispute settlement, asking whether Canada's unresolved disputes are the result of factors specific to those particular disputes or whether assumptions or policy preferences, specific to the Canadian government, also play a role.

CANADA

Worldwide, hundreds of maritime boundaries have been settled since the mid-twentieth century when developments in international law allowed coastal states to extend their jurisdiction farther offshore, creating new boundaries and adding political and economic relevance to previously unimportant, unresolved ones.⁴ The development of coastal state rights over the continental

⁴ Victor Prescott & Clive Schofield, *Maritime Political Boundaries of the World* (Leiden: Martinus Nijhoff Publishers, 2004); Mom Ravin, *Law of the Sea: Maritime Boundaries and Dispute Settlement Mechanisms* (2005),

shelf, advanced in the 1945 *Truman Proclamation* and codified in the 1958 *Geneva Convention on the Continental Shelf (Geneva Convention)*, raised the prospect of exclusive jurisdiction over offshore oil and gas.⁵ Then, in the 1970s, many coastal states extended their exclusive fisheries jurisdiction to 200 nautical miles from shore (and, in some cases, even farther). In 1982, the right to a 200-nautical-mile EEZ was consolidated in the *United Nations Convention on the Law of the Sea (UNCLOS)*.⁶

Canada was affected by all these developments. In 1969, the discovery of a major oil field at Prudhoe Bay, Alaska, raised the prospect of oil and gas deposits in a disputed section of the Beaufort Sea. In 1977, the extension of fisheries jurisdictions by Canada and the United States created a large boundary dispute in the Gulf of Maine, in the middle of a rich fishery that had previously been located in international waters.⁷

1977–78 NEGOTIATIONS ON THE “PACKAGE DEAL”

In 1977, Canada and the United States opened negotiations with a view to resolve all four of their maritime boundary disputes. Canada began by expressing a willingness to make concessions in the Beaufort Sea in return for US concessions seaward of Juan de Fuca Strait and, especially, in the Gulf of Maine.⁸ It also sought a hydrocarbon-sharing regime for the Beaufort Sea, so that oil and gas would not “become a political or economic issue between the two countries because there would be joint access” and “where the line was wouldn’t make any difference.”⁹ This attempt at a “package deal” failed because the United States insisted on dealing with each of the disputes independently and because Canada was concerned that, in the absence of a package deal, a concession on one dispute could weaken its legal positions on the others. The United States was also worried about the creation of precedents in regard to international law, not necessarily in regard to disputes involving Canada but, rather, in regard to disputes elsewhere.¹⁰

Both countries were also concerned about domestic politics. As Christopher Kirkey explained,

Canadian acceptance of the U.S. position on the Beaufort Sea boundary — in the absence of an equitable, comprehensive settlement — would by consequence place the [Pierre] Trudeau government in the politically undesirable position of having to defend an agreement that unquestionably favoured American

online:

<http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/mom_0506_cambodia.pdf>.

⁵ *Truman Proclamation on the Continental Shelf*, Presidential Proclamation no 2667 (28 September 1945); *Geneva Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 [*Geneva Convention*].

⁶ ED Brown, “Delimitation of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III” (1981) 5:3 *Marine Policy* 172. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [*UNCLOS*].

⁷ Donald M McRae, “Canada and the Delimitation of Maritime Boundaries,” in Donald M McRae & Gordon Munro, *Canadian Oceans Policy: National Strategies and the New Law of the Sea* (Vancouver: UBC Press, 1989) 145 at 147.

⁸ Christopher Kirkey, “Delineating Maritime Boundaries: The 1977–1978 Canada–US Beaufort Sea Continental Shelf Delimitation Boundary Negotiations” (1995) 25 *Can Rev Am Stud* 49, 55.

⁹ *Ibid* at 55–56, quoting Lorne Clark.

¹⁰ Kirkey, *ibid* at 59–60 writes: “U.S. officials were concerned that by deviating from this position, which seeks to delimit wet boundaries according to the principle of equidistance — except in cases where specifically defined circumstances exist — American ability to successfully prevail either in the course of international negotiations over future maritime boundary cases, or regarding those cases brought before the ICJ, would be greatly reduced.”

maritime jurisdictional interests in the North over those of Canada. Such an unpalatable scenario could therefore not be permitted by Canadian officials to transpire. As Blair Hankey indicated, “we were concerned about the supposed political sensitivity of the 141st meridian ... we understood that to compromise the line would be politically delicate.”¹¹

Similarly, the US negotiating team “staunchly believed that even if they agreed to the Canadian proposal [for a package deal], it stood no chance of being politically supported both in the interagency process, and by Congress. Such a proposal, if accepted, would undoubtedly be viewed as predominantly favouring Canadian interests.”¹² Finding themselves in a standoff, the parties shifted their attention to singularly resolving the dispute in the Gulf of Maine, where immediate, competing economic interests made some kind of solution imperative.

GULF OF MAINE

The Dispute

The Gulf of Maine is located southwest of the provinces of Nova Scotia and New Brunswick and east-southeast of the states of Maine and Massachusetts. It contains rich fishing grounds, most notably on the shallow Georges Bank, which historically was located in international waters — beyond the territorial sea. In 1977, Canada and the United States claimed fisheries zones out to 200 nautical miles that overlapped on the eastern portion of Georges Bank.¹³ The 8,648-square-nautical-mile overlap was due to the methods used to delimit the extent of maritime boundaries. While Canada delimited its zone in the Gulf of Maine through a straightforward application of the equidistance principle, the United States drew a modified equidistance line that took into account “special circumstances,” especially the shape of the seafloor.¹⁴

[INSERT: MAP 1]

Map 1. Limits of fishery zones and continental shelf claimed by the parties, 1 March 1977 (taken from *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, [1984] ICJ Rep 246 at 285).

Resolution Efforts

In 1979, Canadian and US negotiators signed two treaties that were then sent to the US Senate for its “advice and consent” to ratification. The *East Coast Fisheries Agreement* provided for a complicated regime of transboundary fishing rights but was never put to a vote due to opposition from the US fishing industry.¹⁵ However, the *Agreement to Adjudicate the Maritime Boundary* received the Senate’s advice and consent.¹⁶ In this second treaty, Canada and the United States agreed to submit the dispute to a “chamber” made up of five members of the International Court

¹¹ *Ibid* at 59.

¹² *Ibid* at 60.

¹³ Ted L McDorman, *Salt Water Neighbors: International Ocean Relations between the United States and Canada* (New York: Oxford University Press, 2009) at 135.

¹⁴ *Ibid* at 140–42.

¹⁵ *Ibid* at 137.

¹⁶ U.S. Senate, Executive Report No. 5, 97th Congress, 1st Session, Maritime Boundary Settlement with Canada (1981) 2, cited in *ibid*.

of Justice (ICJ).¹⁷ They asked the chamber to delimit a single maritime boundary — that is, for both the continental shelf and the EEZ. They excluded from the chamber’s mandate the seabed and waters around Machias Seal Island (discussed below) and did so by instructing that the delimitation begin at a designated point “A” south of that feature.

In 1984, the chamber delimited a boundary out to 200 nautical miles from the US coast that divided the disputed zone almost exactly in half.¹⁸ However, the end point of the adjudicated line was only 175.5 nautical miles from the Canadian coast and, as a result, 163 square nautical miles of water column and seabed located within 200 nautical miles of the Canadian coast were left unresolved. Canada’s jurisdiction to regulate fishing in that small area, beyond the US 200-nautical-mile limit but south of the equidistance line, has not been accepted by the United States.¹⁹

Drivers

According to Christopher Kirkey, the decision to focus Canada-US negotiating efforts on this dispute was prompted by a series of developments in 1978, including “the unrestricted fishing of cod, haddock, pollock and scallop species by U.S. vessels in the Gulf of Maine” and “the reciprocal barring of Canadian and American fishing vessels from the other’s waters.”²⁰ These developments led to a “growing concern about the risk of being plunged into a British-Icelandic type of fish war without either side wishing it.”²¹ Another factor was the potential for oil and gas in the Gulf of Maine and the fact that both countries had already issued exploration licenses there.²² All of this created a situation in which, according to US negotiator David Colson, “an agreement was essential in light of the high level of human activity which occurred in the disputed area.”²³ Finally, McDorman reports that the resort to adjudication rather than negotiation was caused, in part, by “the unwillingness of either the Canadian or U.S.

¹⁷ This was the first occasion on which two states took up the option of a chamber. See E Valencia-Ospina, “The Use of Chambers of the International Court of Justice” in V Lowe & M Fitzmaurice, eds, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 503.

¹⁸ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] ICJ Rep 246 [*Gulf of Maine*].

¹⁹ McDorman, *supra* note 13 at 176–78. This issue could be dealt with in a new agreement — which will eventually be needed, in any event, to take the Canada–US boundary into the extended continental shelf — by using a “special area” to assign Canada’s rights over the 163 nautical square miles to the United States, in return for a US compromise elsewhere. Special areas were pioneered in the 1990 United States–Soviet Union Boundary Treaty, where they did not attract protests from other states, and the same technique has been used in the 2010 Norway–Russia Boundary Treaty. See *Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary* (1990) 29 I.L.M. 941, online:

<<http://www.state.gov/documents/organization/125431.pdf>> and *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, English translation online: <http://www.regjeringen.no/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf>. See also Byers, *International Law and the Arctic* (Cambridge: Cambridge University Press) at 35–36, 43–44.

²⁰ Kirkey, *supra* note 8 at 64, n 17.

²¹ Erik B Wang, “Canada–United States Fisheries and Maritime Boundaries Negotiations: Diplomacy in Deep Water” (1981) 38:6 & 39:1 *Behind the Headlines* 1 at 15, quoted in Kirkey, *supra* note 8 at 64, n 17.

²² McDorman, *supra* note 13 at 134.

²³ Kirkey, *supra* note 8 at 64, n 17, quoting correspondence from Colson.

governments to be tarred by the concerned domestic constituencies with having compromised the national position.”²⁴

MACHIAS SEAL ISLAND

The Dispute

Machias Seal Island is a tiny feature (0.08 square kilometres), located about eight nautical miles from Maine and ten nautical miles from New Brunswick, that is disputed between Canada and the United States. The dispute extends to two nearby islets, Gulf Rock and North Rock, as well as the surrounding water column and seabed, an area of around 210 square nautical miles. The water column and seabed are at issue because resolving the dispute over the island will determine on which side the maritime boundary is located. The dispute over the island itself dates back to the 1783 *Treaty of Paris*, which assigned the newly independent United States all islands within twenty leagues (sixty nautical miles) of their coast.²⁵ However, the treaty also excluded any island that was ever part of Nova Scotia, and a 1621 Letters Patent issued by King James I for the purposes of establishing the colony of Nova Scotia includes Machias Seal Island. The western portion of Nova Scotia later became New Brunswick. In addition to the *Treaty of Paris*, the United States’ position is based on the proximity of Machias Seal Island to the US mainland. In addition to the British land grant, Canada’s position is based on the presence of a British (and then Canadian) lighthouse on the island since 1832 — something the United States did not protest until 1971.

[INSERT: MAP 2]

Map 2. Machias Seal Island (from David H. Gray, “Canada’s Unresolved Maritime Boundaries” (1997) 5:3 International Boundaries Research Unit (IBRU) Boundary and Security Bulletin 61 at 66).

Resolution Efforts

In 1979, the dispute over Machias Seal Island and the surrounding water and seabed was excluded from the mandate of the chamber of the ICJ established to resolve the maritime boundary farther out in the Gulf of Maine. In its judgment, the chamber explained this decision on the basis that “the Parties wish to reserve for themselves the possibility of a direct solution of this dispute.”²⁶

Drivers

Machias Seal Island and the surrounding seabed and waters have little economic value. No oil or natural gas has been discovered in the area. Although the surrounding waters contain lobsters, which have been the subject of friction between Canadian and US fisherman, the potential fishery is not particularly large, and the two governments have exercised restraint, including by

²⁴ McDorman, *supra* note 13 at 141.

²⁵ *Treaty of Paris*, 3 September 1783, online: <<https://www.loc.gov/rr/program/bib/ourdocs/paris.html>>.

²⁶ *Gulf of Maine*, *supra* note 18 at 265–66.

adhering to a policy of flag-state enforcement.²⁷ These factors help to explain why the dispute has been left unresolved. As Donald McRae told the *Globe and Mail* in 2012, “every now and then it crops up as an issue between the two parties, and then they just simply try to put aside because I don’t think either side is interested in dealing with it.”²⁸

The “possibility of a direct solution” may not have been the real reason why the dispute over Machias Seal Island and the surrounding seabed and water was excluded from the mandate of the chamber of the ICJ. Governments often find it more difficult to give up (or risk giving up) territory because land generally has more domestic political significance than seabeds or water. As Bernard Oxman has explained, “maritime boundary issues do not normally seem to engage the same level of political attention as many disputes over land territory. The resultant agreements are often viewed as economic or technical.”²⁹

Machias Seal Island also constitutes a zero-sum negotiating situation, with most of the foreseeable results involving one country obtaining uncontested title to the exclusion of the other. This zero-sum outcome could be balanced with concessions elsewhere — for instance, in a multi-boundary package deal or it could be overcome through the creation of a condominium, whereby both countries would share sovereignty over the island, enabling the drawing of a boundary maritime boundary up to the low water mark at both ends. But the United States was opposed to a package deal in 1977–78, and condominiums, although not unprecedented, are rare in international law.³⁰ Finally, it is possible that the interests of subnational governments were in play. Any Canadian concession on Machias Seal Island would diminish the size of New Brunswick, thus bringing that province’s interests (and perhaps constitutional rights) into play. Similar considerations would seem to apply *vis-à-vis* the state of Maine.

BEAUFORT SEA

The Dispute

The Beaufort Sea is the shallow portion of the Arctic Ocean located between Alaska and Canada’s High Arctic islands, just north of the Mackenzie River delta. The dispute over the location of the boundary began in 1976 when the United States protested the line that Canada was using while issuing oil and gas concessions.³¹ The existence of the dispute was confirmed the following year when both countries delineated fishing zones out to 200 nautical miles and used different lines.³² The dispute is centred on the wording of a treaty concluded between Russia and Britain in 1825 (the United States took on Russia’s treaty rights when it purchased

²⁷ McDorman, *supra* note 13 at 193–94.

²⁸ Kim Mackrael, “Canada, Denmark Closer to Settling Border Dispute,” *Globe and Mail* (29 November 2012), online: <<http://www.theglobeandmail.com/news/national/canada-denmark-closer-to-settling-border-dispute/article5831571/>>.

²⁹ Bernard H. Oxman, “International Maritime Boundaries: Political, Strategic, and Historical Considerations” (1994–95) 26:2 *U Miami Inter-Am L Rev* 243 at 256.

³⁰ One example is Pheasant Island in the middle of the Bidasoa River between France and Spain. See Byers, *supra* note 19 at 15.

³¹ McDorman, *supra* note 13 at 184 (referring to *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Diplomatic Note, ICJ Pleadings, 103 (1976) vol 5, Annex 8 to Reply of the United States, 529–30).

³² David H Gray, “Canada’s Unresolved Maritime Boundaries” (1997) 5:3 *International Boundaries Research Unit (IBRU) Boundary and Security Bulletin* 61 at 62.

Alaska in 1867; Canada acquired Britain's rights in 1880).³³ The treaty sets the eastern border of Alaska at the "meridian line of the 141st degree, in its prolongation as far as the frozen ocean."³⁴ Canada claims that this treaty provision establishes both the land border and the maritime boundary and that both must follow the straight north. In contrast, the United States argues that the treaty's delimitation applies to land only and that regular methods of maritime boundary delimitation apply beyond the coastline. In the case of the Beaufort Sea, the United States sees an equidistance line as the legally and geographically appropriate approach.³⁵ Since the coast of Alaska, the Yukon, and the Northwest Territories slants east-southeast from Point Barrow, Alaska, to the mouth of the Mackenzie River, such an equidistance line trends progressively further east of the line that Canada prefers at the 141 degree west meridian, running in a roughly north-northeast direction from the terminus of the land border to the 200 nautical mile limit. As a result, within that distance from shore, an approximately 6,250 square nautical mile pie-shaped disputed sector was created.³⁶

[INSERT: MAP 3]

Map 3. Beaufort Sea: US and Canadian claims (from Sovereign Geographic, online: <<http://www.sovereigngeographic.com>>).

Resolution Efforts

1977–78 Negotiations

As discussed above, Canada and the United States sought to resolve the Beaufort Sea dispute along with their other maritime boundary disputes in 1977–78. At the time, Canada indicated a willingness to approach the disputes as a package and felt that it would trade losses in the Beaufort Sea for gains elsewhere. The United States insisted on treating each dispute separately, and so the two countries focused on their most pressing boundary dispute — the Gulf of Maine.

2010–11 Discussions

Every summer from 2008 through 2011, two icebreakers — one American, the other Canadian — worked together in the Beaufort Sea gathering information about the shape of the ocean floor and the character and thickness of the seabed sediments.³⁷ It was a partnership born of necessity because neither country had two icebreakers capable of the task and because the two countries required a complete scientific picture of the seabed in order to determine the geographic extent of their sovereign rights to an extended continental shelf more than 200 nautical miles from shore. The collaborative mapping beyond 200 nautical miles may have also opened the door to the resolution of the boundary dispute, by identifying that the continental shelf in the Beaufort

³³ *Great Britain/Russia: Limits of Their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean*, 16 February 1825, 75 CTS 95.

³⁴ *Ibid*, art 3.

³⁵ See, eg, US Department of State, *Exclusive Economic Zone and Maritime Boundaries*, Public Notice 2237 (1995) 60 Fed Reg 43825–29.

³⁶ See McDorman, *supra* note 13 at 181–90, for the definitive presentation of the dispute as previously understood.

³⁷ Randy Boswell, "'Astonishing' Data Boost Arctic Claim," *Ottawa Citizen* (12 November 2008) A3; Sian Griffiths, "US-Canada Arctic Border Dispute Key to Maritime Riches," *BBC News* (2 August 2010), online: <<http://www.bbc.co.uk/news/world-us-canada-10834006>>.

Sea might stretch 350 nautical miles or even farther from the shore. The possibility of coastal states having sovereign rights over an extended continental shelf is codified in Article 76 of *UNCLOS*, which Canada has ratified and the United States treats as largely reflective of customary international law.³⁸

The introduction of the extended continental shelf into the equation added a twist to the Beaufort Sea boundary dispute, for if one extends the equidistance line preferred by the United States beyond 200 nautical miles, it changes direction and begins tracking towards the northwest. It does so because of a change in direction of the Canadian coast on the eastern side of the Mackenzie River delta and even more so because of the presence of Banks Island, a large feature on the Canadian side of the Beaufort Sea. The effect of Banks Island is so strong that the equidistance line crosses over the 141-degree-west meridian (which, naturally, continues straight north to the North Pole) and heads towards the maritime boundary between the United States and Russia. This leaves a large and as-yet-unspoken-for area of extended continental shelf to the west of the 141-degree-west meridian and east of the equidistance line, essentially the reverse of the disputed sector farther south. In simple spatial terms, the US line appears to favour Canada beyond 200 nautical miles and vice versa.

In short, what appeared to be a zero-sum negotiating situation now offers opportunities for creative trade-offs; opportunities that resulted in at least some diplomatic re-engagement in 2010. In February of that year, an official from the Canadian Department of Foreign Affairs cited a probable overlap in the two states' views of the areas subject to their extended continental shelf rights as the main reason for a renewed effort to resolve the Beaufort Sea boundary dispute.³⁹ In the Speech from the Throne in March 2010, the Canadian government signalled its desire to "work with other northern countries to settle boundary disagreements."⁴⁰ This was followed by a public invitation to open negotiations specifically on the Beaufort Sea boundary, delivered in May 2010 by then Foreign Affairs Minister Lawrence Cannon during a speech in Washington, DC.⁴¹ By the time Cannon released Canada's Arctic foreign policy statement in August 2010, which reiterated Canada's commitment to resolving boundary disputes, at least one meeting between US and Canadian diplomats had already taken place.⁴² The discussions were suspended at some point in 2011, after the two countries decided they needed more scientific information on the existence and location of hydrocarbon reserves before negotiating a boundary. Other factors in the suspension could have included Cannon's departure from the Foreign Affairs portfolio, a decrease in world oil prices in mid-2011, and concerns about Canadian domestic law and public opinion, as discussed below.

³⁸ *UNCLOS*, *supra* note 6.

³⁹ Randy Boswell, "Beaufort Sea Breakthrough," *Vancouver Sun* (17 February 2010), online: <<http://byers.typepad.com/arctic/2010/02/beaufort-sea-breakthrough.html>>.

⁴⁰ Canada, Speech from the Throne (3 March 2010), online: <<http://www.speech.gc.ca/eng/media.asp?id=1388>>.

⁴¹ Randy Boswell, "Canada Ready to Settle Beaufort Sea Dispute with U.S.: Cannon," *Vancouver Sun* (14 May 2010), online: <<http://byers.typepad.com/arctic/2010/05/canada-ready-to-settle-beaufort-sea-dispute-with-us-cannon.html>>.

⁴² Department of Foreign Affairs, "Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad" (2010), online: <http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP_booklet-PECA_livret-eng.pdf>; Randy Boswell, "Work Underway to Resolve Beaufort Sea Boundary Dispute," *Vancouver Sun* (26 July 2010), online: <<http://byers.typepad.com/arctic/2010/07/work-underway-to-resolve-beaufort-sea-boundary-dispute.html>>.

Drivers

Economic Interests

As far back as the 1970s, seismic surveys and exploratory wells established that oil and gas were present in the Beaufort Sea.⁴³ In 2006, Devon Canada discovered a potential 240 million barrels of oil just to the east of the disputed zone.⁴⁴ The next year, Imperial Oil and ExxonMobil Canada committed to spending CDN \$585 million in return for exploratory rights over a nearby area of seabed.⁴⁵ Then, in 2008, British Petroleum agreed to spend CDN \$1.2 billion in exploring an area adjacent to the Imperial-Exxon-Mobil leases.⁴⁶ In 2010, the three companies concluded a joint venture to explore for oil and gas in the two offshore parcels.⁴⁷ On the US side of the disputed zone, Shell spent US \$7 billion dollars on an exploratory campaign.⁴⁸ As a result of all of this attention, the disputed boundary became of economic interest — because companies need to know which permitting and regulatory authority is responsible for any particular area where they might wish to drill.

World oil prices dropped sharply in 2014, and, in 2015, Shell shut down its campaign north of Alaska without making a find.⁴⁹ Then, in December 2016, both the Canadian and US sides of the Beaufort Sea were put off limits for further oil and gas development as a result of a moratoria announced by the Obama administration and the Trudeau government.⁵⁰ Although the US moratorium will likely be overturned by the Trump administration, and the Canadian moratorium is subject to review every five years, the oil industry has lost interest in the boundary dispute — at least for the moment. There is no commercial fishery in the Beaufort Sea, though Indigenous people from both Canada and Alaska engage in some subsistence fishing there.

Concerns about a Precedent

Canada has always been cautious about compromising on its legal position in the Beaufort Sea because of a concern that this might detrimentally affect its position on other boundary disputes. This is why Canada sought a “package deal” in 1977, as Kirkey explains:

⁴³ For the 2011 “disposition map” of the Beaufort Sea and Mackenzie Delta produced by Aboriginal Affairs and Northern Development Canada, showing past discoveries and “shows,” see <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/nog_mp_bsmc_pg_1317059161670_eng.pdf>.

⁴⁴ Gary Park, “Beaufort Find Is Oil, Not Gas,” *Petroleum News* (21 October 2007) 12, online: <<http://www.petroleumnews.com/pntruncate/304958258.shtml>>.

⁴⁵ Dina O’Meara, “Imperial Oil, Exxon-Mobil Canada Bet C\$585M on Offshore Arctic Oil and Gas,” *Resource Investor* (19 July 2007), online: <<http://www.resourceinvestor.com/2007/07/19/imperial-oil-exxonmobil-canada-bet-c585m-on-offsho>>.

⁴⁶ Scott Hagggett, “BP Bids Big for Canadian Arctic Drilling Rights,” *Reuters* (9 June 2008), online: <<http://uk.reuters.com/article/2008/06/09/uk-energy-arctic-idUKN0947438920080609>>.

⁴⁷ Shaun Polczer, “Firms Team Up in Arctic,” *Calgary Herald* (31 July 2010), online: <<http://www2.canada.com/calgaryherald/news/calgarybusiness/story.html?id=a3a43f92-a51d-4402-a76d-61362b8105b8>>.

⁴⁸ “Shell Ends Exploration in Arctic Near Alaska ‘for the Foreseeable Future’,” *Associated Press* (28 September 2015), online: <<http://www.cbc.ca/news/business/shell-stops-arctic-drilling-development-1.3246355>>.

⁴⁹ *Ibid.*

⁵⁰ “Ban on New Arctic Drilling Gives Canada Leg Up, U.S. Lawmakers Say,” *Reuters* (21 December 2016), online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/offshore-ban-in-arctic-will-cost-northern-economy-northwest-territories-premier-says/article33402219/>>.

If Ottawa were to accommodate the U.S. position on the Beaufort Sea boundary, this would by consequence not only necessitate a departure from the official Canadian government position on the issues (i.e., the 141st meridian should serve as the boundary), but more importantly, be inconsistent with Canada's overall legal approach to delimiting maritime boundaries. That latter approach, which sought to delimit boundaries by equidistance — except in cases where an applicable treaty exists — would be highly discredited and of little use in future international maritime boundary cases that Canadian officials would have to confront. In particular, the Canadian negotiation delegation was explicitly concerned that if it acquiesced to the U.S. favoured position of the equidistance principle in the Beaufort Sea, and mutual satisfaction was not achieved on all three other outstanding maritime boundaries, that the Canadian legal position would be severely weakened should at least one of these remaining cases ultimately go before the International Court of Justice for settlement.⁵¹

As we saw above, the United States had similar concerns about the effect of a precedent.

Zero-Sum versus Win-Win

In 1977–78, Canada and the United States found themselves in a zero-sum negotiating situation in the Beaufort Sea. In other words, the dispute could only be resolved if one state won and the other lost or if both lost. Either Canada would have to surrender on the 141st meridian, or the United States would have to surrender on the equidistance principle, or both would have to surrender simultaneously. Concerns about precedents made all of these options even more unpalatable. Canada was seeking a way out of the zero-sum scenario when it suggested a package deal — a deal, for instance, that would have allowed a US “win” in the Beaufort Sea in return for a Canadian “win” in the Gulf of Maine. And if Canada could have resolved all four disputes with the United States simultaneously, its concerns about a precedent would have disappeared. This was not the case with the United States, however, since its concerns about a precedent extended to disputes with other countries.

Negotiations over the Beaufort Sea boundary resumed in 2010 because of the emergence of a possible win-win outcome as a result of the addition of an extended continental shelf to the dispute, combined with the fact that the equidistance line makes a significant change in direction just beyond 200 nautical miles from shore.⁵² Canada could now accept the application of the equidistance principle while retaining a large portion of the newly expanded disputed area. Alternatively, the United States could accept Canada's interpretation of the 1825 treaty and, thus, the 141st meridian and still gain a very large portion of extended continental shelf.

Domestic Law and Politics

The governments of the Yukon and Northwest Territories sometimes express concern when the United States makes statements or takes regulatory action with respect to the disputed zone.⁵³ But neither territorial government has legal rights in the Beaufort Sea. Unlike the maritime areas off Nova Scotia and Newfoundland and Labrador, where federal-provincial agreements exist, the

⁵¹ Kirkey, *supra* note 8 at 58–59.

⁵² Randy Boswell, “Beaufort Sea Breakthrough,” *Vancouver Sun* (17 February 2010), online: <<http://byers.typepad.com/arctic/2010/02/beaufort-sea-breakthrough.html>>.

⁵³ Maura Forrest, “Pasloski Says Beaufort Sea Drilling Lease Violates Canada's Arctic Sovereignty,” *Yukon News* (23 March 2016), online: <<http://yukon-news.com/news/pasloski-says-beaufort-sea-drilling-lease-violates-canadas-arctic-sovereign/>>.

federal government has sole jurisdiction over offshore resources in the Arctic. Moreover, the economies of the Yukon and Northwest Territories would likely benefit from a resolution of the boundary dispute — if it led to oil and gas activity — since some of the infrastructure and services needed to support such offshore operations would be based in Tuktoyaktuk and Inuvik, while traffic on the Dempster Highway would increase. Politicians and residents of the two territories are likely aware of this; in any event, no opposition was expressed in 2010 when news reports indicated that Canada–US discussions were underway.

The greatest domestic impediment to the resolution of the boundary dispute could be the 1984 *Inuvialuit Final Agreement*, a constitutionally recognized land claims agreement in which the Canadian government and the Inuvialuit used the 141-degree-west meridian to define the western edge of the Inuvialuit settlement region.⁵⁴ In the settlement region, and specifically in an area called the Yukon North Slope, which includes the offshore to the northeast of the terminus of the international land border, Canada recognized Inuvialuit harvesting rights over fish and game and promised to protect the area.⁵⁵ Under international law, Canada could enter into a maritime boundary treaty with the United States that would likely be valid and binding regardless of the domestic rights of the Inuvialuit.⁵⁶ However, under Canadian law, the federal government has a duty to consult, limit any infringement of Aboriginal rights as much as possible, make any such limitation clear through an Act of Parliament, and provide compensation.⁵⁷ It is possible that the existence of these Inuvialuit rights contributed to the 2011 suspension of discussions on the Beaufort Sea boundary. It is also possible, however, that the Inuvialuit could be persuaded to support a resolution of the boundary dispute in return for financial compensation and employment opportunities.

Finally, it is possible that concerns about public opinion across the rest of Canada contributed to the suspension of discussions. Stephen Harper branded himself as a champion of Canadian Arctic sovereignty during his nine years as prime minister from 2006 to 2015. Any concession, especially to the United States, would have been treated harshly by the Canadian media and opposition parties. If concerns about public opinion existed in 1978, even in the context of a possible package deal, they may have existed in 2011 also.

⁵⁴ 1984 *Inuvialuit Final Agreement* (as amended), online:

<http://www.daair.gov.nt.ca/_live/documents/documentManagerUpload/InuvialuitFinalAgreement1984.pdf>. Under section 35 of the *Constitution Act 1982*, (UK), 1982, c 11, “rights that now exist by way of land claims agreements or may be so acquired” are “recognized and affirmed.” See <http://laws.justice.gc.ca/eng/Const/page-12.html#sc:7_II>.

⁵⁵ *Inuvialuit Final Agreement*, *supra* note 54, especially at s 12(2): “The Yukon North Slope shall fall under a special conservation regime whose dominant purpose is the conservation of wildlife, habitat and traditional native use.” Curiously, the Inuvialuit settlement area extends more than 600 nautical miles northward into the Beaufort Sea, well beyond Canada’s exclusive jurisdiction over the living resources of the exclusive economic zone, though it is unclear whether Canada (in 1984 or at any time since) purports to exercise any exclusive jurisdiction beyond 200 nautical miles. For a map of the Inuvialuit settlement area, see <<http://www.aadnc-aandc.gc.ca/eng/1100100031121/1100100031129#chp7>>.

⁵⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 46(1): “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

⁵⁷ *Constitution Act 1982*, *supra* note 54, s 35; *R v Sparrow*, [1990] 1 SCR 1075 (Canada); *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388; *Tsilhqot'in v. British Columbia* [2014] 2 SCR 256.

DIXON ENTRANCE

The Dispute

In 1903, the United States and Britain established an arbitration panel to delimit the border between the Alaska Panhandle and British Columbia.⁵⁸ At the southern end of the panhandle, the panel drew a boundary down the middle of Portland Canal to just south of where it opens into Dixon Entrance, a roughly seventy-five-nautical-mile-long, thirty-nautical-mile-wide body of water that connects the mainland coast to the open sea just to the north of Haida Gwaii (formerly the Queen Charlotte Islands). The panel designated that point just south of the mouth of Portland Canal as Point B and drew a straight line from there to Point A at Cape Muzon on Dall Island, seventy-two nautical miles away.⁵⁹ The resulting “A-B line” runs along the north side of Dixon Entrance.

Canada’s position is that Points A and B are part of the arbitrated boundary delimitation, just like the other turning points, thus giving all of Dixon Entrance to Canada. The United States claims that the A-B line simply allocates title over land, leaving the maritime boundary to be decided in accordance with international law — in its view, the equidistance principle. In 1977, the United States used the equidistance principle to define a fisheries conservation zone through the length of Dixon Entrance. The difference between the Canadian and US positions amounts to 828 square nautical miles, which is spread over two areas south of the A-B line. Two small areas north of the A-B line but south of the equidistance line are, curiously but logically, not claimed by either country.

The dispute also has consequences seaward of Dixon Entrance since the location of the boundary between the two countries’ 200-nautical-mile EEZs, which Canada and the United States agree should be delimited according to equidistance, depends on the boundary that is closer inshore for its starting point. Canada’s preferred line starts at Point A and the United States’ preferred line starts at a point equidistant between Cape Muzon and Langara Island (the northernmost part of Haida Gwaii).⁶⁰

[INSERT: MAP 4]

Map 4. Dixon Entrance (from David H. Gray, “Canada’s Unresolved Maritime Boundaries” (1997) 5:3 IBRU Boundary and Security Bulletin 61 at 62).

Resolution Efforts

In 1945, Canadian and US negotiators reached a tentative settlement of the Dixon Entrance dispute whereby citizens of both countries would, outside of the respective three-nautical-mile territorial seas, have the right to fish and navigate on either side of an equidistance boundary. However, the Canadian government pulled back from the settlement in the face of objections

⁵⁸ *Convention between his Majesty and the United States of America, for the Adjustment of the Boundary between the Dominion of Canada and the Territory of Alaska*, 24 January 1903, online: <https://en.wikisource.org/wiki/Hay-Herbert_Treaty>. For the definitive history of the arbitration, and the resulting dispute over Dixon Entrance, see Charles B Bourne & Donald M McRae, “Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined,” (1976) 14 CYIL 183.

⁵⁹ *Alaska Boundary Case (Great Britain v United States)*, 20 October 1903, reprinted in UNRIAA, vol 40, 481–540, online: <http://www.legal.un.org/riaa/cases/vol_XV/481-540.pdf>.

⁶⁰ McDorman, *supra* note 13 at 168.

from the British Columbia government.⁶¹ In 1977, Dixon Entrance was one of the disputes included in Canada's proposal for a package deal — a proposal that failed to receive support from the United States because of that country's refusal to bundle disputes when negotiating.

Drivers

Economic Interests

Dixon Entrance has not been explored for oil and gas due to a long-standing moratorium on oil and gas drilling off Canada's west coast and a US focus on proven reserves further north. However, there are rich stocks of salmon and halibut in the area. Over the decades, both Canada and the United States have occasionally arrested each other's fishing boats in Dixon Entrance. However, tensions over fisheries have subsided in recent decades for two reasons. First, in 1980, the two countries agreed, in an exchange of notes, to observe flag state enforcement (that is, they each agreed to deal with their own fishing boats and not to arrest boats from the other country).⁶² Second, in 1985, the two countries concluded the *Pacific Salmon Treaty* and created the bi-national Pacific Salmon Commission to cooperatively manage the fishery along the entire coast.⁶³

Security Interests

US Navy submarines regularly pass through the Dixon Entrance on their way to an acoustic testing facility on Back Island, just north of Ketchikan, Alaska. In the early 1990s, Canada accorded navigational permission to the submarines, and the United States may have agreed to provide notice in advance of transits.⁶⁴ However, the United States has never accepted that Canadian permission is required.⁶⁵ Clearly, the US Navy would prefer not to be reliant on the permission of a foreign government to access one of its own facilities, and this factor alone might go a long way towards explaining the United States' refusal to accept the A-B line as a maritime boundary.

Public Opinion

In Canada, the A-B line has great historical significance. It resulted from a four-to-two arbitral decision in which a British-appointed arbitrator broke ranks with his two Canadian colleagues and sided with the three Americans to favour the United States on the location of the land border as well as with regard to several islands. The public reaction in Canada was intense, and, as a result, the position that the A-B line constitutes a maritime boundary — to the disadvantage of the United States — has become a nationalist rallying point. Even today, more than a century

⁶¹ Bourne & McRae, *supra* note 58 at 215.

⁶² McDorman, *supra* note 13 at 285.

⁶³ McRae, *supra* note 7 at 154–55. *Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*, July 2014, Pacific Salmon Commission, online: <<http://www.psc.org/>>.

⁶⁴ McDorman, *supra* note 13 at 170–72.

⁶⁵ *Ibid.*

later, any Canadian government would be cautious about making concessions in Dixon Entrance.⁶⁶

Zero-Sum Situation

As was the case until recently in the Beaufort Sea, Canada and the United States find themselves in zero-sum situation in Dixon Entrance. Any compromise leading to a boundary somewhere between the A-B and equidistance lines would see both countries conceding rich potential fishing grounds, abandoning firm positions, and creating precedents that might damage them with regard to disputes elsewhere.

Interests of a Subnational Government

The BC provincial government claims jurisdiction, *vis-à-vis* the Canadian federal government, over the water column and seabed within Dixon Entrance, east of a line between Point A on Cape Muzon and Haida Gwaii. It does so on the basis that these rights belonged to the colony of British Columbia and were not surrendered when the colony joined Canada in 1871. The BC government also claims jurisdiction, on the same basis, over Hecate Strait, Queen Charlotte Sound, Johnstone Strait, and Georgia Strait, plus the Canadian side of Boundary Pass, Haro Strait, and Juan de Fuca Strait (though only to where the latter strait opens into the Pacific Ocean). In 1984, the Supreme Court of Canada upheld the province's claims with regard to all of these areas except Dixon Entrance and Hecate Strait, which had not been included in the question put to the court.⁶⁷ The BC government has involved itself in the Dixon Entrance dispute, blocking a tentative settlement in 1945 and issuing a position paper on the dispute in 1977.⁶⁸ It could therefore be expected to challenge any Canada–US resolution of the dispute, both politically and in the Canadian courts, unless it was included in the negotiations. Although the involvement of a provincial government in international negotiations is certainly possible, it would introduce another level of complexity to an already complex dispute.

SEAWARD OF THE STRAIT OF JUAN DE FUCA

The Dispute

The boundary between Canada and the United States within the Strait of Juan de Fuca was settled in 1846,⁶⁹ but the development of offshore rights in the mid-twentieth century led to the emergence of a new dispute just west of the strait in the Pacific Ocean. The dispute involves just 15.4 square nautical miles of EEZ, spread over two lens-shaped areas. The continental shelf is

⁶⁶ See: DM Johnston and MJ Valencia, *Pacific Ocean Boundaries: Status and Solutions* (Dordrecht: Martinus Nijhoff, 1991) at 100 (explaining how the “symbolic significance” of the A-B line “almost precludes the political possibility of a concession by Canada.”)

⁶⁷ *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5267/index.do>>.

⁶⁸ *Submission of the Province of British Columbia on West Coast Maritime Boundaries between Canada and the United States* (Victoria, B.C.: Queen's Printer, 1977).

⁶⁹ *Treaty Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains*, 15 June 1846, online: <https://web.archive.org/web/20091113034143/http://www.lexum.umontreal.ca/ca_us/en/cus.1846.28.en.html>.

very narrow west of Juan de Fuca Strait, and the potential for oil and gas is therefore limited. However, there are salmon and halibut stocks on Swiftsure Bank, part of which falls within the lens-shaped area located closest to shore. Canada and the United States agree that the equidistance principle should be applied. The dispute turns on Canada's straight baselines, which it adopted along the indented southwest coast of Vancouver Island in 1969. The United States immediately objected on the basis that the baselines were constructed "contrary to established principles of international Law of the Sea."⁷⁰

The dispute became salient in 1977 when Canada declared a 200-nautical-mile-wide fishing zone. The zone was delimited using an equidistance line that was based on Canada's straight baselines to the north and the low water mark along the US coast to the south. That same year, the United States declared its own fisheries zone, which it delimited using an equidistance line based on the low water lines of both coasts. The United States, in addition to disputing the legality of Canada's straight baselines, contests whether straight baselines are appropriately used for the purpose of delineating an equidistance boundary.

[INSERT: MAP 5]

Map 5: West of Juan de Fuca Strait (from David H. Gray, "Canada's Unresolved Maritime Boundaries" (1997) 5:3 IBRU Boundary and Security Bulletin 61 at 61).

Resolution Efforts

Apart from Canada's inclusion of the dispute within its proposed package deal in 1977, no negotiations have taken place. According to Ted McDorman, "[t]he small area of disputed waters seaward of the Juan de Fuca Strait has caused little concern and has not been the subject of Canada-U.S. discussions."⁷¹

Drivers

There is no evidence of pressure from the fishing industry to resolve the dispute. As in the situation with Dixon Entrance, the cooperative management of the fishery under the Pacific Salmon Commission, combined with flag state enforcement, has created a workable situation for both sides.⁷² For this reason, public opinion does not play any role since very few Canadians and Americans are even aware of the existence of the dispute. There is some degree of regional interest, with the province of British Columbia expressing the view in the 1970s that the boundary should follow the underwater "Juan de Fuca Canyon" rather than an equidistance line.⁷³

As in the other Canada–US boundary disputes, both countries seem concerned that compromising on a principle of delimitation in one instance could weaken their position in another. Added to this, the same concern may exist over the law governing straight baselines. Indeed, the Canada–US dispute seaward of Juan de Fuca Strait could be linked to a dispute over straight baselines in the Arctic. When Canada adopted straight baselines around its high Arctic

⁷⁰ See US notes reprinted in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Reply of the United States, ICJ Pleadings, Oral Arguments, Documents, vol V, Annex 4, 503–4.

⁷¹ McDorman, *supra* note 13 at 175.

⁷² McRae, *supra* note 7 at 154–55.

⁷³ Submission of the Province of British Columbia, *supra* note 68.

archipelago in 1985, they were immediately protested by the United States and the European Community.⁷⁴ Both Canada and the United States might therefore be concerned that any compromise on straight baselines along Vancouver Island could weaken their position in the Arctic, where the dispute over straight baselines is linked to the much more significant dispute over the status of the Northwest Passage.

1973 CANADA–GREENLAND BOUNDARY

The Dispute

In 1970, Canada extended its territorial sea from three to twelve nautical miles.⁷⁵ When doing so, it overlooked that the new limit extended at several points more than halfway across Nares Strait, the narrow channel between Ellesmere Island and Greenland.⁷⁶ Once this consequence was realized, boundary negotiations with Denmark commenced. The boundary under negotiation was potentially quite extensive because Greenland lies within 400 nautical miles of the long eastern coastlines of both Ellesmere Island and Baffin Island, each of which is larger than the United Kingdom.

Resolution Efforts

In 1973, Canada and Denmark agreed to divide the ocean floor using an “equidistance line” — that is, a line that at every point (or, in this case, a series of agreed “turning points”) is an equal distance from the nearest point on each of the two opposing (or, in other cases, adjacent) coasts.⁷⁷ Since then, the two countries have also used the resulting 1,450-nautical-mile boundary to define their fishing zones, meaning that the continental shelf delimitation has informally become an all-purpose maritime boundary.⁷⁸ One provision of the *Agreement on the Continental Shelf between Greenland and Canada* addresses the possibility of hydrocarbon reserves straddling the new boundary.⁷⁹ But unlike some more modern maritime boundary treaties, it only requires that the parties negotiate in these circumstances rather than providing a process or mechanism for resolving the matter.

The treaty does have one unusual element — namely, the way it deals with a disputed island located on the equidistance line. Hans Island, with an area of only 1.3 square kilometres, is not mentioned in the treaty.⁸⁰ Rather, the maritime boundary stops just short of the south shore of the island and begins again just off the north shore of the island. As a result, the dispute over Hans Island has been rendered nearly irrelevant since it is now only about a tiny amount of land, with the surrounding seabed and water column having been allocated by treaty (and practice

⁷⁴ Byers, *supra* note 19 at 133–34, 137–38.

⁷⁵ Act to Amend the Territorial Sea and Fishing Zones Act, SC 1969–70, c 68, s 1243.

⁷⁶ Gray, *supra* note 32 at 68.

⁷⁷ *Agreement between the Government of Canada and the Government of the Kingdom of Denmark relating to the Delimitation of the Continental Shelf between Greenland and Canada* 17 December 1973, (1974) 13(3) ILM 506-11, online: <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-CAN1973CS.PDF>> [*Agreement on the Continental Shelf*].

⁷⁸ Gray, *supra* note 32 at 68.

⁷⁹ *Agreement on the Continental Shelf*, *supra* note 77.

⁸⁰ For more on Hans Island, see Byers, *supra* note 19 at 10–16.

consistent with that treaty). Although the dispute over the island continues, neither country seems to take it very seriously.⁸¹

[INSERT: MAP 6]

Map 6. Canada–Greenland continental shelf boundary (from Canadian Hydrographic Service *Chart 7000*, rev. ed. (12 December 1969).

Drivers

In 1973, there was only a small amount of commercial fishing in the southern portion of Baffin Bay. The fishery, which is mostly for turbot and shrimp, has grown in the ensuing decades and has led to several small disputes between Canada and Greenland over “straddling stocks” — that is, fish populations that move back and forth between the EEZs of different countries or between an EEZ and the high seas.⁸² There was some interest in the potential for oil and gas in Baffin Bay, which is made up entirely of continental shelf. In 1971, Shell obtained exploratory leases from the Canadian government for 860 square kilometres near the eastern entrance of Lancaster Sound.⁸³ In the ensuing decades, some exploratory drilling has taken place in Baffin Bay, although only on the Greenland side and, so far, without any commercially viable deposits being found. As Bernard Oxman explains, “Canada and Denmark are said to have been motivated by the desire to avoid future disputes in a largely unsettled area where Greenland faces the Canadian Arctic.”⁸⁴

LINCOLN SEA

The Dispute

The Lincoln Sea is the portion of the Arctic Ocean located directly to the north of Greenland and Ellesmere Island. The Arctic’s thickest sea ice is found there, pushed into the space between the two land masses and held there for years by prevailing winds and ocean currents. In 1973, the negotiators who delimited the maritime boundary between Canada and Greenland stopped at 82 degrees, 13 minutes north where Nares Strait opens into the Lincoln Sea. Then, in 1977, Canada claimed a 200-nautical-mile fisheries zone along its Arctic Ocean coastline. The zone was bounded in the east by an equidistance line that used the low-water line of the coasts of Ellesmere Island and Greenland and several fringing islands as base points.⁸⁵

⁸¹ In 2005, Canada and Denmark issued a joint statement, indicating that their officials would “discuss ways to resolve the matter.” In the meantime, “all contact by either side with Hans Island will be carried out in a low key and restrained manner.” Canada–Denmark Joint Statement on Hans Island (19 September 2005), online: <<http://byers.typepad.com/arctic/canadadenmark-joint-statement-on-hans-island.html>>.

⁸² See, eg, Martin Mittelstaedt, “Canada Closes Ports in Shrimp Dispute,” *Globe and Mail* (15 February 2010), online: <<http://www.theglobeandmail.com/news/national/canada-closes-ports-in-shrimp-dispute/article1468540/>>.

⁸³ Steve Ducharme, “Shell’s Oil Permits Near Lancaster Sound Still Valid, INAC Says,” *Nunatsiaq News* (11 April 2016), online: <http://www.nunatsiaqonline.ca/stories/article/65674shells_oil_permits_near_lancaster_sound_still_valid_inac_says/>.

⁸⁴ Oxman, *supra* note 29 at 250, n 14.

⁸⁵ Gray, *supra* note 32 at 68.

Denmark adopted its own equidistance line three years later but only after drawing straight baselines — two of which used Beaumont Island as a base point.⁸⁶ Beaumont Island is just over ten square kilometres in size and located more than twelve, but less than twenty-four nautical miles from the Greenland coast. The first of the resulting baselines was 42.6 nautical miles long; the second was 40.9 nautical miles long. The use of straight baselines and Beaumont Island had the effect of pushing the equidistance line slightly westward, adding two lens-shaped areas of thirty-one square nautical miles and thirty-four square nautical miles to the Danish claim.

Canada objected to the Danish straight baselines and particularly the use of Beaumont Island as a base point for four reasons: “Beaumont Island is somewhat west of the other islands, thus it is not part of a fringe of islands; the straight baselines are long; they do not follow the trend of the coast; they do not cross the mouths of the intervening fjords but are farther offshore.”⁸⁷ These reasons seem to be derived from the seminal ICJ decision on straight baselines, namely the 1951 *Anglo-Norwegian Fisheries Case*.⁸⁸

[INSERT: MAP 7]

Map 7. Lincoln Sea (from David H. Gray, “Canada’s Unresolved Maritime Boundaries” (1997) 5:3 IBRU Boundary and Security Bulletin 61 at 64).

Resolution Efforts

In 1982, Canadian and Danish diplomats met to discuss the Lincoln Sea boundary dispute “with neither side moving from their respective positions.”⁸⁹ In 2004, the scope of the dispute was reduced when Denmark modified its straight baselines, replacing the 40.9-nautical-mile baseline east of Beaumont Island with a series of shorter baselines, including one that connects Beaumont Island to John Murray Island, the next island in the chain.⁹⁰ The Danish changes reduced the size of the northernmost disputed area almost to the point of eliminating it, while also strengthening the case for using Beaumont Island as a base point.⁹¹

These developments may have contributed to the announcement by the Canadian and Danish foreign ministers in 2012 that negotiators “have reached a tentative agreement on where to establish the maritime boundary in the Lincoln Sea.”⁹² Apparently, the only issue left for

⁸⁶ See: Executive Order no 176 on the Fishing Territory of Northern Greenland (14 May 1980), online: <<http://faolex.fao.org/docs/pdf/den99033E.pdf>>.

⁸⁷ Gray, *supra* note 32 at 68.

⁸⁸ *Anglo-Norwegian Fisheries Case*, [1951] ICJ Rep] 116.

⁸⁹ Bruce Calderbank et al, *Canada’s Offshore: Jurisdiction, Rights, and Management* 3rd ed (Victoria: Trafford Publishing, 2006) at 163.

⁹⁰ “Royal Decree on Amendment of Royal Decree on Delimitation of the Territorial Waters of Greenland, 15 October 2004” (2005) 56 Law of the Sea Bulletin 126 at 128, online: <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin56e.pdf>.

⁹¹ For a map showing the Danish equidistance line post-2004, see the Map of the Outer Limits of the Exclusive Economic Zone of Greenland, reprinted in “Executive Order on the Exclusive Economic Zone of Greenland, 20 Oct. 2004” (2005) 56 Law of the Sea Bulletin 133 at 136, online: <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin56e.pdf>.

⁹² Canadian Department of Foreign Affairs, “Canada and Kingdom of Denmark Reach Tentative Agreement on Lincoln Sea Boundary,” News Release (28 November 2012) (with backgrounder), online: <<http://news.gc.ca/web/article-en.do?nid=709479>>. See also Kim Mackrael, “Canada, Denmark a Step Closer to Settling Border Dispute” (30 November 2012) *Globe and Mail*, online:

negotiation was a joint management regime for any straddling hydrocarbon deposits. This issue could not be dealt with solely by the Danish and Canadian negotiators, for while Denmark retains control over Greenland's foreign policy, the Greenland government has since 2008 exercised control over natural resources, including on the continental shelf.⁹³ However, joint management regimes have become a standard component part of maritime boundary treaties, and there was (and is) no reason to expect problems during the Canada–Greenland negotiations.

Drivers

The Lincoln Sea boundary dispute was of little practical significance for four reasons: (1) the parties agreed that the equidistance principle should be used; (2) the dispute was over a very small area of EEZ; (3) any resources in the disputed zones would have been exceedingly difficult to access and therefore unlikely to become commercially viable; and (4) there was never any difference of opinion over the location where the adjoining Canadian and Danish jurisdictions would meet at 200 nautical miles from shore, which meant that any dispute with 200 nautical miles of shore was of little legal relevance to a delimitation of the extended continental shelf beyond 200 nautical miles. Like the 1973 boundary treaty between Canada and Greenland, it seems the main reason for seeking to resolve this dispute was to deal with a situation before any problems arose.

The dispute was of little political significance. From the Canadian perspective, it was located within exclusive federal jurisdiction and in the most remote part of the Arctic, which meant that there was virtually no public knowledge or engagement on the issue. Finally, the opening of negotiations was related to Canada's 2010 Arctic Foreign Policy Statement, which expressed an intent to resolve all of the country's Arctic boundary disputes and not just in the Beaufort Sea where interest in oil and gas was growing.⁹⁴ The negotiations with Denmark and the United States were launched at about the same time,⁹⁵ which suggests that resolving the easier dispute in the Lincoln Sea might have been seen as a way to create some momentum for the more difficult dispute in the Beaufort Sea.

ST. PIERRE AND MIQUELON

The Dispute

St. Pierre and Miquelon is an archipelago of eight islands with a total landmass of 242 square kilometres. Located just thirteen nautical miles from the coast of Newfoundland, the islands were claimed by Jacques Cartier on behalf of France in 1536. The islands changed hands several times during wars between France and Britain but have remained uncontested French territory since

<<http://www.theglobeandmail.com/news/national/canada-denmark-a-step-closer-to-settling-border-dispute/article5831571/>>.

⁹³ 2009 Act on Greenland Self-Government, online:

<<http://uk.nanoq.gl/~media/f74bab3359074b29aab8c1e12aa1ecfe.ashx>>.

⁹⁴ Department of Foreign Affairs, "Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad," (2010), online: <http://www.international.gc.ca/polar-polaire/assets/pdfs/CAFP_booklet-PECA_livret-eng.pdf>.

⁹⁵ Randy Boswell, "Canada Ready to Settle Beaufort Sea Dispute with U.S.: Cannon," *Vancouver Sun* (14 May 2010), online: <<http://byers.typepad.com/arctic/2010/05/canada-ready-to-settle-beaufort-sea-dispute-with-us-cannon.html>>.

1815. They support a population of around 6,000 people with an economy based on fishing and tourism. The dispute over maritime zones around St. Pierre and Miquelon began in 1966 when the Canadian and French governments exchanged diplomatic notes setting out their positions with respect to the delimitation of the continental shelf.⁹⁶ The exchange of views was prompted by both countries granting oil and gas exploration licenses in the area.⁹⁷ In 1970, Canada extended its territorial sea from three to twelve nautical miles; one year later, France did the same.

Resolution Efforts

In 1972, the two countries concluded a maritime boundary treaty resolving overlaps within twelve nautical miles of the coasts of Newfoundland, on the one hand, and St. Pierre and Miquelon, on the other.⁹⁸ Canada and France then spent years negotiating over an extension of the boundary out to 200 nautical miles (that is, the EEZ) before agreeing in 1989 to send the matter to an ad hoc arbitral tribunal.⁹⁹ In 1992, the tribunal issued a highly unusual decision.¹⁰⁰ It awarded France a twenty-four-nautical-mile-wide band around the seaward side of the islands, plus a 10.5-nautical-mile-wide corridor extending 188 nautical miles southwards from the islands. If the corridor was intended to allow France access to its territorial sea and EEZ without having to pass through Canada's EEZ, it failed to accomplish this since Canada's zone extends farther offshore and therefore around the stem of the mushroom-shaped French zone.

[INSERT: MAP 8]

Map 8. Illustrative map (from "Court of Arbitration for the Delimitation of Maritime Areas in Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon)" (1992) 31 ILM 1145 at 1148).

Drivers

Fisheries provided the principal motivation for the negotiations and the eventual recourse to third party dispute settlement.¹⁰¹ In 1972, Canada and France agreed to phase out fishing by vessels

⁹⁶ *Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon)*, 10 June 1992," reprinted in (1992) ILM 1145, para 8.

⁹⁷ *Ibid.*

⁹⁸ *Agreement between the Government of Canada and the Government of France on Their Mutual Fishing Relations*, 27 March 1972, reprinted in UN Legislative Series, National Legislation and Treaties Relating to the Law of the Sea (1974) at 570–72 [*Canada–France Fishing Agreement*].

⁹⁹ *Agreement Establishing a Court of Arbitration for the Purpose of Carrying Out the Delimitation of Maritime Areas between France and Canada*, 30 March 1989, reprinted in (1990) 29 ILM 1.

¹⁰⁰ *Court of Arbitration for the Delimitation of Maritime Areas*, *supra* note 96. The situation today is further complicated by the fact that the continental shelf in this area extends well beyond 200 nautical miles. In 2013, Canada filed a submission concerning the seabed along the entire coast of Newfoundland, including offshore from St. Pierre and Miquelon, with the Commission on the Limits of the Continental Shelf. The next year, France included an area of seabed offshore St. Pierre and Miquelon within its submission to the same body. Canada responded by reiterating that France has no rights — to either additional exclusive economic zone or extended continental shelf — beyond those awarded by the tribunal in 1992.

¹⁰¹ Phillip M Saunders and David L VanderZwaag, "Canada and St. Pierre and Miquelon Transboundary Relations: Battles and Bridges" in Dawn A Russell and David L VanderZwaag, eds, *Recasting Transboundary Fisheries*

from metropolitan France in Canadian waters in the Gulf of St. Lawrence and to limit, but not phase out completely, fishing by vessels from St. Pierre and Miquelon.¹⁰² French fishermen responded by spending more time in the disputed waters around St. Pierre and Miquelon.¹⁰³ The two countries also disagreed over the quantities of fish that could be caught sustainably in the area.¹⁰⁴ As McDorman explains,

[w]ith the expansion of French fishing effort in the disputed zone in the early 1980s Canada became increasingly concerned about the health of the fish stocks upon which the fishermen of Newfoundland, Canada's poorest province and a province heavily reliant upon the fishing industry, depend. Couple this with a Canadian confidence of a favourable outcome, and an adjudicated ocean boundary was seen as the final option.¹⁰⁵

McDorman also explains that "Canada had to provide an enticement in order to get the French to agree to adjudicate," in the form of three years of access to 2,950 tonnes of cod in undisputed Canadian waters.¹⁰⁶ The possibility of oil and gas reserves added a further motivation. Hydrocarbons had already been discovered on either side of the disputed zone, and, as mentioned, the two countries had independently issued overlapping exploration licenses in the zone itself. As McDorman explains, the potential for hydrocarbons was "of particular interest to France which is overwhelmingly dependent upon imported oil and gas."¹⁰⁷

NORWAY

[INSERT: MAP 9]

Map 9. Norway's maritime zones and boundaries (from Ministry of Foreign Affairs, Government of Norway, online: <<https://www.regjeringen.no/en/dokumenter/meld.-st.-7-20112012/id663433/sec2>>).

NORTH SEA BOUNDARIES

The Disputes

Negotiations between Norway and its maritime neighbours began in the 1960s when the oil and gas potential of the North Sea became apparent. In 1962, Phillips Petroleum, a US-based company, approached the Norwegian government with a request to initiate drilling.¹⁰⁸ The next year, the government issued a royal decree stating that the seabed and subsoil of the submarine

Management Arrangements in Light of Sustainability Principles: Canadian and International Perspectives (Leiden: Martinus Nijhoff, 2010) 209.

¹⁰² *Canada-France Fishing Agreement*, *supra* note 98 at 570-72.

¹⁰³ Ted L McDorman, "Canada and France Agree to Arbitration for the St. Pierre and Miquelon Boundary Dispute" (1990) 5 *Intl J Estuarine & Coastal L* at 357, 358.

¹⁰⁴ *Ibid* at 357, 358-59.

¹⁰⁵ *Ibid* at 357, 359.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid* 357, 358-59.

¹⁰⁸ Norwegian Ministry of Petroleum and Energy, "Norsk oljehistorie på 5 minutter" ("Norwegian Oil History in 5 Minutes"), *Oil Gas* (2016), online: <<https://www.regjeringen.no/no/tema/energi/olje-og-gass/norsk-oljehistorie-pa-5-minutter/id440538/>>.

areas off the Norwegian coast were under its jurisdiction with regard to natural resources.¹⁰⁹ This move provided an impetus to delimit Norway's maritime boundaries with the United Kingdom and Denmark in areas that were previously high seas. One of the challenges facing Norway concerned the 1958 *Geneva Convention*, the first article of which defines the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."¹¹⁰ Norway had chosen not to sign the convention because of its wording regarding the 200-metre limit. It was concerned that the United Kingdom and Denmark might argue that the Norwegian shelf was bounded by the Norwegian Trench, which drops to 350 metres just off the west coast of Norway and to 700 metres just off the south coast.¹¹¹

However, it turned out that none of the states around the North Sea wished to base a boundary regime on the 200-metre limit.¹¹² This limit was, of course, rendered conditional and therefore uncertain by the subsequent clause within Article 1, namely "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." Since offshore drilling technology was certain to improve over time, the question became not whether the Norwegian Trench constituted a limiting factor but, rather, whether the equidistance principle or some other criterion would be applied to delimit the opposing continental shelves.

Resolution Efforts

A key development occurred in 1964 when the United Kingdom informed Norway that it wished to start negotiations based on the equidistance principle.¹¹³ Britain wanted an agreement with Norway before dealing with other, more complicated boundary issues further south with Denmark, Germany, the Netherlands, Belgium, and France.¹¹⁴ The offer to use the equidistance principle was a major concession because Britain ratified the *Geneva Convention* that same year. Norway's response to the British offer was immediate and positive. The Norwegians were also pleased by the willingness of the British negotiators to accept a boundary calculated from straight baselines drawn between outer islands and reefs along Norway's highly fragmented west coast.¹¹⁵ Those straight baselines had previously been challenged by the United Kingdom before the ICJ, which ruled in Norway's favour in the 1951 *Anglo-Norwegian Fisheries Case*.¹¹⁶ That said, the United Kingdom benefitted from the fact that the Shetland and Orkney Islands were likewise granted full effect with regard to the calculation of the equidistance line. The agreement

¹⁰⁹ Norwegian Petroleum Directorate, "Norway's Petroleum History," *Nor Pet* (2017), online: <<http://www.norskpetroleum.no/en/framework/norways-petroleum-history/>>.

¹¹⁰ *Geneva Convention*, *supra* note 5.

¹¹¹ Helge Ryggvik, "Forhandlingene om Norges kontinentalsokkel" ("The Negotiations over Norway's Continental Shelf"), *Store Nor Leks (Great Norwegian Encyclopaedia)* (2014), online: <https://snl.no/Forhandlingene_om_Norges_kontinentalsokkel> [Ryggvik, "Forhandlingene"].

¹¹² *Ibid.*

¹¹³ Helge Ryggvik, "A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals" (2015) 89:1 *Business History Rev* 3 at 6–7.

¹¹⁴ Ryggvik, "Forhandlingene," *supra* note 111.

¹¹⁵ Torbjørn Kindingstad, *Norges oljehistorie (Norwegian Oil History)* (Oslo: Wigestrands, 2002).

¹¹⁶ LC Green, "The Anglo-Norwegian Fisheries Case, 1951 (ICJ Reports 1951, p. 116)," (1952) 15:3 *Modern L Rev* 373.

between Norway and the United Kingdom was concluded in 1965, just one year after the negotiations began.¹¹⁷

The negotiations with Denmark were more difficult. Denmark had ratified the *Geneva Convention* in 1963¹¹⁸ and could have been expected to argue that Norway's continental shelf was bounded by the Norwegian Trench, the deepest part of which lies between Norway and Denmark. However, Denmark had a strong interest in seeing the equidistance principle applied to the south to define its boundary with West Germany. It was West Germany's position that the location of the boundary should not be based on a simple application of the equidistance principle but should instead take into account the length of its coastline.¹¹⁹ The West Germans took this position because the German coast of the North Sea is concave in shape, while the Danish and Dutch coasts on either side are convex.

Denmark would have also been aware that an argument based on coastal length was likewise available to Norway since the length of the Norwegian coast facing Denmark greatly exceeds the length of the Danish coast facing Norway. Accepting the application of the equidistance principle with Norway enabled Denmark to be consistent in its legal arguments and to avoid the worst-case scenario of having to make concessions based on coastal length in both the south and the north. Norway and Denmark concluded their boundary agreement in 1965.¹²⁰ Denmark was also interested in a quick settlement of the boundary with Norway so that oil exploration in the northern portion of its North Sea continental shelf could begin.¹²¹ Oil exploration in the southern portion was forced to wait, however, because West Germany was unwilling to make any concessions with regard to its legal position. West Germany, Denmark, and the Netherlands eventually agreed to send the matter to the ICJ, which, in 1969, ruled largely in favour of West Germany.¹²²

The Norway–Denmark boundary agreement was a win-win result for both countries. Denmark was able to secure a straightforward application of the equidistance principle in the north before being forced to accept qualifications to that principle in the south. Norway avoided any challenge to its position that might have been based on the *Geneva Convention* and gained jurisdiction over a portion of the North Sea equal in size to its entire land mass.¹²³ The quick resolution of the dispute enabled both countries to open their respective portions of the previously disputed area to oil and gas exploration. Having agreed to a straightforward application of the equidistance principle in 1965, Norway and Denmark had no difficulty agreeing to do so again when, in 1979, they settled the boundary between Norway and the Faroe Islands.¹²⁴

¹¹⁷ Norwegian Petroleum Directorate, *supra* note 109.

¹¹⁸ Aileen McHarg et al, *Property and the Law in Energy and Natural Resources* (New York: Oxford University Press, 2010) at 67.

¹¹⁹ Alex G Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands* (Cambridge: Cambridge University Press, 2013) at 74–86 [Elferink, *Delimitation of the Continental Shelf*].

¹²⁰ *Ibid.*

¹²¹ Ryggvik, “Forhandlingene,” *supra* note 111.

¹²² Elferink, *Delimitation of the Continental Shelf*, *supra* note 119 at 80–90.

¹²³ Ryggvik, “Forhandlingene,” *supra* note 111.

¹²⁴ Kindingstad, *supra* note 115.

Drivers

In 1965, the maximum breadth of coastal state jurisdiction over the continental shelf was not yet clearly defined. The 1958 *Geneva Convention* was unclear on the point, containing both a depth-based limitation of 200 metres and a technology-based limitation that would allow ever-expanding claims as offshore drilling technology improved.¹²⁵ Norway seized the moment to conclude maritime boundary agreements with the United Kingdom and Denmark that took the most expansive possible view of the international law, dividing large portions of the North Sea between them using the equidistance principle. Other countries could have challenged these actions, but they would have been arguing, not for their own rights, but, rather, for the rights of all states to access the areas in question. Moreover, most of those areas were in deep water, beyond the reach of the drilling technologies of the time. For these reasons, the Norway–UK and Norway–Denmark boundary treaties went unchallenged and, with time, became unopposable by other states. Norway’s new boundaries were reinforced when international oil companies began drilling under leases granted by the Norwegian government.¹²⁶ Given the balance of power in international politics at the time, it was likely to Norway’s advantage that most of the oil companies involved were American.¹²⁷

JAN MAYEN BOUNDARIES

The Disputes

Jan Mayen is a small island located roughly 250 nautical miles east of Greenland and 360 nautical miles northeast of Iceland. It has been part of Norway since 1930. There is no permanent population on Jan Mayen, but the EEZ around the island supports a sizeable fishery. In June 1979, Iceland adopted an EEZ of 200 nautical miles, just as Norway had done along the coast of its mainland three years earlier.¹²⁸ The new Icelandic zone came within 200 nautical miles of Jan Mayen, and so Norway responded by declaring its own 200-nautical-mile EEZ around the island, creating an overlap.¹²⁹ Norway then took the view, consistent with its approach to other maritime boundaries, that the equidistance principle was an appropriate solution. Iceland, in contrast, took the view that it should have a higher proportion of the disputed zone, given that the rights of the two states were generated by a small, remote, and uninhabited island, on the one hand, and a significantly larger, populated island country, on the other.¹³⁰

A second boundary dispute was created in 1980 when Denmark extended its 200-mile fisheries zone northwards along Greenland’s east coast, creating an overlap with the Norwegian

¹²⁵ *Geneva Convention on the Continental Shelf*, *supra* note 5.

¹²⁶ Ryggvik, “Forhandlingene,” *supra* note 111; Kindingstad, *supra* note 115; Petter Ulleland, *Den undersjøiske fjellhulle: Konsolideringen av den norske kontinentalsokkel 1982–2007* (Tromsø: University of Tromsø, 2008).

¹²⁷ Tore Jørgen Hanisch & Gunnar Nerheim, *Norsk Oljehistorie. Fra vantro til overmot? Bind 1 (Norwegian Oil History: From Disbelief to Bravado)* (Oslo: Leseselskapet, 1992); Rolf Tamnes, *Oljealder 1965–1995: Norsk Utenrikspolitisk Historie (Norwegian History of Foreign Affairs)* (Oslo: Cappelen Damm, 1997); Ulleland, *supra* note 126.

¹²⁸ Robin Churchill, “Claims to Maritime Zones in the Arctic — Law of the Sea Normality or Polar Peculiarity?” in Alex Oude Elferink & Donald Rothwell, eds, *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (The Hague: Martinus Nijhoff Publishers, 2001) 105 at 118 [Churchill, “Claims to Maritime Zones”].

¹²⁹ *Ibid.*

¹³⁰ Ryggvik, “Forhandlingene,” *supra* note 111; Ulleland, *supra* note 126.

zone on the northwest side of Jan Mayen.¹³¹ Denmark argued that it deserved a larger proportion of this second disputed zone because Greenland's coast is much longer than Jan Mayen's and because the population of Greenland, living much closer to the area, deserved privileged access to fish stocks located there.¹³² Norway held firm to the equidistance principle, and, after years of unsuccessful negotiations, Denmark submitted the dispute to the ICJ in 1988.¹³³

Resolution Efforts

The dispute between Norway and Iceland was resolved through a conciliation committee consisting of three members: one from Norway, one from Iceland, and one from the United States as the neutral third member.¹³⁴ An agreement was signed in 1981 whereby the Icelandic continental shelf was recognized as extending a full 200 nautical miles from the Icelandic coast in the area between Jan Mayen and Iceland, notwithstanding the proximity of the Norwegian island.¹³⁵ Iceland thus gained a much larger continental shelf than it would have had under the equidistance principle. At the same time, a resource-sharing regime was incorporated into the new boundary agreement. Norway gained the right to participate in 25 percent of the oil and gas exploration on a portion of Iceland's continental shelf just south of the new boundary, while Iceland gained the right to participate in 25 percent of the oil and gas exploration on a portion of Jan Mayen's continental shelf just north of the new boundary.¹³⁶

As for the Norway–Denmark dispute, the ICJ delimited a single maritime boundary between Greenland and Jan Mayen in 1993.¹³⁷ The court began with an equidistance line on a provisional basis and then considered whether “special circumstances” justified any adjustments in order to achieve an “equitable result.” The court concluded that the longer length of the Greenland coast required a delimitation that tracked closer to Jan Mayen and that the line should also be shifted somewhat eastwards to allow Denmark equitable access to fish stocks. Norway and Denmark implemented the judgment through a boundary treaty concluded in 1995.¹³⁸

Drivers

Norway's willingness to concede to Iceland's position was based on several political and economic considerations. First, insisting on the equidistance principle in the context of a small, remote, and unpopulated island would have damaged relations between Norway and its smaller

¹³¹ Churchill, “Claims to Maritime Zones,” *supra* note 128.

¹³² Robin Churchill, “The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation” (1994) 9:1 Int J Mar Coast Law 1 [Churchill, “Greenland-Jan Mayen Case”].

¹³³ *Ibid.*

¹³⁴ Ulf Linderfalk, “The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation” (2016) 2016 SSRN, May 24, 1-26, online: <<https://ssrn.com/abstract=2783622>>; Ryggvik, “Forhandlingene,” *supra* note 111.

¹³⁵ *Agreement on the Continental Shelf between Iceland and Jan Mayen*, 22 October 1981, online: <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ISL-NOR1981CS.PDF>> [Agreement between Iceland and Jan Mayen].

¹³⁶ *Ibid.*

¹³⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, [1993] ICJ Rep 38, online: <<http://www.icj-cij.org/docket/files/78/6743.pdf>>.

¹³⁸ Alf Håkon Hoel, “The Legal-Political Regime in the Arctic” in *Geopolitics and Security in the Arctic: Regional Dynamics in a Global World* (New York: Routledge, 2014) 49 at 55; Churchill, “Greenland-Jan Mayen Case,” *supra* note 132.

Nordic cousin.¹³⁹ Second, Norway had already discovered large oil fields in the North Sea, while Iceland had no equivalent resources.¹⁴⁰ Third, the most promising oil and gas prospects between Iceland and Jan Mayen were located close to the smaller island, in an area that Norway received despite its concession.¹⁴¹ Just in case, the Norwegians made sure that the boundary treaty provided them with a 25 percent share of oil and gas development on the Icelandic side.¹⁴² They also insisted that the waiver of the equidistance principle was not a precedent for other negotiations.¹⁴³ The dispute has also been connected to larger considerations regarding membership in the North Atlantic Treaty Organization (NATO) and anti-NATO sentiment in Iceland at the time.¹⁴⁴

In 2008, as the prospect of actual oil and gas activity came into view, Norway and Iceland concluded a follow-up treaty providing a more detailed framework for cooperative exploration of straddling deposits¹⁴⁵ and deposits within the two zones of 25 percent participation.¹⁴⁶ According to Norwegian Foreign Minister Jonas Gahr Støre, the arrangement provided the predictability that the oil companies needed.¹⁴⁷ This joint hydrocarbon regime, although not unprecedented,¹⁴⁸ was the first to be established in Arctic waters. Regardless of these developments, conditions around Jan Mayen are relatively inhospitable for petroleum development, with difficult ice conditions and deep water.¹⁴⁹

Fisheries interests played a role in both disputes, though the interests were mostly on the side of Norway's negotiating partners. To some degree, this was recognized in the ICJ's judgement, which adjusted the Norway–Denmark boundary to accommodate Greenland's interest in a potential capelin fishery.¹⁵⁰ As for the Norway–Iceland boundary, Icelandic fishermen had been pursuing capelin southeast of Jan Mayen for some time, while Norwegian fishing in the disputed zone had only just begun.¹⁵¹

¹³⁹ Ryggvik, "Forhandlingene," *supra* note 111.

¹⁴⁰ Kindingstad, *supra* note 115.

¹⁴¹ Ryggvik, "Forhandlingene," *supra* note 111; Linderfalk, *supra* note 134.

¹⁴² *Agreement between Iceland and Jan Mayen*, *supra* note 135.

¹⁴³ Ryggvik, "Forhandlingene," *supra* note 111.

¹⁴⁴ Guðni Th Jóhannesson, "The Jan Mayen Dispute between Iceland and Norway, 1979–1981: A Study in Successful Diplomacy?" *Arctic Frontiers, Tromsø* (24 January 2013), online: <http://gudnith.is/efni/jan_mayen_dispute_24_jan_2013>

¹⁴⁵ *Agreement between Iceland and Norway Concerning Transboundary Hydrocarbon Deposits*, 3 November 2008, online: <http://www.nea.is/media/olia/JM_unitisation_agreement_Iceland_Norway_2008.pdf>.

¹⁴⁶ Agreed Minutes Concerning the Right of Participation pursuant to Articles 5 and 6 of the Agreement of 22 October 1981 between Iceland and Norway on the Continental Shelf in the Area between Iceland and Jan Mayen, 3 November 2008, online: <http://www.nea.is/media/olia/JM_agreed_minutes_Iceland_Norway_2008.pdf>.

¹⁴⁷ Jonas Karlsbakk, "Norway and Iceland Sign Border Treaty," *Independent Barents Observer* (5 November 2008), online: <<http://barentsobserver.com/en/node/20950>>. According to the same report, the new treaty was signed just three days after the Norwegian Bank gave the Icelandic government a loan of approximately €1 million as part of Norway's assistance to Iceland during the global financial crisis.

¹⁴⁸ McDorman, *supra* note 13 at 333–37.

¹⁴⁹ Churchill, "Greenland-Jan Mayen Case," *supra* note 132 at 6.

¹⁵⁰ *Ibid* at 3–6.

¹⁵¹ *Ibid* at 3.

The Dispute

The Barents Sea lies north of Norway's Finnmark region and Russia's Kola Peninsula and between Norway's Svalbard archipelago to the northwest and two of Russia's archipelagos — Franz Josef Land and Novaya Zemlya — to the northeast and east. Roughly 500,000 square nautical miles in size, it has an average depth of only 230 metres. The entire seabed constitutes a continental shelf, making the Barents Sea a prime location for fish, oil, and gas. For more than three decades, Oslo and Moscow have contested roughly 50,000 square nautical miles or about 10 percent of the Barents Sea. Moscow has argued that a number of “special circumstances” were relevant to the boundary delimitation: the length and shape of Russia's coast; the size of the respective populations in the adjacent areas; ice conditions; fishing, shipping, and other economic interests; and strategic concerns. It also argued that the 1920 *Svalbard Treaty* prevented any points on that archipelago from influencing the delimitation.¹⁵² In Moscow's view, all of these factors combined to justify a sector line along the 32 degree, 04 minutes, 35 seconds east meridian, with that line being adjusted east of Svalbard only, so as not to infringe on the area defined under the *Svalbard Treaty*.¹⁵³

Oslo responded that the Soviet Union had drawn the sector line in 1926 for the sole purpose of defining the territorial status of several offshore islands, without any intention of delimiting maritime zones. It argued that a median line should instead be drawn from the mouth of the Varangerfjord, a narrow inlet between Finnmark and the Kola Peninsula, within which a territorial sea boundary had been agreed in 1957.¹⁵⁴ Such a line would be equidistant, at all points, from the Norwegian and Soviet mainland coasts; further out, it would be equidistant from Svalbard in the west and Novaya Zemlya and Franz Josef Land in the east.¹⁵⁵

The dispute arose in the 1960s when Norway and the Soviet Union both relied on the 1958 *Geneva Convention* to claim offshore rights.¹⁵⁶ It acquired greater consequence in 1977 when the two countries asserted 200-nautical-mile EEZs encompassing both fish and seabed resources.¹⁵⁷ Then, in 1996 and 1997 respectively, Norway and Russia ratified *UNCLOS*, Article 76 of which recognizes that a coastal state may exercise sovereign rights over an extended continental shelf more than 200 nautical miles from shore, if and where it can demonstrate a “natural prolongation” of its land mass.¹⁵⁸ However, Article 83 of *UNCLOS* also stipulates that a continental shelf delimitation between states with opposite or adjacent coasts “shall be affected by agreement on the basis of international law ... in order to achieve an equitable solution.” The same stipulation is made in Article 74, which deals with the delimitation of overlapping EEZs.

¹⁵² *Svalbard Treaty*, 9 February 1920, Paris, online:

<http://www.sysselmannen.no/Documents/Sysselmannen_dok/English/Legacy/The_Svalbard_Treaty_9ssFy.pdf>

¹⁵³ Robin Churchill & Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (London: Routledge, 1992) at 63.

¹⁵⁴ *Ibid* at 47.

¹⁵⁵ *Ibid* at 63.

¹⁵⁶ *Geneva Convention on the Continental Shelf*, *supra* note 5. See Tore Henriksen & Geir Ulfstein, “Maritime Delimitation in the Arctic: The Barents Sea Treaty” (2011) 42 *Ocean Development & Intl L* 1 at 2 [Henriksen & Ulfstein, “Maritime Delimitation”].

¹⁵⁷ Henriksen & Ulfstein, “Maritime Delimitation in the Arctic,” *supra* note 156.

¹⁵⁸ Asim Zia, Ilan Kelman & Michael H Glantz, “Arctic Melting Tests the United Nations Convention on the Law of the Sea” in Rebecca H Pincus & Saleem H Ali, eds, *Diplomacy on Ice Energy and the Environment in the Arctic and Antarctic* (New Haven: Yale University Press, 2015) at 132.

As a result of *UNCLOS*, the Barents Sea boundary dispute expanded in scope, providing more room for compromise and mutual benefit.

Resolution Efforts

Negotiations over the Barents Sea boundary stretched over four decades, after being formally launched in 1974.¹⁵⁹ The talks gained momentum in 1988 when a provisional line between the two positions was drawn and Soviet Prime Minister Nikolai Rysjkov announced that a settlement was possible — if agreement could be reached on the joint exploitation of resources in the disputed area.¹⁶⁰ The talks, however, came to a standstill after the Soviet Union collapsed. Norway was also unrelenting in its demand for a settled boundary before any shared resource scheme was implemented.

In 2005, Russian President Vladimir Putin and Norwegian Prime Minister Kjell Magne Bondevik announced that Norway and Russia would initiate “strategic cooperation” on petroleum development in the Barents Sea.¹⁶¹ Negotiations on the boundary dispute were resumed later that year. In 2007, the two countries signed a revision of the 1957 agreement on the boundary within the Varangerfjord.¹⁶² The revision, which provided a clear starting point for the boundary farther out, was an essential step for the complete resolution of the dispute.¹⁶³ The breakthrough on the rest of the boundary came in 2010 when the two countries committed to an all-purpose boundary that would be drawn “on the basis of international law in order to achieve an equitable solution,” recognizing “relevant factors ... including the effect of major disparities in respective coastal lengths” while dividing “the overall disputed area in two parts of approximately the same size.”¹⁶⁴ The resulting treaty, with geodetic lines connecting eight defined points, was ratified by the Norwegian and Russian governments after the Norwegian Storting and the Russian Duma gave consent in 2011.¹⁶⁵

¹⁵⁹ Arild Moe, Daniel Fjærtøft & Indra Øverland, “Space and Timing: Why Was the Barents Sea Delimitation Dispute Resolved in 2010?” (2011) 34:3 *Polar Geography* 145 at 147.

¹⁶⁰ Laila Ø Bakken & Kristian Aanensen, “Historisk løsning av delelinjen” (“Historical Settlement of the Delimitation Line”), *NRK* (Norwegian Broadcasting Corporation) (27 April 2010), online: <<https://www.nrk.no/norge/--historisk-losning-av-delelinjen-1.7098938>>

¹⁶¹ *Ibid.*

¹⁶² <Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord Area (2007), 67 *UN Law of the Sea Bulletin* 42, online:

<http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin67e.pdf

>

¹⁶³ “Agreement between Norway and Russia on Maritime Delimitation in the Varangerfjord Area,” Press Release (2007), online: <<https://www.regjeringen.no/en/aktuelt/Agreement-signed-between-Norway-and-Russ/id476347/>>.

¹⁶⁴ “Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean” (27 April 2010), online: <http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/030427_english_4.pdf>.

¹⁶⁵ *Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 2010, online:

<http://www.regjeringen.no/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf> [English translation]. See also Henriksen & Ulfstein, “Maritime Delimitation,” *supra* note 156; Thilo Neumann, “Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean” (2010) 14:34 *ASIL Insight*, online:

<http://www.asil.org/files/2010/insights/insights_101109.pdf>. On the prompt ratifications, see Walter Gibbs, “Norway Hails Barents Treaty OK by Russian Duma,” *Reuters* (26 March 2011), online:

<<http://www.reuters.com/article/2011/03/26/barentstreaty-idUSLDE72P0HY20110326>>. For a map of the new boundary line, see <http://www.regjeringen.no/upload/UD/kart/kart_100914_ny.gif>.

The treaty sets a single “multi-purpose” maritime boundary as it delineates both the EEZ and continental shelf within 200 nautical miles from shore and for the extended continental shelf beyond that. It is a question of only limited interest as to “whether the agreed boundary is best described as a modified median line (as argued by Norway) or a modified sector line (as argued by Russia),”¹⁶⁶ since the treaty divides the previously disputed sector almost exactly in half. The treaty also includes provisions on the co-management of any hydrocarbons that straddle the boundary through the conclusion of a “unitization agreement” for the exploitation of any such deposit and on the access of private companies to drilling rights on either side of the boundary.¹⁶⁷

[INSERT: MAP 10]

Map 10. Norway–Russia Maritime Boundary in the Barents Sea (“Norway and Russia Sign Treaty to End Boundary Dispute in Barents Sea,” *Eye on the Arctic*, online: <<http://www.rcinet.ca/eye-on-the-arctic/2010/09/16/norway-and-russia-sign-treaty-to-end-boundary-dispute-in-barents-sea/>>).

Drivers

The settlement of the dispute was due to several factors, of which the potential for oil and gas is most frequently cited.¹⁶⁸ In 1975, the two countries agreed on a moratorium on oil and gas exploitation in the area.¹⁶⁹ Notwithstanding the moratorium, some seismic surveying did take place in the dispute zone on the Russian side,¹⁷⁰ while exploratory wells were drilled — and oil and gas discovered — in the undisputed waters on either side. However, low prices and high costs combined to restrain development until the 2000s, when several large projects were realized. On the Norwegian side, the Snøhvit gas field and the Goliat oil field came on stream in 2006 and 2016, respectively.

There has been less activity on the Russian side, as there are more easily accessible resources either on shore or closer to shore in the Yamal/Nenets region further east.¹⁷¹ However, both sides of the Barents Sea are thought to contain considerable hydrocarbon reserves.¹⁷² Moreover, ice-free conditions, a relatively hospitable climate (compared with other offshore parts of the Arctic at similar latitudes) and relatively good coastal infrastructure (especially compared to the North American Arctic) make the Barents Sea attractive for oil companies.¹⁷³

In 1988, the massive Shtokman gas field was discovered on the Russian side of the Barents Sea. In 2007, Gazprom entered into a consortium with Norway’s Statoil (then StatoilHydro) and France’s Total to develop the field. In 2012, technical problems, disagreements among the partners, and declining prices (especially in the United States, due to

¹⁶⁶ Henriksen & Ulfstein, “Maritime Delimitation,” *supra* note 156 at 7.

¹⁶⁷ For a more detailed analysis, see Byers, *supra* note 19 at 43–44.

¹⁶⁸ Moe, Fjærtøft & Øverland, *supra* note 159.

¹⁶⁹ Willy Østreng & Yngvild Prydz, *Delelinjen i Barentshavet: Planlagt samarbeid versus uforutsett konflikt? (The Boundary in the Barents Sea: Planned Cooperation versus Unexpected Conflict)* (2007).

¹⁷⁰ Bakken & Aanensen, *supra* note 160.

¹⁷¹ Dag H Claes & Arild Moe, “Arctic Petroleum Resources in a Regional and Global Perspective” in Rolf Tamnes & Kristine Offerdal, eds, *Geopolitics and Security in the Arctic: Regional Dynamics in a Global World* (London: Routledge, 2014) 97 at 102–10.

¹⁷² *Ibid.*

¹⁷³ Øistein Harsem, Arne Eide & Knut Heen, “Factors Influencing Future Oil and Gas Prospects in the Arctic” (2011) 39:12 *Energy Policy* 8037.

the fracking revolution) led to the project being shelved.¹⁷⁴ The development phases of the Shtokman field correlated with the signing of the 2007 *Varangerfjord Agreement* and provided impetus for the 2010 *Boundary Treaty*.¹⁷⁵

Since 2010, petroleum-related cooperation between Norway and Russia has expanded. The Russian company Lukoil applied to operate on the Norwegian continental shelf, acquiring initial approval in 2011. It has since gained stakes in a number of licences in the Norwegian portion of the Barents Sea, mostly near the boundary with Russia.¹⁷⁶ In addition to oil and gas, fisheries have long been at the forefront of the cooperative maritime relationship between Norway and Russia.¹⁷⁷ The Barents Sea contains the world's largest cod fishery.¹⁷⁸ Effective management cooperation has, over the last decade, enabled Norway and Russia to increase their science-based quotas — to the point where the cod stock provides more than US \$2 billion in sustainable annual catches.¹⁷⁹ However, fisheries did not act as an incentive for the conclusion of the boundary treaty in 2010.¹⁸⁰ As explained by Geir Hønneland, some Russian fishermen instead voiced concern that a clear delineation would deny access to some historically important fishing grounds.¹⁸¹ After the agreement was signed in 2010, critical voices at the local level in northwest Russia have continued to question the wisdom of the decision. So far, however, both countries have enforced the treaty through their respective coast guards¹⁸² as well as initiating discussion on unitization in the case of any discovery of transboundary hydrocarbons.¹⁸³

Beyond economic interests, Arild Moe, Daniel Fjærtøft, and Indra Øverland argue that Russia's desire to affirm the primacy of the *UNCLOS* regime and “tidy up its spatial fringes” are additional factors explaining the 2010 settlement.¹⁸⁴ Indeed, Russia benefits enormously from the right that every state has to an EEZ because of its extremely long coastline. And the shallow nature of the Arctic Ocean means that it will also benefit from the *UNCLOS* rules on extended continental shelves, perhaps more than any other country. Eliminating the legal and political uncertainties associated with unresolved maritime boundary disputes is one way of securing

¹⁷⁴ Claes & Moe, *supra* note 171.

¹⁷⁵ Tore Henriksen & Geir Ulfstein, “Maritime Delimitation in the Arctic: The Barents Sea Treaty” (2010) 42:1–2 *Ocean Dev Intl L 1; Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord Area (2007)*, 67 *UN Law of the Sea Bulletin* 42, online:

<http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin67e.pdf

>; *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, September 15, 2010, online:

<https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf>

¹⁷⁶ Atle Staalesen, “Lukoil Is Norway's New Arctic Petro Partner,” *Independent Barents Observer* (24 May 2016), online: <<https://thebarentsobserver.com/en/industry/2016/05/lukoil-norways-new-arctic-petro-partner>>.

¹⁷⁷ Geir Hønneland, “Co-management and Communities in the Barents Sea Fisheries” (1999) 58:4 *Hum Organ* 397 [Hønneland, “Co-management and Communities”]; Geir Hønneland, “Norsk-russisk miljø- og ressursforvaltning i nordområdene” (2012) 29 *Nordlit*, online: <<http://septentrio.uit.no/index.php/nordlit/article/view/2303/2134>>.

¹⁷⁸ Geir Hønneland, “Co-management and Communities in the Barents Sea Fisheries” (1999) 58:4 *Hum Organ* 397.

¹⁷⁹ Geir Hønneland, *Hvordan skal Putin ta Barentshavet tilbake? (How Will Putin Reclaim the Barents Sea?)* (Bergen: Fagbokforlaget, 2013) [Hønneland, *Hvordan skal*].

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Andreas Østhagen, “High North, Low Politics Maritime Cooperation with Russia in the Arctic” (2016) 7:1 *Arctic Rev L & Politics* 83.

¹⁸³ “Norway and Russia to Step Up Cooperation in Hunt for Arctic Oil,” *Reuters* (28 November 2016), online: <<http://www.reuters.com/article/norway-russia-oil-idUSL8N1DT3H9>>.

¹⁸⁴ Moe, Fjærtøft & Øverland, *supra* note 159.

these benefits.¹⁸⁵ Finally, Russia's interest in resolving its disputes, and thus strengthening the *UNCLOS* regime, may have been influenced by the fact that non-Arctic countries are effectively excluded from the Arctic's vast continental shelves as a result of these rules. In both Russia and Norway, a newfound emphasis on Arctic affairs as well as a desire to reaffirm the Arctic maritime legal regime (*UNCLOS*) has acted as an additional driver of dispute settlement. We will return to this point in the second part of this article.

SVALBARD-GREENLAND BOUNDARY

The Dispute

Svalbard is located less than 400 nautical miles from Greenland, and both Norway and Denmark claim 200-nautical-mile EEZs around their respective islands. The resulting overlap came to approximately 44,000 square nautical miles.¹⁸⁶ Norway's sovereignty over the Svalbard archipelago was recognized by the *Svalbard Treaty*, which was adopted as part of the Paris Peace Accords at Versailles in 1920.¹⁸⁷ The treaty, which is open to all states, gives the citizens of its parties the right to economic access to the islands — subject to Norway's right to regulate activity on a non-discriminatory basis and to raise taxes for the purposes of providing services and infrastructure. In 1977, Norway claimed a 200-nautical-mile fisheries protection zone around Svalbard and argued that this zone is not covered by the treaty because this innovation in maritime law did not exist in 1920.¹⁸⁸ The fisheries protection zone is important to Norway because the shallow waters around Svalbard serve as a nursery for large numbers of juvenile Atlantic cod.¹⁸⁹

To avoid escalating a dispute with other countries over the scope of the treaty and the possible rights of access to offshore oil and gas resources, Norway has not claimed an EEZ around Svalbard.¹⁹⁰ However, under international law, a state does not need to claim a continental shelf, which is automatically generated by the adjoining territory.¹⁹¹ Norway claims that Svalbard does not have a continental shelf in its own right and that the continental shelf around Svalbard is solely under Norwegian jurisdiction as an extension of the mainland's continental shelf. Although other countries dispute this,¹⁹² the Norwegian view received some support from the Commission on the Limits of the Continental Shelf, which, in 2009, issued recommendations that recognized the existence of a Norwegian extended continental shelf to the

¹⁸⁵ *Ibid.*

¹⁸⁶ Alex G Oude Elferink, "Maritime Delimitation between Denmark/Greenland and Norway" (2007) 38:4 *Ocean Dev Intl Law* 375 [Elferink, "Maritime Delimitation"].

¹⁸⁷ *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden Concerning Spitsbergen signed in Paris 9th February 1920*, 9 February 1920, 1–15, online:

<http://www.sysselmannen.no/Documents/Sysselmannen_dok/English/Legacy/The_Svalbard_Treaty_9ssFy.pdf>.

¹⁸⁸ Torbjørn Pedersen & Tore Henriksen, "Svalbard's Maritime Zones: The End of Legal Uncertainty?" (2009) 24:1 *Intl J Mar Coastal L* 141.

¹⁸⁹ Erik J Molenaar, "Fisheries Regulation in the Maritime Zones of Svalbard" (2012) 27:1 *Intl J Marine Coastal L* 3.

¹⁹⁰ Hønneland, *Hvordan skal*, *supra* note 179 at 31.

¹⁹¹ McDorman, *supra* note 13 at 21–34.

¹⁹² DH Anderson, "The Status under International Law of the Maritime Areas around Svalbard" (2009) 40:4 *Ocean Dev Intl L* 373.

north of Svalbard.¹⁹³ In 2015, the Norwegian government launched a licensing round for oil and gas exploration and production that included blocks on what would, otherwise, be Svalbard's continental shelf. Russia delivered a diplomatic protest, and, so far, no activity has commenced in those blocks.¹⁹⁴

Resolution Efforts

Norway drew straight baselines around Svalbard in 2001, while Denmark drew straight baselines around Greenland in 2004.¹⁹⁵ Then, in 2006, Norway and Denmark concluded an all-purpose maritime boundary between Svalbard and Greenland.¹⁹⁶ Roughly 430 nautical miles long, the boundary is based on an equidistance line, adjusted slightly to take into account the presence of Denmark's Tobias Island some thirty-eight nautical miles off the Greenland coast.¹⁹⁷ By concluding the treaty, Denmark implicitly recognized that Svalbard generates both fishing and continental shelf rights. The treaty includes a provision on straddling mineral deposits, whereby either party can initiate negotiations on possible cooperative solutions without committing the two parties to any result. The preamble of the *Svalbard–Greenland Delimitation Agreement* also points out that the treaty does not set the boundary between their respective extended continental shelves — a matter that the parties will have to address at some future point.¹⁹⁸

Drivers

Economic interests seem to have provided some motivation for the Norway–Denmark negotiations. Oude Elferink explains how the 2006 treaty's provisions on straddling mineral deposits are based on the 1995 treaty on the boundary between Jan Mayen and Greenland, while going into more detail with regard to how exploitation would occur.¹⁹⁹ The inclusion of these detailed provisions anticipates oil and gas activity along the new boundary at some point.

For Norway, another clear goal was the acquisition of international recognition for its position on the fishing zone and continental shelf around Svalbard. Although some argue that Norway abandoned its policy of equidistance when settling its boundaries with Greenland and Russia,²⁰⁰ by doing so, it succeeded in removing two potential causes of further debate and discord over Svalbard. The status of the waters and seabed around the archipelago is not yet fully settled, but Norway's position is stronger now than it was before.

¹⁹³ Torbjørn Pedersen, "The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries" (2006) 37:3–4 *Ocean Dev & Intl L* 339; Thomas Nilsen, "Limits of Norway's Arctic Seabed Agreed," *Independent Barents Observer* (16 April 2009), online: <<http://barentsobserver.com/en/node/19278>>.

¹⁹⁴ Johan Hammerstrøm, "Russland varsler Svalbard-bråk om nye oljeområder," *E24* (2015), online: <<http://e24.no/makro-og-politikk/russland/russland-varsler-svalbard-braak-om-nye-oljeomraader/23686830>>.

¹⁹⁵ Anderson, "Status under International Law," *supra* note 192 at 373–84.

¹⁹⁶ *Agreement between the Government of the Kingdom of Norway on the One Hand, and the Government of the Kingdom of Denmark Together with the Home Rule Government of Greenland on the Other Hand, Concerning the Delimitation of the Continental Shelf and the Fisheries Zones in the Area between Greenland and Svalbard*, Copenhagen, 20 February 2006, 2378 UNTS 21 [*Svalbard–Greenland Delimitation Agreement*].

¹⁹⁷ See generally Elferink, "Maritime Delimitation," *supra* note 119.

¹⁹⁸ Ida Cathrine Thomassen, *The Continental Shelf of Svalbard: Its Legal Status and the Legal Implications of the Application of the Svalbard Treat Regarding Exploitation of Non-Living Resources* (Tromsø: University of Tromsø, 2013) at 30.

¹⁹⁹ Elferink, "Maritime Delimitation," *supra* note 119 at 376.

²⁰⁰ Thomassen, *supra* note 198.

TWO APPROACHES TO MARITIME BOUNDARY DISPUTES?

This article addresses the question: why does Canada have so many unresolved maritime boundary disputes, at least in comparison to Norway? Does the Canadian government take a different approach to disputed maritime boundaries, or are each of Canada's unresolved disputes just unusually difficult because of factors specific to each of them? This analytical section reviews the factors that contributed to the settlement of Norway's disputes, before considering the possible reasons why individual Canadian disputes have remained unresolved. Table 1 provides a starting point for the analysis.

NORWAY

Table 1. Overview of Norway's maritime boundaries

Dispute	Status	Drivers	Barriers
North Sea boundaries	<ul style="list-style-type: none"> • agreement with the United Kingdom in 1965 • agreement with Denmark in 1965 • agreement with Denmark (on Faroe Islands) in 1979 	<ul style="list-style-type: none"> • potential hydrocarbons • existing fisheries • legal strategy (locking in gains provided by new developments in international law) 	<ul style="list-style-type: none"> • legal uncertainty • concerns about precedent/position elsewhere
Jan Mayen boundaries	<ul style="list-style-type: none"> • agreement with Iceland in 1981, revised in 2008 • agreement with Denmark in 1995, after ICJ decision in 1993 	<ul style="list-style-type: none"> • existing and potential fisheries • potential hydrocarbons • positive relations among Nordic nations 	<ul style="list-style-type: none"> • limited
Barents Sea boundary	<ul style="list-style-type: none"> • agreement with Russia in 2010 	<ul style="list-style-type: none"> • potential hydrocarbons • reducing risk of armed conflict • potential geo-political value of resolution and support of <i>UNCLOS</i> regime (e.g., solidifying position of Arctic versus non-Arctic states) 	<ul style="list-style-type: none"> • regional interests (Russian fishermen concerned about loss of potentially valuable resources)
Svalbard–Greenland boundary	<ul style="list-style-type: none"> • agreement with Denmark in 2006 	<ul style="list-style-type: none"> • potential hydrocarbons • securing some international recognition of claims around Svalbard 	<ul style="list-style-type: none"> • limited

From the 1960s onwards, successive Norwegian governments maintained a policy of actively seeking to resolve maritime boundary disputes. This policy was the result of several factors. The first, identified by Bernard Oxman with regard to boundaries worldwide, is “the desire to ‘consolidate’ coastal state jurisdiction newly acquired under international law,” which “appears to be particularly true in enclosed and semi-enclosed seas where the peaceful enjoyment of extended maritime jurisdiction is especially dependent upon arrangements with one’s neighbors.”²⁰¹ In the North Sea, Norway sought rapid settlements with the United Kingdom and Denmark after the *Geneva Convention*, and parallel developments in state practice made it possible to credibly claim a 200-nautical-mile continental shelf.²⁰² In addition to consolidating new rules on coastal jurisdiction that favoured their interests, the three states were keen to apply the equidistance method.²⁰³ Denmark, in particular, saw strategic legal value in supporting equidistance as a principle of international law. As Oxman explained,

[o]thers [states] may wish to use one or more agreements to influence an outstanding delimitation either directly or indirectly. The classic example of this approach is the equidistant line drawn by Denmark and the Netherlands as part of a more general implementation of the equidistance principle in Article 6 of the Convention on the Continental Shelf in the North Sea that included, in addition to these two states, Norway and the United Kingdom. It represented not only an attempt to reinforce the use of equidistance in the North Sea but, by extending the line to a point equidistant from their coasts and the German coast, an effort to apply equidistance directly to their respective boundaries with Germany.²⁰⁴

Norway and the United Kingdom also benefitted from the equidistance principle, which was relatively easy to apply and gave each country vast, uncontested, and potentially oil-and-gas rich portions of the continental shelf.

It is also possible that Norway was thinking strategically beyond the North Sea to its contested Barents Sea boundary with the Soviet Union. Since Norway’s position in the Barents Sea was based upon equidistance, any new state practice in favour of that principle in the North Sea could be seen as bolstering its claim in the High North. In any event, a more general desire to consolidate rights was apparent in the Barents Sea, where economic interests combined with security interests to motivate the negotiation of a clearly defined boundary with the Soviet Union and later Russia. Norway first requested negotiations on the boundary in 1967.²⁰⁵ In 1974, Norway and the Soviet Union agreed on a joint framework to manage both potential hydrocarbons (through a moratorium) and shared fish stocks in the disputed zone. The latter were managed thorough the “Grey Zone Agreement,” which was signed in 1978 and renewed annually until 2010.²⁰⁶ The adoption of the *Barents Sea Boundary Treaty* that year was the result of more than four decades of continuous effort by Norwegian diplomats. Significantly, Norway

²⁰¹ Oxman, *supra* note 29 at 254.

²⁰² Ryggvik, “Forhandlingene,” *supra* note 111.

²⁰³ Oxman, *supra* note 29 at 254, n 24.

²⁰⁴ *Ibid* at 265.

²⁰⁵ Moe, Fjærtøft & Øverland, *supra* note 159 at 147.

²⁰⁶ *Agreement on an Interim Practical Arrangement for Fishing in an Adjoining Area in the Barents Sea*, (1978), original Norwegian text at (1978) *Overenskomster med fremmede stater* 436. For more details, see Kristoffer Stabrun, “The Grey Zone Agreement of 1978: Fishery Concerns, Security Challenges and Territorial Interests” (2009) 13 FNI Rep 1.

had long been willing to compromise to find a solution.²⁰⁷ The challenge was to persuade the Soviet Union and later Russia to engage and likewise compromise on the matter.²⁰⁸

Economic interests have long been a factor in Norway's efforts to resolve boundary disputes. The negotiations with the United Kingdom and Denmark began after it became clear that Norway had substantial hydrocarbon potential in the North Sea. The motivation provided by economic interests was powerful enough to overcome concerns about a lack of knowledge as to where, exactly, the resources were located. Although this uncertainty loomed large in the negotiations,²⁰⁹ an influx of foreign companies and the prospect of win-win outcomes carried the negotiations forward.²¹⁰ Economic interests in both hydrocarbons and fish also motivated Norway's decades-long effort to resolve the Barents Sea boundary dispute.

However, economic interests do not fully account for Norway's policy of actively seeking to resolve boundary disputes. Instead, the policy is the result of economic incentives aligning with more general foreign policy goals, namely safeguarding Norwegian sovereignty and ensuring stability in regional relations. Norway, as a relatively small state, has long pursued stable relations with its neighbours that are governed by international law and institutions.²¹¹ This general policy was motivated by the experiences of the First World War and, especially, the Second World War when neutral Norway was occupied by Germany.²¹² Norway's geographic proximity to the Soviet Union, which made it vulnerable during the Cold War, further contributed to defining foreign policy goals of stability and conflict avoidance.²¹³ Proactively settling maritime boundaries is more than a technical, legal, or economic issue for Norway; it is a core element of the country's foreign policy.

Maritime space has similarly been a constitutive part of the modern Norwegian state. For a country with maritime zones seven times the size of its landmass, the ocean has been and remains integral to economic and security interests. Providing stable legal frameworks for the exploitation of marine resources and maintenance of national sovereignty has thus been a priority

²⁰⁷ Tamnes, *supra* note 127 at 294–302; Moe, Fjærtøft & Øverland, *supra* note 159 at 148.

²⁰⁸ Moe, Fjærtøft & Øverland, *supra* note 159.

²⁰⁹ Ryggvik, "Forhandlingene," *supra* note 111.

²¹⁰ When it later became apparent that the field that stimulated the Norwegian oil boom in the 1970s — *Ekofisk* — was located on the Norwegian side of the tri-point where the Norwegian, British, and Danish continental shelves meet in the North Sea, questions were raised in the United Kingdom and Denmark about the 1964 and 1965 agreements. However, the newly agreed boundaries were never challenged. Kristin Øye Gjerde, "Kunne Valhall vært dansk?" *Kult Valhall* (2015) online: <<http://www.kulturminne-valhall.no/Historien/1960-aarene-Oljeleting/Kunne-Valhall-vaert-dansk>>; Ryggvik, "Forhandlingene," *supra* note 111.

²¹¹ See, eg, Tamnes, *supra* note 127; Iver B Neumann et al, *Norge og alliansene: gamle tradisjoner, nytt spillerom* (Oslo: Norwegian Institute of International Affairs, 2008); Marie Haraldstad, "Embetsverkets rolle i utformingen av norsk sikkerhetspolitikk: Nærområdeinitiativet" (The role of the Norwegian bureaucracy in the design of Norwegian security policy: the Neighborhood Policy Initiative) (2014) 72:4 Int Polit 431; Iver B Neumann & Sieglinde Gstöhl, *Lilliputians in Gulliver's World? Small States in International Relations* (San Diego: International Studies Association, 2006).

²¹² Tamnes, *supra* note 127; Olav Riste, "With an Eye to History: The Origins and Development of 'Stay-Behind' in Norway" (2007) 30:6 J Strateg Stud 997.

²¹³ Although this does not imply that Norway is devoid of power politics, as an active North Atlantic Treaty Organization member with a dependence on the United States for security assurances. See Paal S Hilde, "Armed Forces and Security Challenges in the Arctic" in Rolf Tamnes & Kristine Offerdal, eds, *Geopolitics and Security in the Arctic: Regional Dynamics in a Global World* (London: Routledge, 2014) 147; Leif C Jensen & Geir Hønneland, "Framing the High North: Public Discourses in Norway after 2000" (2011) 28:1 Acta Boreal 37; Østhagen, *supra* note 182.

for successive Norwegian governments.²¹⁴ In the post-Cold War era, a renewed interest in Arctic affairs also played a role, especially in the resolution of the Barents Sea boundary dispute. This renewed interest can be traced to the “Red-Green” coalition,²¹⁵ which took office in 2005 shortly after the publication of several reports that highlighted the economic potential of the Barents Sea.²¹⁶ These studies were driven by the oil and gas industry, which was shifting its attention northwards as fields in the North Sea became depleted.²¹⁷

The renewed interest in Arctic affairs was also linked to developments in the Norway–Russia relationship, including the abduction of two Norwegian fisheries inspectors when they boarded the Russian trawler *Elektron* in the fisheries protection zone around Svalbard in 2005.²¹⁸ The new interest in the Arctic was thus coupled with a long-standing policy of pragmatic cooperation with Russia on transboundary issues ranging from fish stocks, to migration, to trade.²¹⁹ Norway began putting more effort into the bilateral relationship, concentrating on environmental management and people-to-people cooperation on a local and regional level.²²⁰

These factors placed the ongoing Norwegian effort to settle the Barents Sea boundary dispute in a larger and essentially positive foreign policy context. However, the final step towards the 2010 treaty was Russia’s decision to work with Norway in finding a solution. Although it is not the purpose of this article to examine Russia’s motivations,²²¹ this country reinvigorated its Arctic policy in 2004–5.²²² This new political and strategic orientation correlated with economic interests, especially in offshore oil and gas. It thus became more important for Russia to “tidy up its spatial fringes,” as Moe, Fjærtøft, and Øverland have argued.²²³

Finally, it is noteworthy that Norway was willing to depart from equidistance in the negotiation of individual boundaries, while maintaining its commitment to the principle more generally. The Jan Mayen–Iceland boundary provides one example of this, with concessions being made with respect to Iceland’s dependence on fisheries and Norway’s positive disposition towards its smaller Nordic neighbour.²²⁴ When similar arguments were raised by Denmark concerning the Jan Mayen–Greenland boundary, Norway was unrelenting until the ICJ delimited the boundary in 1993. These were calculated moves that allowed Norway to settle individual disputes amicably while preserving its general negotiating position in favour of equidistance, including, most importantly, in the Barents Sea. At the same time, Norway made repeated use of hydrocarbon cooperation regimes: in the Iceland–Jan Mayen, Greenland–Svalbard, and Barents Sea boundary treaties. These arrangements differ in their detail, but they all intended to

²¹⁴ Tamnes, *supra* note 127.

²¹⁵ Referring to the Labour party (red), the Socialist party (red/green), and the Center party (agrarian green).

²¹⁶ Norwegian Ministry of Foreign Affairs, *St.meld. nr. 30 (2004–2005): Muligheter og utfordringer i nord* (Oslo, 2005); Olav Orheim et al, *NOU 2003:32 Mot nord! Utfordringer og muligheter i nordområdene* (Oslo: Norwegian Ministry of Foreign Affairs, 2003); Bjørn Brunstad et al, *Big Oil Playground, Russian Bear Preserve or European Periphery?* (Delft: Eburon Academic Publishers, 2004).

²¹⁷ ECON, *2025 Ringer i vannet* (2025 Circles in the water), 1-29, (Oslo, 2006), online:

<http://www.aksjonsprogrammet.no/vedlegg/ECON_ringer06.pdf>, 2005); Brunstad et al, *Big Oil Playground*.

²¹⁸ Hønneland, *Hvordan skal*, *supra* note 179; Hønneland, “Co-management and Communities,” *supra* note 177.

²¹⁹ Jensen & Hønneland, “Framing the High North,” *supra* note 213.

²²⁰ Hønneland, *Hvordan skal*, *supra* note 179.

²²¹ See Moe, Fjærtøft & Øverland, *supra* note 159.

²²² Katarzyna Zysk, ‘Russia’s Arctic Strategy: Ambitions and Restraints’ in Barry Scott Zellen, ed, *Fast-changing Arctic: Rethinking Arctic Security in a Warmer World* (Calgary: Calgary University Press, 2013) 281.

²²³ Moe, Fjærtøft & Øverland, *supra* note 159 at 158.

²²⁴ Oxman, *supra* note 29 at 259, n 35; Churchill, “Greenland-Jan Mayen Case,” *supra* note 132.

overcome a barrier of uncertainty — that is, the unwillingness of states to settle boundaries because of concern that they might surrender access to still undiscovered seabed resources.

In sum, Norway's policy of actively seeking to resolve maritime boundary disputes can be explained by its desire to: (1) "lock in" gains that followed the development of new rules of international law; (2) support the equidistance principle through state practice in an effort to strengthen its legal position with regard to still-unresolved disputes elsewhere; (3) avoid tensions and obtain legal certainty over readily exploitable resources; (4) promote its larger foreign policy goals of stability and security obtained through international law and other forms of cooperation, especially *vis-à-vis* the Soviet Union and later Russia; and, more recently, (5) promote stability, security, and economic development in the Arctic through dispute resolution and enhanced cooperation.

CANADA

Table 2: Overview of Canada's maritime boundaries

Dispute	Status	Drivers	Barriers
Gulf of Maine	<ul style="list-style-type: none"> • ICJ judgement in 1984, mostly settled 	<ul style="list-style-type: none"> • existing fisheries, with potential for some conflict • potential hydrocarbons 	<ul style="list-style-type: none"> • public opinion • zero-sum result
Machias Seal Island (and surrounding waters)	<ul style="list-style-type: none"> • unresolved 	<ul style="list-style-type: none"> • limited 	<ul style="list-style-type: none"> • zero-sum result • local fisheries interests • regional interests (island part of province of New Brunswick or state of Maine) • dispute over land as well as maritime zones
Beaufort Sea	<ul style="list-style-type: none"> • unresolved (negotiations in 2010–11) 	<ul style="list-style-type: none"> • potential hydrocarbons • regional interests in economic development 	<ul style="list-style-type: none"> • public opinion • low oil prices • domestic law (<i>Inuvialuit Final Agreement</i>) • concerns about precedent/position elsewhere • zero-sum result (at least until 2010)
Dixon Entrance	<ul style="list-style-type: none"> • unresolved 	<ul style="list-style-type: none"> • existing fisheries 	<ul style="list-style-type: none"> • security (access to submarine-testing facility) • public opinion • zero-sum result • regional interests
Seaward of Strait of Juan de Fuca	<ul style="list-style-type: none"> • unresolved 	<ul style="list-style-type: none"> • existing fisheries 	<ul style="list-style-type: none"> • low importance • zero-sum result • concerns about precedent/position elsewhere • some regional interests
1973 Canada–Greenland Boundary Treaty	<ul style="list-style-type: none"> • resolved in 1973 (except for Hans Island) 	<ul style="list-style-type: none"> • existing and potential fisheries • potential hydrocarbons • symbolic resolution 	<ul style="list-style-type: none"> • limited
Lincoln Sea	<ul style="list-style-type: none"> • tentative agreement in 2012 	<ul style="list-style-type: none"> • symbolic resolution 	<ul style="list-style-type: none"> • regional interests
St. Pierre and Miquelon	<ul style="list-style-type: none"> • resolved through arbitration in 1992 	<ul style="list-style-type: none"> • existing fisheries • potential hydrocarbons 	<ul style="list-style-type: none"> • public opinion • regional interests • zero-sum result

Unlike Norway, most of Canada's maritime boundary disputes remain unresolved or are only partially resolved. Is this because of an absence — or insufficiency — of factors favouring negotiation and settlement? Are there factors present, specific to each individual dispute, that disfavour negotiation and settlement? Currently, there are few economic incentives for settling Canada's unresolved boundary disputes. In the cases of the Lincoln Sea, Machias Seal Island,

and seaward of Juan de Fuca Strait, the resources located within the disputed zones are speculative, commercially unviable, or relatively small in size. In the Beaufort Sea, there is considerable hydrocarbon potential, but it has not been realized due to high operating costs and the availability of comparable resources elsewhere. In Dixon Entrance, Canada and the United States have worked out an arrangement allowing fisherman from each side to access the disputed zone subject to flag state enforcement.

Significantly, while negotiations on the Beaufort Sea boundary were initiated after oil prices rose in the 2000s, they were suspended when prices fell. In the Gulf of Maine and around St. Pierre and Miquelon, relatively high levels of economic activity and the potential for a “cod war” scenario involving repeated and reciprocal arrests of fishing boats eventually pushed the disputing parties into adjudication and arbitration. Sometimes, the absence of economic interests may facilitate an agreement, as Bernard Oxman explains about the United States’ success in settling maritime boundary disputes far from home: “The most obvious explanation is that it is easiest to reach agreement in the case of small islands surrounded by the deep waters of the Caribbean Sea or the Pacific Ocean where the boundary regions are unlikely to contain hydrocarbons or localized fisheries.”²²⁵ In Canada, the same factor may have contributed to the conclusion of the tentative agreement in the Lincoln Sea, where the area in dispute was small and the prospect of economic activity was very low.

In the Beaufort Sea, uncertainty about the existence and location of hydrocarbons played a role. After initiating boundary negotiations with the United States in 2010, uncertainty concerning the existence and location of hydrocarbons seems to have contributed to the suspension of the talks. An effort was made to resolve the uncertainty through seismic mapping of the disputed zone, but the resulting delay coincided with a change of Canadian foreign ministers and a sharp drop in world oil prices. Compare this with Norway, which was willing to concede a large area of contested seabed to Iceland because it knew that the greatest potential for oil and gas lay close to Jan Mayen. However, uncertainty is not an absolute barrier to a boundary agreement. In the North Sea in the 1960s, Norway, Denmark, and the United Kingdom decided that the cost of leaving boundaries unresolved was higher than any potential losses resulting from uncertainty.

Maritime boundary disputes do not automatically catch the attention of government ministers. However, as Oxman explains, “[t]here is no doubt that political factors influence whether, and if so when, a maritime boundary is negotiated or submitted to a tribunal for determination.”²²⁶ In 2005 and again in 2008, Canadian Prime Minister Stephen Harper put Arctic sovereignty at the centre of his election strategy and, by doing so, put the Beaufort Sea boundary back on the foreign policy agenda. However, Harper’s political focus on the Arctic may have become a double-edged sword with regard to dispute settlement, in that his strong rhetoric contributed to what has been called “sovereignty anxiety” — the idea that Canada is struggling to uphold its sovereignty in the Arctic and is thus prone to security threats in the region.²²⁷ This anxiety, in turn, would have made it politically more difficult to make

²²⁵ Oxman, *supra* note 29 at 251.

²²⁶ *Ibid* at 294.

²²⁷ Whitney P Lackenbauer, “Polar Race or Polar Saga? Canada and the Circumpolar World” in James Kraska, ed, *Arctic Security in an Age of Climate Change* (New York: Cambridge University Press, 2011) at 219.

concessions as part of a boundary settlement, especially when the United States is the negotiating partner.²²⁸

The sensitivity of Canadians to the power differential with the United States should not be underestimated. Many of the great political debates of Canadian history have involved proposals to tie Canada more tightly to its southern neighbour, whether through trade and investment agreements, improved access for US cultural industries, or closer military cooperation.²²⁹ Norwegian concerns about Russia are of a different character. This insight adds another layer to our understanding of Canada's approach to boundary disputes. On the one hand, Canada initiated negotiations with the United States on the Beaufort Sea in order to achieve legal certainty over potential resources and in circumstances where the expansion of the dispute into the extended continental shelf had created the possibility of a win-win outcome. On the other hand, settling a boundary dispute requires that both sides surrender at least some of the seabed and water column within their previous claimed "sovereignty." If the dispute in question has not been politicized, governments can come to a settlement, as Canada and Denmark did in 1973. However, once a dispute has become politicized, any resolution of the dispute carries domestic political risk. Indeed, even undertaking negotiations may carry risk, which explains why government officials often refer to negotiations as "discussions."

An alternative view is that settling boundary disputes can reinforce sovereignty by removing sources of tension and potential conflict. This seems to have been Norway's view in the Barents Sea, where the 2010 treaty removed a source of tension and potential conflict with Russia. Any conflict with Russia would necessarily threaten Norwegian sovereignty, given the power disparity between the two countries. Canada's relationship with the United States involves a similar power disparity but is otherwise quite different. Canada and the United States are partners in NATO and the North American Aerospace Defense Command and share a common energy market under the *North American Free Trade Agreement*.²³⁰ This greatly reduces the stakes involved in their boundary disputes and creates the sense that these disputes are "manageable" — in other words, there is no security or political imperative for them to be resolved. As McDorman explains, "the allocation of government resources, both human and political, inevitably flows to the immediate and urgent" — even if it would be logical to resolve boundary dispute in the absence of "immediate friction."²³¹ When economic interests require a settlement, as occurred in the Gulf of Maine and around St. Pierre and Miquelon, Canada does find its way to a boundary resolution — in both cases, by outsourcing the actual drawing of the line to objective and disinterested third parties.

WHY IS CANADA DIFFERENT?

Our comparison of Canada and Norway's maritime boundary disputes reveals some similarities. Both countries actively sought resolution of their disputes after international law changed in favour of coastal states in the 1950s, 1960s, and 1970s. Norway was successful in regard to all of its significant disputes, except the one with Russia. Canada settled the boundary between its

²²⁸ McDorman refers to the "emotional freight" of sovereignty disputes, especially for Canada *via-à-vis* the United States. McDorman, *supra* note 13 at 3.

²²⁹ Stephen Brooks, "Canada–United States Relations" in John C Courtney and David E Smith, eds, *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 379.

²³⁰ *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289, 605 (1993).

²³¹ McDorman, *supra* note 13 at 195.

Arctic islands and Greenland in 1973 and sought a “package deal” with the United States in 1977. When the offer of a package deal was rejected, Canada and the United States sent the Gulf of Maine dispute to adjudication. Beginning in 2005 and 2006, Canada and Norway began paying more attention to the Arctic. Norway settled its remaining dispute with Denmark in 2006 and its dispute with Russia in 2010. Canada initiated negotiations on the Beaufort Sea with the United States in 2010 and announced a tentative agreement on the Lincoln Sea with Denmark in 2012.

Another similarity concerns the fact that, for Canada in the Beaufort Sea and Norway in the Barents Sea, the ability to achieve a settlement was highly contingent on the preferences of a more powerful neighbour. The Barents Sea dispute was resolved when Russia became willing to make concessions — motivated, perhaps, by a desire to achieve legal certainty with regard to oil and gas and to reinforce the already very profitable co-management of the cod fishery. The United States has shown no comparable willingness to compromise because its economic interests were less engaged and perhaps because of a concern that moving away from equidistance in the Beaufort Sea would weaken its legal position in Dixon Entrance, seaward of Juan de Fuca Strait, and elsewhere in the world.

However, the Norwegian and Canadian contexts are quite different from one another. Norway sought to secure its sovereignty through the settlement of its boundaries — particularly with Russia — where the ongoing presence of a dispute posed unacceptable security risks. Canada’s anxiety about its own sovereignty plays the opposite role, acting as a barrier to settlement, albeit in circumstances where managing ongoing disputes is a viable option because of the amicable nature of its relationship with the United States. In the one Canada–US boundary dispute where there is an explicit security dimension, namely the passage of US submarines through Dixon Entrance, the two countries have essentially agreed to disagree, with Canada giving blanket permission for the voyages and the United States insisting that permission is not required.

Canada’s unresolved maritime boundary disputes also seem to be related to concerns about legal consistency and the creation of precedents.²³² In both the Beaufort Sea and Dixon Entrance, Canada’s legal position is attached to what might be called “hard points,” namely the treaty concluded between Britain and Russia in 1825 and the A-B line drawn by an arbitral tribunal in 1903. Moving away from one of these hard points could increase the pressure to move away from the other. Similarly, the dispute seaward of Juan de Fuca Strait concerns, in part, the legality of Canada’s straight baselines, which is also one of the central issues in the Canada–US dispute over the status of the Northwest Passage. Canada might worry that a compromise seaward of Juan de Fuca Strait would weaken its position in the Arctic. Norway, being in a different position geographically and legally, has sought some of its settlements precisely in order to reinforce the equidistance principle elsewhere.

These examples demonstrate how having multiple boundary disputes with the United States has posed a sequencing problem for Canada since resolving any particular dispute almost always requires concessions from both sides. In 1977, Canada sought to solve the sequencing problem by offering to negotiate a “package” deal — an offer that was refused by the United States, which likely calculated that dealing with each boundary dispute in turn would work to its

²³² In the *Gulf of Maine* case, *supra* note 18, Canada was concerned that advancing an equidistance-based argument would weaken its position in the Beaufort Sea and Dixon Entrance. It therefore reframed the argument to focus on equity considerations; considerations that, not coincidentally, led to an equidistant result. See McRae, *supra* note 7 at 155.

overall advantage. Norway's sequencing problem always concerned its dispute with Russia, which could only be resolved on the basis of some negotiated version of "equity." Norway dealt with the problem by resolving its other boundaries first, which freed it up to make a concession on equidistance during negotiations over the Barents Sea boundary. Whether Canada and Norway were right to be concerned about the creation of legal precedents in their different disputes, and therefore the sequencing of their resolution efforts, is another matter. Many states with multiple boundary disputes seem quite comfortable taking different legal positions, depending on their interests in any particular outcome.²³³

Another difference between Norway and Canada has been the willingness of the former country to use hydrocarbon cooperation regimes as a way of reaching final settlements. Although there is a provision on hydrocarbon sharing in the 1973 Canada–Greenland boundary treaty, this provision does not commit the parties to any procedures or outcomes. And while the 2012 tentative agreement on the Lincoln Sea foresees the inclusion of rules on hydrocarbon cooperation, that part of the treaty has yet to be finalized. Norway, in contrast, has hydrocarbon mechanisms built into most of its boundary treaties, including, most significantly, in the Barents Sea with Russia.

Notwithstanding its use of hydrocarbon cooperation regimes, Norway seems to have a relatively high tolerance for uncertainty when negotiating boundary treaties. Canada, in contrast, seems to have a relatively low tolerance, as exhibited by its pullback from discussions on the Beaufort Sea boundary because of a lack of certainty as to the location of oil and gas reserves. Norway's relatively high tolerance for uncertainty about the existence and location of hydrocarbons might be explained, in part, by a counterbalancing desire to reduce uncertainty and risk of another kind, namely tensions and possible conflicts over competing claims to seabed resources in the Barents Sea. This desire for risk reduction has seen Norway make an ongoing effort to "tidy up its spatial fringes."²³⁴ In Canada, where all of the boundaries are with NATO allies, there seems to be more tolerance for uncertainty over political relations with neighbours, as manifested in the "management" of disputes.

Two final differences between the two countries concern constitutional structures and the rights of Indigenous peoples. As a federal state, Canada has several maritime boundary disputes that are complicated by provincial claims and even, potentially, constitutionally entrenched rights. It is difficult to imagine the governments of British Columbia and New Brunswick standing quietly by while the government of Canada negotiates with the United States over Dixon Entrance or Machias Seal Island. Similarly, the *Inuvialuit Final Agreement* is a major complication for Canada in the Beaufort Sea boundary dispute. In contrast, Norway is a unitary state, and while the Saami people have significant rights under Norwegian law, none of those rights extend beyond the territorial sea.²³⁵ These factors, although not the focus of this article, further reflect the complexity involved in explaining how countries approach their maritime boundaries.

To conclude, our comparison of Norway and Canada's maritime boundaries has revealed important differences, not in their general approach to dispute settlement but, rather, in the nature

²³³ Prosper Weil, *The Law of Maritime Delimitation: Reflections* (London: Grotius Publications, 1989).

²³⁴ Paraphrasing Moe, Fjærtøft & Øverland, *supra* note 159 at 158.

²³⁵ Øyvind Ravna, "Samerett og samiske rettigheter i Norge" ("Sami Law and Sami Rights in Norway") in *Juss i Nord: Hav, fisk og urfolk: En hyllest til Det juridiske fakultet ved Universitetet i Tromsøs 25-årsjubileum (Law in the North: Ocean, Fish and Indigenous Peoples: A Tribute to the Legal Faculty at the University of Tromsø's 25th Anniversary)* (Oslo: Gyldendal, 2012).

of their respective sets of boundaries. Norway has benefitted from having a collection of boundary disputes that are relatively susceptible to settlement, and through a combination of active engagement, compromise, and strategic sequencing, has been able to resolve them all. Canada, in contrast, has found itself with a collection of boundary disputes that are less susceptible to settlement. Each dispute has had its own set of factors that have favoured or disfavoured settlement, and two of them — in the Gulf of Maine and around St. Pierre and Miquelon — have been settled, albeit through recourse to adjudication or arbitration. The fact that Canada still has a number of unresolved maritime boundary disputes, it turns out, is not the result of a different policy approach. A careful examination of the details of the individual disputes, and their context, has disproved this assumption.