

The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay

TIMO KOIVUROVA

Northern Institute for Environmental and Minority Law
University of Lapland
Rovaniemi, Finland

The rapidly changing Arctic has received much media attention in recent years. The planting of a Russian flag underneath the North Pole in August 2007 raised concerns about the future of the region, with some even predicting military confrontation. Some scholars suggest that there is a race on to see who can stake the biggest claim to the continental shelf—and exploit the plentiful hydrocarbon resources under the seabed. For most international lawyers, such an explanation seems far-fetched given that the coastal states have behaved in keeping with the international law of the sea. Contrasting descriptions such as these call for a more nuanced understanding of what is unfolding in the region. This reflective article presents three scenarios describing the types of development that may ensue as coastal states proceed to draw the outer limits of their continental shelves in the Arctic Ocean.

Keywords Continental shelf, Arctic Ocean, law of the sea, Self-determination, power politics

Introduction

The media have trained extensive attention on the Arctic in recent years, showing particular interest in what is perceived as competition among the Arctic states to stake the biggest claim on the continental shelf—and exploit the plentiful hydrocarbon resources under the seabed. The planting of a Russian flag on the Arctic Ocean seabed in August 2007 raised serious concerns about the future of the region, with some even predicting military confrontation. Sparking this scenario is the idea that, as climate change opens up this previously inaccessible region to natural resource development, states have begun to engage in typical power politics to determine who gets to the resources first.

An alternative description is that states have drawn or are in the process of demarcating the outer limits of the continental shelf on the basis of international law of the sea. For most international lawyers, the recent continental shelf “claims” by the Arctic Ocean coastal states are those states exercising their rights and observing their obligations under the law of the sea and the United Nations Law of the Sea Convention (LOS Convention).¹

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Address correspondence to Professor Timo Koivurova, the Arctic Centre, post box 122, 96101 Rovaniemi, Finland. E-mail: timo.koivurova@ulapland.fi

In other words, the coastal states have behaved precisely as they should, exercising their international legal rights carrying out their international law obligations consistent with the law.²

These two alternative descriptions have come to be the understandings of why there has been a surge of activity among the coastal states with respect to the Arctic Ocean continental shelf. In truth, the two descriptions are not mutually exclusive, but they throw light on only two relevant, though somewhat different, aspects of the events unfolding in the region.

This article will proceed in three steps. First, it is important to take the “race to the resources” description seriously because it is not only the media that perceive such a development in the Arctic, many researchers do as well.³ Accordingly, this article examines why this perception has become so popular in explaining the continental shelf “claims” made by the Arctic coastal states. Second, it is important to clarify why continental shelf activity in the Arctic Ocean can be seen as an orderly process. To this end, some basic geophysical concepts related to the seafloor are presented in order to demonstrate how the law of the sea regulates the seabed and its resources. This is followed by a brief overview of how the law governing the seabed has evolved. The article then goes on to demonstrate why the law of the sea can be seen as the “better” or at least a more relevant description for what is currently happening on the seabed in the Arctic. In the third step, the article goes beyond this argument in order to attain a better understanding of the developments. It would be naïve to simply conclude that states are blindly observing their obligations under the law of the sea and the LOS Convention. They are eager to expand their jurisdictions to the extent possible and this tendency certainly applies to their continental shelves. The aim here is to understand the reasons why the Arctic states have thus far been keen to comply with their responsibilities under international law. Finally, an attempt is made to provide scenarios describing the types of development that may ensue as coastal states proceed to draw the outer limits of their continental shelves in the Arctic Ocean.

“Race to the Resources”

For many, it must have seemed only a matter of time before the natural resources of the Arctic would be exploited. Indeed, given that there are not that many people living in the Arctic—otherwise many might oppose natural resource development along the lines of “not in my back yard” (NIMBY)—these areas would seem to be tempting sites for exploitation. It has been only the inaccessibility of the region, according to this line of thinking, that has prevented the vast resources from being tapped. As soon as technology is developed that can capture the resources, companies and states will enter the region.

Then along came the awareness that climate change will hit the Arctic hardest, a realization brought home most compellingly by the Arctic Council, which sponsored the Arctic Climate Impact Assessment.⁴ Since ice and snow react swiftly to global warming, it has been estimated that climate change has already impacted the Arctic and that the change in the region will be twice as intense as elsewhere on the planet. Indeed, climate change would seem to be the cause for the opening up the previously inaccessible region to resource development, including any hydrocarbons in the Arctic Ocean seabed which are most often the resource of interest.

The International Energy Agency (IEA) has estimated that, despite efforts to steer energy use toward renewable sources, energy development scenarios indicate that dependence on fossil fuels will grow by 2030.⁵ The Arctic hydrocarbon resources seem tempting from two other perspectives—they appear to be plentiful and safe. According to an assessment

by British Petroleum (BP), the reserves of hydrocarbons in the Arctic (not just the Arctic Ocean) account for 25%–50% of those yet to be tapped.⁶ Moreover, the resources are located in areas with no ongoing conflicts. It can be convincingly argued that the combined effect of climate change and interest in exploiting hydrocarbons has prompted the recent efforts by states to stake claims to seabed areas in the region.

The recent activity with respect to the continental shelf beyond 200 nautical miles began in the Arctic with a vast claim made by the Russian Federation in 2001 covering almost one-half of the Arctic Ocean seabed.⁷ All the other Arctic coastal states reacted, but especially did the United States. The United States criticized many aspects of the claim, particularly Russia's attempt to claim the Lomonosov Ridge that runs through the central Arctic Ocean Basin as part of its continental shelf. According to the U.S. view at the time, the Lomonosov Ridge "is an oceanic part of the Arctic Ocean basin and not a natural component of the continental margins of either Russia or of any State."⁸ The Russians planted their flag in August 2007 underneath the North Pole on the Lomonosov Ridge, provoking vigorous protests from the other Arctic coastal states. As reported by *The Guardian*:

Russia symbolically staked its claim to billions of dollars worth of oil and gas reserves in the Arctic Ocean today when two mini submarines reached the seabed more than two and a half miles beneath the North Pole. In a record-breaking dive, the two craft planted a one metre-high titanium Russian flag on the underwater Lomonosov ridge, which Moscow claims is directly connected to its continental shelf. However, the dangerous mission prompted ridicule and scepticism among other contenders for the Arctic's energy wealth, with Canada comparing it to a 15th century colonial land grab.⁹

BBC News provided the following account:

Russian explorers have planted their country's flag on the seabed 4,200m (14,000ft) below the North Pole to further Moscow's claims to the Arctic. The rust-proof titanium metal flag was brought by explorers travelling in two mini-submarines, in what is believed to be the first expedition of its kind. Both vessels have now rejoined the expedition's ships, completing their risky return journey to the surface. Canada, which also claims territory in the Arctic, has criticised the mission. "This isn't the 15th Century," Canadian Foreign Minister Peter MacKay told the CTV channel. "You can't go around the world and just plant flags and say 'We're claiming this territory,'" he said. Melting polar ice has led to competing claims over access to Arctic resources. Russia's claim to a vast swathe of territory in the Arctic, thought to contain oil, gas and mineral reserves, has been challenged by several other powers, including the US.¹⁰

Other coastal states have followed suit with respect to the Arctic seafloor. Norway made a continental shelf claim in 2006 regarding three separate areas on its northeast Atlantic and Arctic continental shelves.¹¹ This prompted reactions from some other states regarding the status of the seabed around the Svalbard Islands.¹² Denmark (Greenland) and Canada are actively developing their Arctic continental shelf claims, as is the United States.

In an issue of *Foreign Affairs*, Scott G. Borgerson argued that even military conflict of some sort may be possible.

The situation is especially dangerous because there are currently no overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes. The Arctic has always been frozen; as ice turns to water, it is not clear which rules should apply. The rapid melt is also rekindling numerous interstate rivalries and attracting energy-hungry newcomers, such as China, to the region. The Arctic powers are fast approaching diplomatic gridlock, and that could eventually lead to the sort of armed brinkmanship that plagues other territories, such as the desolate but resource-rich Spratly Islands, where multiple states claim sovereignty but no clear picture of ownership exists.¹³

On its face, it does seem reasonable to argue that the “race to the resources” storyline constitutes a plausible description of the behavior of the Arctic states. That is, climate change is opening up the region to power politics with the states vying over who can first stake a claim to the hydrocarbon resources of the seabed. Yet, this is a one-sided account of the events.

The Rights of States to the Continental Shelf and Its Resources

Before commencing a detailed look at how the law of the sea regulates the ownership and use of the seabed and its resources, it is useful to clarify the difference between the terms used in geophysics and international law that refer to the various portions of the seabed and to provide a short account of how the law relating to the seabed has evolved.

Since geophysics tries to examine the reality of the seabed, it has more precise concepts for the purpose. The continental shelf proper is adjacent to the coast and drops to an average depth of 180 meters, where it gives way to a steep slope descending to an average depth of 2,500 meters. From there it continues as the less steep continental rise, which then becomes the deep ocean floor. Geophysics uses the concept of “continental margin” to cover the continental shelf, continental slope, and continental rise. The law of the sea, now mostly codified in the LOS Convention, grants to coastal states sovereign rights over the resources of the legal continental shelf, which in most cases can be equated with the geophysical continental margin instead of the geophysical continental shelf.

Before World War II, coastal states enjoyed sovereignty over only a narrow territorial sea extending 3 to 4 nautical miles. This changed dramatically after the war, prompted in part by the 1945 Truman Proclamation, in which it was declared that:

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.¹⁴

This started the era of creeping coastal state jurisdiction, especially with regard to the seabed, the outer limit of which was defined in Article 1 of the 1958 Continental Shelf Convention as:

For the purpose of these articles, the term “continental shelf” is used as referring (a) to 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 super-adjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.¹⁵

The problem with this definition was that it effectively permitted coastal states to claim larger seabed areas with the development of technology, to the extent that even the ocean floor's resources beyond the geophysical continental shelf possibly could be divided among states.

From the perspective of international law, the seabed is a natural prolongation of a coastal state's land territory into the sea. The entitlement to the resources in the continental shelf quickly matured into a principle of customary international law, with the result that all coastal states came to be entitled to the resources in the seabed adjacent to their coasts. The state is not even legally obligated to claim its adjacent shelf; it is automatically under the sovereign rights of the nearest coastal state.¹⁶ The main legal question to be resolved coming out of the 1950s was the location of the outer limits of the continental shelf.

Countering this expansionist trajectory was a proposal made by Maltese ambassador Arvid Pardo in 1967 at the UN General Assembly. Pardo urged that the ocean floor should be designated as the "common heritage of mankind" and administered by an international governance mechanism that would allow the economic benefits of the resources of the ocean floor to be shared equitably between developing and developed states.¹⁷ Pardo's proposal acted as a major impetus for convening the Third United Nations Conference on the Law of the Sea (UNCLOS III), which produced the comprehensive "constitution" of the oceans: the LOS Convention.

The LOS Convention was negotiated over an extended period of time, from 1973 to 1982, as a package deal permitting no reservations.¹⁸ The Convention involves a compromise between various groupings of states with differing interests related to the seabed. For instance, states with broad adjacent continental margins were able to have wording adopted that recognized that the entire continental margin was subject to the exclusive sovereign rights of coastal states. Geologically disadvantaged states (those whose continental margin was minimal) managed to push for a provision that entitled all states to a continental shelf of a minimum of 200 nautical miles, which coincides with the exclusive economic zone (EEZ). This meant that these states effectively exercise powers over the ocean floor as well. Most importantly, the LOS Convention defined the outer limit of the continental shelf more clearly than its 1958 predecessor.¹⁹ In addition, the Convention designated the mineral resources of the ocean floor beyond national jurisdiction to be the common heritage of humankind under the governance of the International Seabed Authority (ISA).²⁰

Even though states with broad continental margins were recognized as having an extended outer limit of the continental shelf to cover almost the entire geophysical continental margin (and, in some exceptional cases, areas beyond it), they also had to make concessions. For example, they had to submit to rules requiring them to transfer some of the revenues from the resources exploited on their extended continental shelf to developing states.²¹ More importantly, where their geophysical continental shelf exceeds 200 nautical miles, they had to provide information to the Commission on the Limits of the Continental Shelf (CLCS or Commission), a 21-member scientific body,²² with respect to their proposed outer limit. The submission to the Commission is to be made within 10 years of the date when the state becomes a party to the LOS Convention.²³ The Commission can only make recommendations, but these are influential because the outer limits of the continental shelf become "final and binding" only when they have been enacted on the basis of the recommendations.²⁴ The timeline for such submissions is fairly tight in light of the fact that

states need to provide the Commission with a vast amount of scientific and technical data. Why the tight timeline? It was considered necessary to define the outer limits of continental shelves as quickly as possible, given that only after those limits are set is it possible to know where the boundary lies between states' continental shelves and the resources of the ocean floor, which is under the jurisdiction of the ISA.

Which Is a Better Description of the Continental Shelf Activity: “Rush to the Resources” or “Orderly Development on the Basis of the Law of the Sea”?

Even though the “rush to the resources” storyline appears to be the more popular description for why states are staking claims to continental shelf areas, two arguments demonstrate that it is a one-sided account that leaves the relevant legal considerations out, considerations that the states themselves take into account and regard as important.

First, states argue that they are carrying out their law of the sea and LOS Convention rights and duties. States have complied with their obligations under the LOS Convention in an exemplary manner. Russia was the first country to make a submission to the CLCS, and it was also the first country to which the Commission responded by asking Russia to revise its submission regarding the central Arctic Ocean Basin.²⁵ Whatever symbolic importance the planting of the Russian flag may have had for domestic policy, Russia has not argued that the act has any international legal effect and it has announced that it will make a revised submission to the Commission. As noted above, Norway made a submission in 2006 regarding three separate areas in its Northeast Atlantic and Arctic continental shelves.²⁶ The CLCS has now made recommendations to Norway on the outer limits of the continental shelf.²⁷ The timelines for Denmark (Greenland) and Canada to make submissions are 2014 and 2013, respectively, and the two states are cooperating in collecting the necessary data. The United States has been collecting data regarding the outer limits of its continental shelf in the Arctic Ocean. Although the United States is not a party to the LOS Convention, the administrations of William J. Clinton, George W. Bush, and Barack Obama have urged the U.S. Senate to give its consent for the United States to become a party.²⁸

Secondly, the May 2008 meeting in Ilulissat, Greenland, of the political representatives from the five coastal states of the Arctic Ocean further reinforces the view that continental shelf entitlements will be pursued in an orderly manner. The meeting was mainly designed to explain to the rest of the world that there is no scramble for resources going on in the Arctic, but rather that there is an orderly development. This can be seen from the Ilulissat Declaration, which was issued by the meeting:

... the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other Uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. This framework provides a solid foundation for responsible management by the five coastal States and other Users of this Ocean through national implementation and application of relevant provisions.²⁹

Moreover, the states agreed to cooperate in collecting scientific data on the continental shelf, a commitment that has spawned a great deal of collaborative research between the Arctic coastal states.³⁰

Finally, what if there was no climate change taking place at all? The LOS Convention was negotiated at a time when there was not much awareness about climate change. When thinking of whether to submit a claim to the CLCS, would the states behave in the same way if the Arctic waters were inaccessible? It can be argued reasonably that any rational state would make the claims in its submission exactly as extensive as the LOS Convention allows and that states need to do so now, given that the Convention entered into force in 1994 and the first deadline for a submission was in 2004. If the entire community of states has accepted the generous rules as to how the outer limits of the continental shelves are to be drawn, why would states not take the benefit from those rules? Moreover, since it cannot be predicted how fast and in which direction technology will develop, it is only rational for a state to make as extensive a submission as possible to the CLCS. In this light, it is difficult to envisage that the present and future consequences of climate change have triggered the perceived competition for hydrocarbon resources in the Arctic.

Why Coastal States Observe the Rules

There is little doubt that coastal states have adhered to the LOS Convention when preparing to draw the outer limits of their continental shelves. Yet, it is also important to ask why the states are observing these rules. Territorial enlargement is one of the core policy areas for any state so it would seem fairly naïve to think that they are not acting with strategic interests in mind. It is, however, important to keep in mind what states are in effect observing. As discussed above, even if there is a Commission procedure to scrutinize the outer limits of continental shelves of coastal states, states with broad continental margins succeeded in incorporating extensive flexibility in the LOS Convention regarding those limits.

States can choose to fix the outermost limit with two methods from the foot of the continental slope as the starting point—either a line delineated on the basis of the thickness of sedimentary rocks (the thickness of sedimentary rocks being at least 1% of the shortest distance from such point to the foot of the slope) or fixed points no more than 60 nautical miles from the foot of the slope.³¹ Article 76(5) of the Convention identifies limits that the continental shelf cannot exceed—either 350 nautical miles from the baselines or “100 nautical miles from the 2,500-metre isobath, which is a line connecting the depth of 2,500 metres.” Moreover, there are difficult terms describing various features of the seabed complicating the drawing of outer limits and increasing the discretion for coastal states. Even if oceanic ridges cannot be part of a state’s continental shelf³² and submarine ridges cannot extend over 350 nautical miles from baselines,³³ a state can use the other outermost limit (the 2,500-meter isobath plus 100 nautical miles) in the case of submarine elevations that are natural components of the continental margin (plateaus, rises, caps, banks, and spurs),³⁴ which leads states to make efforts to demonstrate that a particular feature is not a submarine ridge but is a submarine elevation. Adding to the flexibility is that a state can draw the outermost limits of different portions of its continental shelf using different methods.³⁵ The upshot of the discretion available to states is that there will not be much ocean floor (the Area) resources left for the ISA to administer in the Arctic Ocean.³⁶

With such flexibility, it is no wonder that states with broad continental margins, such as the Arctic coastal states, can easily observe the rules. They also benefit a great deal from following the rules. A coastal state gains legitimacy and finality for its outer limits.

What Will Happen in the Future?

As presented above, there are various ways to interpret the continental shelf claims recently made to the Arctic Ocean seabed. There are many “knowledge communities”³⁷ that have

deeply held assumptions regarding how international events unfold. International lawyers in general, and law of the sea scholars in particular, tend to presume that states observe commonly accepted rules. Yet, there are also many specialized disciplines of international law (such as human rights law) that do not treasure rules mutually accepted by the states (such as the LOS Convention), but rather urge various actors to push for a change in these rules. Some schools of international relations emphasize how difficult it is to coordinate the actions of sovereign states, an assumption that many times leads them to expect disputes rather than cooperation between states. Some schools of thought, particularly influential in military establishments, tend to see military strategic confrontations as natural occurrences in the uneasy coexistence of nation-states. One interesting aspect of Arctic governance is that it is still very much dominated by nation-states in an era when many argue that their overall influence in governance is eroding.

Even if following the rules has clearly dominated the actions of Arctic Ocean coastal states with respect to the continental shelf thus far, it is by no means a given that this will continue. It is important to keep in mind that, to date, Norway is the only one of the five Arctic coastal states to which the Commission has issued a full set of recommendations. Most of the difficult issues remain unresolved. The Lomonosov Ridge may be a good example. Russia considers the feature to be a natural prolongation of its land into the sea, as symbolized by the flag planted underneath the North Pole on the ridge. Russia made this clear in its 2001 submission to the Commission, to which the United States reacted by arguing that Lomonosov Ridge is of oceanic origin and cannot be part of the continental shelf of any state. More recently, Canada and Denmark have also made it clear that they consider the Lomonosov Ridge (or part thereof) to be part of their continental shelves, but their submissions are not due until 2013 and 2014, respectively. Moreover, the Commission returned Russia's submission for further scientific-technical studies with regard to the central Arctic Ocean Basin, perhaps signaling that it may have questions about Russia's view that the Lomonosov Ridge is part of the country's continental shelf. With such complex situations unresolved, it will be useful to examine how things may evolve.

Orderly Development Will Continue

Given that continental shelf developments in the Arctic Ocean have been peaceful and orderly thus far, it seems fair to ask why this would not continue. A preference for orderly development is the way that the Arctic states have defined their Arctic policies.³⁸ All the states place a great deal of importance on the Arctic Council as the predominant soft law forum for advancing environmental protection and sustainable development in the region. The Council is an intergovernmental forum of the eight Arctic states (the five Nordic States, Canada, the Russian Federation, and the United States), permanent participants (the region's organizations of indigenous peoples), and observers consisting of non-Arctic states, intergovernmental, and nongovernmental organizations.³⁹ The status of the six organizations of indigenous peoples is unique in an intergovernmental forum in that the indigenous peoples must be consulted by the Arctic states before any decisions are made. The Arctic Council has sponsored important scientific studies and produced some guidelines, but many feel it suffers from its soft law status, ad hoc funding, and lack of a secretariat.⁴⁰

There are other signals that point to orderly and peaceful development in the region. The long-standing sovereignty dispute between Canada and Denmark over tiny Hans Island seems to be cooling off. This largely symbolic dispute over an island located between Greenland and Ellesmere Island has provoked both parties to plant their flags in turn on

the island. Yet, on 26 April 2010 both countries and Greenland's military and political leadership made a joint visit to the island, and the parties are now determined to clear up the minor disagreement.⁴¹ More importantly, the dispute over the maritime boundary between Norway and Russia in the Barents Sea, a controversy that has lasted over 40 years, was settled—at least on a preliminary basis—when President Dmitry Medvedev and Prime Minister Jens Stoltenberg met on 27 April 2010.⁴² The formal agreement was completed in September 2010.⁴³ This development is perceived by some to have prompted Canada to suggest talks with the United States over resolving their maritime boundary dispute in the Beaufort Sea.⁴⁴

A New Arctic Ocean Governance Architecture?

The main reason for organizing the meeting of the Arctic Ocean coastal states in Greenland in May 2008 was to tell the rest of the world and the media that what was going on in the region was not a scramble for resources, but rather an orderly development on the basis of the law of the sea.⁴⁵ The core of the Ilulissat Declaration is an affirmation that the five coastal states will pursue continental shelf entitlements in an orderly fashion. The meeting, however, caused consternation among certain Arctic policy actors, prompting them to “legalize” their policy stances. The European Parliament reacted to the “A5 meeting” arguing that the Antarctic Treaty⁴⁶ and its Madrid Protocol⁴⁷ should be used as a source of inspiration when negotiating a comprehensive Arctic Treaty.⁴⁸ WWF Arctic International, the most active observer in the Arctic Council, called for an Arctic Convention, which it argued could bring at least the possibility of retaining sustainability in a region that is undergoing a dramatic change, with concomitant possibilities to engage in various new economic activities.⁴⁹ The most vocal party, however, was the strongest of the indigenous organizations—also a permanent participant in the Arctic Council—the Inuit Circumpolar Council (ICC). Its position is no surprise when one reads the following part of the Ilulissat Declaration:

By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges. . . . The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.⁵⁰

The coastal states define themselves as sovereigns with stewardship over the “livelihoods of local inhabitants and indigenous communities.” This was a difficult issue for the Inuit because they had no active role in the Ilulissat meeting and were, in effect, seen as under the stewardship—together with the region's ecosystem—of the coastal states. Soon after the Greenland meeting, in November 2008, the ICC and Inuit leaders issued the “Inuit Leaders' Statement on Arctic Sovereignty,” in which they noted that the Ilulissat Declaration did not go far enough in affirming the rights that the Inuit have gained through international law, land claims, and self-government processes.⁵¹ This statement was further refined for the Arctic Council ministerial meeting in April 2009, when the Inuit issued their Circumpolar Inuit Declaration on Arctic Sovereignty.⁵²

The legal architecture of the 2009 Inuit Declaration relies on the self-determination of indigenous peoples. For the Inuit, the Arctic and the world at large do not consist only

of sovereign states and their territories, but have grown to involve a complex governance system where authority and power is exercised on various levels and with various mandates and on legal or nonlegal bases.⁵³ This is undoubtedly the case. In many situations, there are forms of authority that bypass nation-states as forms of “governance” or “international governance.” Indigenous peoples have various levels of governance of their own, ranging in the case of Inuit from their international organization, the ICC, to national ICC offices, down to indigenous governance arrangements under national law. Parts of the Inuit Declaration emphasize the various governance forms where the Inuit act in these legally relevant positions, from the international to the domestic and to the subunit level. With their sovereignty declaration, the Inuit set out to find a way to reconcile their self-determination rights as a people and state sovereignty in international policymaking.

The Arctic’s indigenous peoples, the European Parliament, and the WWF International Arctic Programme were provoked by the coastal states’ declaration to come forward with their own international legal approaches. It seems clear that all the actors are tapping into the body of law that best serves their own interests. The coastal states invoke their maritime sovereignty and sovereign rights as set out in the LOS Convention and the corresponding customary law of the sea. Indigenous peoples appeal to self-determination which, at least in its internal form, is clearly evolving in customary international law.⁵⁴ The European Parliament took the position in favor of broader governance. The EU Commission is currently an ad hoc observer in the Arctic Council. Its goal is to gain an enhanced status in Arctic cooperation given the substantial interests it has in the region as articulated in the Commission’s Arctic policy.⁵⁵

What does this instrumental use of international law signal? It can be argued that the discursive shift from soft, managerial language related to the environmental protection and sustainable development evidenced in the Arctic Council to the legal principles invoked by actors inside and outside of the Arctic Council may signal that there may be a change in the governance architecture in the region. At the very least, some actors seem to be preparing for the possibility of a regime change and ensuring that they maintain their status in any new form of cooperation.⁵⁶

Continental Shelf Developments Leading to Disputes

There are many who fear that significant disputes will arise when Russia, Canada, Denmark, and the United States set the outer limits of their continental shelves in the Arctic Ocean. What if the Commission does not endorse the Lomonosov Ridge as a natural prolongation of Russia’s continent? Even if Russia claims that planting its flag on the Lomonosov Ridge carries no international legal implications, the act symbolized the importance that Russia places on asserting that this ridge is part of its adjacent continental shelf. Those who argue that Russia will enclose the feature as part of its continental shelf, whatever the Commission recommends, may have a point.⁵⁷ As there are now three coastal states that consider parts of the Lomonosov Ridge as their continental shelf, there will likely be some sort of political disagreement as to which parts of the ridge belong to which state’s shelf. It should be noted that the Commission has no authority to adopt recommendations whenever there exist overlapping claims,⁵⁸ making it most likely that the states will need to resolve any disagreement jointly or possibly resort to the dispute settlement avenues in Part XV of the LOS Convention. In light of the Ilulissat Declaration and state practice throughout the world with respect to overlapping ocean claims, it is most likely that the states will resolve these overlapping entitlements through negotiations rather than resort to third-party dispute settlement options.

The position of the United States in all of this is difficult. Not being a party to the LOS Convention, it is unlikely that it can make a submission to the Commission. If the United States remains a nonparty, it may not enjoy the legitimacy and finality for its outer limits of its continental shelf that other states expect through the Commission procedure. If the United States proclaims outer continental shelf limits—possibly, though unlikely, ones that overlap with a Commission-endorsed Canadian continental shelf—this may create a challenging political situation.

International lawyers are careful when defining the types of sovereign rights that coastal states enjoy over their continental shelf. States are entitled only to explore and exploit its natural resources (mainly hydrocarbons). Beyond the EEZ, state action is limited mainly to drilling for oil and gas. It is easy to understand why the military analysts and policymakers of the world are either unaware of or do not think of the extended continental shelf in such a nuanced perspective. They may not think of a nation's continental shelf primarily in terms of specific rights and obligations, but rather perceive it in territorial terms. If military activities take on a greater importance in the High Arctic, part of that military-strategic calculation—seeing the extended continental shelf, at least for some purposes, as part of the home territory—may prompt the states to establish “spheres of influence,” a scenario that may lead more readily to controversies. Somewhat along these lines, in 2009 Russia published a strategy paper outlining plans to create a new military force to protect its interests in the disputed Arctic maritime regions.⁵⁹

Concluding Observations

The current consensus in the Arctic Ocean is that orderly, peaceful development will continue with respect to the continental shelf and the coastal states drawing the outer limits of their continental shelves. This is a reasoned opinion, given that Arctic Ocean coastal states have so far felt it in their best interests to live up to their law of the sea and LOS Convention obligations. The coastal states benefit from following the rules as these ensure that continental shelves extend far out into the Arctic Ocean Basin. Yet, as argued above, it is not self-evident that orderly development will continue.

International lawyers have been busy explaining that the “scramble for resources” storyline is just a media stunt and that the states in the Arctic Ocean region are behaving in line with law of the sea. Yet, caution is needed not to convey too strongly the image that all that is happening is that states are blindly following the law of the sea. As argued above, the law of the sea and the LOS Convention serve the interests of coastal states with respect to their vast continental shelves in the Arctic Ocean. The inherent flexibility of the rules by which coastal states can draw their continental shelf outermost limits makes it irrational for them not to make use of such rules. Yet, when the coastal states assert that they are following what the law of the sea allows, it is important for scholars to think more critically about exactly what states are observing. If the coastal states face a situation where the rules do not anymore serve their interests—for instance, Russia receiving recommendations from the Commission that would deviate from the outermost limits it may set out in its revised submission for the central Arctic Ocean—it is useful to ponder whether states will still see the rule following as their best available continental shelf strategy.

Developments with regard to continental shelves in the Arctic are fraught with arguments by various actors that refer to international law. This invites the interests of other disciplines to explore “what the law is.” Law as a tool for policy is a tempting explanation given that it conveys the idea that others have to follow it. The problem is that international

law is such a flexible set of rules and principles, one containing even the occasional inherent contradiction, which can be used to serve various constituencies and interests. Since law carries a powerful symbolic authority, it should be treated with caution. There should be more awareness of the applicable international law rules, but scholars should also examine the complexity and nature of these rules. It is only with this caution that international law can enhance prospects for better capturing the reality of international governance.

Notes

1. U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397.
2. See V. Jares, "The Continental Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic," *Vanderbilt Journal of Transnational Law* 43 (2009): 1265–1305.
3. See, for example, R. Howard, *The Arctic Gold Rush: The New Race for Tomorrow's Natural Resources* (London: Continuum Press, 2009).
4. *Impacts of a Warming Arctic*, Arctic Climate Impact Assessment, Overview Report (Cambridge: Cambridge University Press, 2004); and, see generally, *Arctic Climate Impact Assessment: Final Scientific Report* (Cambridge: Cambridge University Press, 2005), available at www.acia.uaf.edu/.
5. See the IEA's "World Energy Outlook" Web site at www.worldenergyoutlook.org/.
6. "Arctic Oil Tempts Norway to Seek Drilling at 'Gates of Hell,'" 25 September 2009, Bloomberg, available at www.bloomberg.com/apps/news?pid=newsarchive&sid=ajnhJCcmv8pU. The United States Geological Survey had earlier estimated that the reserves are plentiful. U.S. Geological Survey, "Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle," 2008, available at pubs.usgs.gov/fs/2008/3049/.
7. Russian Federation, "Executive Summary—Submission to the Commission on the Outer Limits of the Continental Shelf," 20 December 2001, available at the website of the Commission on the Limits of the Continental Shelf (CLCS), www.un.org/Depts/los/clcs_new/clcs_home.htm.
8. United States, "Note," 18 March 2002, *ibid.*
9. Tom Parfitt, "Russia Plants Flag on North Pole Seabed," 2 August 2007, *The Guardian*, available at www.guardian.co.uk/world/2007/aug/02/Russia.arctic (accessed 11 June 2008).
10. "Russia Plants Flag Under N Pole," 2 August 2007, BBC News, available at news.bbc.co.uk/2/hi/europe/6927395.stm.
11. Norway, "Executive Summary—Submission in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea," 27 November 2006, available at the CLCS Web site, *supra* note 7.
12. See, for example, Spain, "Note 184-JR/ot," 3 March 2007, *ibid.* Spain confirmed its position that, as a party to the 1920 Svalbard Treaty, 2 *L.N.T.S.* 8, it reserves its rights to exploit the natural resources of the shelf around Svalbard, including in the extended area.
13. S. Borgerson, "Arctic Meltdown: The Economic and Security Implications of Global Warming," *Foreign Affairs* (March–April 2008), available at www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown.
14. United States, Executive Order 9633 of September 28, 1945—Reserving and Placing Certain Resources of the Continental Shelf Under the Control and Jurisdiction of the Secretary of the Interior, 10 *Fed. Reg.* 12303, 59 *U.S. Stat.* 884.
15. Convention on the Continental Shelf, 1958, 499 *U.N.T.S.* 311.
16. For many international lawyers, the term "claim" seems a misnomer, given that continental shelf is automatically under the sovereign rights of the nearest coastal state, without any need to claim it. Yet, for instance, when two states perceive that their continental shelves cover the same portion of the seabed, it can be said that they are engaged in claiming it since there are no clear-cut rules determining the extent of the entitlements. See V. Golitzyn, "Continental Shelf Claims in the Arctic Ocean: A Commentary," *International Journal of Marine and Coastal Law* 24 (2009): 401–408.

17. *U.N. General Assembly Official Records*, First Committee, 1515th Meeting, U.N. Doc. A/C.1/PV.1515, 1 November 1967, 1515 and 1516th Meeting, U.N. Doc. A/C.1/PV.1516, 1 November 1967, 1–3.

18. LOS Convention, *supra* note 1, art. 309.

19. *Ibid.* Article 76 contains the complex criteria for drawing the outer limit in paragraphs 4 to 6.

20. *Ibid.*, Part XI. The ISA is:

an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The Authority is the organization through which States Parties to the Convention shall, in accordance with the regime for the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organize and control activities in the Area, particularly with a view to administering the resources of the Area and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organize and control activities in the Area, particularly with a view to administering the resources of the Area. See the ISA Web site at www.isa.org.jm/en/about.

21. *Ibid.*, art. 82.

22. *Ibid.*, art. 76 and Annex II.

23. *Ibid.*, Annex II, art. 4. This date was extended by a decision of the Meeting of the State Parties (SPLOS) to the Convention to May 2009 for those states that had become parties before May 1999. “Decision regarding the date of commencement of the ten year period,” Doc. SPLOS/72, 29 May 2001, available at the Web site of the UN Division for Ocean Affairs and the Law of the Sea, www.un.org/Depts/los/index.htm. A 2008 SPLOS decision further relaxed this deadline. “Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of states, particularly developing states, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72,” Doc. SPLOS/183, 20 June 2008, provided that:

It is understood that the time period referred to in article 4 of annex II to the Convention and the decision contained in SPLOS/72, paragraph (a), may be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission in accordance with the requirements of article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf.

24. LOS Convention, *supra* note 1, art. 76(8).

25. See the short summary of these recommendations, available in UN General Assembly, “Report of the Secretary-General—Oceans and Law of the Sea, addendum, Doc. A/57/57/Add.1, 8 October 2002, paragraph 313. For an overview, see Mel Weber, “Defining the Outer Limits of the Continental Shelf Across the Arctic Basin: The Russian Submission, States’ Rights, Boundary Delimitation and Arctic Regional Cooperation,” *International Journal of Marine and Coastal Law* 24 (2009): 653–681.

26. Norway, Submission to the Commission, *supra* note 12.

27. CLCS, “Summary of the Recommendations to the Submission Made by Norway,” 27 March 2009, available at the CLCS Web site, *supra* note 7.

28. For an in-depth analysis of continental shelf activity country by country, see Ted L. McDorman, “The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean,” *Journal of Transnational Law and Policy* 18 (2009): 155–194, at 176–183.

29. Ilulissat Declaration, 28 May 2008, available at arctic-council.org/filearchive/Ilulissat-declaration.pdf.

30. See B. Baker, "Law, Science and the Continental Shelf: The Russian Federation and the Promise of Arctic Cooperation," *American University International Law Review* 25 (2010): 251–281.

31. LOS Convention, *supra* note 1, art.76(4).

32. . *Ibid.*, art. 76 (3):

[t]he continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

33. *Ibid.*, art. 76 (6).

34. *Ibid.*

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

See T. Heidar, "Legal Aspects of Continental Shelf Limits," in *Legal and Scientific Aspects of Continental Shelf Claims*, ed. M. H. Nordquist, J. N. Moore, and T. H. Heidar (Leiden: Martinus Nijhoff, 2004), 19–39, 28.

35. For a useful commentary, see International Law Association, "Committee on Legal Issues of the Outer Continental Shelf," in *Report of the Seventy-Second Meeting held in Toronto, 2006* (2006).

36. One study has indicated that there may be four areas of seafloor outside of Arctic coastal states' continental shelves. Ron Macnab, "The Outer Limits of the Continental Shelf in the Arctic Ocean," in *Legal and Scientific Aspects of Continental Shelf Claims*, ed. M. H. Nordquist, J. N. Moore, and T. H. Heidar (Leiden: Martinus Nijhoff, 2004), 301–312. See also A. Proelß and T. Müller, "The Legal Regime of the Arctic Ocean," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 68 (2008): 651–688. At a Global Ocean Forum in Paris in May 2010, Vladimir Golitzyn, a judge on the International Tribunal for the Law of the Sea pondered whether there will be any Area left in the Arctic Ocean. (Personal observation by the author.)

37. This term is somewhat synonymous to "epistemic communities," which Peter M. Haas has introduced in international relations research to refer to networks of professionals with recognized knowledge and skill in a particular area and who also share a set of beliefs. P. M. Haas, "Epistemic Communities and International Policy Coordination," *International Organization* 46 (1992): 1–35.

38. For a good overview of the recent Arctic policy documents, see H. Borlase, "Consistencies and Inconsistencies in the National Strategies of the Arctic Littoral States" (LLM thesis prepared for the Polar Law Masters Programme, University of Akureyri, Iceland), available at skemman.is/stream/get/1946/5645/1/Harry_Final.pdf.

39. See the Arctic Council Web site at www.arctic-council.org.

40. For an overview and analysis, see T. Koivurova and D. VanderZwaag, "The Arctic Council at 10 Years: Retrospect and Prospects," *University of British Columbia Law Review* 40 (2007): 121–194.

41. Randy Boswell, "Canada, Denmark Start Talks to Resolve Border Dispute," 27 March 2010, Canwest News Service, available at www2.canada.com/edmontonjournal/news/story.htm?id=4dd583c. See also John Ibbitson, "Canada and Denmark Make Headway in Dispute over Hans Island," *Toronto Globe and Mail*, 27 January 2011.

42. "Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and Arctic Ocean," 27 April 2010, available at www.regjeringen.no/en/dep/ud/Whats-new/news/2010/statement_delimitation.html?id=601983.

43. Treaty Between Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 15 September 2010, available at www.regjeringen.no/en/dep/ud/campaign/delimitation/treaty.html?id=614006.

44. Randy Boswell, "Work Underway to Resolve Beaufort Boundary Dispute," 26 July 2010, Postmedia News, available at www.realpolitik.tv/ocean-arctique/work-underway-to-resolve-beaufort-sea-boundary-dispute-30-07-10.

45. The Arctic Ocean coastal states used "law of the sea" throughout the Ilulissat Declaration since the United States is not a party to the LOS Convention.

46. Antarctic Treaty, 1959, 402 *U.N.T.S.* 71.

47. Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), 1991, 30 *I.L.M.* (1991), 1461.

48. The European Parliament urged the European Commission to contemplate initiating action on an Arctic treaty. The October 2008 European Parliament resolution stated:

Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.

Neither the European Commission nor the European Council saw this goal as worth pursuing. European Parliament resolution of 9 October 2008 on Arctic governance, available at www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0474&language=EN; European Parliament resolution on the opening of international negotiations with a view to adopting an international treaty for the protection of the Arctic, available at www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2009-0163&language=EN.

49. See WWF, "Reforming Arctic Marine Governance," available at wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/reforming_arctic_marine_governance/.

50. Ilulissat Declaration, *supra* note 29.

51. "Towards an Inuit Declaration on Arctic Sovereignty," statement issued by Inuit Leaders at the Inuit Leaders' Summit on Arctic Sovereignty, 6–7 November 2008, available at www.sikunews.com/News/International/Arctic-Sovereignty-Begins-with-Inuit-5567.

52. "Circumpolar Inuit Declaration on Arctic Sovereignty," April 2009, available at www.itk.ca/circumpolar-inuit-declaration-arctic-sovereignty.

53. *Ibid.*, para. 4.2.

54. The 2007 United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, adopted 13 September 2007, available at www.un.org/esa/socdev/unpfii/en/drip.html, advances self-determination in Articles 3 and 4 in the following manner: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . . [i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

55. Communication from the Commission to the European Parliament and the Council, "The European Union and the Arctic Region," COM (2008) 763, available at ec.europa.eu/maritimeaffairs/pdf/com08_763_en.pdf.

56. See, generally, T. Koivurova, "Limits and Possibilities of the Arctic Council in a Rapidly Changing Scene of Arctic Governance," *Polar Record* 46 (2010): 146–156.

57. See V. Golitzyn, "Continental Shelf Claims in the Arctic Ocean: A Commentary," *International Journal of Marine and Coastal Law* 24 (2009): 401–408. See, however, Gudmundur Eiriksson, who argued that there is nothing that would preclude a state party to the LOS Convention bringing a case to an appropriate Convention body if it perceives that a coastal state has not acted on the basis of Commission's recommendations. Gudmundur Eiriksson, "The Case of Disagreement Between a Coastal State and the Commission," in *Legal and Scientific Aspects of Continental Shelf*

Claims, ed. M. H. Nordquist, J. N. Moore, and T. H. Heidar (Leiden: Martinus Nijhoff, 2004), 251–262.

58. LOS Convention, *supra* note 1, Annex II, Article 9, provides that “[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.”

59. See Associated Press, “Russia Plans to Create Arctic Military Force,” 27 March 2009, available at www.msnbc.msn.com/id/29916834/.