

Power Politics or Orderly Development?

Why Are States "Claiming" Large Areas of the Arctic Seabed?

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In recent times the media have given vast attention to the Arctic, especially the perceived competition as to which of the Arctic states is able to claim the biggest stake of the continental shelf and, thereby, be able to exploit the plentiful hydrocarbon resources lying underneath the seabed. The story line here is built on the idea that because climate change is opening this previously inaccessible region to natural resource development—resources that are plentiful—the states are engaging in their typical power politics to determine who gets to these resources first. Even though this story line seems very appealing, the argument in this chapter is that this is a fundamentally flawed account of what is taking place in the Arctic. In fact, the argument is that at least so far, the continental shelf developments in the Arctic can be explained by states observing their law of the sea duties. Another issue, however, is what will happen when the Arctic coastal states extend their presence farther onto the seabed of the Central Arctic Ocean. Will this development challenge the prevailing position of the Arctic intergovernmental forum, the Arctic Council, as the main platform for Arctic governance?

The chapter will proceed in two steps. First, it is important to take the "race to resources" story

line seriously because it is not only media that perceives that such development is going on in the Arctic but also researchers as well. The chapter, therefore, makes the attempt to understand why this story line has become so popular in explaining the continental shelf claims in the region. Before explaining to the reader why we perceive the continental shelf claim development as an orderly process, it is useful to familiarise the reader with some basic concepts related to the seabed from a geophysical point of view in order to grasp how the law of the sea regulates the seabed and its resources. Thereafter, a brief overview of how the seabed law has evolved in the law of the sea is in order, after which we will demonstrate why, indeed, the law of the sea can be seen as the best explanation for these continental shelf developments in the Arctic.

Second, it is also important to examine the international political and legal consequences of Arctic coastal states further penetrating into the Arctic Ocean seabed. What is interesting is whether this development will challenge the present intergovernmental forum in charge of Arctic affairs, the Arctic Council. Before studying this question, however, it is useful to introduce the reader to what type of cooperation the eight Arctic states (the Russian Federation,

Canada, the United States, Denmark (Greenland), Iceland, Norway, Sweden, and Finland) have practised within the Arctic Council. It is important to examine what type of regional international political and legal dynamic the continental shelf development has engendered and whether this dynamic can be seen to challenge the Arctic Council as the predominant intergovernmental forum for Arctic affairs. An analysis on both of these questions will be drawn in the conclusion.

1. Is There a "Race to Resources" or Orderly Development Going on in the Arctic?

For many persons thinking along a rationalist or realist approach in international relations, it must seem only a matter of time before the natural resources of the Arctic would be exploited. Indeed, given that few humans live in the Arctic, and thus few who may try to fight against developing natural resources by claiming "not in my backyard," these areas would seem to be tempting places for natural resources exploitation. Only the inaccessibility of the region, according to this line of thinking, prevented the vast natural resources from being exploited; as soon as technology were developed to harness these resources, companies and states would enter the region.

Then came the awareness that climate change was hitting the Arctic hardest, especially evinced by the Arctic Council who sponsored the Arctic Climate Impact Assessment.¹ Because ice and snow are the first physical forums to react to global warming, it has been estimated that climate change has already impacted the Arctic and that the change in the region will be more intense than in other regions of the world. Indeed, climate change seems to open this previously inaccessible region for resource development, and there certainly are several reasons to make use of the hydrocarbons from the seabed of the Arctic waters.

First of all, fossil fuels seem to have a future in the energy markets. The International Energy

Agency (IEA) has recently estimated that despite the efforts by the climate regime to convert our energy use toward renewables, with the present energy development scenarios our dependence on fossil fuels will actually grow by 2030.² Additionally, Arctic hydrocarbon resources seem tempting from two perspectives. They are estimated to be plentiful as exhibited by British Petroleum (BP, which recently estimated them to constitute 25–50 percent of the unfound reserves of hydrocarbons).³ They are also generally considered to be safe because they are located in areas with no ongoing conflicts. It can thus be concluded that the combined effect of climate change and interests to exploit hydrocarbons in the Arctic might be behind the recent efforts by states to stake seabed areas in the Arctic.

This state activity began in the Arctic with the Russian Federation's vast claim in 2001, covering almost half of the Arctic Ocean seabed.⁴ All the other Arctic Ocean coastal states, especially by the United States, reacted to the Russian claim, criticising many aspects of the claim, especially its attempt to claim the Lomonosov Ridge that runs through the Central Arctic Ocean Basin, which, according to the United States, "is oceanic part of the Arctic Ocean basin and not a natural component of the continental margins of either Russia or of any State."⁵ In August 2007 the Russians planted their flag underneath the North Pole in the Lomonosov Ridge, thereby provoking heavy protests from the other Arctic coastal states. As reported by the Guardian newspaper,

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.⁶

BBC News then 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 U.S.⁷

In the recent *Foreign Affairs* article, Scott G. Borgerson, International Affairs Fellow at the Council on Foreign Relations and a former Lieutenant Commander in the U.S. Coast Guard, 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.⁸

Overall, therefore, it does seem to make a sense to claim that the story line we're calling the "race to resources" explains the states' behaviour. In this story line, the climate change opens the regions for power politics over who is able to stake the hydrocarbon resources of the Arctic sea bed first. Yet, the present author perceives this as a flawed account of what is taking place. Why?

1.1. The Rights of States over the Seabed and Its Resources

Before moving to study closely how the present 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 over the various portions of the seabed and provide a short account of how the law relating to seabed has evolved. Because geophysics tries to examine the reality of the seabed, it offers much more nuanced concepts for it: The continental shelf proper adjacent to the coast dives down to the average depth of 180 metres, which then gives way to steep slope averaging up to 2,500 metres deep and continues with the less steep continental rise, which then transforms into the ocean floor. Geophysics understands the concepts of the continental margin covering continental shelf, continental slope, and the rise. The present law of the sea, as mostly codified in the 1982 UN Convention on the Law of the Sea (UNCLOS),⁹ grants the coastal state sovereign rights over the resources of the legal continental shelf, which can in most cases be equated with geophysical continental margin (not the geophysical continental shelf).

Before World War II, the coastal states enjoyed sovereignty only over a narrow three to four nautical miles of territorial sea. This was dramatically changed after the war, with the 1945 Truman Proclamation by the United

States declaring the following: "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 sea bed 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."¹⁰ This started the era of creeping coastal state jurisdiction, especially in regard to the seabed, the outer limit of which was defined in Article 1 of the 1958 Continental Shelf Convention as follows:

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.¹¹

The problem with this definition was that it effectively permitted the possibility of coastal states claiming larger seabed resources with the development of technology, to the extent that even ocean floors could have been divided between the coastal states. Yet because states all around the world continued to extend their sovereign rights over the resources of the continental shelf, the entitlement to these resources fairly quickly matured into a principle of customary international law. Consequently, all coastal states of the world came to possess entitlement to resources in the seabed adjacent to their coasts.

From an international law perspective, the seabed is a natural prolongation of the land territory into the sea, and thus the coastal state is not even legally obligated to claim it; it is automatically under the sovereign rights of the nearest coastal state. The main legal question to be resolved is related to where the outer limits of the continental shelf lie, which, on the basis of the 1958 Continental Shelf Convention, could

have meant that coastal states divided the resources of the ocean floor between themselves.

A counter-force for this trajectory came from Maltese ambassador Arvid Pardo, who, in 1967, proposed in the UN General Assembly that the ocean floor should be designated as "A common Heritage of Humankind" and governed by an international governance mechanism, whereby the economic benefits of the ocean floor riches could be shared equitably between developing and developed states. Pardo's proposal acted also as one major reason for convening the Third UN Conference on the Law of the Sea, with the aim to produce a comprehensive "constitution" of the oceans, which became the UNCLOS.¹²

The Convention was negotiated over an extended period of time, from 1973 to 1982, as a package deal, permitting no reservations to the Convention.¹³ UNCLOS was able to achieve a compromise between various groupings of states having differing kinds of interests related to the seabed. For instance, broad continental margin states were able to have rules accepted, which allowed the whole continental margin to be subjected to the sovereign rights of coastal states, whereas the geologically disadvantaged states (those whose continental margin was minimal) managed to push for a rule that entitles all states to a minimum of 200 nautical miles of continental shelf (meaning that these states effectively exercise powers over ocean floor as well). UNCLOS was also successful in defining more clearly the outer limit of the continental shelf¹⁴ than its 1958 predecessor convention and in designating the ocean floor as part of the common heritage of mankind and under the governance of International Sea-Bed Authority (ISBA).¹⁵

Even though broad continental margin states were able to extend the outer limit of the continental shelf to cover the whole geophysical continental margin (and in some exceptional cases beyond) during the negotiations, they had to make concessions as well. For example, they had to submit to rules requiring them to transfer some of the revenues from the offshore hydrocarbon exploitation in their extended continental shelf to developing states via the ISBA,¹⁶ and

more importantly, they had to scientifically prove the extent of their continental shelf in the Commission on the Limits of Continental Shelf (CLCS, or Commission), a scientific body with twenty-one members.¹⁷ A coastal state must make the submission if it perceives that its continental margin exceeds 200 nautical miles within ten years from the date when it became a party to the UNCLOS.¹⁸ Although the Commission can only make recommendations, these recommendations are legally influential because the continental shelf's outer limits become final and binding only when they have been enacted on the basis of the recommendations.¹⁹ The deadline for such submissions is fairly tight given that states need to provide the Commission with vast amounts of scientific and technical data. Why? Doing so was seen as necessary in order to define the outer limits of continental shelves as quickly as possible given that only after knowing these limits is it possible to know where the boundary between states' continental shelves and the Area, which is under the jurisdiction of the ISBA, lies.

1.2. Which Explains Better the Continental Shelf Activity—"Rush to Resources" or UNCLOS?

Even though the "rush to resources" story line appears to be the more popular explanation for why states are engaged in staking continental shelf areas, I argue that this is a flawed account, and there are two good means to prove this.

States are themselves arguing that they are just following their UNCLOS duties. Can this be backed up with any reliable evidence? Indeed, because, at least for the time being, states have followed their duties under UNCLOS in an ideal manner. Russia was the first country to make the submission to the CLCS, and it was also the first country to which the Commission issued recommendations, requiring it to revise its submission in the Central Arctic Ocean Basin.²⁰ Whatever symbolic importance the Russian-flag planting had for the domestic policy of Russia, Russia has not argued that this

would have any legal effect,²¹ and they have informed the CLCS that they will make the revised submission to the Commission within the new deadline. Norway made a submission in 2006 to three separate areas in its Northeast Atlantic and Arctic continental shelves, which invoked some reactions from other states as to the status of the seabed around Svalbard Islands.²² Yet, as explained by the Norwegian foreign ministry, this is an issue unrelated to the outer limits of the continental shelf.²³ Now the CLCS has made recommendations to Norway for drawing the outermost limits of its continental shelf.²⁴ Deadlines for making submissions to Denmark (Greenland) and Canada are due in 2014 and 2013 respectively, and both states are cooperating to try to collect the necessary information within the tight deadline. According to news sources, the United States has also started to develop its continental shelf submission.²⁵ Even though not a party to the UNCLOS, the previous Bush Administration attempted to become a party, and the current Obama administration will likely continue these efforts.²⁶

Finally, let's make a thought rehearsal. What if there was no climate change taking place at all? At least the UNCLOS was negotiated during a time period when there was little awareness of climate change. Would the states behave in the same way if the Arctic waters were as inaccessible as ever when considering whether to submit a claim to the CLCS? We argue that any rational state would make its submission exactly as large as it can on the basis of UNCLOS, and they would need to do it now because the UNCLOS entered into force in 1994 (and the first deadline for a submission was, thus, in 2004). If the whole state community accepts very generous rules regarding how the outer limits of the continental shelves are to be drawn, why would states not take full benefit of those rules? Moreover, because we cannot predict how fast and to which direction technology will develop, it would be only rational for a state to make as large as possible a submission to the CLCS because advancements in technology might have

opened these regions for resource development even without climate change. With this in mind, it is difficult to envisage that the present and future consequences of climate change would have triggered this competition over hydrocarbon resources.

2. What Kind of Impact May the Continental Shelf Developments in the Arctic Have for Arctic Governance?

Even though we can conclude that, so far, the continental shelf developments are proceeding in the Arctic on the basis of the UNCLOS, it is clear that there are international legal and political consequences from the Arctic Ocean coastal states enlarging their presence in the high Arctic. It is also true that the perceived competition over hydrocarbon reserves in the region has triggered a new type of policy discussion over how the Arctic, in particular its ocean, should be governed. It is thus important to examine whether this continental shelf development can be one factor in challenging the prevailing intergovernmental forum dedicated to the Arctic governance, the Arctic Council. This condition relates especially to the recent Ilulissat meeting in Greenland between the five Arctic Ocean coastal states, which was largely organized to show to the rest of the world that there is no scramble for resources going on in the Arctic. The coastal states laid a regional agenda for cooperation, which challenged the prevailing structures of governance in the region, in particular the Arctic Council.

We now proceed in the following manner. First, it is useful to study how the intergovernmental cooperation in the Arctic commenced and investigate the dynamics of the Arctic Council body. Then it is important to examine the policy dynamics brought about by the five-coastal state meeting in Ilulissat, which provides a good basis for drawing conclusions as to whether the continental shelf developments in the region are indeed one factor pushing for an Arctic Council regime change toward more focused cooperation in the Arctic Ocean.

2.1. The Emergence of the Arctic Council

The initial idea of Arctic-wide cooperation was launched in 1987 in Murmansk by former Soviet Secretary-General Michail Gorbachev. The Soviet leader proposed that the Arctic states could initiate cooperation in various fields, one being protecting the Arctic environment.²⁷ This idea was developed further when Finland convened a conference of the eight Arctic states in Rovaniemi in 1989 to discuss the issue. After two additional preparatory meetings in Yellowknife, Canada, and Kiruna, Sweden, the eight Arctic states as along with other actors met again in Rovaniemi in 1991 to sign the Rovaniemi Declaration, by which they adopted the Arctic Environmental Protection Strategy (AEPS).²⁸

The AEPS identified six priority environmental problems facing the Arctic: persistent organic contaminants, radioactivity, heavy metals, noise, acidification, and oil pollution. It also outlined the international environmental protection treaties that apply in the region and, finally, specified actions to counter the environmental threats. The eight Arctic states established four environmental protection working groups: Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR), and the Arctic Monitoring and Assessment Programme (AMAP). Three ministerial meetings (after the signing of the Rovaniemi Declaration and the AEPS) were held in this first phase of Arctic cooperation, generally referred to as the AEPS process. The meetings were held in 1993 (in Nuuk, Greenland), 1996 (in Inuvik, Canada), and 1997 (in Alta, Norway). Between the ministerial meetings, Senior Arctic Officials guided cooperation—officials who were typically from the foreign and environmental ministries of the eight Arctic states. The last AEPS ministerial was held after establishing the Arctic Council and focused on integrating the AEPS into the structure of the Council.

The Arctic Council was established in September 1996 in Ottawa, Canada, with the Arctic

states signing the Declaration Establishing the Arctic Council and issuing a joint communiqué to explain the newly created body.²⁹ With the founding of the Council came changes in the form of Arctic cooperation that had been based on the AEPS document—changes that extended the terms of reference beyond the previous focus on environmental protection. The Council was empowered to deal with “common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”³⁰ This yielded a very broad mandate because “common issues” can include almost any international policy issue; however, the Declaration provides in a footnote that “the Arctic Council should not deal with matters related to military security.”³¹ Environmental cooperation is now included as a principal focus within the mandate of the Council,³² with the four environmental protection working groups that started as part of AEPS cooperation continuing under the umbrella of the Council.³³ The second “pillar” of the Council’s mandate is cooperation on sustainable development,³⁴ whose terms of reference were adopted in the second ministerial meeting of the Council, held in 2000 in Barrow, Alaska, and that is managed by the Arctic Council Sustainable Development Working Group (SDWG).³⁵

The Declaration amends and elaborates the rules on participation set out in the AEPS. It provides for three categories of participants: members, permanent participants, and observers. The eight Arctic states are members, and the three organisations representing the indigenous peoples of the Arctic are permanent participants.³⁶ The Declaration also lays down the criteria for acquiring the status of observer³⁷ and permanent participant as well as the decision-making procedure for determining those statuses.³⁸

The decision-making procedure of the Arctic Council, which had developed with AEPS cooperation, was made more explicit in the Declaration. For example, Article 7 provides that “Decisions of the Arctic Council are to be by consensus of the Members.” In Article 2, “member” is defined as including only the eight Arctic

states. Decision making by consensus is to be undertaken only after “full consultation”³⁹ with the permanent participants, that is, the organisations of the Arctic indigenous peoples. Although the permanent participants do not have formal decision-making power, they are clearly in a position to greatly influence in practice the decision making of the Council.⁴⁰

The work of the Arctic Council is strongly controlled by its chair states. The first was Canada (1996–1998), followed by the United States (1998–2000), Finland (2000–2002), Iceland (2002–2004), Russia (2004–2006), and Norway (2006–2009);⁴¹ the current chair is Denmark. Because the Council has no permanent secretariat, the chair state has a great deal of freedom to choose its priorities during its tenure, which hinders the formation of long-term policies (although the three Scandinavian states have created a semipermanent secretariat to function in Tromsø, Norway, until 2012).⁴² The Arctic Council has also created certain programs of its own, such as the Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP), which recently became the sixth working group, and the Arctic Climate Impact Assessment (ACIA). The Council has carried out many ambitious scientific assessments in addition to the ACIA, the most recent being the oil and gas assessment released in 2008 and the 2009 Arctic Marine Shipping Assessment.⁴³ Both the AEPS and the Arctic Council have been established by declarations, and, thus, Arctic-wide cooperation has been based on soft law from its very inception. Moreover, the Council’s funding is still based on ad hoc contributions, and the Council has not yet engaged in any sensitive policy areas, retaining its basic focus on scientific assessments.⁴⁴

2.2. Do the Continental Shelf Developments Constitute a Challenge to the Arctic Council?

The Ilulissat meeting in Greenland by the five coastal states of the Arctic Ocean flamed the discussion on future Arctic governance. This meeting was mostly designed to explain to the rest of

the world that there is no scramble for resources going on in the Arctic, but rather an orderly development. Even though this might have been the original intention, it provoked many reactions among various Arctic “constituencies.”

According to the Ilulissat Declaration, the coastal states found that the Arctic Ocean is at a threshold of significant changes due to climate change and melting sea ice, and because of this, “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.”⁴⁵ They also presented themselves as protecting the environment as well as indigenous and other local inhabitants in the Arctic Ocean in the following way:

Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities. . . . 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.

The Arctic Ocean coastal states perceived that there is “no need to develop a new comprehensive international legal regime to govern the Arctic Ocean” because

Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal

framework and to the orderly settlement of any possible overlapping claims. This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions.

Even though Denmark insisted in the 2007 Narvik Senior Arctic Official (SAO) meeting prior to this Greenland meeting that the coastal state cooperation would not compete with the Arctic Council, the meeting caused friction among the Council members.⁴⁶ Iceland has been the most concerned of the three states (the others are Finland and Sweden) left out of this meeting. It expressed its concern in the Narvik SAO meeting⁴⁷ and also in the August 2008 Conference of the Arctic parliamentarians;⁴⁸ this is, of course, no surprise. The Ilulissat Declaration seems to outline an agenda for cooperation between the littoral states of the Arctic Ocean regarding high-level ocean policy issues, thus it is potentially challenging the Arctic Council, with its eight members, broad circumwide focus, and soft work on environmental protection and sustainable development. The coastal states committed themselves in the Ilulissat meeting to work in various international forums, organizations, and existing treaties to, among other things, improve shipping safety, prevent and reduce ship-based pollution in the Arctic Ocean, protect the marine environment, strengthen search and rescue capabilities, and improve accident response mechanisms in general. Moreover, they agreed to cooperate to collect scientific data on the continental shelf and especially to settle in an orderly manner any overlapping continental shelf entitlements.⁴⁹

The Greenland meeting also provoked a reaction from one of the strongest Arctic Council permanent participants, the Inuit Circumpolar Council (ICC) and national Inuit leaders, who, in their “Statement issued by Inuit Leaders at the Inuit Leaders’ Summit on Arctic Sovereignty,”⁵⁰ outlined their concerns over the five coastal state meeting:

Concern was expressed among us leaders gathered in Kuujuaq that governments were entering into Arctic sovereignty discussions without the meaningful involvement of Inuit, such as the May, 2008 meeting of five Arctic ministers in Ilulissat, Greenland. The Kuujuaq summit noted that while the Ilulissat Declaration asserts that it is the coastal nation states that have sovereignty and jurisdiction over the Arctic Ocean, it completely ignores the rights Inuit have gained through international law, land claims and self-government processes. Further, while the ministers strongly supported the use of international mechanisms and international law to resolve sovereignty disputes, it makes no reference to those international instruments that promote and protect the rights of indigenous peoples.

However, the ICC and the Inuit leaders were also critical of the present Arctic governance:

We recognized the value of the work of the Arctic Council and asked ICC, through its permanent participant status on the Council, . . . We further noted the meaningful and direct role that indigenous peoples have at the Arctic Council, while at the same time expressing concern that the Council leaves many issues considered sensitive by member states off the table, including security, sovereignty, national legislation relating to marine mammal protection, and commercial fishing.

They also identified their own justification for being strongly involved in Arctic governance:

We took note of various declarations and statements made by governments and industry regarding overlapping claims and assertions of Arctic sovereignty without full regard to Inuit concerns and rights. We further asserted that any claim of sovereignty that nation states may make is derived through the use and occupancy by Inuit of lands and seas in the Arctic. . . . Various aspects of what sovereignty means for Inuit were discussed. There was agreement among us that the foundation of Inuit sovereignty begins

at home, and that only through Inuit well-being and the development of healthy and sustainable communities can meaningful sovereignty be achieved. To achieve these goals, we called upon Arctic governments to be active partners in creating such a foundation.

Thereafter, they clarify their position in the event that a new governance arrangement is to be negotiated:

We called upon Arctic governments to include Inuit as equal partners in any future talks regarding Arctic sovereignty. We insisted that in these talks, Inuit be included in a manner that equals or surpasses the participatory role Inuit play at the Arctic Council through ICC's permanent participant status.

Because they target serious criticism of the Council's inability to tackle sensitive issues, the Inuit can thus be interpreted as favoring a stronger governance arrangement than the present Arctic Council. Even though they naturally make their own case for why Inuits should be included in any future talks of Arctic governance, they also refer to indigenous peoples' rights in general and the Arctic Council's permanent participant status in particular. One possible view that emerges from their statement is that any future governance arrangement should include the present permanent participants of the Council as equal partners with the eight Arctic Council member states.

The EU Parliament on October 9, 2008⁵¹ adopted a Resolution in which the Parliament first took note of the Greenland meeting (paragraph I) and then established its Arctic agency in the following words:

whereas three of the EU's Member States, and a further two of the EU's closely-related neighbours participating in the internal market through the EEA Agreement, are Arctic nations, meaning that the EU and its associated states comprise more than half the numeric membership of the Arctic Council.

For the EU Parliament, the ultimate governance solution should involve a broader group of countries and the region's indigenous peoples. The EU Parliament

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 (paragraph 15).⁵²

Given that the EU has no Arctic coastline but instead potentially significant navigational and fisheries interests in the region, the alternative of establishing a more inclusive governance arrangement for the Arctic would suit the interests of the EU better than the law of the sea approach pursued by the five Arctic coastal states or even the Arctic Council, which is built on the difference between Arctic and non-Arctic states. Parliament's strategic choice to pursue an inclusive governance arrangement for the Arctic is well reflected in the resolution: It suggests the Antarctic Treaty system (ATS) as a model for the Arctic—a system that is a very inclusive governance arrangement, as it is, in principal, open to all states who conduct scientific research in Antarctica.⁵³ As a minimum requirement, the Parliament outlines an idea of a treaty covering the unpopulated and unclaimed area at the centre of the Arctic Ocean. Even though it is worded in a legally incorrect manner,⁵⁴ this suggestion also takes an inclusive approach to Arctic governance because all states possess rights and interests in the high seas and deep seabed of the Arctic Ocean under the law of the sea.

Even though the European Parliament made the above-mentioned suggestion to the European

Commission, the latter, in its November 2008 Communication, did not respond to this call. The Commission's Communication did, however, provide an interesting starting point for its Arctic policy by first diagnosing the problem: "The main problems relating to Arctic governance include the fragmentation of the legal framework, the lack of effective instruments, the absence of an overall policy-setting process and gaps in participation, implementation and geographic scope."⁵⁵ One remedy for tackling such problems is, according to the Commission, to "Explore the possibility of establishing new, multi-sector frameworks for integrated ecosystem management. This could include the establishment of a network of marine protected areas, navigational measures and rules for ensuring the sustainable exploitation of minerals." The non-Arctic coastal states have also expressed their willingness to become part of the established Arctic intergovernmental forum, currently via applying observer status from the Arctic Council (China, South Korea, and even Japan). For the time being, however, the Council did not approve in its last ministerial meeting in April 2009 in Norway permanent observer status to China or the European Commission.

Even though there clearly is a new dynamic in Arctic governance, the Arctic coastal states have not reacted to these new interests with enthusiasm, as shown by their rejection of the observership status for China and the European Commission. The recent Arctic policy documents of the United States and Russia have been very much in line with the Ilulissat Declaration, perceiving the current Arctic Council and the law of the sea as an adequate solution for the Arctic even though they are willing to engage in proactive regulation, for example, from the U.S. Arctic policy document. In this, the U.S. policy considers that the Arctic Council "should remain a high-level forum devoted to issues within its current mandate,"⁵⁶ but it should also promote ways to enhance governance in the changing Arctic:

Consider, as appropriate, new or enhanced international arrangements for the Arctic to address

issues likely to arise from expected increases in human activity in that region, including shipping, local development and subsistence, exploitation of living marine resources, development of energy and other resources, and tourism.⁵⁷

3. Evaluation

A reasonable assessment at the time of this writing is that the UNCLOS is able to contain the challenges that the continental shelf activity in the Arctic poses. This conclusion, however, can only be drawn cautiously because some of the Arctic submissions will in all likelihood overlap and Russia's vast submission may face challenges in the Commission procedure. Yet given that the Arctic Ocean coastal states are already preparing for the eventual delimitation of the boundaries of their continental shelves and that at least so far Russia has abided by the CLCS procedures, it can be presumed that the submissions will not prompt any serious conflicts in the Arctic. This does not mean that the process will progress in an orderly fashion to its conclusion; it only means that the development so far has been orderly and fully in line with international law, whereby there is no reason to presume that the process naturally engenders conflict.

The media and even some researchers try to claim that the melting brought on by climate change has made previously inaccessible Arctic waters targets for power politics and that the race is on among states to be the first to grab the resources, which could possibly provoke military conflicts. However, that this story line is more of a story than an account of the realities in the regions is clear. One reason for this misconception may be that it has taken such a long time for the UNCLOS continental shelf process to unfurl. The UNCLOS was negotiated for a long period of time—1973 to 1982—and it did not enter into force until 1994. The first deadline for a state party to the UNCLOS to make a submission concerning an extended continental shelf to the CLCS was 2004, and thus the process has started to operate only very recently.

It is exactly now that the submissions for extended continental shelves need to be made—and increasingly are being made.⁵⁸

It is probably difficult for a nonlawyer to imagine that a process that started in 1973 is the main cause of the present continental shelf activity, but this is in fact the case. Yet, as shown above, this activity in the Arctic has clear politico-legal consequences even though it seems reasonable to surmise that no conflicts will arise from these. Overall, the reality of continental shelf activity in the Arctic testifies to the power of rules, rather than political considerations, in guiding state behaviour—at least thus far.

As discussed above, even though states have conducted continental shelf activity within the letter of the UNCLOS, these developments pose a possible challenge to the Arctic Council: They change the politico-legal setting in the Arctic simply by extending the presence of Arctic states farther onto the Arctic Ocean seabed. The politico-legal setting in the Arctic will change further when all the current continental shelf submissions are processed by the Commission and the Arctic coastal states have agreed (or not) on the boundaries of any overlapping entitlements.

The gradual penetration of the five littoral states further into the Arctic Ocean through their continental shelf submissions may be part of an overall challenge to the Arctic Council as the main intergovernmental forum managing the Arctic issues. Over time the coastal states may find it more reasonable to conclude multi-lateral treaties focusing on the Arctic Ocean rather than the entire Arctic, which has been the traditional focus of the Arctic Council. Moreover, the states may find it important to confront the difficult management problems caused by the melting sea ice (such as increased navigation and offshore hydrocarbon exploitation) through a more focused Arctic Ocean cooperation rather than a soft-cooperation platform such as the Arctic Council. Such a development would leave Finland, Sweden, and Iceland, all members of the Arctic Council, out of the core

of the cooperation, which has already caused some friction.

Conversely, the Arctic Council has also evolved incrementally from the AEPS to the present Arctic Council. Gradually, the institutional formation of the Council and its deliverables have become more ambitious and an increasing number of states (China, South Korea, Japan) as well as the European Commission want to join the Council as observers. Of much importance is, therefore, whether the Arctic Council can transform itself to become a real governance body of the region or whether it will retain its current ambition of producing scientific assessments and nonbinding guidelines, especially given the vast challenges ahead. If the Council cannot renew its operating format, it is likely to be overrun by more focused and ambitious cooperation by the five coastal states of the Arctic Ocean.⁵⁹

NOTES

1. IMPACTS OF A WARMING ARCTIC, ACIA OVERVIEW REPORT (2004) [ACIA Synthesis Report]; see generally the ARCTIC CLIMATE IMPACT ASSESSMENT FINAL SCIENTIFIC REPORT (2005), available at www.acia.uaf.edu/.

2. See the press reports from the IEA's World Energy Outlook website, available at www.iea.org/Textbase/publications/free_new_Desc.asp?PUBS_ID=2025.

3. See www.bloomberg.com/apps/news?pid=20601102&sid=ajnhJCmv8pU. The U.S. Geological Survey has earlier estimated that these are plentiful. See <http://geology.com/U.S.gs/arctic-oil-and-gas-report.shtml>.

4. See www.un.org/depts/los/clcs_new/submissions_files/submission_rU.S.htm.

5. See the reaction, available at www.un.org/depts/los/clcs_new/submissions_files/rU.S.01/CLCS_01_2001_LOS_U.S.Atex.pdf.

6. See www.guardian.co.uk/world/2007/aug/02/Russia.arctic.

7. See <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

8. See www.foreignaffairs.org/20080301faessay87206p20/scott-g-borgerson/arctic-meltdown.html.

9. See www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

10. See www.presidency.ucsb.edu/ws/index.php?pid=12332.

11. See http://sedac.ciesin.org/entri/texts/continental_shelf.1958.html.

12. The earlier attempts produced four separate laws of the sea conventions (I of 1958) and the second was a failure (1960).

13. See Article 309.

14. Article 76 contains fairly complex criteria for drawing the outer limit in its paragraphs 4 to 6. International Law Association (its outer continental shelf committee) has made an important contribution in its Toronto 2006 Conference Report, available at www.ila-hq.org/en/committees/index.cfm/cid/33.

15. As stated on the ISBA homepage, the ISBA 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 www.isa.org.jm/en/about.

16. Article 82.

17. Article 76 and Annex II.

18. This date was postponed by the parties to the Convention to those states that had become parties before May 1999, thus extending their submission deadline to May 2009. See Annex II to the Convention, Article 4. A recent 2008 decision by the states parties to the Law of the Sea Convention (SPLOS) will further mitigate this deadline. In Decision SPLOS/183 regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of states, particularly developing states, to fulfill the requirements of article 4 of annex II to the UN Convention on the Law of the Sea as well as the decision contained in SPLOS/72, paragraph (a), it was provided: [The Meeting of States Parties] "1. [The Meeting of States Parties] [d]ecides that: (a) 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 Procedure² and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf." See www.un.org/Depts/los/meeting_states_parties/eighteenthmeetingstatesparties.htm.

19. Article 76 (8).

20. See short summary of these recommendations, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement>. According to paragraph 41, "As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations."

21. Article 77 (3) of the Convention.

22. See www.un.org/depts/los/clcs_new/submissions_files/submission_nor.htm (11.6.2008). See, e.g., Spain's reaction, available at www.un.org/depts/los/clcs_new/submissions_files/nor06/esp_0700348.pdf.

23. The Norwegian Ministry for Foreign Affairs responded to the author's e-mail question as follows: "It is clear that Svalbard is part of the Kingdom of Norway. According to the law of the sea, only states have continental shelf. Accordingly all continental shelf areas that originate from Norwegian territory are Norwegian in the sense that they are subject to Norwegian jurisdiction. It is also clear from all maps of the seabed that a continuous continental shelf extends north from mainland Norway and around and past Svalbard." E-mail response, April 8, 2008, from the official of the Ministry (on file with the author).

24. See www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf.

25. See www.sciencedaily.com/releases/2008/02/080211134449.htm.

26. As of October 31, 2007, the U.S. Senate Foreign Relations Committee approved the Law of the Sea Convention, sending it to the full Senate for ratification. See "Law of the Sea Clears Committee," at <http://lugar.senate.gov/sfrc/sea.html>. The United States has now tried to become party to the UNCLOS under both Clinton and Bush Administrations, but in both cases the Senate was able to block its approval.

27. Gorbachev proposed that a nuclear-weapon-free zone be declared in northern Europe, naval activity be limited in the seas adjacent to northern Europe, peaceful cooperation be the basis for utilizing the resources of the Arctic, scientific study of the Arctic has great significance for all humankind, the countries of the North cooperate in matters of environmental protection, and the Northern Sea Route be opened by the Soviet Union to ice-breaker-escorted passage.

28. The history of the negotiation process is studied in MONICA TENNBERG, *THE ARCTIC COUNCIL: A STUDY IN GOVERNMENTALITY* 53-61 (1998). The AEPS is reproduced in 30 ILM 1624 (1991).

29. The 1996 Declaration on the Establishment of the Arctic Council. The Declaration is reprinted in 35 ILM 1385-90 (1996).

30. *Id.* at art. 1 (a) of the Declaration.

31. *Id.* at 3.

32. *Id.* at art. 1 (b).

33. *Id.* Article 1 (b) reads, "The Arctic Council is established as a high level forum to . . . b. oversee and coordinate the programs established under the AEPS on the Arctic Monitoring and Assessment Program (AMAP); Conservation of Arctic Flora and Fauna (CAFF); Protection of the Arctic Marine Environment (PAME); and Emergency Prevention, Preparedness and Response (EPPR)."

34. *Id.* Article 1 (c) reads, "The Arctic Council is established as a high level forum to . . . c. adopt terms of reference for, and oversee and coordinate a sustainable development program."

35. The home page of the SDWG is at <http://portal.sdwg.org/>.

36. Article 2 of the Declaration enumerates the following as permanent participants: "The Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation." Three organisations have since been accepted as permanent participants: the Aleut International Association, the Gwich'in Council International and the Arctic Athabaskan Council.

37. *Id.* Article 3 of the Declaration reads, "Observer status in the Arctic Council is open to: a) non-Arctic states; b) inter-governmental and inter-parliamentary organisations, global and regional; and c) non-governmental organisations that the Council determines can contribute to its work."

38. *Id.* Article 2 (2) reads, "Permanent participation is equally open to other Arctic organisations of indigenous peoples with majority Arctic indigenous constituency, representing: a. a single indigenous people resident in more than one Arctic State; or b. more than one Arctic indigenous people resident in a single Arctic state." Decisions by the Arctic states on whether this criterion is fulfilled must be unanimous. Article 2 also states, "the number of Permanent Participants should at any time be less than the number of members."

39. *Id.* at art. 2.

40. Timo Koivurova & Leena Heinämäki, *The Participation of Indigenous Peoples in International Norm-making in the Arctic*, 42 POLAR RECORD (221) 101-9 (2006).

41. In the Scandinavian chair-period, with Norway, Denmark, and Sweden drawing up their own Action Plan, the ministerial meetings are organised during the spring rather than fall, as previously.

42. See http://arctic-council.org/article/2007/11/common_priorities.

43. See <http://arctic-council.org/filearchive/amsa2009report.pdf>.

44. For a comprehensive account of the evolution of the Arctic Council, see Timo Koivurova & David VanderZwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 U. BRIT. COLUM. L. REV. 121-94 (2007).

45. Ilulissat Declaration 2008, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>.

46. Narvik SAO meeting 2007 (November 28-29, Final Report), available at <http://arctic-council.org/filearchive/Narvik%20-FINAL%20Report-%2023Apr08.doc>.

47. In the discussion in the Narvik SAO meeting (18.1.), "Iceland expressed concerns that separate meetings of the five Arctic states, Denmark, Norway, U.S., Russia and Canada, on Arctic issues without the participation of the members of the Arctic Council, Sweden, Finland and Iceland, could create a new process that competes with the objectives of the Arctic Council. If issues of broad concern to all of the Arctic Council Member States, including the effect of climate change, shipping in the Arctic, etc. are to be discussed, Iceland requested that Denmark invite the other Arctic Council states to participate in the ministerial meeting. Permanent participants also requested to participate in the meeting. Denmark responded that the capacity of the venue may be an issue."

48. The Conference statement in its paragraph 39 "Notes the information from the Danish delegation concerning the Ilulissat Declaration, and the concerns of the Icelandic delegation regarding full participation of all states of the Arctic Council." Conference Report 2008, available at www.arcticparl.org/_res/site/file/files%20from%2028th%20conference/Conference_Report_Fairbanks_final.pdf.

49. See the Ilulissat Declaration, available at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>.

50. Statement 2008 issued by Inuit Leaders at the Inuit Leaders' Summit on Arctic Sovereignty (Nov. 6-7, 2008), available at www.sikunews.com/art.html?artid=5711&catid=2.

51. European Parliament resolution of Oct. 9, 2008 on Arctic governance, available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0474+0+DOC+XML+V0//EN.

52. The Commission did not follow this suggestion by the EU Parliament but provided that "The full implementation of already existing obligations, rather than proposing new legal instruments should be advocated. This however should not preclude work on further developing some of the frameworks, adapting them to new conditions or Arctic specificities." Arctic Communication 2008: 4.

53. See the provision on membership in article IX.2 of the Antarctic Treaty, 72 UNTS (1961) 5778.

54. The EU Parliament spoke of the "unclaimed area at the centre of the Arctic Ocean," by which it can refer to types of areas beyond national jurisdiction, the deep seabed (the Area) and the high seas. First, if the Parliament refers to the deep seabed, this cannot be said to be an unclaimed area because the coastal states do not claim their continental shelf, for it is a natural prolongation of the land mass into the sea. Hence, the deep seabed is a result of what remains after the coastal states have drawn the outer limits of their continental shelves. Second, high seas cannot be subjected to sovereignty claims under the law of the sea. It would thus have been legally correct to speak, for instance, of "areas beyond national jurisdiction at the centre of the Arctic Ocean." It is also a bit odd why the Parliament spoke of this area as "unpopulated," given that it is referring to the core of an ice-covered ocean.

55. Arctic Communication 2008 (Nov. 20, 2008). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, THE EUROPEAN UNION AND THE ARCTIC REGION. Brussels, COM(2008) 763, available at http://ec.europa.eu/maritimeaffairs/pdf/com08_763_en.pdf.

56. U.S. Arctic Region Policy 2009. NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-66, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE/HSPD-25 (January 9, 2009), Arctic Region Policy. On file with the authors.

57. *Id.* at C 5b.

58. There was a vast amount of submissions made by coastal states of the world just before the revised deadline for these submissions, which was May 13, 2009. Currently, there are fifty-one submissions, either unilateral or joint.

59. For a forthcoming account, see Timo Koivurova, *Limits and Possibilities of the Arctic Council in a Rapidly Changing Scene of Arctic Governance*, POLAR RECORD, forthcoming.