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THE GROWING UNCERTAINTY?

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WILL LEGAL PROCEDURE SURVIVE THE GROWING UNCERTAINTY?



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- The Arctic Ocean seabed is expected to contain substantial natural resource reserves, which states seek to lay claim to. The once influential idea that this could lead to a scramble for the Arctic and inter-state conflict has generally been considered unlikely.
- Until now, the Arctic Ocean coastal states have followed rule-based procedures to settle their overlapping claims in the Arctic Ocean. The United Nations Convention on the Law of the Sea (UNCLOS) provides a legal framework for the delineation of the outer limits of the continental shelf. Russia, Canada, Denmark and Norway have submitted, or are in the process of submitting, their claims to the relevant United Nations body, the Commission on the Limits of the Continental Shelf.
- Despite the growing tension between Russia and other Arctic Ocean coastal states, it is likely that the continental shelf claims will be settled in an orderly fashion. This is mostly due to the fact that the UNCLOS treaty works for the benefit of the coastal states.
- However, adverse political dynamics may challenge the status of, and adherence to, the relevant legal processes in the Arctic. Most of these are related to uncertainty over Russia. Consequently, the possibility of unilateral and illegal action cannot be completely ruled out.

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## Introduction

When the Russian expedition planted their national flag on the North Pole seabed in August 2007, many became convinced that the scramble for abundant Arctic hydrocarbon resources had begun. It was expected, especially in the media, that states would engage in power politics to gain access to these resource reserves in a manner that could lead to a new Cold War in the Arctic. While this story-line was initially accepted in expert circles as well, it was soon dismissed as an over-exaggeration.

There were two main reasons for this. First, the Arctic Ocean coastal states reaffirmed their commitment to the United Nations Convention on the Law of the Sea (UNCLOS) – the so-called ‘constitution of the seas’ – in the Arctic. In the 2008 Ilulissat Declaration, the states agreed not only that ‘the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf’, but also more broadly that ‘we remain committed to this legal framework and to the orderly settlement of any possible overlapping claims’.<sup>1</sup>

Second, all coastal states other than the United States<sup>2</sup> started to prepare their submissions to extend their respective continental shelves to the relevant United Nations body, the Commission on the Limits of the Continental Shelf (CLCS), on the basis of UNCLOS. Until now, various submissions to the CLCS have been made. Denmark made a vast continental shelf claim in December 2014 that included the seabed at the North Pole and most of the Lomonosov Ridge – an underwater ridge that runs across the Arctic Ocean. As early as 2001, Russia’s submission had claimed that most of the same ridge belonged to its continental shelf. Given the CLCS’s dissatisfaction with the Russian claim, Russia revised and finally resubmitted its claim to the Commission on 3 August, 2015. As anticipated, the updated claim still overlaps with the Danish claim. A third formal claim to the Arctic seabed is expected to emerge from Canada.<sup>3</sup>

This paper investigates this ongoing process of extending national continental shelves in the Arctic Ocean. In order to contextualize the analysis, the paper starts by explicating the historical evolution of UNCLOS as the internationally recognized legal framework in which the extension of continental shelves is being pursued. The paper continues by asking whether UNCLOS is working as intended in the Arctic. To this end, the paper explicates a number of factors why the delimitation of continental shelves is likely to proceed in an orderly manner despite overlapping claims and, consequently, why these claims are not expected to lead to significant international tensions between the Arctic coastal states. As respect for international law can never be guaranteed, the paper also highlights existing and potential adverse political dynamics that may challenge the status of, and adherence to, UNCLOS in the Arctic. Most of these are related to uncertainty over Russia.

## The evolution of UNCLOS and continental shelf claims

Prior to World War II, coastal states enjoyed sovereignty over only a narrow territorial sea, three to four nautical miles in extent. This was dramatically changed after the war by the 1945 Truman Proclamation whereby ‘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’.<sup>4</sup> This heralded 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 this analysis, 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 superjacent 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.”

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1 See the Ilulissat Declaration at [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).

2 The US is not a party to UNCLOS, but develops its continental shelf claim on the basis of the customary law of the sea.

3 For a complete list of submissions, see [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

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4 See [http://www.gc.noaa.gov/documents/gcil\\_proc\\_2667.pdf](http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf).

The problem with this definition was that it effectively permitted coastal states to expand their seabed presence with the development of technology, to the extent that even ocean floors could have been divided between the coastal states. A counter-force to this trend came from Maltese ambassador Arvid Pardo, who in 1967 proposed in the UN General Assembly that the ocean floor should be designated as part of the common heritage of humankind and governed by an international governance mechanism that would share the economic benefits of the ocean floor's riches equitably between developing and developed states. Pardo's proposal also acted as a major impetus for convening the United Nations Conference on the Law of the Sea III, which sought to produce a comprehensive 'Constitution' of the oceans and became the 1982 UNCLOS.

UNCLOS was negotiated over an extended period – from 1974 to 1982 – as a package deal in that it permitted no reservations to the Convention and contained an elaborate dispute settlement mechanism. It succeeded in achieving a compromise between various groupings of states with differing interests related to the seabed. For instance, states having a broad continental margin<sup>5</sup> had rules accepted that allowed the resources of the whole continental margin to be subject to the sovereign rights of coastal states; geologically disadvantaged states (those whose continental margin was minimal) managed to push for a rule that entitles all states to a continental shelf of a minimum of 200 nautical miles. UNCLOS was also successful in defining the outer limit of the continental shelf more clearly than its 1958 predecessor and in designating the ocean floor as part of the common heritage of mankind and having it governed by the International Seabed Authority (ISBA).

Even though states with broad continental margins were able to extend the outer limit of the continental shelf to cover the whole geophysical continental margin (and in some exceptional cases areas beyond it) during the negotiations, they had to make compromises as well. For example, they had to submit

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5 In most cases the legal continental shelf can be equated with the continental margin, as defined in Article 76 (3) of UNCLOS: 'The 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'.

to rules requiring them to transfer some of the revenues from offshore hydrocarbon exploitation on their extended continental shelf to developing states via the ISBA and, more importantly, had to scientifically prove the extent of their continental shelf to the 21-member CLCS. This submission must be made by a coastal state within 10 years of its becoming a party to UNCLOS if it considers that its continental margin exceeds 200 nautical miles.

The CLCS can only make recommendations but these recommendations are legally influential because the coastal states' outer limits become final and binding only when they have been established on the basis of the recommendations. The deadline for such submissions is fairly tight given that states need to provide the Commission with a vast amount of scientific and technical data. This is because it was considered necessary to define the outer limits of continental shelves as quickly as possible: it is only after establishing these limits that the boundary between states' continental shelves and the area under the jurisdiction of the ISBA can be defined.

### Is UNCLOS working as intended in the Arctic?

Up to now, Arctic coastal states have followed the rule-based UNCLOS procedure and submitted their claims to the CLCS. Russia was the first country to make such a submission to the CLCS in 2001 and also the first to which the Commission issued recommendations in 2002. Russia was requested by the CLCS to gather additional scientific data and finally, in early August 2015, Russia made a revised submission to the CLCS. Norway made a submission in 2006 and has now received recommendations from the CLCS according to which it is gradually drawing the outermost limits of its continental shelf. Denmark made its submission in December 2014, Canada is currently undertaking surveys to collect further data, and the United States has published the results of its continental shelf programme.<sup>6</sup> It seems that after the delineation and delimitation of continental shelves in the Arctic Ocean, there will not be much common area left for the ISBA to administer.

It is likely that these continental shelf claims will be settled in an orderly fashion. First, it is in the

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6 See <http://www.continentalshelf.gov>.

common interests of all Arctic coastal states to have as large continental shelves as possible, something that an orderly settlement can produce cost-effectively. Secondly, and as mentioned, the coastal states have committed themselves via the 2008 Ilulissat Declaration to ‘orderly settlement of any possible overlapping claims’.

Perhaps even more importantly today, this commitment has been reaffirmed since the annexation of Crimea. The Danish 2014 submission, in particular, not only acknowledges that there will be overlapping claims, but has taken steps to mitigate any potential tension arising from this through a preliminary consultation with other Arctic coastal states. With respect to Russia, the Danish submission includes an agreement (via an exchange of notes), which was concluded after the Crimean annexation by Russia (27 March 2014), wherein both states agree that either can proceed with its submission to the CLCS, and that delimitation will then be implemented by the two states themselves.

Importantly, the most significant resource reserves are within the Exclusive Economic Zones or territorial waters of the Arctic coastal states and there does not seem to be an abundance of valuable seabed resources in the overlapping areas to compete over. Even if there were, it would likely take decades before technology would allow the commercial use of those operationally and financially challenging areas. Furthermore, as difficult and costly hydrocarbon extraction in Arctic waters has relied on international public-private co-operation which, in turn, benefits from a favourable and low-risk operating and investment environment, interstate disputes over continental shelf extensions are unlikely to be conducive to commercial activities in the Arctic offshore. Another issue is the extensive backlog of submissions awaiting review in the CLCS, meaning that it may well take until 2020 or beyond before the CLCS is able to process them all, as there are over 100 from all corners of the globe.

Even if, say, Denmark, Canada and Russia experienced problems in settling the North Pole area boundaries – or Denmark and Russia the boundary in the Lomonosov Ridge – there is no indication that this would necessarily lead to tensions. From a historical perspective, it is important to remember some of the lessons learned from the past that highlight the possibility of negotiated and peaceful

agreements in the Arctic. For example, Barents Sea boundary negotiations between the Soviet Union and subsequently Russia with its NATO neighbour Norway took over 40 years to resolve, but resolved they were. Furthermore, even during the Cold War, Norway and the Soviet Union were able to establish a fisheries agreement in the disputed area between the states.

### **Growing uncertainty and its implications for UNCLOS in the Arctic**

While the settlement of continental shelf claims is likely to take place in an orderly fashion, there are also adverse geopolitical dynamics – mostly related to relations between Russia and other Arctic Ocean Coastal states – that might jeopardize this.

First, geostrategic and economic considerations play a major role in the way different countries regard UNCLOS in the Arctic. For Russia, export revenues from the energy sector are vital for socio-economic development, its foreign policy toolbox, and its quest to regain great-power status. As Russia’s mature oil and gas fields are steadily being depleted, it is forced to develop its frontier energy regions, most notably the Arctic. Consequently, Russia has considered it prudent to endorse UNCLOS in the Arctic not only to gain access to new resources, but also to generate a stable and predictable investment and operating environment as a necessary enabler of regional socio-economic development.

However, Russian Arctic ambitions are becoming increasingly difficult to realize. This is not only due to challenging operating conditions, but also to adverse market conditions and Western sanctions against Russia that together hinder the pace and scope of economic development. If the Arctic economic potential does not materialize, this could have serious implications for the status of UNCLOS in the Arctic – especially if the deteriorated political relations between Russia and the West continue. If the biggest stabilizing factor, namely common economic interests, were eliminated from the equation, the region could still be utilized as a tool in domestic and international politics.

Russia has invested considerable international and domestic political capital in developing the Arctic, and utilized the region in nation-building and

identity politics. The development of Arctic mega-projects has even been compared to the Soviet space programme of the 1960s and 70s, both as evidence of the country's greatness and as a tool for general technological development.

Consequently, Russia has a lot at stake in the region and it is conceivable that the Arctic could increasingly witness other 'uses' besides the economic one. For example, it could be increasingly employed in the construction of enemy images that incite nationalism at home. Furthermore, as Russian military capabilities remain uncontested in the Arctic, it could even be constructed as a new hostile theatre for domestically targeted 'foreign policy victories' that secure regime stability in a situation where the Russian domestic political and economic system is facing severe problems.

If these adverse dynamics became more widely entrenched, this would, in practice, mean a reversal of the co-operative political imaginary of, and spirit in, the Arctic. In this context, the role of international law could be undermined and it is not totally out of the question that the political dynamics affecting the overlapping continental shelf issue could consequently take a turn for the worse.

Second, Russia's consistent commitment to international law can no longer be taken for granted under the current regime. In the Arctic, Russia has failed to respect UNCLOS in the case of the 2013–14 diplomatic dispute between the Netherlands and Russia over the capture of the Greenpeace ship Arctic Sunrise after the organization's protest at the Prirazlomnoye oil rig in the Pechora Sea. In particular, Russia failed to follow the UNCLOS provisions and its own explicit commitment to the treaty by declining to accept UNCLOS arbitration mechanisms. This raised serious doubts about Russia's consistent commitment to UNCLOS when its vital national interests, such as resource exploitation, are threatened.

More importantly, the annexation of Crimea and the ongoing conflict in Ukraine highlight even more clearly that Russia is prepared to dismiss the foundational international norms and commitments it has previously endorsed. These include key principles – sovereign equality, non-use of force, inviolability of frontiers, and the territorial integrity of states – agreed upon in the 1975 Helsinki Final

Act, as well as other international obligations such as the security assurances to Ukraine agreed upon in the 1994 Budapest Memorandum, conventional and nuclear arms limitation frameworks, and best practices in conducting military exercises.

As a result, Western perceptions of Russia and its intentions have deteriorated. There is widespread distrust of Russia in the West today, particularly given the perceived discrepancy between what the Russian leadership says and what it does. Unlike the Soviet Union, contemporary Russia under President Vladimir Putin is seen as a very unpredictable power in Europe.

Given these developments, the emerging question is whether or not one should expect Russia to remain consistently committed to its legal and diplomatic obligations in the Arctic, including the established maritime order and its foundational legal corpus, UNCLOS, let alone its diplomatic agreement with Denmark on a negotiated settlement over continental shelf claims. At the very least, Russia's recent track record does raise serious concerns in this respect that need to be considered also in the context of continental shelf claims.

Third, Russia has chosen the path of a revisionist power in Europe. Most recently, this has become evident with the annexation of Crimea and the ongoing conflict in Eastern Ukraine. The current regime in Russia considers the collapse of the Soviet Union as a geopolitical catastrophe that not only diminished the status of Russia, but also shattered the perceived legitimate territorial integrity of the state. The annexation of Crimea can be interpreted as an act to reclaim lost territory, albeit at the cost of significant financial and reputational losses, as well as operational difficulty.

The question then arises of the implications of this for territorial stability in the Arctic. In this respect, Russia has been known to send mixed signals. In the late 2000s, Russia made what appeared to be a unilateral claim to the seabed of the North Pole while at the same time endorsing UNCLOS and resolving a border dispute with Norway in the Barents Sea. More recently, during the conflict in Ukraine, Russia's public endorsements of international law and co-operation have co-existed with bolder rhetoric about the territorial value of, and Russia's territorial designs on, the Arctic.

Dmitry Rogozin, Deputy Prime Minister and the head of Russia's Arctic Commission, has been at the epicentre of this issue. In April 2015, he emphasized the significant, even semi-religious value of the Arctic in a much-circulated tweet: 'The Arctic – Russia's Mecca'.<sup>7</sup> He later went on to argue that the annexation of Crimea was a historic restorative act with a potential parallel in the north: 'Last year, we had the historic reunification of Sevastopol and the Crimea. This year, we present a new view and new powerful stress on the development of the Arctic. Basically, it is all about the same [thing]'.<sup>8</sup>

Even if these statements were mere nationalistic rhetoric or simply meant for domestic consumption, they are nevertheless public speech acts that reinforce the uncertainty about Russia's territorial intentions. Today, in the light of the annexation of Crimea, it is not altogether unreasonable to ask whether Russia could simply decide to further 'restore' its territorial integrity by claiming much of the Lomonosov Ridge as a natural extension of its land mass.

Fourth, the ambiguous comments are also worrisome when viewed in the context of Russia's ongoing military build-up in the Arctic, which it is pursuing in tandem with the continental shelf process. For contemporary security analysts, a threat is typically understood as a combination of capability and harmful intent, or the perception of such intent. That said, the latter part of the equation has intensified in the eyes of the West with regard to Russia. At the same time, Russia has also signalled its intention to improve its Arctic capabilities by re-opening various military bases and establishing a new strategic military command in the region. The securing of the Arctic was also recently highlighted in Russia's new 2014 military strategy.

Traditionally, and certainly before the crisis in Ukraine, the increase in Russian military presence

and capabilities in the Arctic was widely interpreted as legitimate state behaviour to improve situational awareness and the ability to respond to various safety and security scenarios in an opening region. During the crisis, growing uncertainty about Russia's intentions has opened the door for alternative interpretations. Russia's growing capability and activity in the Arctic have again been interpreted as an indicator of aggressive and threatening behaviour, and as an illustration of Russia's intention to militarize and dominate the region. For example, the establishment of military bases along the Northern Sea Route can be read as *de facto* control of the maritime area with potential implications for freedom of navigation and territorial stability, as the military presence could act as a coercive back-up or backdrop to secure Russia's interest to extend its continental shelf northwards.

Growing military capabilities, especially in a time of uncertainty about Russia's intentions, may reintroduce the classic security dilemma to the Arctic. This would be detrimental to the spirit of co-operation in the region, with potential implications for the reliability of legal procedures – in this case the orderly delimitation of continental shelves – in the Arctic.

## Conclusion

The post-Cold War Arctic has been one of the most peaceful areas on the planet, characterized by bilateral negotiations, multilateral co-operation and governance, and public-private joint ventures. As a result of powerful incentives for stability in combination with relatively well-functioning Arctic governance, the potential for a major inter-state conflict in the Arctic has generally been regarded as quite low.

In order to ensure peace and co-operation in the region, legitimate and confidence-building governance mechanisms remain vital. UNCLOS has been crucial in this respect. Although the treaty has been challenged in other parts of the world – for instance in the South China Sea with similar dynamics related to hydrocarbon resources, undefined boundaries and major power interests – UNCLOS has been working as intended in the Arctic. This is mostly due to the fact that the treaty works for the benefit of the coastal states, generating much-needed predictability in the region. The continental shelf

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7 The Washington Post (2015) 'The Arctic is Russia's Mecca, says top Moscow official', <http://www.washingtonpost.com/blogs/worldviews/wp/2015/04/20/the-arctic-is-russias-mecca-says-top-moscow-official/>. Accessed June 5, 2015.

8 Barents Observer (2015) 'Expansionist Rogozin looks to Arctic', <http://barentsobserver.com/en/arctic/2015/04/expansionist-rogozin-looks-arctic-21-04>. Accessed June 5, 2015.

processes are expected to continue in an orderly manner also in the future.

Nonetheless, the status of international law critically depends on the nations' political will to adhere to it. According to official statements by all the Arctic states, this will exists in the Arctic despite the generally worsened relations between the West and Russia. However, predicting future Arctic trajectories has become more difficult due to heightened uncertainty. As indicated, threat is a combination of capability and intention. If one follows this formula, the overall risk levels can be considered to have risen in the Arctic as well.

While the continental shelf process is ongoing, Russia is building up its military presence in the region and remains uncontested in this respect. More importantly, it is the intention part of the equation that has become more difficult to discern, given the discrepancy between what Russia says and what it does in other parts of the world. As this is the case, the possibility of unilateral and illegal action cannot be completely ruled out. In the absence of clear global enforcement, the status of, and respect for, international law – and UNCLOS in particular here – must be understood in specific political contexts.

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