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Continental Shelf Claims by the Arctic Ocean Coastal States – Preliminary Evaluation

The media has presented the broad continental shelf claims by the Arctic states as prompted by melting sea ice, which opens the continental shelf and deep sea-bed to resource development. In this story-line, there is a fierce competition as to who gets there first to occupy the resources (mainly oil and gas).

This is not an adequate picture of what is happening, since the process is largely governed by the United Nations Convention of the Law of the Sea (UNCLOS) – many times referred to as the “Constitution of the oceans”.

Under UNCLOS, all states that become parties to the Convention – and which have a broader continental shelf than 200 nautical miles (the so called “extended continental shelf”) – are under a legal obligation to make a submission to the UN Commission on the Limits of Continental Shelf (UN Commission) within 10 years from becoming parties to the treaty. Since Russia became a party already in 1997, it made its submission on 20 December 2001, which was also the first submission ever made to the UN Commission (all the other Arctic Ocean coastal states reacted to Russian submission). Norway, of the Arctic states, made the submission in 2006. Canada (deadline November 2013) and Denmark/Greenland (deadline November 2014) are intensely preparing their submissions. The US is not yet a party to the UNCLOS, but currently the Bush Government tries to become a party to it and the US is already preparing its submission (according to the news paper sources).

The submission must be supported by scientific and technical information in order for the UN Commission – (which is an expert body of 21 members and having expertise in geology, geophysics or hydrography) - to evaluate whether Article 76 criteria is followed by the coastal state in drawing the outermost limit of its continental shelf (when it exceeds 200 nautical miles). On the basis of Article 76, scientific criteria determines, in most cases, to what extent the legal continental shelf of a coastal state can reach.

The Convention provides very complex criteria for drawing the outermost limits of the extended continental shelf, but in principle (and broadly speaking) Article 76 of the Convention prescribes criteria by which the coastal state can extend its continental shelf to whole of its continental margin (but not to the deep sea-bed). This is the reason why it is so important to have a UN expert body to examine the information submitted by all coastal states since there is a temptation for the coastal states to claim as broad areas as possible as part of their continental shelf (and thereby having sovereign rights over the resources in the shelf).

What is clear is: 1) that there are outermost limits to the continental shelf claim, either 350 miles from the baselines or that the shelf “shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres”. USA, in its reaction, accused Russia for exceeding these outermost limits in certain localities. 2) Oceanic ridges cannot be claimed as part of the state’s continental shelf, and the US argues in its reaction to Russia’s first submission that this is exactly what Russia is doing. 3) Continental shelf cannot be occupied (Art. 77.3) and thus any concerns of Russia occupying some parts of ocean floor (manifested in the planting of Russian flag to the ocean floor) are invalid from the viewpoint of UNCLOS and the law of the sea (4) and that, apart from outermost limits, if the continental margin of a coastal state does not extend up to 200 NM, it will be 200 NM)

Yet, there are also many unresolved issues for the simple reason that the UN Commission has not yet given any recommendations, but only returned Russia’s submission back to Russia for it to collect further scientific information, which Russia has been collecting ever since. Russia’s submission was heavily criticized by the US in its reaction arguing that many regions that Russia was claiming as belonging to its continental margin were of oceanic origin and cannot thus be claimed by any state (but are governed by PART XI and of the UNCLOS and its implementation agreement as common heritage of mankind and managed by the UN International Sea-bed Authority).

Even though the UN Commission does not have the authority to make a binding decision as to the extent of the continental shelf, its recommendations are very influential. This is so because under UNCLOS the outer limits of the continental shelf will be “final and binding” only after the coastal state has enacted them in accordance with the recommendations by the UN Commission. If the coastal state disagrees with the UN Commission, it must make a new or revised submission to the UN Commission (Article 8 of Annex II). It can be expected that States will follow these recommendations.

The UN Commission does not have the authority to decide overlapping continental shelf claims by coastal states, and these need to be agreed between the states themselves. This applies to the possible overlapping claims by Russia and some other states over the Lomonosov ridge, if it is seen as non-oceanic ridge (the US argued in its reaction that Lomonosov ridge “is oceanic part of the Arctic Ocean basin and not a natural component of the continental margins of either Russia or of any State”). UNCLOS contains also dispute-resolution provisions in case the parties cannot reach the agreement by themselves.

At least so far, the Arctic states have all acted with respect to their continental shelf claims in accordance with their obligations under the UNCLOS.

The possibility for an Arctic Treaty

Arctic co-operation has in a fairly short time been able to transform from the Arctic Environmental Protection Strategy Co-operation (AEPS, commenced in 1991) to the Arctic Council in 1996, a stronger form of inter-governmental forum than the AEPS.

On the other hand, the Arctic-wide co-operation process has – even though the name was changed – developed gradually around the same institutional forms (ministerial meetings, senior arctic officials, working groups, participation by indigenous peoples' organisations). The Arctic Council made the decision-making process explicit, clarified the rules of procedure, elevated the indigenous peoples' organisations as permanent participants, and has added two new working groups. Still, much the same institutional structure has been retained from the 1991 onwards.

It is also the case that in recent years, the work and deliverables of the Arctic Council have become more ambitious. This is due to the fact that the working-groups, which are the core platforms of action in the Council, have been able to produce influential scientific assessments, and some cases even recommendations, which have clearly made a difference (prime example being the Arctic Climate Impact Assessment, ACIA).

On the other hand, many observers to the Council have become more critical of its work, and have taken up the question whether its current structure and status should be strengthened. The only actor – clearly the most influential observer to the Council – that has outright informed that a multilateral treaty needs to be negotiated is the WWF Arctic.

Other actors (and observers to the Council), such as the World Conservation Union, Arctic parliamentarians and UNEP GRID Arendal – have preferred a different approach. They have urged that a study be conducted as to the effectiveness of multilateral treaties in the Arctic, and only after such an audit, discussion should be commenced as to whether a treaty should be negotiated.

The points of criticism to the Arctic Council are well-known, having no permanent funding base, no permanent secretariat (currently there is the semi-permanent secretariat till 2012, but no security whether this will continue after that), and no legal status, to name a few. Such a weak inter-governmental platform can not really do much but commission scientific assessments and, at the most, prescribe soft guidelines. With this structure, it seems fairly clear that the vast challenges created by climate change cannot be managed in the Coun-

cil. As is well known, climate change will radically transform the environment and ecosystems of the Arctic, and open up new economic opportunities to use the Arctic waters (e.g. shipping, fishing, oil and gas exploitation).

Possible benefits of the treaty approach may include, e.g.: encouraging greater political and bureaucratic commitments; establishing firmer institutional and financial foundations; transcending the vagaries of changing governmental viewpoints and shifting personnel; giving legal status to environmental principles and standards; raising the public profile of regional challenges and cooperation needs; and providing for dispute resolution.

Apart from the problem of how to mobilize political will for the Arctic states (or a wider group) to opt for the treaty approach there are possible downsides to negotiating an Arctic treaty, e.g.: lengthy and costly preparatory and negotiation processes involved; risk of legalizing lowest common denominator standards and contributing another layer of complexity to the already fragmented array of multilateral environmental agreements.

The ultimate problem for those who push for an Arctic treaty is that at least at present there are no real sign from the Council and its member states that they would be ready to go for the treaty approach, at least in the immediate future.

The 2006 Salekhard ministerial (and before it the 2004 Reykjavik ministerial in light of the ACIA findings) asked the SAOs to "examine the organization of the Arctic Council with a view to improve its effectiveness and efficiency, and report back to the next Ministerial" in 2008, but there does not seem to be much progress in this.

It seems that increasingly the Arctic treaty discussions (by NGOs and scholars) center on the Arctic Ocean (since many of the economic opportunities seem to be opening there with melting ice), and how to create a regime to manage that Ocean. Yet, for those AC member states not fronting the Arctic Ocean (Iceland, Finland and Sweden), this change of focus would seem difficult to accept.

¹For instance., difficulty in getting consensus on the need for an agreement, primacy given to addressing extra-regional and global sources of pollution and environmental threats, and lack of a sense of urgency and crisis among politicians about the need to further strengthen regional legal arrangements.