

Planting the Flag in Arctic Waters: Russia's Claim to the North Pole

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Abstract

With its demonstrative planting of a Russian Flag in the seabed in the Arctic Ocean outside of the 200 nautical mile limitation of the continental shelf in 2007, the Russian Federation has fuelled discussions on claims concerning the outer continental shelf by Arctic rim-States. Although the planting of the flag in the ocean floor is irrelevant under international law, it reveals a political attitude that may make agreement and co-operation concerning the different demands more difficult. The disputes on the boundaries of the outer continental shelf cannot be settled finally by the Commission on the Limits of the Continental Shelf or by dispute settlement under the UN Convention on the Law of the Sea but only by agreement amongst the parties themselves.

A. Introduction

The Russian Federation is one of the Arctic rim-States and possesses a long coastline and islands north of the Arctic Circle. The recognized maritime zones, in which Russia enjoys sovereignty or at least certain sovereign rights, reach far into the Arctic Ocean. Russia, however, claims rights to more of the world's most Northern – and mainly frozen – sea: the extension of the continental shelf and the relevant sovereign rights up to the North Pole. The Russian Federation has been particularly active in claiming sovereign rights over vast parts of the Arctic Ocean floor. The two most significant events are the formal submission to the Commission on the Limits of the Continental Shelf (CLCS)¹ to extend the continental shelf and the symbolic planting of a Russian flag in the ocean floor during the course of a scientific exploration expedition in 2007. While the former is relevant for the legal proceedings in the determination of Russian claims, the latter has only political relevance. How strong a political symbol the planting of the Russian flag was, can be measured by the reaction of other Arctic States. The other Arctic States have begun to start scientific missions themselves to collect evidence for potential claims to extended continental shelves, and to

¹ This Commission was established by Art. 76, para. 8 and Annex II of the UN Convention on the Law of the Sea (UNCLOS), 21 ILM (1982), 261-262.

enhance the number of modern ice-breakers stationed in Arctic harbors and to reinforce military capacity in the region.²

In 2001 Russia made a submission to the CLCS for the extension of its continental shelf beyond 200 nautical miles (nm) in the Arctic Ocean region. The Russian Federation, however, is not the only State claiming functional jurisdiction, i.e. jurisdiction as far as the exploration and exploitation of natural resources is concerned, over an extended part of the Arctic continental shelves. In 2006 Norway made a submission to the CLCS which inter alia concerns the central Arctic Ocean. Denmark, allegedly, is considering a submission.

The continental shelf, like the Exclusive Economic Zone (EEZ) in the water column above the continental shelf up to 200 nm from the baselines,³ is not subject to full national sovereignty or jurisdiction.⁴ Yet, the law of the sea grants certain exclusive rights concerning economic activities, namely, for the continental shelf, the exploitation of mineral and certain natural resources.⁵ Allegations of vast oil or gas fields in the subsoil of the seabed around the North Pole, as well as diamond and non-ferrous metal accumulations, added to the rising potential to access these resources due to advanced technologies and the melting of the ice, has raised the interest of riparian States. While figures on the amount of mineral resources hidden in the subsoil of the Arctic Ocean are mainly estimations due to a lack of research caused by the hostile conditions of the deep sea under permanent ice cover, in times of growing energy demand States clearly desire to safeguard access and exclusive exploitation rights. It shall be noted, however, that if resources are exploited on the continental shelf beyond 200 nm, Art. 82 of the UN Convention on the Law of the Sea (UNCLOS) requests States to make payments and contributions. In this respect the regime concerning the ex-

² Canada has announced to reinforce military capacity of Canadian Rangers in Resolute Bay from 900 to 5.000, see A. Proelss & T. Müller, 'The Legal Regime of the Arctic Ocean', 68 *Heidelberg Journal of International Law* (2008), 651, 652.

³ An extension of the continental shelf beyond 200 nm does not confer rights in the water column above (Art 78 UNCLOS), i.e. an extended shelf does not mean an extended EEZ.

⁴ On the regime for the EEZ see Arts 55-75 UNCLOS.

⁵ Art. 77 para. 1 UNCLOS allows the coastal State sovereign rights for the purpose of the exploration and exploitation of the natural resources of the continental shelf. Natural resources are defined to consist of mineral resources and living sedentary species (Art. 77 para. 4 UNCLOS). According to Art. 77 para. 2 UNLCOS the rights are exclusive in the sense that non-exploration and non-exploitation do not legitimize other States to undertake these activities.

tended continental shelf differs from the exploitation rights for the shelf up to 200 nm from the coastal baselines. In any case the planting of a Russian flag by a submersible in the ocean floor well outside the limit of 200 nm from the Russian baselines, from which the extension of the different zones of the sea and the seabed are measured,⁶ has fuelled discussions over “who owns the North Pole” and has even led to notions of a “battle over the North Pole” in the press.⁷

B. Factual and Legal Background

I. The Arctic: Features and Problems

The term “Arctic”, in common parlance refers to the region surrounding the North Pole, delineated by the Arctic Circle. The States commonly referred to as the “Arctic nations”, i.e. those States which have coastal waters within the Arctic Circle, are Canada, Denmark (via Greenland), Norway, the Russian Federation and the United States of America (via Alaska). Other interested and affected States in the Arctic region include Iceland, Finland and Sweden.⁸ Yet, the latter are not part to any potential disputes concerning rights over the continental shelf below the Arctic Ocean around the Pole. The Arctic Ocean extends over 14.056 million sq km and for most part of the year still consists of the polar icecap.⁹ The permanent presence of ice has played an important role concerning the question of which legal regime is applicable to the Arctic: land or water?

The Arctic is faced with many problems of various kinds: environmental, social and legal. Environmental aspects such as the melting of sea-ice due to global warming, the extinction of endemic species and pollution may alter the biosystem irreversibly. While the melting of the ice opens new

⁶ Art. 3-16 UNCLOS address the limits of the territorial sea and the relevant establishment of baselines along the coast as the basis for measurement. The articles on the breadth of the other zones of the seas and the seabed refer back to these provisions, e.g. Art. 57 UNCLOS concerning the EEZ and Art. 76 para. 1 concerning the Continental Shelf.

⁷ See the report in the German weekly magazine *Der Spiegel*, ‘Der Kampf um den Nordpol’, *Der Spiegel*, 38/2008, 15 September 2008, 160-168.

⁸ Consequently some authors refer to eight Arctic States, e.g. D. R. Rothwell, *The Polar Regions and the Development of International Law* (1996), 155.

⁹ On further geographical data concerning the Arctic Ocean see Central Intelligence Agency, *Arctic Ocean, The World Factbook* (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/xq.html> (last visited 19 January 2009).

economic prospects with regard to the exploitation of mineral resources and transportation, local communities may lose their livelihoods and culture. Human rights concerns relate to the more than thirty indigenous peoples whose traditional lifestyle and cultural heritage depends upon the preservation of the Arctic environment. Last but not least disputes about jurisdictional claims to parts of the ocean and the seabed between the littoral States complicate the creation of a comprehensive governance regime in the Northern Polar region.

During the Cold War the Arctic gained particular strategic relevance because it comprised the shortest route between the Soviet Union and the United States of America. At the Bering Strait both States are only 57 miles apart.¹⁰ At that time the Arctic was suddenly perceived as a key geostrategic deployment area in any major conflict between the superpowers.¹¹ While strategic proximity between Russia and the US may have lost its immediate relevance, new conflicts could arise not only in the Arctic but over the Arctic. The focus of the current discussion relates to the question of the exploitation of mineral resources, e.g. oil and gas fields, to the transportation of cargo¹² and to related environmental concerns. Yet, the issue of sovereign rights over mineral resources bears particular potential for conflict and may even prove to be a risk for international security. Furthermore the melting of the ice opens the way not only for carrier ships but also for warships. In this context the designation of certain passages as "international straits"¹³ is under dispute and may gain particular relevance. As a result of these developments Arctic rim-States have lately confirmed to keep and potentially strengthen their Arctic fleets. At the same time they have declared in the Ilulissat Declaration their commitment to an orderly settlement of disputes and the rules and regulations of the law of the sea.¹⁴ Russian rhetoric, how-

¹⁰ S. Chaturvedi, *The Polar Regions – A Political Geography* (1996), 88.

¹¹ *Id.*

¹² Russia has always relied strongly upon the northern sea route. The melting of the ice will further enhance interests in shipping in Arctic waters. On the relevance of the Russian Arctic waters for transport see N. I. Khvochtchinski & Y. M. Batskikh, 'The Northern Sea Route as an Element of the ICZM System in the Arctic: Problems and Perspectives', 41 *Ocean & Coastal Management* (1998), 161-173.

¹³ UNCLOS has established a special regime for straits used for international navigation that recognizes certain rights of third States, e.g. transit passage and innocent passage; see Arts 34-45. UNCLOS.

¹⁴ The Declaration can be accessed at <http://www.ambmoskva.um.dk/NR/rdonlyres/08609E4F-8D34-4174-A419-A65547B317F0/0/ArcticOceanConference.pdf> (last visited 25 February 2009).

ever, seems to indicate that it is committed to the law of the sea as long as Russian claims in the Arctic are formally acknowledged. Internally there is a strong emphasis on Russian rights over the Arctic. The value of political declarations like the Ilulissat Declaration will be put to the test, if Russian claims to extended sovereign rights in the Arctic Ocean are assessed negatively.

II. Formal Co-operation and Governance in the Arctic

When comparing legal regulation for the two Poles it becomes apparent that the land of, and waters around, Antarctica are governed by a specific legal regime consisting of different legal instruments and institutions and that there is no equivalent for the Arctic.¹⁵ While Antarctica and the Arctic differ considerably – the former being a continent surrounded by a belt of ocean, the latter a partially frozen ocean surrounded by a belt of continents¹⁶ – they resemble each other in their need for a specific governance regime founded upon the co-operation of States.¹⁷

Although agreement on the necessity of cooperation in the Arctic has led to the creation of the Arctic Council by the Ottawa Declaration in 1996,¹⁸ the organization has not created a legal and governance regime for the region that is comparable to the one for Antarctica. Member States to the Arctic Council are Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America. In addition to the member States, organizations of indigenous peoples qualify as permanent participants and give the Arctic Council a unique structure. Although the mandate of the Arctic Council is broader, its focus of attention is concerned with environmental matters.¹⁹

¹⁵ See inter alia Proelss & Müller, *supra* note 2, 654; Rothwell, *supra* note 8, 155, however is of the opinion that a distinctive “Arctic international law” has begun to emerge and that the different bilateral and multilateral efforts constitute an “Arctic legal regime”, even if the institutional frame may not be comparable to Antarctica.

¹⁶ D. Pharand, ‘Freedom of the Seas in the Arctic Ocean’, 19 *University of Toronto Law Journal* (1969), 210, 214.

¹⁷ For suggestions on establishing a regime for the Arctic comparable to Antarctica see S. Holmes, ‘Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty’, 9 *Chicago Journal of International Law* (2008), 323, 346-347.

¹⁸ 35 ILM (1996), 1387-1390.

¹⁹ On the different approaches to protect the Arctic Environment before the founding of the Arctic Council see D. R. Rothwell, ‘The Arctic Environmental Protection Strategy and International Environmental Cooperation in the Far North’, 6 *Yearbook of International Environmental Law* (1995), 65-105; on more recent developments see

One explanation for the late and not particularly substantive cooperation in the Arctic region was seen in the Cold War period. Decades of tension between the superpowers and the strategic relevance of the Arctic resulted in the perception of the Arctic nations that they had little interests in common and hence they felt only marginally motivated to cooperate in non-military matters.²⁰

III. The Legal Regime for the Arctic: Ice-is-Land?

As there is no landmass at the North Pole and the law of the sea does not generally distinguish between fluid and frozen waters,²¹ it is now commonly accepted that the Arctic Ocean and the relevant jurisdictional claims by riparian States are governed by UNCLOS and customary international law of the sea.²² In the past the permanent presence of ice had led some commentators to suggest that the Arctic Ocean should not be subject to the general legal regime of the seas. One approach to extend sovereignty claims by the littoral States in the Arctic was the so-called "ice-is-land" theory. According to such considerations ice off the coasts of States could *inter alia* be used to define the baselines from which the breadth of the sea-zones is measured. A potential differentiation between different types of ice, e.g. pack ice or shelf ice, further complicated this approach.²³ While "land-is-ice" theories had originally been popular by Soviet commentators²⁴ before the adoption of UNCLOS, afterwards Soviet and Russian writings generally acknowledged that the Arctic Ocean, whether frozen or not, is governed by

D. VanderZwaag *et al.*, 'The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives', 30 *Denver Journal of International Law and Policy* (2001-2002) 131-171.

²⁰ Chaturvedi, *supra* note 10, 97.

²¹ Art. 234 UNCLOS is titled "ice-covered areas". However, this article does not establish a general regime on such areas but only concerns competences of the coastal State to adopt specific regulations to prevent, reduce and control pollution in ice-covered areas in its exclusive economic zones.

²² Specific treaties for the Arctic concern the protection of species, e.g. Polar Bears, but do not establish a territorial regime. The Agreement on the Conservation of Polar Bears, 13 ILM (1974), 13-18, which was concluded between Canada, Denmark, Norway, the Soviet Union and the United States is a remarkable exception to the lack of co-operation in non-military issues during the Cold War; see also Chaturvedi, *supra* note 10, 98-99.

²³ For the Canadian and Russian Perspective see E. Franckx, *Maritime Claims in the Arctic – Canadian and Russian Perspectives* (1993), 81 and 153.

²⁴ W. Lakhtine, 'Rights over the Arctic', 24 *American Journal of International Law* (1930), 703, 712.

the law of the sea and that coastal States could not make fully-fledged claims to sovereignty over ice-covered areas off their coasts.²⁵ Today Russian claims to sovereign rights in Arctic waters are based upon UNCLOS and mainly concern the extension of the Russian continental shelf according to Art. 76 para. 8 UNCLOS.

Another theory supporting extended sovereignty claims which are, as such, not in conformity with the current international law of the sea, suggested dividing the Polar region up into national sectors amongst the Arctic States.²⁶ The Soviet Union had kept its policies open in regard to the sector theory.²⁷ While claims to full sovereignty over a sector of ice and water up to the Pole seemed to have been discarded by the Soviet Government at an early stage, the exercise of certain rights over a sector or the use of the sector theory to delimit sea zones was not as clearly rejected but became a “cornerstone” in the writings of Soviet and Russian commentators.²⁸ The insistence of Soviet academic writings upon a sector theory for the Poles has sometimes led to its designation as a “Soviet theory”. This, however, fails to recognize the acceptance of the sector theory for Antarctica and early views by the other Arctic rim-States.²⁹ In today’s boundary questions in the Arctic, the sector theory could resurface as part of the argument to determine sea-zones according to coastline proportionality.³⁰ Indeed maps of the Russian claims for functional jurisdiction over an extended continental shelf roughly resemble a pie-shaped sector.³¹

²⁵ See the evaluation of Soviet and later Russian writings Franckx (23), 170.

²⁶ On this discussion see D. Pharand, ‘Sovereignty in the Arctic: the international legal context’, in E. J. Dosman (ed.), *Sovereignty and Security in the Arctic* (1989), 145, 151 and, with further references to early writers, Pharand, *supra* note 16, 213.

²⁷ On Soviet and Russian reliance upon the sector theory see Rothwell, *supra* note 8, 168-169.

²⁸ See the evaluation by Franckx, *supra* note 23, 153 and 168-169. As early as 1926 the Soviet Union formulated the sector theory in a decree; see Lakhtine, *supra* note 24, 709.

²⁹ For the Canadian example see Franckx, *supra* note 23, 79-83.

³⁰ Holmes, *supra* note 17, 343. Proportionality, however, is only one element of the delimitation of the continental shelf and closely connected to the equidistance principle, see ICJ, Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), para. 57.

³¹ A map in which the Russian claims to the outer continental shelf in the Arctic are marked was part of the 2001 submission and is available at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/RUS_CLCS_01_2001_LOS_2.jpg (last visited 20 January 2009).

C. The Extended Continental Shelf Under the Law of the Sea

I. The Planting of the Russian Flag

While the designation of ocean zones is a national unilateral act, its effect and acceptance by other States depends upon public international law. The determination of the outer limits of the continental shelf is such an act. In principle, States may declare the boundaries unilaterally. In cases where an extended continental shelf is claimed other States will only accept the boundaries if the procedure established by the UNCLOS is adhered to. With the exception of the United States all Arctic Nations are parties to the UNCLOS.³²

The planting of the Russian flag in the floor of the Arctic Ocean has led commentators to insist that there is no more terra nullius and that international law no longer knows titles to land which rely upon such unilateral acts.³³ Russia, like other States, has a history of claiming sovereignty over Arctic islands by discovery through Russian explorers, relative proximity to the Russian mainland, and effective occupation.³⁴ Although the perspectives on a lack of title due to occupation are correct and the planting of the flag no longer has any legal relevance under international law, Russia, from its point of view, has not intended to claim and occupy territory in the sense of terra nullius. Rather the flag in the ocean floor is a demonstrative political symbol of Russian legal claims to an extended continental shelf under the UN Convention on the Law of the Sea. So far Russia has clearly expressed its will to abide by the rules and regulations of the law of the sea.³⁵ In the

³² With a view to Arctic issues US National Security Presidential Directive 66, issued 9 January 2009 under President George W. Bush, urges the Senate to accede to UNCLOS in order to benefit from the procedure for the establishment of an extended continental shelf and to participate in the development and interpretation of the Convention. See <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm> (last visited 25 February 2009).

³³ See Holmes, *supra* note 17, 323 with further references; Proelss & Müller, *supra* note 2, 655.

³⁴ Rothwell, *supra* note 8, 168.

³⁵ The German weekly magazine *Der Spiegel* announced an openly aggressive national Russian directive according to which full sovereignty was claimed and the termination of membership in UNCLOS proclaimed as ultima ratio if the Russian claims were not accepted. See Reich der Kälte, *Der Spiegel*, 5/2009, 26 January 2009. For an English version see <http://www.spiegel.de/international/world/0,1518,604338,00.html> (last vi-

submission to the CLCS Russia has designated the boundaries of the claims in the Arctic. The flag was planted within this area. Whether Russia is legally entitled to such extensive claims is a distinct matter and depends inter alia upon geological evidence and other States' claims to an extension of their continental shelves.

II. Continental Shelf and Outer Continental Shelf

Under UNCLOS all coastal States parties are entitled to a continental shelf, i.e. the seabed and the subsoil of the submarine areas extending to a distance of 200 nm from the baselines (Art. 76 para. 1 UNCLOS).³⁶ This provision guarantees a 200 nm zone for those coastal States where the continental margin does not extend up to that distance. Coastal States in areas where the continental margin lies further out than 200 nm from the baselines can claim the area up to the margin by making a submission to the CLCS.³⁷

As already mentioned, in principle, the designation of the continental shelf, like the delineation³⁸ of other zones under the law of the sea, is a unilateral act. However, in the case of the extended continental shelf UNCLOS has established an institution and procedure to determine the boundaries. Clearly, the act of determination of the limit is still performed by the relevant State. However, only the limits of the extended continental shelf, which are established on the basis of the recommendations of the CLCS become "final and binding" (Art. 76, para. 8 UNCLOS). While the legal consequences of a violation of the procedure or disregard of the recommendations of the Commission are not explicitly stated in UNCLOS, it must be assumed that such unilateral claims are under international law not binding and will not be accepted by other States. In the end, the process of participation with the CLCS and their recommendations do not change the nature of the determination of the relevant seaward boundary of the outer continental shelf as being unilateral. Yet, the process is decisive for acceptance by other States and unilateral determination in contradiction to a recommendation at

sited 25 February 2009). However, it seems that so far, relying upon sources in English language including English press information by the Russian Government and Parliament, a Russian directive with such content has not been adopted.

³⁶ On the predecessor convention and the cumbersome drafting history of the UNCLOS provisions see M. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Vol. II (1993), 827-836.

³⁷ See S. V. Suarez, *The Outer Limits of the Continental Shelf* (2008) for a substantive discussion on the issue.

³⁸ On the difference between delineation (unilateral) and delimitation (contractual) see Proelss & Müller, *supra* note 2, 675-676 and footnote 93.

least violates the procedure established by Art. 76 para. 8 UNCLOS.³⁹ Coastal States with adjacent or opposite coasts shall determine the boundaries of their continental shelves by agreement.⁴⁰

The Commission is only competent to deal with claims for functional jurisdiction over a continental shelf extending further than 200 nm. The designation of a continental shelf up to 200 nm is undertaken by the coastal State unilaterally or by agreement with their neighboring or opposite coastal States.⁴¹ The definition of the outer limit as such is "open-ended"⁴². States may define the outer limits by choosing either 350 nm from the baselines as the outer limit or draw a line 100 nm from the 2,500 metre isobath.⁴³ The second method could result in the establishment of a margin which extends further than 350 nm from the baselines.⁴⁴ This also applies to the Arctic Ocean as States are free to choose the more favorable method to delineate the outer continental shelf.⁴⁵

While Art. 76 para. 6 UNCLOS limits the extension to the 350 nm boundary in the case of submarine ridges, it distinguishes between such ridges and submarine elevations that are natural components of the continental margin. For elevations that are natural components of the continental margin, States can choose the determination according to a line drawn 100 nm from the 2,500 metre isobath. For submarine ridges an extension reaching up to 350 nm from the baselines is the absolute limit of an outer continental shelf.⁴⁶

The provisions referring to the delineation of the outer limits of the continental shelf belong to the most complicated provisions of the law, the sea convention. Terms such as "shelf", "slope", "rise", "oceanic ridge", "submarine ridge", and "submarine elevation" are decisive for the correct determination of the outer limits of the continental shelf. UNCLOS provides

³⁹ *Id.*, 675-677.

⁴⁰ Art. 83 UNCLOS.

⁴¹ In the absence of agreement many cases of continental shelf delimitation have ultimately been decided by arbitration or other dispute settlement.

⁴² A. Oude Elferink, 'Continental Shelf, Commission on the Limits of', in R. Wolfrum (ed.), *Max-Planck Encyclopedia of Public International Law* (2008), available at www.mpepil.com (last visited 20 January 2009), para. 2.

⁴³ Art. 76 para. 5 UNCLOS.

⁴⁴ Nordquist *et al.*, *supra* note 36, 879.

⁴⁵ Proelss & Müller, *supra* note 2, 665.

⁴⁶ On the distinction between the different elevations and their relevance for Art. 76 UNCLOS see R. Lagoni, 'Festlandsockel', in W. Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), 193-194.

a formula for the calculation of the limits of the outer continental shelf, but does not offer definitions for terms crucial to apply the formula and thus leaves the application of the provisions to each case to the Commission and the States parties. Although the CLCS has attempted to clarify matters in Chapter 7 of its Scientific and Technical Guidelines, many questions are left open. The issue of different types of ridges, for example, which is most relevant to the Russian claims in the Arctic Ocean, is left to examination on a case-by-case basis. Yet, not only is the application of the method of calculation and the evaluation of supporting scientific data complicated, the legal consequences are likewise subject to interpretation. For example, the interpretation of crucial legal terms such as “final and binding” in Art. 76 para. 8 UNCLOS or “without prejudice” in Art. 6 para. 10 UNCLOS have been identified as problematic.⁴⁷

The CLCS may not itself decide upon a legally binding boundary but can only recommend the determination of an extended continental shelf. If the coastal State establishes the boundaries of its extended continental shelf in accordance with the recommendation by unilateral declaration, the limits become final and legally binding on the other States parties in accordance with Art. 76 para. 8 UNCLOS. However, the interpretation of the terms “final and binding” has raised considerable consternations among academic writers.⁴⁸

In such a complicated matter such as the determination of the outer shelf it is likely that the precise implementation of a CLCS recommendation may be questioned and, as a consequence, legal validity be doubted by other States parties. With a view to the Arctic Ocean the CLCS has not yet made any accepted recommendations on the extension of any State’s continental shelf.⁴⁹ Hence, as of today no littoral State may exercise any sovereign

⁴⁷ The International Law Association has identified 22 “Legal Issues of the Outer Continental Shelf” which warrant further consideration; ILA Resolution No.2/2006, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/33> (last visited 20 January 2009).

⁴⁸ See B. Baker, ‘States Parties and the Commission on the Limits of the Continental Shelf’, in T. Malick Ndiaye & R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes – Liber Amicorum Judge T. A. Mensah* (2007), 669, 673. For a discussion of the interpretation of the term see Proelss & Müller, *supra* note 2, 673-677.

⁴⁹ Russia has responded to recommendations by another round of fieldwork; see *infra* at C). Norway is the second Arctic State to have submitted claims for an extension. Denmark has undertaken scientific missions in the Arctic to collect geological sam-

rights concerning the exploitation of the resources of the continental shelf under the Arctic Ocean beyond 200 nm from the baselines.⁵⁰

III. "Disputed Areas"

The legal capacity of the CLCS, however, is even more limited than it might seem,⁵¹ when it comes to maritime areas under dispute.⁵² Art. 76 para. 10 UNCLOS provides that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts." In contrast to the unilateral determination of the limits following a recommendation of the CLCS, States with opposite or adjacent coasts shall delimit their continental shelves by agreement (Art. 83 para. 1 UNCLOS) or, if an agreement cannot be reached within a reasonable time, by dispute settlement (Art. 83 para. 2 UNCLOS). An equivalent provision has been adopted for the EEZ in Art. 74 UNCLOS.

Since parties to UNCLOS may opt out of binding dispute settlement for questions concerning Art. 83 UNCLOS under Art. 298 para. 1 lit. a) i) UNCLOS, the law of the sea does not offer any compulsory method of delimitation of the continental shelf, if States have adjacent or opposite coasts. In principle, States are forced to reach an agreement with their neighbours. Norway is the only Arctic UNCLOS member that has not opted out of mandatory and binding dispute settlement with a view to Art. 83 UNCLOS.⁵³

ples with a view to support claims to an extended continental shelf off the Greenland coast but has not made any submission yet.

⁵⁰ The exploitation of mineral resources outside the continental shelf is governed by the special regime for the deep-seabed, i.e. Part XI of UNCLOS and the Agreement Relating to the Implementation of Part XI of the UNCLOS, and administered by the International Seabed Authority (ISA).

⁵¹ On general criticism concerning the Commission's capacity see also Baker, *supra* note 48, 669 with further references in footnote 2 and 680-686 in regard to a lack of legal expertise and competence.

⁵² On "disputed areas" see A. Oude Elferink & C. Johnson, 'Outer Limits of the Continental Shelf and "Disputed Areas": State Practice Concerning Article 76(10) of the LOS Convention', 21 *International Journal of Marine and Coastal Law* (2006), 461-487.

⁵³ Canada's declaration under Art. 298 para. 1 UNCLOS to opt out compulsory dispute settlement for inter alia the delimitation of the continental shelf according to Art. 83 UNCLOS was made upon ratification on 7 November 2003. The declaration is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Canada (last visited 20 January 2009); Denmark declared upon ratification on 16 November 2004 that binding dispute settlement was not accepted for delimitation of adjacent or opposite continental shelves; available at: [http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%20)

D. The Russian Claims

I. Procedure

The Russian Federation was the first State to make use of the procedure under Art. 76 para. 8 UNLCOS when delivering a submission to the CLCS in 2001.⁵⁴ Art. 4 of Annex II to UNCLOS sets a deadline for submissions. According to this provision claims must be made within 10 years after the convention for that State has entered into force. This provision was adapted by the 11th Meeting of the Parties. Due to the fact that members for the CLCS were only elected in 1997, i.e. three years after UNCLOS entered into force, and the Scientific and Technical Guidelines for submissions to the CLCS were established as late as 1999, States decided to extend the 10-year period for States for which the convention entered into force before 1999. For these States the day of commencement of the 10-year time period for making submission is 13 May 1999, i.e. the day the Scientific and Technical Guidelines of the CLCS were adopted. For the Russian Federation UNCLOS came into force on 11 April 1997. Hence the deadline for Russian submissions to an extended continental shelf is 13 May 2009. Norway is in the same position as Russia, while the 10-year period for Canada and Denmark ends 2013 and 2014 respectively. For the United States it would commence upon entry into force, if the US acceded to UNCLOS.⁵⁵ It has been suggested that the Russian submission years before the ending of the deadline resulted in large part from circumstances within the Government.⁵⁶

20ratification (last visited 20 January 2009). The Soviet Union made the relevant declaration to opt out binding procedures on 10 December 1982 when signing the treaty and the Russian Federation made another declaration with the same objective upon ratification on 12 March 1998. The latter is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20signature (last visited 20 January 2009).

⁵⁴ See UN Press Release SEA/1729, 21 December 2001, available at <http://www.un.org/News/Press/docs/2001/sea1729.doc.htm> (last visited 20 January 2009).

⁵⁵ On 15 May 2007 then President George W. Bush urged the US Senate to decide favorably on accession to UNCLOS, speech available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html> (last visited 20 January 2009), but despite a Senate Panel voting in favor of accession in October 2007, the full Senate has not yet decided. A law of accession would need a 2/3 majority. As mentioned above National Security Presidential Directive 66 repeats the advantages of accession and urges the Senate to decide favorably.

⁵⁶ R. Macnab & L. Parson, 'Continental Shelf Submissions: The Record to Date', 21 *International Journal of Marine and Coastal Law* (2006), 309, 310 with further reference in footnote 2.

The Russian submission concerns an extended continental shelf in the Arctic and the Pacific Ocean. Canada, Denmark, Japan,⁵⁷ Norway and the United States have each reacted with communications to the Russian submission laying out their positions.⁵⁸ Canada and Denmark were concerned that a lack of reaction could implicitly express agreement or acquiescence in regard to the Russian claims. While both States wanted to prevent such conclusions, they refrained from expressing an opinion on the substance of the claims. Norway drew the attention of the Commission to the fact that the Barents Sea was an area under dispute regarding the boundaries between Norway and the Russian Federation and should be treated accordingly. By this submission Norway maintained that any recommendation by the Commission for the area under dispute is without prejudice to matters relating to the delimitation between parties.⁵⁹ The US took the opportunity to express their views on the substance of the claims, e.g. in regard to oceanic ridges. In essence the United States questions the Russian submission in the light of contradicting scientific opinions and asks the Commission not to give any recommendation if there is a lack of certainty with regard to scientific evidence. The claims concerning the Arctic Ocean have been fully considered by the CLCS. In 2002 the Commission gave a recommendation on the outer limit of the Russian continental shelf⁶⁰ and expects Russia to revise the submission for the extension of the continental shelf in the Central Arctic Ocean.⁶¹

II. The Lomonosov and Alpha-Mendeleev Ridge

The Lomonosov and Alpha-Mendeleev Ridges traverse the Arctic Ocean from the margin of Siberia to that of Greenland and North America. While their location indicates that they are natural prolongations of the mar-

⁵⁷ The Japanese communication concerns the Russian claims in the Pacific and do not refer to questions of Arctic Ocean delimitation.

⁵⁸ The relevant letters are available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last visited 20 January 2009).

⁵⁹ See Rule 4 lit. b) of Annex I to the Rules of Procedure of the CLCS, UN Doc. CLCS/40/Rev.1, 17 April 2008. While the Rules of Procedure were amended in 2008; Annex I was adopted in 1998 and has remained unchanged.

⁶⁰ The recommendation as such was not published. A summary of the proceedings and the recommendation is contained in the Report of the Secretary General to the General Assembly, UN Doc. A/57/57/Add.1, 8 October 2002, para. 27-41.

⁶¹ UN Doc. A/57/57/Add.1, 8 October 2002, para. 41.

gins, there are morphological breaks off the Russian coast that could be regarded as separations from the continental margin.⁶² Due to many uncertainties there is no broad consensus in the Arctic geoscientific community whether or not elevations such as the Lomonosov Ridge are natural prolongations of the landmasses of the adjacent coasts of the Amerasia Basin.⁶³ In addition to organizing an international conference on the issue in St. Petersburg in 2003,⁶⁴ Russia in 2005 and 2007 proved active in collecting more scientific evidence to support the claims of an extended shelf based upon sea ridges as an underwater prolongation of the continental margin.⁶⁵ The submarine field mission in 2007 during the course of which the submersible planted the Russian flag, *inter alia* had the task to collect samples of sediment and rock to support the theory of the Lomonosov ridge as an extension of the Russian landmass.⁶⁶ Art. 76 UNCLOS defines the continental shelf as the “natural prolongation of [...] land territory”. Hence, claims for an extension of the shelf must provide some evidence that the ocean floor beyond 200 nm still meets this requirement.

In the 1940s Russian scientists discovered the Lomonosov mountain ridge extends from the New Siberian Islands to the Canadian Ellesmere Island.⁶⁷ Denmark claims that the ridge had previously been connected to Greenland.⁶⁸ So far, however, no other Arctic State except Russia has submitted any claims to an extended shelf based upon the Lomonosov Ridge. In a letter in response to the Russian submission in 2001, the US stated that in her view the Lomonosov Ridge was “a freestanding feature in the deep, Oceanic Part of the Arctic Ocean Basin, and not a natural component of the continental margins of either Russia or any other State.”⁶⁹

Russia emphasizes the qualification of the Lomonosov and Alpha-Mendeleev Ridge as “submarine elevations” and not as “submarine ridges”. As already explained above, three categories have to be distinguished to

⁶² See figures and explanations at R. Macnab, *Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76*, 223, 226.

⁶³ Macnab & Parson, *supra* note 56, 311.

⁶⁴ On the contents see Macnab & Parson, *supra* note 56, 311-312.

⁶⁵ On the 2005 mission and plans for subsequent field work Macnab & Parson, *supra* note 56, 312.

⁶⁶ Holmes, *supra* note 17, 336.

⁶⁷ Pharand, *supra* note 16, 214-216.

⁶⁸ Holmes, *supra* note 17, 336.

⁶⁹ The US communication is available at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf (last visited 20 January 2009).

explain Russian anxiety: oceanic ridges, submarine ridges and submarine elevations. Claims for an extended shelf cannot be based upon oceanic ridges, i.e. such ridges cannot be used to determine the outer limit of the shelf by e.g. relying upon the 100 nm distance from the 2,500 m isobath. Submarine ridges that are a natural prolongation of the mainland can be employed for determination of an extended shelf but the maximum seaward limit of 350 nm from the baselines applies. This maximum limit, however, does not apply for submarine elevations, provided, again, that they can be regarded as natural prolongations of the continental landmass. Russian insistence on the ridges qualifying as natural prolongations of the continental shelf in the form of underwater elevations, therefore, has the aim of achieving the largest possible extension of the continental shelf under the law of the sea and, in fact, to claim most of the seabed in the Arctic Ocean.⁷⁰ As mentioned above it is disputed amongst scientists whether the Lomonosov and Alpha-Mendeleev Ridge indeed meet the criteria. There is a tendency in international writings, however, to qualify the ridges as "submarine ridges" and to limit Russian claims to an outer continental shelf at 350 nm of the coast.⁷¹

Whether Russia will accept a recommendation of the CLCS which is not in conformity with Russian expectations on extending sovereign rights is difficult to assess. So far Russia has relied upon the procedure by delivering further evidence instead of seeking direct confrontation by simply proclaiming an extended continental shelf.⁷² However, so far Russia still has hope that the evidence will convincingly prove its claims. In the end Russia may have to decide whether it reverses the internal policies that proclaim Russian rights over the largest parts of the Arctic Ocean or whether it risks non-compliance with the procedure under the UNCLOS, the related stigmatization and, potentially, dispute-settlement.

⁷⁰ On different modes of delineation for the Russian claims in the Arctic Ocean see the charts and discussion in Proelss & Müller, *supra* note 2, 665-672.

⁷¹ See inter alia R. Macnab, 'The Outer Limits of the Continental Shelf in the Arctic Ocean', in M. Nordquist *et al.* (eds), *Legal and Scientific Aspects of Continental Shelf Limits* (2004), 301, 305.

⁷² As a consequence Proelss & Müller, *supra* note 2, 682 see grounds for careful optimism.

III. Overlapping Norwegian Claims

In 2006 Norway submitted its claims to an extended continental shelf in Arctic waters: the Barents Sea Loop Hole and the Western Nansen Bay.⁷³ Both areas have also been claimed by Russia. Norway, in the executive summary of the submission, notes bilateral delimitation consultations for the Barents Sea and the Western Nansen Basin.⁷⁴ In a communication concerning the Norwegian submission, Russia acknowledges that the continental shelf between both States has not yet been settled and that the Barents Sea delimitation issue is considered a “maritime dispute”. Accordingly, any recommendation by the Commission shall not prejudice matters relating to the delimitation of the shelf between them.⁷⁵ In March 2009 the CLCS issued a recommendation on the Norwegian claims.⁷⁶ In regard to the Barents Sea Loop Hole the Commission finds that the Norwegian continental shelf extends beyond 200 nm and that it will depend upon agreement between Norway and Russia to determine the exact delimitation.⁷⁷ Notwithstanding the claims and the relevant recommendation by the CLCS Norway has explicitly stated that a Norwegian outer continental shelf would not reach as far as the North Pole. As a consequence, the Russian Federation is currently the only State formally claiming sovereign rights over mineral resources under the Pole.

⁷³ Continental Shelf Submission by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea – Executive Summary, available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf (last visited 20 January 2009).

⁷⁴ *Id.*, 12.

⁷⁵ The note is available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf (last visited 20 January 2009).

⁷⁶ A document entitled Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on November 2006 (hereinafter Summary of the Recommendations) can be accessed at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (last visited 24 April 2009).

⁷⁷ Summary of the Recommendations, *id.*, paras 22-24. For the Western Nansen Bay and the Banana Hole, both areas, which are not under dispute, the CLCS recognizes Norwegian entitlement to an extended continental shelf, see Summary of the Recommendations, paras 26 and 44.

IV. Other Issues

Although the United States are not a party to UNCLOS, the CLCS has asked Russia to transmit to the Commission the charts and coordinates of the delimitation line after entry into force of the maritime boundary delimitation agreement with the US concerning the Bering Sea.⁷⁸ The US is interested in operation of the agreement and has stated that it is awaiting Russia's ratification and will urge the Russian Federation to do so.⁷⁹

Other issues concerning Russian Arctic waters, while not related to claims to the Pole, concern the question of straight baselines⁸⁰ and straits. Russia claims that most of its Arctic straits are internal waters which are enclosed by strait baselines and not subject to any passage rights.⁸¹ The question of passage rights will gain further relevance when the Arctic becomes navigable in larger parts and for more time during the summer and maybe even permanently. In this case "internationality" may be established by more frequent use. Canada, likewise, focuses upon exclusive rights over its Arctic straits,⁸² while the US maintains that the Russian North East Passage and the Canadian North West Passage are international straits regulated by UNCLOS.⁸³ Russia and Canada will attempt to prevent transit use by insisting upon sovereignty over the waters as either internal or historic waters.⁸⁴

⁷⁸ UN Doc. UN Doc. A/57/57/Add.1, 8 October 2002, para. 39.

⁷⁹ US National Security Presidential Directive 66 (32).

⁸⁰ On the issue of the Russian straight baselines in the Arctic see R. D. Brubaker, 'The Legal Status of the Russian Baselines in the Arctic', 30 *Ocean Development & International Law* (1999), 191-233.

⁸¹ See R. D. Brubaker, 'Straits in the Russian Arctic', 32 *Ocean Development & International Law* (2001), 263, 265 and 271.

⁸² See M. Byers, 'Internationales Recht und internationale Politik in der Nordwestpassage: Konsequenzen des Klimawandels', 67 *Heidelberg Journal of International Law* (2007), 145-157.

⁸³ Brubaker, *supra* note 81, 277. US National Security Presidential Directive 66 (32) once again confirms the US views concerning the North West Passage as a strait for international navigation but does not mention the North East Passage.

⁸⁴ On the status of and passage through the North West Passage see Proelss & Müller, *supra* note 2, 655-661.

E. Future Prospects: Agreement or Dispute Settlement?

In the case of the overlapping Arctic claims between Norway and Russia both States must reach an agreement on delimitation. Since Russia does not accept compulsory dispute settlement for the continental shelf concerning adjacent or opposite coasts, UNCLOS does not offer any legally binding proceedings to decide the matter. For the central Arctic Ocean and claims reaching to the Pole Russia must wait for a recommendation from the CLCS and potentially reach an agreement with other States claiming overlapping parts, e.g. in the case of a possible future submission by Denmark.

In the hypothetical case of Russia or any other Arctic nation starting to explore or exploit gas or oil resources on the Arctic Ocean's seabed beyond 200 nm, this could be challenged in a dispute settlement procedure e.g. before the ICJ or the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal. Parties to UNCLOS shall attempt to peacefully settle conflicts concerning the interpretation or application of the convention firstly by informal means (Arts. 279-285 UNCLOS) before they turn to formal procedure and refer the dispute to the ITLOS, the ICJ or an arbitral tribunal (Arts. 286-296 UNCLOS).

In general, States Parties to UNCLOS may choose a forum for the binding settlement of disputes upon ratification of the convention (Art. 287 UNCLOS). The Arctic States Parties to UNCLOS have elected different fora. In this case UNCLOS indicates that the parties to a dispute shall agree upon arbitration. Two situations have to be distinguished in this context: the extension of the shelf in an area of maritime dispute, i.e. with overlapping claims from the adjacent or opposite neighbour, and the extension into the Area without overlapping claims for an outer continental shelf. For the first scenario UNCLOS offers an exception to compulsory dispute settlement. As mentioned above Art. 298 UNCLOS allows parties optional exceptions to formal dispute settlement for specific categories of disputes. The determination of the limits of the continental shelf between States with opposite or adjacent coasts (Art. 83 UNCLOS) is such a matter. Not only Russia, but also Canada and Denmark have made use of these exceptions and have declared not to accept any of the procedures under Arts 286 et seq. The United States, as a non-party, to UNCLOS cannot bring a case concerning the limits of the outer continental shelf to the ITLOS but could request arbitration or apply to the ICJ given that the relevant preconditions for the specific case are met.

In the case of no overlapping claims by adjacent or opposite coastal States and Russia extending the continental shelf beyond 200 nm miles in

contradiction to a recommendation by the CLCS other States' standing before an international court or tribunal may be problematic.⁸⁵ The designation of the seabed outside the coastal States' continental shelves as the common heritage of mankind in Art. 136 UNCLOS alone may not be sufficient to give standing as an effect erga omnes of the concept is not generally accepted. Yet, the provisions on benefit-sharing resulting from the exploitation of mineral resources of the Area give States Parties to the UNCLOS a subjective interest in governance of these resources by the International Seabed Authority (ISA) and not by individual States. In sum, however, recourse to formal dispute settlement is unlikely.

It seems more likely that the Arctic nations will co-operate and solve the issue of jurisdictional claims by agreement. In the end it will be the States who decide upon the delimitation of the continental shelf and neither the CLCS nor a dispute settlement body. It must be doubted, however, whether States will agree upon a comprehensive governance regime for all Arctic issues. States have expressed the view that a new legal governance regime for the Arctic is not necessary. They have done so both jointly, in the Ilulissat Declaration, and individually, e.g. the US in National Security Presidential Directive 66. A piecemeal approach for the continental shelves seems the more likely option. By the planting of the flag and the claims to large parts of the Arctic, Russia has clearly given the political signal that negotiations will not be easy. It is left to be seen whether a "working mutual trust"⁸⁶ amongst the Arctic States can be established that allows for an operational system of communication and procedure leading to a consensual solving of the boundary questions.

⁸⁵ See the discussion by Proelss & Müller, *supra* note 2, 678.

⁸⁶ Baker, *supra* note 8, 686.

