

Arctic Ocean Seabed Rights: The Last Great Land Grab?

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JURIST Guest Columnist Don Rothwell of Australian National University College of Law, says that a looming May 2009 deadline for states to file data with the Commission on the Limits of the Continental Shelf established under the Law of the Sea Convention (LOSC) may force the US to accede to the LOSC in the very near future if it does not wish to be left behind in the carving up of the Arctic seabed.

Recent events suggest that the Arctic Ocean has the potential over coming years to be at the centre of a modern version of the last great land grab, except that on this occasion it will be the seabed that will be up for claim and counterclaim. Russia's 2007 flag planting on the North Pole seafloor, and recent comments by US government scientists over the potential for a clash with Canada over the seafloor north of Alaska illustrate why this issue is beginning to attract serious attention. Fortunately, there are mechanisms under the law of the sea to calm fears of an outbreak of tension over the polar north, but this will create some challenges given the US position towards the 1982 UN Convention on the Law of the Sea (LOSC).

The LOSC reinforced the right of coastal states to assert continental shelf claims, a right first recognised under the 1958 Geneva Convention on the Continental Shelf, and extended the minimum outer limit of a juridical continental shelf to 200 nautical miles. However, in an important concession to those coastal states with broad continental shelves, Article 76 of the LOSC permits the extension of the shelf beyond 200 nautical miles to the outer edge of the continental margin, which in some instances could be as distant as 350 nautical miles. There is no unilateral right to assert a claim to an 'outer continental shelf' (OCS), rather coastal states must first submit data supporting such a claim to the Commission on the Limits of the Continental Shelf (CLCS), one of the more important LOSC institutions. In recognition that the final delimitation of the outer limits of the continental shelf would ultimately have an impact upon the 'area' of the deep sea-bed reserved for management by the International Sea-bed Authority, the LOSC provided for a ten year deadline within which coastal states were to assert their OCS claims. Following some modifications to the calculation of that deadline, May 2009 is looming as a critical date for the original state parties to the LOSC by which time those states who seek to assert such a claim must have submitted their data to the CLCS.

The implications of the OCS regime for the Arctic Ocean are significant. Much of the Arctic remains beyond the limits of 200 nautical mile EEZ and continental shelf claims, including the seabed at the North Pole. A number of coastal states fronting the Arctic could potentially assert OCS claims including Canada, Denmark, Iceland, Norway, Finland, Russia, and the US. Russia was the first to make an OCS claim, presenting its submission before the CLCS in 2001, followed in 2006 by Norway. Denmark is reported to be close to making its claim and the others must be expected to follow soon. What can be anticipated is that over the course of the next few years the CLCS will be facing multiple claims to an OCS over the Arctic, a number of which will overlap. How can the Commission be expected to respond?

The Commission, which operates under a mandate based upon Article 76 and Annex II of the LOSC, has in its Rules of Procedure made clear that it will not become engaged in political or legal disputes. To date the CLCS has sought to strictly maintain its role as a scientific and technical body, notwithstanding that its recommendations can have enormous significance as to the legitimacy of OCS claims. As such the Commission has sought to neatly sidestep OCS claims which have been asserted offshore disputed territories, or which may result in overlapping claims between two or more states. This has already been an issue in the context of OCS claims in the Southern Ocean with both Australia and New Zealand indicating their desire for the Commission to set aside for the time being claims which both country may be able to make offshore Antarctica, but which would raise considerable controversy because of the general lack of international recognition of those claims and their consistency with the Antarctic Treaty.

The CLCS is therefore set to become an important forum in resolving some of the controversies over Arctic sea-bed claims, and this may prove to be a catalyst for forcing the US to reassess its position towards the LOSC. Because there is to date so little state practice with OCS claims under Article 76 of the LOSC, it cannot be said – unlike the general position with respect to 200 nautical mile continental shelf claims – to be reflective of customary international law. There could be no basis for the US asserting a unilateral claim to an OCS without having first acceded to the Convention and having made a submission before the CLCS. This is not to suggest that the US would have to sit on the sidelines whilst other Arctic states assert claims to the Arctic Ocean. Indeed the US already has an active program in place responding to OCS submissions by way of direct communications with the UN Secretary-General which in turn are made available to the CLCS. Therefore, whilst the US would most certainly be able to respond to Arctic Ocean claims, and in particular any claims which may overlap with those the US feels it may be entitled to assert offshore Alaska, it would not be able to officially make or assert such a claim until such time as it became a party to the Convention. It is for this reason that the US may be forced in the very near future to accede to the LOSC if it does not wish to be left behind in the carving up of the Arctic seabed.

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