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Worker recovering robotics Remote Operated Vehicle (ROV) after entering sea surface during oil and gas pipeline inspection in the middle of South China Sea. (Credit: Opsorman / shutterstock)

Complexity Does Not Signify Failure

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The announcement on 19 December 2023 by the US Department of State of the geographic coordinates defining the outer limits of the United States' continental shelf in areas beyond 200 nautical miles (NM)[1] is the final piece of the Arctic continental shelves puzzle. Nevertheless, it will take some time for a complete picture to emerge.

Few maps have circulated more widely than the one first produced by the International Boundaries Research Unit (IBRU) at Durham University in 2008 depicting "Maritime Jurisdiction and Boundaries in the Arctic Region". In the intervening years, it has been revised several times to reflect the submissions of Canada, Denmark/Greenland, Norway and Russia to the Commission on the Limits of the Continental Shelf (CLCS) as well as the potential US continental shelf beyond 200 NM.[2] The United States' announcement has confirmed what the IBRU map had anticipated: Canada and the US have overlapping continental shelf entitlements in the Beaufort Sea[3] and the US continental margin in the Arctic Ocean is vast.[4]

The depiction of the claimed continental shelf entitlements became so complex that IBRU eventually produced a simplified version of the map, one focused solely on the Arctic coastal States' extended continental shelves. However, even this more focused map is a morass of overlapping colors and patterns. Yet complexity should not be equated with confusion. From a legal standpoint, the fact that the Arctic coastal States have overlapping areas of continental shelf does not mean that the legal regime has failed or has proven to be inadequate.

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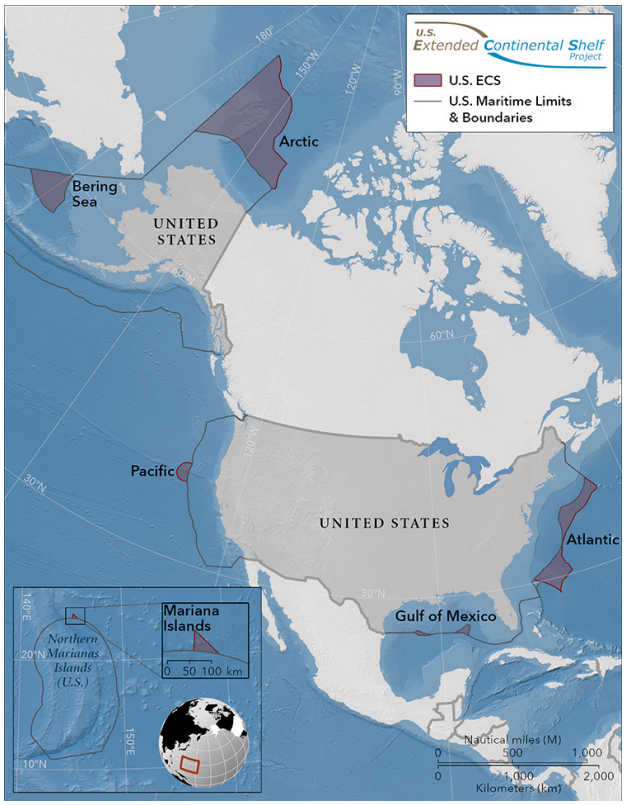

U.S. Extended Continental Shelf (Credit: US State Department)

The rules governing the continental shelf in the 1982 Law of the Sea Convention (LOSC) and reflected in international customary law seek to achieve an equitable balance between the sovereign rights of the coastal State over the resources of its continental shelf and certain rights and freedoms conferred upon other States. The legal regime also seeks to balance the role of the coastal State and that of the international community, through a collectively agreed set of rules, in defining the precise extent of a State's continental shelf.

The first objective, the balancing of rights and freedoms, may appear to have met with greater success. After all, controversies surrounding, for example, the reconciliation of a coastal State's sovereign rights over the resources of its continental shelf and the right of all States to lay submarine cables have not made the cover of Time Magazine.[5] Of course, differences of interpretation have emerged around these types of issues (e.g. the conduct of marine scientific research) but they have not garnered widespread or sustained attention.

It is rather the second balancing exercise that has attracted relentless media and scholarly commentary, much of it critical. Yet the nature of the task must be considered: the determination of the precise extent of what Article 76(3) of the LOSC describes as the "submerged prolongation of the landmass of the coastal State". Mirroring this language, the US Announcement refers to the continental shelf as "the extension of a country's land territory under the sea".[6]

Boundaries and territorial limits, as the framework for political organization and legal systems, are of vital importance to all States, as are the tensions and conflict they often generate. This reality is reflected in the provisions of the LOSC and the rules of customary law, which strive to promote peaceful coexistence while acknowledging the constraints imposed by national interests and by ideological and economic differences.[7]

The rule for the delimitation of the continental shelf between States with adjacent or opposite coasts set out in Article 83 of the LOSC is a telling example. Canada and the United States, as has been made clear, have overlapping areas of continental shelf in the Beaufort Sea confirming the need for an all-purpose maritime boundary. According to Article 83, which the US considers to be customary law, "[t]he delimitation … shall be effected by agreement … in order to achieve an equitable solution."

While Article 83 underlines the obligation weighing on States to peacefully resolve any outstanding boundary disagreements, it does not provide a clear-cut solution. Rather, the legal rule governing delimitation of the

continental shelf assigns the determinative role to the States themselves, relying on their commitment to good faith negotiations and the peaceful resolution of disputes. With many factors and circumstances to be considered if a truly "equitable solution" is to be found, it should come as no surprise that delimiting the continental shelf boundaries between the Arctic coastal States is a complex and, for this very reason, a protracted process.

As for the delineation of the outer limit of a coastal State's continental shelf beyond 200 NM, a line separating the submerged landmass of the State from the seabed and ocean floor of the Area, designated as the common heritage of mankind, a more precise set of rules governs the process. To correct the mistake of a potentially ever moving limit under the exploitation criterion of the 1958 Geneva Convention,[8] Article 76(4) of the LOSC lays down two scientific formulas that States must utilize to establish the outward extent of their continental shelf beyond 200 NM. Global interests in the Area are also protected through the imposition of constraint lines under Article 76(5) which define the maximum permissible extent of a coastal State's continental shelf.

From the start of its data collection activities in 2003, the United States has abided by the scientific rules set out in Article 76 which it considers reflective of customary international law—a fact confirmed in the explanations accompanying the detailed maps published on the 19 December 2023. What is more noteworthy and significant is the reference in the final paragraph of the Introduction to a "package of data and documents" to be eventually submitted to the Commission on the Limits of the Continental Shelf.

Icebreaking vessel in Arctic (Credit: maks_ph / shutterstock)

Under paragraph 8 of Article 76, where a coastal State's continental shelf entitlement stretches beyond 200 NM, the detailed scientific information gathered under paragraphs (4) and (5) is to the submitted to the CLCS. After analyzing the scientific dossier, the Commission makes "recommendations" to the coastal State and if it decides to establish the limits of its shelf on the basis of those recommendations, they are considered to be "final and binding".[9] However, and as a reflection of the great sensitivity that surrounds boundary making, the State delegations were careful to include in Article 76(10) a vital constraint: "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

The Introduction to the Executive Summary declares that the United States will file its submission package with the Commission upon its accession to the LOSC. More importantly, given that accession may never occur, the paragraph asserts that the United States is also "open to filing its submission package with the Commission as a non-Party to the Convention". This willingness to engage in the CLCS process is quite remarkable given the lengthy delay (currently estimated at 15-20 years) such a decision entails.

Although the obligation detailed in Article 76(8) is imposed on "the coastal State" and not on "State Parties" to the Convention, there has been some resistance to the idea that the United States should participate in the CLCS process. However, as the US Government argues, submitting its data package to the Commission would not only be consistent with the language of paragraph 8 (the Commission's mandate is to provide advice and recommendations to "coastal States"), but critically, it would "support the rules-based system under the Convention for delineating the continental shelf and the seabed area beyond national jurisdiction."

The publication of the outer limits of the Extended Continental Shelf of the United States testifies to the complexity of the process unfolding in the Arctic region. However, it also reaffirms the commitment made by all five Arctic coastal States in the 2008 Ilulissat Declaration:

> The Arctic Ocean stands at the threshold of significant changes… By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal States are in a unique position to address these possibilities and challenges. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean… We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.

Time, however—more than ever given the diplomatic breakdown with Russia—will be needed for this vital promise to be fulfilled.

Opinions expressed in Wilson Center publications and events are those of the authors and speakers and do not represent the views of the Wilson Center.

ENDNOTES

1 Available at https://www.state.gov/the-us-ecs/.

2 Available at https://www.durham.ac.uk/research/institutes-and-centres/ibru-borders-research/maps-and-publications/maps/arctic-maps-series/.

3 Note 1, p. 19.

4 "The extended continental shelf of the United States in this region [Arctic] extends north to a distance of 350 nautical miles (in the east) and more than 680 nautical miles (in the west) from the territorial sea baselines of the United States. Ibid, p. 15.

5 Time Magazine Cover: Who Owns the Arctic, 1 October 2007, available at https://content.time.com/time/covers/0,16641,20071001,00.html.

6 Available at https://www.state.gov/announcement-of-u-s-extended-continental-shelf-outer-limits/.

7 "International Law Is Irrevocably Transformed", Statement made on 10 December 1982 at the final session of the Law of the Sea Conference a Montego Bay, Jamaica, reproduced in United Nations, supra note 6, at xxix.

8 See Article 1 of the Convention, available at https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

9 On the issue of "final and binding", see B. Kunoy, "Recommendations on the Russian Federation's Proposed Outer Continental Shelf Area, 3 March 2023, EJIL: Talk!, available at https://www.ejiltalk.org/recommendations-on-the-russian-federations-proposed-outer-continental-shelf-in-the-arctic-area/.

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