THE DIALECTIC OF UNDERSTANDING PROGRESS IN ARCTIC GOVERNANCE

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INTRODUCTION

The way the Arctic is perceived, in terms of policy and law, has changed considerably in recent years. For someone like myself, who has been following the development of the region for a couple of decades, it is of interest why this has taken place[1] – and what has been driving these changes.

Understanding how these sudden changes in Arctic policy and law have been interpreted in the larger community of researchers and professionals–that have worked on a broad field of Arctic governance–is also interesting. It is my argument that

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[1] I defended my dissertation: "Environmental Impact Assessment in the Arctic: A Study of International Legal Norms" in 2001, *see* TIMO KOIVUROVA, ENVIRONMENTAL IMPACT ASSESSMENT IN THE ARCTIC: A STUDY OF INTERNATIONAL LEGAL NORMS (2002), and have since been leading large international research projects, and have given policy advice in issues of Arctic international governance. I have published extensively on these issues for over 15 years and participated in numerous seminars, conferences and workshops. Particularly interesting in this respect was my experience as a member of the program board overseeing a large international research program Geopolitics North (http://www.geopoliticsnorth.org/), which ran from 2008-2012. The project started with classical geopolitical assumptions but had to revise these as they carried the research work. The project progressed very much in line with the dialectical understanding that I will present later in the article.

there exists a loose network of experts in Arctic international governance, of which only a minority are lawyers or legal scholars. This loose network of experts – to some aspects similar to what we in international law have called "invisible college of international lawyers"[2] or Peter Haas as an epistemic community[3] – can be argued to be found also among those who specialize in Arctic international governance. In 1977, while discussing the invisible college of international lawyers, Oscar Schachter advances the view:

> That professional community, though dispersed throughout the world and engaged in diverse occupations[,] constitutes a kind of invisible college dedicated to a common intellectual enterprise . . . . [I]ts members are engaged in a continuous process of communication and collaboration. Evidence of this process is found in the journals and yearbooks of international law, in the transnational movement of professors and students, and in the numerous conferences, seminars and colloquia held in all parts of the globe.[4] [O]ne last point merits attention in regard to the law making role of the professional community of international lawyers. That may be summarized as a traditional concern with the requirements of "*la conscience juridique*," sometimes translated as the sense of justice.[5]

In a similar vein, the "Arctic knowledge community" participates in the same seminars and conferences and publishes, generally, in the same periodicals. The "Arctic knowledge community" possesses the characteristics defined by Haas as a "recognized expertise and competence [in Arctic governance issues as well as] an authoritative claim to policy-relevant

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[2] *See generally* Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

[3] *See generally* Peter Haas, *Epistemic Communities and International Policy Coordination*, INT'L ORG., Winter 1992, at 1.

[4] Schachter, *supra* note 2, at 217.

[5] *Id*. at 225.

knowledge within [an] issue-area."[6] In addition, both Schachter and Haas define their respective invisible college or an epistemic community as consisting of persons who are not only interested in gaining knowledge, but care also of how policy evolves in that specific issue area.[7] Arctic knowledge community does not only restrain itself to analyzing what has taken place in Arctic governance; its members also actively assert their claims regarding how this governance can be improved.

My argument is that, within this Arctic governance knowledge community, the interpretation of what is problematic in Arctic governance, particularly in offshore oil and gas, has progressed through dialectical stages of "scramble for resources"[8] to "orderly development"[9] and finally to what I refer to as "somewhat orderly exploitation." This dialectic has been evident in how we have interpreted what is problematic regarding the way the states have occupied or exercised their powers/rights in the Arctic Ocean sea floor.

First, it is important to take the "scramble for resources" storyline seriously because it is not only various media that

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[6] Haas, *supra* note 3, at 3.

[7] In his *The Invisible College of International Lawyers,* Schachter speaks of the "professional community" of international lawyers forming an "invisible college dedicated to a common intellectual enterprise." Schachter, *supra* note 2, at 217. Regarding "epistemic communities" Haas observes: " usable knowledge encompasses a substantive core that makes it usable for policy makers, and a procedural dimension that provides a mechanism for transmitting knowledge from the scientific community to the policy world. . . ." Peter Haas, *When Does Power Listen to Truth? A Constructivist Approach to the Policy Process*, J. EUR. PUB. POL'Y, Aug. 2004, at 569, 573.

[8] *See, e.g.,* Brian Beary, *Race for the Arctic*, 2 CQ GLOBAL RESEARCH 213, 217 (2008); Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 86 FOREIGN AFF. 63 (2008); KENNETH J .BIRD ET AL., CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE, UNITED STATES GEOLOGICAL SURVEY (Peter H. Stauffer ed., 2008), *available at* http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf (last visited Sept. 11, 2012) [hereinafter USGS Appraisal].

[9] *See, e.g.*, Timo Koivurova, *Power Politics or Orderly Development? Why Are States "Claiming" Large Areas of the Arctic Seabed? in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENT 362 (Sanford R. Silverburg ed., 2011).

perceive that such development is going on in the Arctic, but many academic and policy researchers take this tack as well.[10] We need to take it seriously because it misinforms public understanding of the Arctic, and has implications for how researchers make policy recommendations. Moreover, this storyline continues to exert influence, even if most experts have abandoned it as the best explanation of what is unfolding in the Arctic; the media keeps utilizing this storyline still today.[11] It is, therefore, important to first make an attempt to explain why this storyline has become so popular in explaining the continental shelf claims in the Arctic.

I. SCRAMBLE FOR RESOURCES

It was with disbelief that many reacted to what Russian submarines did in August 2007, planting their flag underneath the North Pole in Lomonosov Ridge.[12] The Canadian Minister for Foreign Affairs stated to the media that "[t]his isn't the 15th century. You can't go around the world and just plant flags to claim territory."[13] Other Arctic Ocean coastal states also reacted to the Russian move. The United States officially criticized many aspects of the Russian claim, especially Russia's attempt to

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[10] Borgerson, *supra* note 8, at 63; *see also* Timo Koivurova, *Do the Continental Shelf Developments Challenge the Polar Regimes?*, *in* 1 THE YEARBOOK OF POLAR LAW 477 (2009) [hereinafter *Continental Shelf*].

[11] *See* Timo Koivurova, *Is There a Race to Resources in the Polar Regions? in* CANADA'S AND EUROPE'S NORTHERN DIMENSIONS 52 (2009) *available at* http://www.cci.ualberta.ca/en/OutreachandEvents/CanadasandEuropesNorthernDimen/~/media/cci/Documents/PagesfromCanadasandEuropesNorthernDimensionsIsthere.pdf (last visited June 11, 2013).

[12] A collateral symbol to commence a new era within Arctic affairs was the expedition 'Arktika 2007', in which a submarine planted the Russian national flag on the seabed at the North Pole instantly drew further attention from around the world to a rising geopolitical debate concerning the Arctic. *See* Piotr Graczyk and Timo Koivurova, *A New Era in the Arctic Council's External Relations? Broader Consequences of the Nuuk Observer Rules for Arctic governance,* POLAR RECORD, Jan. 23, 2013, at 1, 5 (2013).

[13] Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST (Aug. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/06/AR2007080601369.html.

assert sovereign rights over the Lomonosov Ridge that runs through the Central Arctic Ocean Basin. According to the US, the 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."[14]

The Russian flag planting – and the almost simultaneous reports of the dramatic loss of sea ice in the Arctic Ocean in September 2007[15] – reinforced the view that the scramble for resources had started. With the scramble for resources underway and the decreasing levels of sea ice, a new ocean containing vast quantities of hydrocarbons,[16] is opening up. It is these new reserves of hydrocarbons over which the states are fighting.

There seemed to be no doubt that climate change was melting the Arctic Ocean sea ice, since 1979 satellite information demonstrated this to be the case.[17] In general, since ice and snow are the first to react to global warming, it has been estimated that the Arctic has already been impacted by climate change, and the change there will be twice as intense as the change in other regions of the world.[18] Indeed, it seems to be one of the

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[14] Commission on the Limits of the Continental Shelf, United States of America: Notification Regarding the Submission Made by the Russian Federation of the Commission of the Limits of the Continental Shelf, CLCS.01.2001.LOS/US (March 18, 2002), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf.

[15] *See generally Arctic Sea Ice*, NASA EARTH OBSERVATORY, http://earthobservatory.nasa.gov/Features/SeaIce/page3.php (last visited June 9, 2013).

[16] These resources account for about 22 percent of the undiscovered, technically recoverable resources in the world. *See* USGS Appraisal, *supra* note 8.

[17] "Since 1979, by using passive microwave satellite data, [it has been] seen that Arctic perennial sea ice cover has been declining at 9.6 percent per decade." *Arctic Sea Ice Continues to Decline, Arctic Temperatures Continue to Rise in 2005*, NASA (Sept. 28, 2005), http://www.iea.org/publications/freepublications/publication/English.pdf.

[18] *See generally* ARCTIC MONITORING AND ASSESSMENT PROGRAM, IMPACTS OF A WARMING ARCTIC (2004) *available at* http://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786. (last visited Sept. 2, 2012) [hereinafter IMPACTS]. *See* INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012 (2012) *available at*

consequences of climate change that previously inaccessible regions will be opened up to resource development; and it could be argued that there certainly are several compelling reasons for why the world should make use of the vast reserves of hydrocarbons from the seabed of the Arctic waters.

First of all, despite growing international demands for the development of renewable energy sources, fossil fuels seem to have a future in the energy markets after all. The International Energy Agency (IEA) has recently estimated that, despite the efforts by the climate regime to convert our energy use towards renewables, with the present energy development scenarios, our dependence on fossil fuels will grow even more by 2030.[19] And the Arctic hydrocarbon resources seem tempting from two perspectives. They are estimated to be plentiful and they are generally considered to be safe, as they are located in areas with no on-going political conflicts.[20] It can, thus, be concluded that the combined effect of climate change and interests to exploit hydrocarbons in the Arctic could likely explain why the Russians started to "occupy" the sea floor in 2007.

And it was evident to the media that the Arctic Ocean coastal states were out there to occupy as much of the seafloor as possible. For example in 2001 the Russians staked its claim to much of the Central Arctic Ocean seafloor, and sent a research vessel to study the sea floor.[21] Since then other countries have followed Russia's lead. Norwegians made their official claim in

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http://www.worldenergyoutlook.org/media/weowebsite/2012/Acknowledgements.pdf.

[19] *See, e.g.*, *World Energy Needs and Nuclear Power*, WORLD NUCLEAR ASS'N, http://www.world-nuclear.org/info/Current-and-Future-Generation/World-Energy-Needs-and-Nuclear-Power/#.UbWmxNhqPHQ (last updated July 28, 2013).

[20] *See* USGS Appraisal, *supra* note 8, at 3; *see generally* INTERNATIONAL ENERGY AGENCY, *supra* note 18 (describing Iraq as a current source of hydrocarbons). On the other hand, it would seem that Arctic gas is not as tempting to exploit as it used to be given the shale gas boom in the US.

[21] Clifford Krauss Et Al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, *available at* http://www.nytimes.com/2005/10/10/science/10arctic.html?pagewanted=print&_r=0.

2006,[22] and Canada, Denmark (Greenland), and the United States announced that they are trying to make their claims.[23] This seemed to carry with it the possibility that the states' interests would run counter to each other and tensions, even military conflicts, could ensue.[24]

This drama provoked swift political and legal action in 2007, first from the "foreign minister" of the European Union (EU), who argued–in releasing the Commission's report on climate change and international security–that some type of international treaty was needed to contain the geopolitical struggle unfolding in the region.[25] As much was suggested by Scott G. Borgerson – International Affairs Fellow at the Council on Foreign Relations and a former Lieutenant Commander in the US Coast Guard – in a 2007 edition of Foreign Affairs, arguing that even military conflict of some sort may be possible:

> The situation is especially dangerous because there are currently no overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes. The Arctic has always been frozen; as ice turns to water, it is not clear which rules should apply. The rapid melt is also rekindling numerous interstate rivalries and attracting energy-hungry newcomers, such as China, to the region. The Arctic powers are fast approaching diplomatic gridlock, and that could eventually lead to the sort of armed brinkmanship

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[22] Press Release, Commission on the Limits of the Continental Shelf, Receipt of the Submission Made by Norway to the Commission on the Limits of the Continental Shelf, U.N. Doc. 06/313 (Dec. 21, 2006), *available at* http://www.un.org/depts/los/clcs_new/submissions_files/nor06/clcs_07_2006_los_e.pdf [hereinafter Norway Submission].

[23] *See generally* Vladimir Jares, *The Continental Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic*, 42 VAND. J. TRANSNAT'L L. 1265, 1302-03 (2009).

[24] *See* Borgerson, *supra* note 8, at 71, 74, 75-76.

[25] Resolution of 9 October 2008 on Arctic Governance, PARL. EUR. DOC. (P6_TA(2008)0474) (2008), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0474&language=EN.

> that plagues other territories, such as the desolate but resource-rich Spratly Islands, where multiple states claim sovereignty but no clear picture of ownership exists.[26]

Overall, it seemed at the time that it was beyond any serious discussion and that what is called here "scramble for resources" explains the behaviour of states.[27] In this storyline, unprecedented and rapid climate change opens the Arctic as terrain for power politics over who is able to stake the hydrocarbon resources of the Arctic Ocean seabed first. Yet, despite the fact that it did convince most in the Arctic governance knowledge community at the time, it was clearly an erroneous account of events and was fairly soon abandoned by the knowledge community as not explaining what is taking place in the region. A better explanation seemed to be what I call here "orderly development."

II. ORDERLY DEVELOPMENT

Soon, international law scholars, among others, suggested that the Arctic Ocean coastal states are, in fact, following rules of an international treaty, the United Nations Convention on the Law of the Sea (hereinafter UNCLOS).[28] As a collective, we legal professionals were able to tell to the rest of the world – as we did in the first polar law symposium held in 2008 in Akureyri Iceland – that states are just following the rules and procedures of the law of the sea and UNCLOS.[29] When we drafted our media release, colleagues from other disciplines of the Arctic governance knowledge community were curious as to how something like international law can explain what is happening. Many in the geography or international relations fields were unaware of UNCLOS (or customary law of the sea as mostly codified by UNCLOS), so there was lots of discussion involving

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[26] Borgerson, *supra* note 8, at 71.
[27] *See Continental Shelf*, *supra* note 10.
[28] *See* Koivurova, *supra* note 9.
[29] *Continental Shelf, supra* note 10, at 1 484-87.

how rules had come into being and by which procedures the states are legally bound. In a nutshell, continental shelf rules evolved in a particular manner, which is explained below.

Before World War II, coastal states enjoyed sovereignty only over a narrow strip of territorial seas, extending three to four nautical miles.[30] This was changed dramatically after the war, with the 1945 Truman Proclamation by the US, declaring the following:

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed 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.[31]

This initiated the era of creeping coastal state jurisdiction, especially in regard to the sea bed, the outer limit of which was defined in Article 1 of the 1958 Continental Shelf Convention as follows:

> For the purpose of these articles, 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;

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[30] *Id.*

[31] John T. Woolley & Gerhard Peters, *Harry S. Truman: 'Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf,' September 28, 1945*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=12332 (last visited Sept. 13, 2013).

> (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[32]

The problem with this definition was that it effectively permitted the possibility of coastal states claiming larger seabed resources with the development of technology, to the extent that even ocean floors could have been divided between the coastal states.[33] A counterforce for this trajectory came from Maltese ambassador Arvid Pardo, who, in 1967, proposed in the UN General Assembly that the ocean floor be designated as a common heritage of humankind.[34] Pardo argued that it should be administered and overseen by an international governance mechanism, whereby the economic benefits of the ocean floor riches could be shared equitably between developing and developed states.[35] Pardo's proposal also served as one major reason for why the third United Nations Conference on the Law of the Sea was convened in New York in 1973 (the first UNCLOS and second UNCLOS were held in Geneva in 1958 and 1960 respectively), now with the aim to produce a comprehensive "constitution" of the oceans, which became the UNCLOS.[36]

The Convention was negotiated over an extended period of time – from 1973 to 1982[37] – as a package deal, permitting no

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[32] Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 499 U.N.T.S. 312, 312, *available at* http://treaties.un.org/doc/publication/UNTS/Volume%20499/v499.pdf.

[33] *Id.* at 485.

[34] U.N. GAOR, 22d Sess., 1516th mtg. at 1, ¶ 3, U.N. Doc. A/C.1/PV.1515 (Nov. 1, 1967).

[35] *See id.* ¶ 6.

[36] *See* R.V. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 13-15 (2d ed. 1988). Four conventions were adopted during UNCLOS I in 1958. *Id.* at 13.

[37] *See* U.N. Div. for Ocean Affairs & the Law of the Sea, The United Nations Convention on the Law of the Sea (A Historical Perspective) (1998), *available at* http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical Perspective.

reservations to the Convention.[38] UNCLOS was able to achieve a compromise between various groupings of states having differing kinds of interests related to the seabed.[39] For instance, broad continental margin states were able to have rules accepted, which allowed the whole continental margin to be subjected to the sovereign rights of coastal states, whereas geologically disadvantaged states – those whose continental margin was minimal – managed to push for a rule that entitles all states to a minimum of 200 nautical miles along the continental shelf, meaning that these states effectively exercise powers over the ocean floor as well.[40] UNCLOS was also successful in defining more clearly the outer limit of the continental shelf than its 1958 predecessor convention, and in designating the ocean floor as part of the common heritage of mankind and under the governance of International Sea-Bed Authority (ISBA).[41]

Even though, during the negotiations, broad continental margin states were able to extend the outer limit of the continental shelf to cover the whole geophysical continental margin (and in some exceptional cases beyond), they had to make compromises as well.[42] For example, they had to submit to rules requiring them to transfer some of the revenues from offshore hydrocarbon exploitation in their extended continental shelf to developing states via the ISBA[43] and, more importantly, they had to document and "prove" the extent of their continental shelf scientifically in the Commission on the Limits of the Continental Shelf (CLCS or Commission), a scientific body with 21 members.[44] The submission must be made by a coastal state if it perceives that its continental margin exceeds 200 nautical miles within ten years from the date when it became a party to

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[38] United Nations Convention on the Law of the Sea, pt. XVII, art. 309, Dec. 10, 1982, 1833 U.N.T.S. 397, 519 [hereinafter UNCLOS], *available at* http://treaties.un.org/doc/publication/UNTS/Volume%201833/v1833.pdf.

[39] *See id*.

[40] *See id.*

[41] *See id.* pt. XI; *see also About Us*, INTERNATIONAL SEA BED AUTHORITY, http://www.isa.org.jm/en/about (last visited Sept. 13, 2013).

[42] *Continental Shelf, supra* note 10. *See infra* notes 29-30.

[43] UNCLOS, *supra* note 38, pt. VI art. 82, at 431.

[44] *Id.* pt. VI art. 76, at 429. *see also id.* annex II art. 1-2, at 525.

the UNCLOS.[45] The Commission can only make recommendations, but these recommendations are legally influential because the continental shelf's outer limits become final and binding only when they have been enacted on the basis of the recommendations.[46] The deadline for such submissions is fairly tight, given that states need to provide the Commission with vast amounts of scientific and technical data. Why? It was seen as necessary to define the outer limits of continental shelves as quickly as possible, since only after knowing these limits is it possible to know where the boundary between states' continental shelves and the Area, which is under the jurisdiction of the ISBA, lies.[47]

Could we international lawyers then support our argument that states were only following their UNCLOS duties with reliable evidence? Russia was the first country to make the submission to the CLCS in 2001, and it was also the first country to which the Commission issued recommendations, requiring it to revise its submission in the Central Arctic Ocean Basin.[48] Whatever symbolic importance the Russian flag planting may

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[45] *Id.* annex II art. 4, at 526. This date was postponed by the parties to UNCLOS to those states that had become parties before May 1999, thus extending their submission deadline to May 2009. UNCLOS, *supra* note 38, annex II art. 4 at 526.

[46] *Id.* pt. VI art. 76(8), at 429; *see also* Int'l Law Ass'n [ILA] 71st Conference, Berlin, Ger., Aug. 16-21, 2004, *Rep. of the Comm. on Legal Issues of the Outer Continental Shelf*, (2004) *available at* http://www.ilahq.org/download.cfm/docid/B5A51216-8125-4A4B-ABA5D2CAD1CF4E98.

[47] *About Us, supra* note 41.

[48] The Secretary-General, *Oceans and the law of the sea: Addendum to Rep. of the Secretary-General*, ¶¶ 27, 38-50, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement. "As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations." *Id.* at ¶ 41; *see also* Mel Weber, *Defining the Outer Limits of the Continental Shelf across the Arctic Basin: The Russian Submission, States' Rights, Boundary Delimitation and Arctic Regional Cooperation*, 24 INT'L J. MARINE & COASTAL L., 653, 653-81 (2009) (Providing overview of Russian submission to the Commission on the Outer Limits of the Continental Shelf).

have had for its domestic policy, Russia has not argued that this would have any legal effect.[49] The Russians have insisted that they will make the revised submission to the Commission within the foreseeable future.[50] Norway made a submission in 2006 to three separate areas in its North East Atlantic and Arctic continental shelves.[51] The CLCS has now made recommendations to Norway as to how to draw the outermost limits of its continental shelf.[52] Deadlines for Canada and Denmark (Greenland) to make their submissions are 2013 and 2014 respectively, and both states are desperately trying to collect the necessary data and information within these tight deadlines. According to news sources, the US has also started to develop its continental shelf submission, even though it is not a party to the UNCLOS.[53] Already the Clinton and Bush Administrations have tried to become parties to the UNCLOS, but without result. The current Obama administration continues this struggle.[54]

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[49] UNCLOS, *supra* note 38, pt. VI art. 77(3), at 429-30.

[50] *See* Trude Pettersen, *Russia's Arctic Shelf Bid 90 Percent Complete*, BARENTS OBSERVER (Dec. 13, 2011), http://barentsobserver.com/en/topics/russias-arctic-shelf-bid-90-percent-complete.

[51] Norway Submission, *supra* note 22; *see*, Press Release, The Permanent Mission of Spain, the United Nations to the Secretary-General, Note Verbal (Mar. 3, 2007), *available at* http://www.un.org/depts/los/clcs_new/submissions_files/nor06/esp_070034 8.pdf (explaining Spain's reaction to Norway's submission).

[52] U.N. Comm'n of the Limits of the Cont'l Shelf, 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 27 November 2006, U.N. Doc CLCS/40/Rev. 1, Annex VI (Mar. 27, 2009) *available at* http://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ. pdf (providing a summary of the recommendations made by the Commission in respect of Norway's submission).

[53] *Defining the Limits of the U.S. Continental Shelf*, U.S. DEPARTMENT OF ST., http://www.state.gov/e/oes/continentalshelf/ (last visited Nov. 12, 2013).

[54] *See* Sarah Ashfaq, *Something for Everyone: Why the United States Should Rafity the Law of the Sea Treaty*, 19 J. TRANSLATIONAL L. & POL. 2, 358 (2010). *See also Continental Slope Off Alaska 100 Nautical Miles Further Off Coast Than Assumed*, SCIENCE DAILY (Feb. 12, 2008) http://www.sciencedaily.com/releases/2008/02/080211134449.htm.

To articulate to the world that what they were doing was only to follow the law of the sea, the Arctic Ocean coastal states convened a preparatory meeting as early as the end of 2007 and organized a political level meeting in Greenland in May 2008, wherein they issued what is known as the Ilulissat Declaration.[55] In the Declaration, they made it clear that there is already a comprehensive legal regime in place in the Arctic, the law of the sea.[56] In other words, there is no reckless vying for power over the Arctic Ocean seabed but an orderly development that proceeds on the basis of the law of the sea. Among other issues, coastal states stated that "the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf" and that they "remain committed to this legal framework and to the orderly settlement of any possible overlapping claims." States committed themselves also to co-operating themselves in resource intensive scientific work required to make a submission to the CLCS, and this has occurred between many Arctic Ocean coastal states.[57]

Now, it seemed evident that it was the law of the sea that explained the continental shelf activity of the Arctic Ocean coastal states, not the storyline referred to here as "scramble for resources." Not only were the coastal states only following the procedures set out by UNCLOS, but they also explicitly committed to the orderly settlement of any possible disputes over where their continental shelf boundary would lie. It seemed, indeed, that the law of the sea could explain what is happening as pertaining to states' continental shelf activity.

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[55] *See* Illulissat Declaration, Den-Green, May 28, 2009, *available at* http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

[56] The coastal states stated that "[i]n this regard, we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims." *See id.*

[57] *See id.*

III. SOMEWHAT ORDERLY EXPLOITATION

After more debate and argument, difficult questions arose over the role of the law of the sea as the simple explanation of what had motivated state action in the area. Many started to question whether indeed the Arctic Ocean coastal states were only innocently following the rules of the law of the sea and UNCLOS.[58] It seemed natural to assume that if states follow rules, they do so for their own self-interest. The question then arose, why do states follow these continental shelf rules? The reason for this can be found from the negotiations leading up to the conclusion of the UNCLOS.

When the states were negotiating the rules on where the limits for outer continental shelf should lie, those with broad continental margin made sure that UNCLOS would codify such rules, thereby maximizing their hydrocarbon interests.[59] The practical consequence of this is that Article 76, which regulates the maximum outer limits of continental shelf, is now so flexible that it is almost certain that hydrocarbons will be found within the states' continental shelves.[60] Hence, when the rules were already negotiated during the 1970's, these hydrocarbon interests were secured for coastal states.[61] But these rules are beneficial for states also for other reasons. By processing their submissions via the CLCS, states will have their broad continental shelf boundaries endorsed by an international body. With that process, which is a fairly secretive process, states will receive guidance

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[58] I presented these thoughts in our National Defence University's Suomenlinna seminar, on 2 June 2010. *See* Timo Koivurova, *Scramble for Resources or Orderly Development - What is Happening in the Arctic, in* NORDIC COOPERATION AND THE FAR NORTH 1-13 (Salmela ed.), *available at* http://www.doria.fi/bitstream/handle/10024/74180/StratL2_46w.pdf?sequence=1.

[59] Timo Koivurova, *The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay*, 42 OCEAN DEV. & INT'L L. 211, 215 (2011) [hereinafter *Actions of the Arctic States*].

[60] *See* FRIDTJOF NANSENS INSTITUTT & DNV, ARCTIC RESOURCE DEVELOPMENT: RISK AND RESPONSIBLE MANAGEMENT 7 (2012), *available at* http://www.dnv.com/binaries/arctic_resource_development_tcm4-532195.pdf.

[61] *Actions of the Arctic States*, *supra* note 59, at 215.

on how to enact their outermost limits.[62] When they enact their outermost limits on the basis of these recommendations, they receive near universal legitimacy for their very broad continental shelf powers. One could turn the question around and ask: why would states not follow the rules that legitimized their large entitlements to the continental shelf and to the hydrocarbons?

It was only after this debate was completed within the Arctic governance knowledge community, I argue, that we were ready to really penetrate what was problematic in offshore oil and gas exploitation. It was not really the inter-state aspects that were so interesting, since in any case most of the hydrocarbons would sit comfortably in one or another state's jurisdiction. Instead, what is important is taking place within the limits of national jurisdiction. So, now we were finally able to focus on the questions regarding the most problematic aspects of Arctic resource exploitation:

- Whether states are allowing very risky Arctic offshore oil and gas exploitation?[63]
- If they are, how are Arctic communities and ecosystems taken into account in planning these operations, how are indigenous rights protected; how is worker safety ensured, etc.?

And, we already have some tentative answers to these questions. It seems that the Arctic states (and also e.g. Greenlandic Inuit)[64] are ready to open their hydrocarbons for

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[62] *See* Rules of Procedure of the Commission on the Limits of the Continental Shelf, Comm'n on the Limits of the Cont'l Shelf, 25th Sess., Mar. 17-April 18, 2008, annex II, CLCS/40/Rev.1 (April 17, 2008).

[63] Timo Koivurova & Kamrul Hossain, *Hydrocarbon Development in the Offshore Arctic: Can it be Done Sustainability?*, 10 OIL, GAS & ENERGY L. INTELLIGENCE, Jan. 2012, at 1, *available at* http://www.arcticcentre.org/loader.aspx?id=3f84034c-e386-476f-a282-3b6ac1a035e2.

[64] *See* Andreas Østhagen, *Dimensions of Oil and Gas Development in Greenland*, THE ARCTIC INSTITUTE, http://www.thearcticinstitute.org/2012/12/dimensions-of-oil-and-gas-development.html (last visited June 09, 2013).

companies (state-owned or private), and there are significant interests in exploiting these on the part of the companies, even if there are significant risks involved in, among other things, drilling in ice-infested waters.[65] On the other hand, Arctic Ocean coastal states' national regulatory systems and institutions are mostly there to regulate and ensure that this is done in a safe and environmentally sound manner.[66] Moreover, the two agreements that have been negotiated under the auspices of the Arctic Council – the search and rescue agreement and the oil spills agreement[67] – both are important for preparing for the worst-case scenarios in Arctic offshore oil and gas development. In a similar vein, the Arctic Council has already revised its Offshore Oil and Gas Guidelines twice,[68] which testifies to the effect that these Guidelines are taken seriously, even if no monitoring of how these Guidelines are being used in practice is taking place. Yet, some questions are left unanswered. How can we, for example, make sure that these rules are monitored and enforced in the Arctic's remote conditions, with both personnel and equipment resources lacking? The latter may point to the importance of corporate social responsibility standards of companies operating in the Arctic, another issue-area where the Arctic Council has commenced action.[69]

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[65] TIMO KOIVUROVA & KARUL HOSSAIN, OFFSHORE HYDROCARBON: CURRENT POLICY CONTEXT IN THE MARINE ARCTIC, *available at* http://arctic-transform.org/download/OffHydBP.pdf.

[66] *Id.*

[67] Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, *available at* http://www.ifrc.org/docs/idrl/N813EN.pdf (last visited June 12, 2013); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, *available at* http://www.state.gov/r/pa/prs/ps/2013/05/209406.htm (last visited June 09, 2013); *See also* Timo Koivurova, *New Ways to Respond to Climate Change in the Arctic*, 16 ASIL INSIGHTS 33 (2012), *available at* http://www.asil.org/pdfs/insights/insight121023.pdf (last visited June 09, 2013).

[68] The first Guidelines were published in 1997, the first revision was done in 2002 and the latest revision was in 2009. Arctic Council, Arctic Offshore Oil and Gas Guidelines, 2009, http://library.arcticportal.org/1551/1/offshore_oil_and_gas_guidlines.pdf (last visited June 09, 2013).

[69] *See* DEPARTMENT FOR INFRASTRUCTURE AND ECONOMIC COOPERATION, GUIDELINES FOR SIDA'S SUPPORT TO CORPORATE SOCIAL RESPONSIBILITY,

IV. DIALECTICS OF HOW OUR UNDERSTANDING HAS PROGRESSED

It is tempting to explain the way our knowledge community's collective understanding progressed with the resort to the dialectical theory of understanding. There are various sub-branches in the general theory of dialectics, but a popular version of dialectics proceeds from the idea that there is first a thesis, which is necessarily countered by an antithesis, trying to fully challenge the original thesis, and this challenge leading to synthesis.[70] One of the fathers of dialectics, Georg Friedrich Wilhelm Hegel (1770-1831), did not use these exact terms, but instead preferred the progression from abstract to negative leading into the concrete, which better captures the progression in how the Arctic governance knowledge community evolved in its understanding. According to Hegel, the original thesis is necessarily abstract since it is yet to be tested in practice.[71] It is this trial and error that leads to the antithesis, the negative, which then leads to the concrete, the synthesis.[72]

If we examine the progress in the evolution in our interpretation, it seems clear that the scramble for resources was a typical abstract thesis, which made sense in many ways. Yet, when serious efforts commenced to examine whether this storyline indeed matched reality, the knowledge community found that it did not; it was proved to be negative. States' actions, and words demonstrated that states were following law of the sea and UNCLOS very closely. Hence, it was nearly

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(2005), *available at* http://www.sida.se/Global/Partners/N%C3%A4ringsliv/CSR-gudielines%20%282%29.pdf (accessed June 09, 2013).

[70] *See generally* Michael H.G. Hoffmann, *The Curse of the Hegelian Heritage: "Dialectic," "Contradiction," and "Dialectical Logic" in Activity Theory*, IVAN ALLEN COLLEGE SCHOOL OF PUBLIC POLICY, Working Paper Series No. 9, 2005 *available at* http://www.spp.gatech.edu/faculty/workingpapers/wp9.pdf (last visited June 2013).

[71] Nathan Rotenstreich, *Some Remarks on the Formal Structure of Hegel's Dialectic*, 5 PHIL. AND PHENOMENOLOGICAL RES. no. 2, 242-46 (1944).

[72] *Id.* at 246-52.

impossible to continue holding the idea that there was some kind of lawless scramble over who gets to occupy most of the state floor when everything showed that states were behaving on the basis of the law of the sea and UNCLOS. Thus, the thesis was clearly negated. Yet, this is not the whole story. This negation enabled researchers to delve further into why states were following the law of the sea and UNCLOS, and to rejecting the idea that this was a situation where states were acting merely to follow the rules, given the beneficial nature those rules had on the interests of coastal states. This then lead to more concrete questions over what exactly is problematic as regards Arctic offshore oil and gas exploitation and enhanced our ability to focus on specific questions that could be answered in a more nuanced manner.

CONCLUSION

As I have argued, we have clearly witnessed a progress in our knowledge community's understanding through rational discussion based on scientific principles, in particular that all arguments and theories can be falsified. Scientific principles lead, necessarily, into challenging all truth-claims and, thereby, there is an inherent self-correction at work. At the very least, this functioned in the case studied in this article.

Unfortunately, we have not had the same development in the media, which keeps repeating the same scramble for resources story line. There are probably many reasons for this, including commercial ones, but it seems that there are also underlying reasons why the general audience wants to hear of the great game in the Arctic. It seems obvious that the Wild West allegory has a strong resonance when we talk of Arctic matters. Given the enormous influence the Wild West has had on Western culture, especially via the popular culture, it is no wonder that people tend to find similarities when they compare the Wild West and the current "final frontier" - the Arctic. The Wild West was seen as a new frontier, just like the current Arctic, with presence of indigenous populations and new economic possibilities. It was also a place for those who were brave enough to penetrate into

this new world, with no laws and no sheriffs, very much the way the Arctic has been described in the media.[73]

It is also the case that the general public does not have the same interest for knowledge as the members of the Arctic governance knowledge community. Most in the general public do not possess a special relationship to the region; very few have even visited it. It is more of a place for imagination and hearing interesting stories, especially because they do not possess the normative relationship to the region. They do not care about what happens to the region and its inhabitants. This also explains why the Arctic governance knowledge community has quickly revised its interpretations as to what happens in the region, in addition to the fact that this is where they possess special expertise and are expected to provide knowledge that correlates with what is actually taken place in the region.

Overall, we have witnessed clear progress in the way the Arctic governance knowledge community now understands the matters Arctic, but even this progress is clouded by the projections of how quickly climate change is progressing, in general, and particularly in the Arctic. It seems particularly relevant to point out – as Greenpeace has now done in its campaign[74] – that states are opening the final hydrocarbon province, which is at the same time seen as the early warning place of global climate change.[75] Our rational debate on the twists and turns of the direction of Arctic governance seems to pale in comparison with the threats posed by climate change to the region. Even if the Arctic does play a very strong symbolic

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[73] *See*, Franklyn Griffiths, *Towards a Canadian Arctic Strategy*, *FOREIGN POLICY FOR CANADA'S TOMORROW* 1 (2009), http://opencanada.org/wp-content/uploads/2011/05/Towards-a-Canadian-Arctic-Strategy-Franklyn-Griffiths1.pdf (accessed June 09, 2013). According to Griffiths, "Over the next while, climate change and media hype on the 'cold rush' for Arctic seabed rights will be the main drivers of southern attention to the northernmost part of the world." *Id.*

[74] Because of its concerns on the uninhabited area of the Arctic high north, Greenpeace's campaign is to put a ban on oil drilling in the area in order to save the Arctic. *See* THE GREENPEACE CAMPAIGN (2012), http://www.savethearctic.org/ (last visited June 11, 2013).

[75] IMPACTS, *supra* note 18, at 24.

region in our fight against climate change, all evidence points to the direction that if only possible, oil and gas resources of the region will be exploited.[76] This is not a good sign for how we as humanity can face up to our probably biggest long-term challenge, climate change.

[76] *See* Timo Koivurova, *Environmental Protection in the Arctic and Antarctica*, *in* POLAR LAW TEXTBOOK 23, 42 (Natalia Loukecheva ed., 2010).