

Coastal State Sovereignty in the Arctic Offshore: Is it Compatible with the Concept of a Borderless North?

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Abstract

The notion of a Borderless North is attractive, however its basic philosophy runs counter to prevailing attitudes concerning the inviolability of maritime boundaries. Being well entrenched within the current doctrine of customary state practice, these attitudes are unlikely to change in the foreseeable future. However, they needn't prevent Arctic coastal states from establishing a framework for consultation and collaboration that is designed to achieve meaningful objectives in fields where the national sovereignty of coastal states is not perceived to be under threat. Marine scientific research is suggested as such a field, with its emphasis on addressing transboundary issues for the greater benefit of all.

Introduction

The UN Convention on the Law of the Sea (UNCLOS) provides a framework for coastal states to follow when establishing the zones where they may exercise national jurisdiction. In prescribing mechanisms for defining the outer limits of these zones, the Convention encourages states to cooperate in the construction of bilateral boundaries or borders that are shared with neighbour states, and in so doing to seek equitable solutions. The Convention also seeks to prevent 'creeping jurisdiction' of coastal states by stipulating where the individual rights of coastal states end, and where the collective rights of other states begin.

This paper begins by describing the maritime zones that are defined by various limits and boundaries, and by outlining the inherent rights of coastal and other states in the zones so defined. It then goes on to review the situation in the Arctic Ocean, and ends by proposing a collective approach for dealing with important regional issues while respecting the sovereign rights of the Arctic coastal states.

Maritime Sovereignty – A General Overview

From a juridical perspective, the ocean is divided into zones where states are entitled to exercise a range of rights and freedoms – see Figure 1 and Table A. As a general rule, a coastal state enjoys privileged levels of authority in the zones adjacent to its territory, the authority diminishing progressively with increasing distance from the coastline. Conversely, other states must progressively relinquish freedoms as they penetrate deeper into the zones where a coastal state exercises jurisdiction.

This section provides an overview of the zones in which coastal and other states are entitled to exercise their respective rights and duties. It also touches upon the methodologies that may be called into play when partitioning these zones between neighbour states.

The Territorial Sea Baseline (TSB)

While not a zone per se, the TSB is significant in that it marks the limit between a coastal state's land territory and the ocean which lies beyond that territory. There are two types of baseline: normal and

straight. By definition, the normal baseline is defined by the low water line shown on charts that are officially recognized by the coastal state.

The straight baseline is called into play when it would be impractical to define a normal baseline on a coast that is heavily indented or fringed with islands. Within certain limitations, it consists of a succession of straight lines that cross bay openings, river mouths, and channels lying between islands and the mainland.

A coastal state can define its TSB using any combination of normal and straight baselines. It is incumbent upon a coastal state to publicize the location of its TSB through illustration on published charts or through promulgation of its geographic coordinates.

Internal Waters

Internal Waters lie on the landward side of the TSB. The sovereignty of a coastal state extends to these waters, where to all intents and purposes its authority is the same as on dry land.

The Territorial Sea

The Territorial Sea extends seaward from the TSB for up to 12 nautical miles. The coastal state exercises sovereignty over this zone, however the right of innocent passage is open to ships of all states. In this context, 'passage' is defined generally as a simple traversal of the Territorial Sea, with or without a port call. A passage is 'innocent' as long as it is "not prejudicial to the peace, good order or security of the coastal state".

The delimitation of Territorial Seas between neighbouring states is usually determined by a median line which is everywhere equidistant from their respective TSBs, unless the parties agree otherwise, or unless there are special circumstances, such as historical entitlement.

The Contiguous Zone

The Contiguous Zone extends a maximum of 12 nautical miles beyond the Territorial Sea, or 24 miles from the TSB. Within the Contiguous Zone, a coastal state is authorized to prevent and to punish actions that infringe upon its laws and regulations pertaining to customs, fiscal, immigration, or sanitary matters within the Territorial Sea.

There are no specific provisions for delimiting the Contiguous Zone between neighbouring states. This zone is usually integral to the Exclusive Economic Zone (EEZ, discussed in the following section), and its bilateral boundaries could be expected to conform automatically to those of the EEZ.

The Exclusive Economic Zone (EEZ)

The EEZ extends beyond the Territorial Sea to a maximum of 200 nautical miles from the Territorial Sea Baseline. Within its EEZ, a coastal state can exercise a broad range of powers relating to the management and exploitation of resources of the seabed and superjacent waters. It also has jurisdiction over such matters as: the establishment of artificial islands, installations, and structures; marine scientific research; and the protection and preservation of the marine environment.

All states retain certain rights within a coastal state's EEZ, e.g. freedom of navigation and overflight, and the laying of submarine cables and pipelines (as long as they respect the provisions of the Convention, and the rights and duties of the coastal state). Other states are also entitled to harvest living resources that are determined by the coastal state to be surplus to its needs, or to exceed its own harvesting capacity. Such harvesting rights extend to landlocked and geographically-disadvantaged states whose geographic situation makes them dependent upon the living resources of other states' EEZs in order to meet their nutritional requirements.

The delimitation of EEZs between neighbouring states is to be determined by agreement on the basis of international law and with a view to achieving an equitable partition. There is no set process for

defining the bilateral boundaries of adjacent or overlapping EEZs: neighbouring states are expected to negotiate this matter in good faith, and if a mutually-satisfactory solution proves impossible to achieve, the Convention defines procedures that can be invoked for the settlement of disputes.

The Outer Continental Shelf (OCS)

The OCS is a juridical construct and is not to be confused with the physiographic continental shelf (which is a shallow zone of indeterminate width adjacent to a given coastline, and where the seafloor is flat-lying). In general terms, the OCS consists of the seabed and subsoil of the submerged prolongation of a coastal state's land mass, where that prolongation extends beyond 200 nautical miles. The delimitation of the OCS is based upon geological and bathymetric criteria that are defined in Article 76 of UNCLOS. Not all coastal states are entitled to an OCS, only those with a continental margin that satisfies the criteria of Article 76.

Within its OCS, a coastal state is entitled to exercise a number of sovereign rights, notably the management and exploitation of living and non-living resources of the seabed and subsoil. In the case of non-living resources, the coastal state must pay to the International Seabed Authority a royalty that is based on the value of production, and which is distributed equitably to other states, taking into particular account the needs of developing states. Note that a coastal state has no jurisdiction over the living resources of the superjacent waters of its OCS, as it does in its EEZ. The coastal state's non-resource rights in the OCS are comparable to those it enjoys in its EEZ, whereas certain restrictions may be imposed upon other states – for instance, their scientific research must in general be constrained to the superjacent waters.

There has been very little state practice so far in this domain, but the question of OCS delimitation between neighbouring states is presumably subject to the same provisions as for EEZs: parties are encouraged to seek a negotiated solution, failing which they have recourse to standard mechanisms for dispute settlement.

The High Seas

The High Seas consist of all parts of the world ocean that lie beyond coastal state EEZs, Territorial Seas, and Internal Waters, and outside the archipelagic waters of archipelagic states. The freedom of the High Seas is open to all states and entitles them to engage in: navigation, overflight, laying of submarine pipelines and cables, construction of artificial islands and other installations, fishing, and scientific research. No state is entitled to claim sovereignty over any part of the High Seas, so in principle boundary definition is not an issue.

The Area

The Area is that part of the seabed which lies beyond all state jurisdiction. Mineral resources at or beneath the seabed are considered to be the 'common heritage of mankind.' The management and exploitation of these resources are the responsibility of the International Seabed Authority. Similar to the High Seas, no state is entitled to claim sovereignty over any part of the Area, so in principle boundary definition is not an issue.

Maritime Sovereignty in the Arctic Ocean

In many respects, the jurisdictional map of the Arctic Ocean remains a work in progress. This section offers a general overview of the limits and boundaries that pertain to the sovereignty of Canada, Denmark acting on behalf of Greenland, Norway, the Russian Federation, and the United States of America. In the remainder of this paper, these five states will be referred to as 'Arctic coastal states'. Maritime boundaries in the Norwegian Sea are not included in the present discussion, although it is recognized that this region shares many of the boundary issues of the Arctic Ocean.

All Arctic coastal states have defined their Territorial Sea Baselines (TSB), and in consequence their Internal Waters. However, some problems remain in areas where coastlines are ice-covered or subject to seasonal changes, and where there is disagreement over what constitutes a proper straight

baseline. The latter disagreements have risen to prominence in the matter of shipping rights through the Northern Sea Route which skirts the north coast of the Russian Federation, and through the Northwest Passage that traverses the Canadian Arctic Archipelago.

Of the five bilateral boundaries that separate the maritime zones of the Arctic coastal states, only two have a point of origin at the terminus of the land boundaries of the affected states: the boundary between Norway and the Russian Federation, and that between Canada and the United States of America – see Figure 2. In principle, a well-defined land terminus should provide a solid point of departure for partitioning the Territorial Seas, the Contiguous Zones, and the Exclusive Economic Zones between adjacent states, but in practice some important topics need to be dealt with first, among them the designation of appropriate TSB basepoints, and the selection of mutually-acceptable procedures for constructing the boundary line.

The three remaining bilateral boundaries are all located in straits that separate the affected states: Bering Strait (between the Russian Federation and the United States of America); Nares Strait (between Canada and Greenland); and Fram Strait (between Greenland and the Norwegian Island of Spitsbergen). In all three cases, maritime zones are projected from opposite coasts and meet in the middle of the straits, necessitating negotiations to achieve partitions that are mutually satisfactory.

Each Arctic coastal state meets the criteria of Article 76 for the establishment of an Outer Continental Shelf (OCS) beyond 200 nautical miles. In 2001, the Russian Federation was the first Arctic state to present its case to the Commission on the Limits of the Continental Shelf, only to be informed that Commission members had reservations about their supporting information, and that it would be necessary to address these concerns in a revised submission. The remaining four states (including the United States of America, which has yet to ratify the Law of the Sea) are engaged in activities preparatory to the delimitation of their Outer Continental Shelves, with varying levels of cooperation between neighbour states. A provisional analysis suggests that the cumulative Outer Continental Shelves of the Arctic coastal states could encompass most of the central Arctic Ocean, leaving two zones where coastal states could not exercise sovereign rights – see Figure 3. These two zones form a part of the Area, which incorporates all components of the global seabed that lie beyond national jurisdiction, and where mineral resources on and below the seabed comprise the ‘common heritage of mankind’.

The combined Exclusive Economic Zones of the Arctic coastal states form an unbroken belt that encircles the entire Ocean, leaving an enclave in the centre where all states may exercise the freedom of the High Seas – see Figure 2.

Within this context, the ability to perform marine scientific research in the Arctic Ocean has emerged as an issue freighted with significant political overtones. With the prospect of seeing most of that ocean encompassed by the EEZs and OCSs of the Arctic coastal states, other states have been expressing concern about the potential loss of access to regions where important scientific questions remain to be answered. For example in one recent incident, two research icebreakers operated by non-Arctic coastal states were forced to cancel long-standing plans for scientific excursions through the EEZ of a coastal state, when local authorities attempted to impose substantial fees for access to those waters and for services which included icebreaker escort.

Discussion

The foregoing section has described some of the issues that Arctic coastal states must address in order to achieve equitable projections of national sovereignty and jurisdiction into the offshore. At present, all states are engaged in activities relating to the construction of the outer limits of their continental shelves, where they are entitled to exercise certain sovereign rights. At the same time, a number of neighbouring states need to negotiate bilateral limits in order to partition their sovereignty over the seabed and superjacent waters off their adjacent coasts.

When considering such issues in the Arctic Ocean, it is worth recalling that worldwide, unresolved maritime limits and boundaries are estimated to number in the hundreds – so the Arctic is hardly unusual in this respect. Nevertheless, this is no time for complacency. For all its environmental rigours, the Arctic Ocean remains unique and vulnerable: unique because it is the only large enclosed sea that alternates between polar night and day; in addition, it features a persistent ice cover that serves as an effective barrier to the sort of ocean-atmosphere exchanges that are commonplace in other parts of the world. These circumstances make for a marine environment that is very different from that of other oceans, and one that scientists are still trying to understand.

The Arctic Ocean is also vulnerable: with a deep central basin that is essentially cut off from the world ocean, it serves as a catch basin for the long-term retention of contaminants that originate locally from coastal states, from shipping and related industrial activities, or from remote sites after transportation via atmosphere and surface currents. Moreover, as one of the engines that drive world climate, the Arctic is impacted by global warming, with long-term consequences that cannot be predicted with any reliability at this time.

Many of the problems and challenges that are associated with the Arctic Ocean transcend national boundaries, and their satisfactory resolution can only proceed on the basis of cooperation among coastal states. This cooperation requires a pooling of interests, along with a willingness to engage in multiparty debate and decision-making with a view to initiating collective action that will lead to some greater good. Such action could imply a loss or reduction of certain sovereign rights in the offshore, which coastal states are reluctant to accept for valid reasons, e.g. defense and environmental concerns; ownership of living and non-living resources; cultural and historical perceptions that underlie a sense of national identity; etc.

It would appear therefore that the concept of a Borderless North could be difficult to realize in offshore areas, however nothing rules out cooperation among coastal states for the purpose of achieving a worthwhile collective goal. Indeed, Part IX of UNCLOS advocates cooperation among the coastal states that border enclosed or semi-enclosed seas such as the Arctic Ocean.

Specifically, Part IX encourages affected states to coordinate their actions in:

- the management, conservation, exploration, and exploitation of living resources;
- the protection and preservation of the marine environment;
- the development of policies and programs of scientific research;
- the constructive involvement by other interested states or organizations.

Thus there is a legal, if not a moral, incentive for Arctic coastal states to implement a regional framework of transboundary cooperation that would enable them to devise effective solutions for common problems. Such an arrangement might not match all the ideals of a truly Borderless North, but its effect would be to promote the development of a circumpolar community that shunned the pursuit of narrow national self-interest and sought instead to involve participating states in an ongoing process of communication, consultation, and collaboration.

Conclusion

The concept of the Borderless North is attractive, offering the prospect of free and unencumbered transfers of information, people, and goods among the region's states. Coastal states, however, tend to be vigilant concerning the threat (perceived or otherwise) of erosions to their sovereign rights in the offshore, and with good reason. In light of all the factors that impact upon activities in the Arctic Ocean and upon the relationships that prevail among the region's coastal states, it would be unrealistic to expect an early easing of this vigilance. Consequently, it cannot be anticipated that Arctic maritime borders, be they established or in progress, will become more porous in the foreseeable future, facilitating rather than hindering exchanges between neighbour states.

This is not to suggest that the situation cannot be ameliorated. On the contrary, arctic coastal states would benefit by maintaining an ongoing, wide-ranging dialogue with a view to harmonizing their values and perceptions, and to devising appropriate strategies for dealing collectively and effectively with common problems in the offshore.

Marine scientific research represents one field of endeavour that would no doubt benefit from a greater spirit of openness and cooperation in the Arctic: the outcome of such a collaborative activity would substantially increase our understanding of the region, and would contribute towards the establishment of a solid foundation for decisions that affected the social, economic, and environmental wellbeing of northern societies. With the upcoming International Polar Year relying heavily on multinational scientific cooperation, we are entering a propitious era for capitalizing and acting upon our common interests in the Arctic; the IPY could be a very effective springboard for launching a spate of ideas and activities that validated the concept of the Borderless North.

Acknowledgements and disclaimer

The ideas presented in this paper have developed during numerous discussions with knowledgeable colleagues and associates, and their contributions are hereby acknowledged. Errors of fact or interpretation, however, are the author's alone. The opinions presented here do not represent the views of any government or organization.

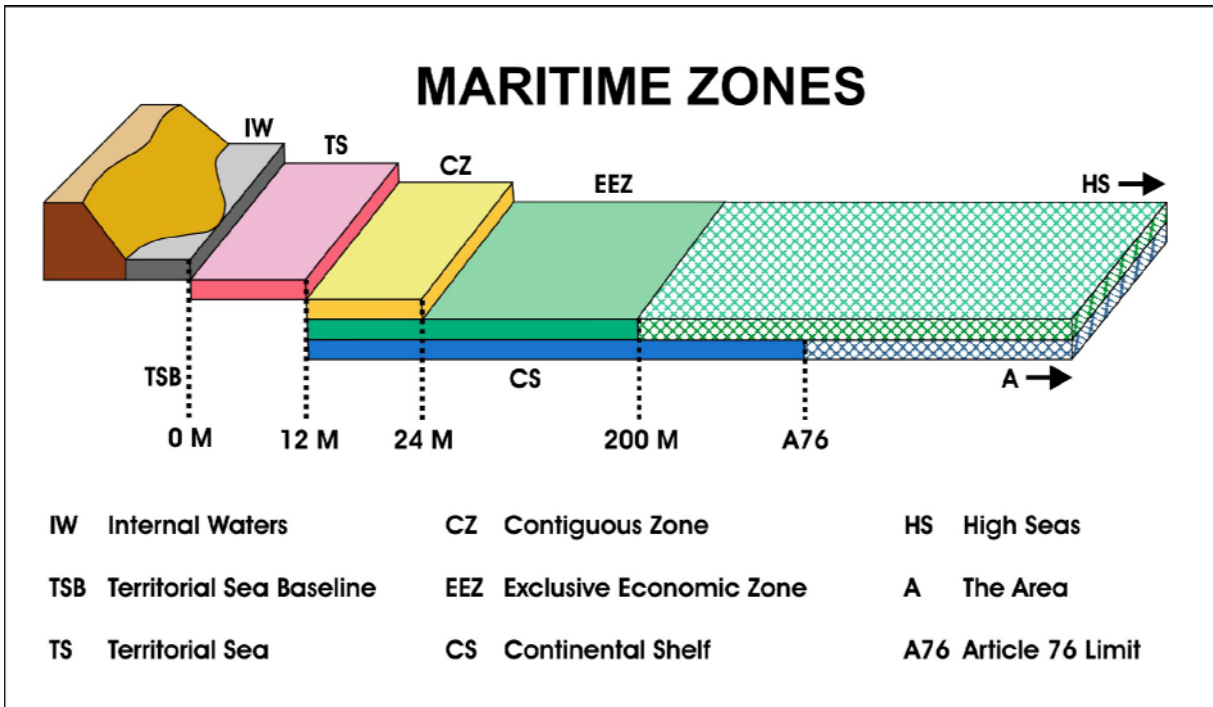


Figure 1. Diagrammatic representation of the seaward extents and overlaps of the maritime zones where a coastal state may exercise a range of sovereign rights and authorities. Table A summarizes the rights of the coastal and other states throughout these zones. (adapted from an illustration posted on the website of Geoscience Australia)

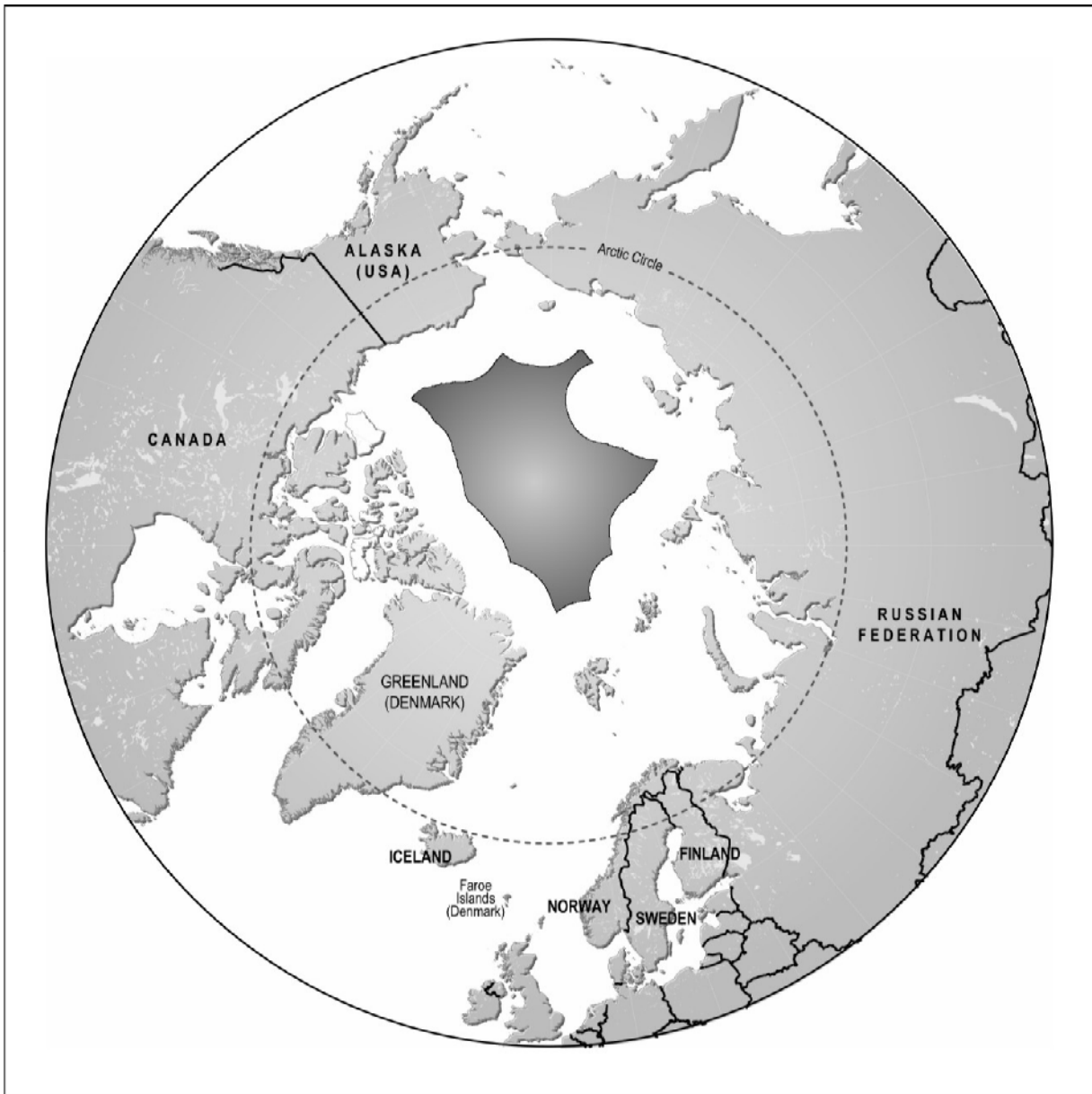


Figure 2. Map of northern land boundaries, illustrating how the border between Canada and the USA, and the border between Norway and the Russian Federation, extend to the coast of the Arctic Ocean. The dark grey area in the centre of the Arctic Ocean is a High Seas enclave surrounded by the cumulative Exclusive Economic Zones of the five Arctic coastal states. (adapted from an illustration posted on the website of GRID-Arendal)

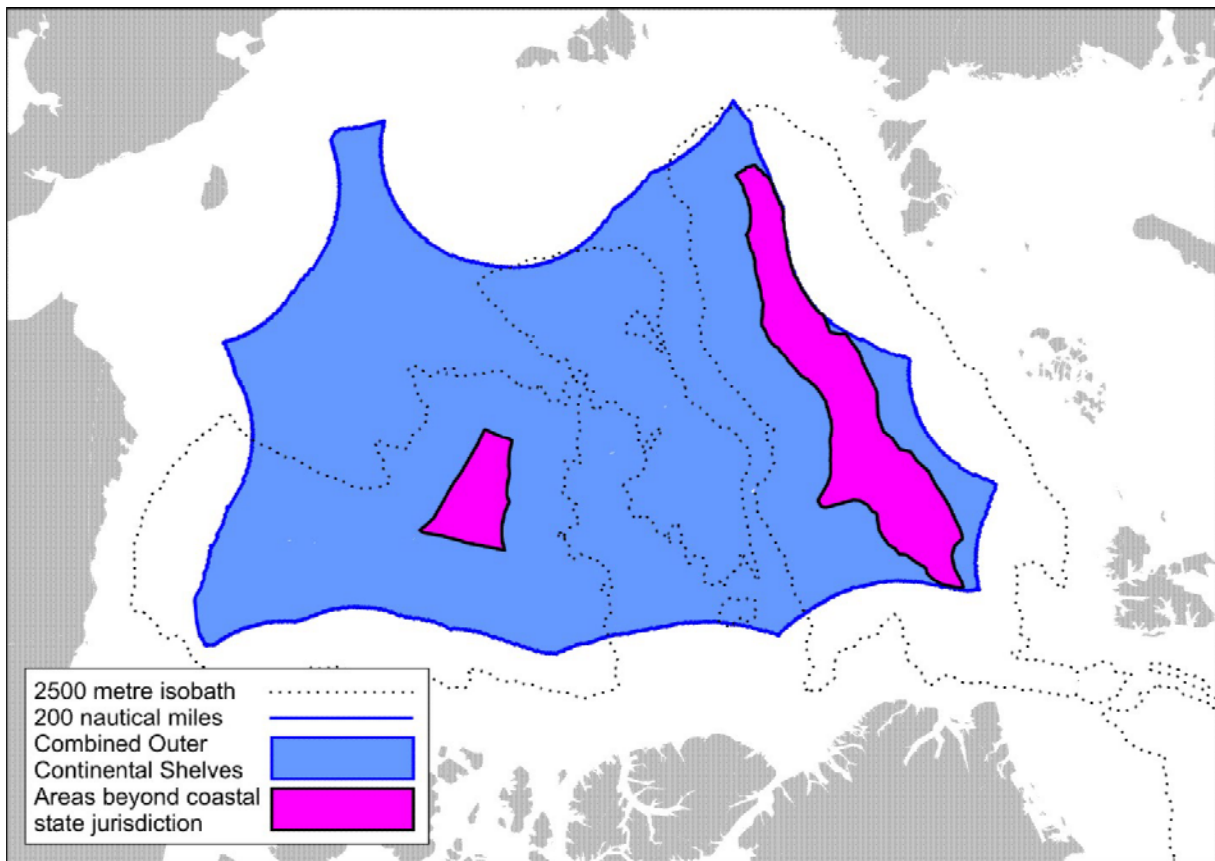


Figure 3. Map illustrating the potential extent of the cumulative Outer Continental Shelves (shown in blue) of the five coastal states that surround the Arctic Ocean, and which will be entitled to exercise certain sovereign rights according to the provisions of Article 76 of UNCLOS. Also illustrated are zones (shown in magenta) that do not meet the criteria of Article 76 and which therefore cannot be included within the Outer Continental Shelves; they form instead a part of the Area, which is managed by the International Seabed Authority and where seabed resources are treated as the ‘common heritage of mankind.’

TABLE A: MARITIME ZONES AND SUMMARY OF COASTAL STATE RIGHTS

Maritime Zone	Distance from TSB	Summary of Coastal State Rights	Levels of State Rights
Internal Waters	N/A	Comparable to sovereignty on land	Coastal State
Territorial Sea	12	As for Internal Waters, but granting innocent passage to vessels of other states	
Contiguous Zone	24	As for EEZ, plus laws pertaining to customs, fiscal, immigration, or sanitary matters	
Exclusive Economic Zone	200	Resource ownership; structures on the seabed; scientific research; environmental preservation	
Continental Shelf	>200	Jurisdiction over non-living resources on and beneath the seabed	
High Seas	N/A	Freedom of the High Seas	Other States
Area	N/A	Mineral rights managed by International Seabed Authority	