These strengths of the law of the sea framework need to be balanced against several weaknesses, which include the following.

- The Article 76 processes for continental shelf delineation through the Commission on the Limits of the Continental Shelf are slow due to the unexpectedly large number of submissions that have been received. This means that late comers to the process, such as Canada, Denmark, and possibly the United States, may be waiting a decade or more for their claims to be assessed, resulting in ongoing uncertainty as to the ultimate extent of continental shelf claims in the Arctic Ocean.
- The Article 234 provisions will only provide for enhanced marine environmental protection measures for Arctic coastal states for as long as Arctic Ocean EEZ waters are ice-covered for half a year plus one day, after which the ongoing application of pre-existing measures would be legally dubious, meaning that Canada and the Russian Federation may need to reassess some of their Arctic marine environmental protection laws.
- As the Arctic Ocean becomes more accessible to international shipping, freedom of navigation for the ships of all states will need to be recognized through those areas that are incontrovertibly EEZ or high seas. This phenomenon—known as ''trans-Arctic shipping''—may in turn lead to new strategic rivalries between Arctic and non-Arctic states over the freedom of navigation in the Arctic.
- UNCLOS has very limited capacity to provide for the management and protection of Arctic wildlife, especially threatened species. For example, Articles 65 and 120 create a very broad overarching framework for marine mammal management, which arguably defers to the International Whaling Commission.
- Finally, and of particular significance in the Arctic, the law of the sea gives little recognition to the rights of indigenous peoples.

In conclusion, it can be observed that the Ilulissat Declaration is clearly stated to be an instrument that applies to the Arctic Ocean. By implication it does not purport to apply to those waterways not within the bounds of the Arctic Ocean, which would include internal waters including waters on the landward side of straight baselines such as the waters of the Northwest Passage. However, perhaps the most obvious weakness of the law of the sea as an Arctic legal framework is that it only applies to the marine Arctic. It lacks a terrestrial application and thus is not capable of ultimately providing a legal framework for Arctic governance as a whole.

Offshore Oil and Gas Development in the Arctic: What the Arctic Council and International Law Can—and Cannot—Do

By Betsy Baker[*]

My topic is offshore oil and gas development in the Arctic, examined through two lenses:

- The work of the Arctic Council; and
- The international instruments applicable to offshore oil and gas activity.

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I begin with a reminder that two ASIL interest groups are sponsoring this panel: International Environmental Law, and Rights of Indigenous Peoples. We have heard very little this morning about the rights of the indigenous peoples who have lived in the Arctic for millennia. I am struck by how frequently panels in which I participate relegate this topic to an ''add-on.'' This occurs in part because I often speak about the international law of the sea, or about offshore oil and gas resources, a sector in which indigenous rights fall largely under the domestic legal regimes of each of the Arctic countries. This places the issue largely, but not entirely, in the realm of comparative rather than international law.

A question Don Rothwell posed as we planned our panel is pertinent here: ''In which direction is the Arctic Council taking the legal regime of the Arctic?''

The Arctic Council is the one forum in international law that places representatives of indigenous peoples at the same table with states, albeit without the vote that the states have. As you have learned by now, the Arctic Council is a forum for the eight Arctic states and the Permanent Participants to discuss ''common arctic issues'' (art. 1) . . . ''requiring circumpolar cooperation (preamble),'' . . . ''in particular issues of environmental protection and sustainable development,'' (art 1), and excluding matters of security. The category of Permanent Participants was ''created'' explicitly, per the terms of the 1996 Ottawa Declaration establishing the Council, to ''provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.'' The six Permanent Participants are the Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North (Raipon)—currently receiving heightened and unfavorable attention from the Russian government—and the Saami Council. This composition of states and indigenous peoples at the same table is unique in multilateral fora.

The Arctic Council is neither an international organization nor a formal legal regime. Arctic states took great care at the Arctic Council's inception to make clear that it did not have legal personality. Today, on the verge of admitting a greater number of observers at the Kiruna Ministerial in May 2013, it is taking great care to establish rules for observer status that look quite familiar to those of us who teach international organizations law. Under the rules for observer status adopted at the last Ministerial, in Nuuk, Greenland in 2011, the role of observers is limited largely to working group participation and financial contributions to projects (not to exceed member contributions). Notable for our purposes today is the new requirement that observers ''respect the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants.''

How might this requirement play out in future Arctic Council activity regarding offshore oil and gas? What the Arctic Council has already accomplished in this arena can be considered quiet but significant outcomes of its working groups, including Arctic Monitoring and Assessment (AMAP) and Protection of the Arctic Marine Environment (PAME).

The 2007 AMAP Oil and Gas Assessment identifies as the bases for Arctic offshore oil and gas activity the precautionary approach, polluter pays, and three kinds of assessments: environmental, strategic, and risk assessments. Similarly, the 2009 PAME Arctic Offshore Oil and Gas Guidelines provide in Section 1.3 that such activity ''should be based'' on four ''Guiding Principles'': (1) the precautionary approach; (2) polluter pays, as reflected in Principles 15 and 16 of the Rio Declaration; (3) continuous improvement; and (4) sustainable development. The PAME Guidelines are non-binding but negotiated word by word, which is why the following excerpt is interesting in the context of relating indigenous rights to offshore development.

In discussing environmental impact assessment, Article 3.6 of the Guidelines says that states:

> should consult and cooperate with the indigenous peoples concerned through their own representative institutions in order to understand and integrate their needs and concerns with any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, such as oil and gas.

The language quoted parallels Article 32 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). This language did not appear in the 2002 version of the Guidelines, so the negotiators inserted it with intent. People familiar with UNDRIP will note, however, that this rephrasing excludes the Declaration's specific reference to prior informed consent. Where the Declaration says ''shall consult and cooperate,'' the Guidelines say ''should.'' Where the UNDRIP says consult ''in order to obtain their free and informed consent prior to the approval of'' any project, the Guidelines say ''in order to understand and integrate their needs and concerns with'' any project affecting their lands or resources. Although the Guidelines water down the UNDRIP language, they nonetheless provide a clear, if inexplicit, reference with the potential for development down the road.

As a co-panelist mentioned, since 2010 two Arctic Council Ministerial Task Forces have served as negotiating forums for separate binding agreements relevant to offshore oil and gas activity, although neither is an Arctic Council instrument. The 2011 Arctic Search and Rescue Agreement (Arctic SAR) is relevant to improving infrastructure and coordination for response to all incidents at sea (and in the air) broadly, but not to offshore oil and gas activity per se. The ''Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic,'' negotiated by a task force of the same name, is anticipated for signature at Kiruna.

Let me turn briefly to international instruments relevant to offshore oil and gas development in the Arctic. Lucien Chabason identifies two main gaps in the current structure of international laws relevant to offshore oil and gas development: (1) no ''upstream'' agreement exists regarding authorization and monitoring of offshore exploration and exploitation activity, because coastal states have primary jurisdiction; and (2) no ''downstream'' agreement exists on responsibility and liability for industrial offshore oil and gas activity by, e.g., Mobile Offshore Drilling Units (MODUs) when on station (vs. tanker transport of oil, which does have an effective regime). Past efforts have failed.[1]

What are some of the obstacles to filling these gaps? The International Maritime Organization (IMO) is the competent organization in this arena under the UN Convention on the Law of the Sea. However, the IMO regulates vessels in transit, not drilling platforms on station. Under Article 235(2) of the LOS Convention, individual states must ensure ''prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.'' The Montara and Deepwater Horizon incidents drew attention, if only indirectly, to the fact that international law does not adequately address liability for damage from mobile installations in the way the two International Conventions for Oil Pollution Damage (on Civil Liability, and on Establishment of a Fund for Compensation, respectively) have regarding oil spills from vessels.

[1] Lucien Chabason, *Offshore Oil Exploitation: A New Frontier for International Environmental Law* (Institute for Sustainable Development and International Relations (IDDRI), Working Paper No. 11, 2011).

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The IMO Legal Committee has observed that Articles 198, 208, and 235 of the LOS Convention ''do not, in themselves, establish an existing international liability and compensation regime, but rather impose a legal obligation on States to establish such a regime or regimes.''[2] In 2012 that committee declined to extend to offshore installations the coverage of Strategic Direction 7.2, under which the IMO focuses on mitigating and responding to environmental impacts of shipping incidents and operational pollution from ships. It chose rather to develop guidance for states interested in bilateral or regional responses to liability and compensation issues related to transboundary pollution damage from offshore exploration and exploitation activities.[3] One regional avenue could be to examine how approaches to liability and financial requirements affect safety culture of the companies conducting offshore activity in the Arctic.

Articles 208 and 214 of the LOS Convention offer a way to bridge gaps created by the fact that individual states regulate industrial activity in their offshore areas. Regarding offshore artificial islands, installations, and structures under their jurisdiction, Article 208 says that coastal states shall adopt laws, regulations, and measures that ''shall be no less effective than international rules, standards and recommended practices and procedures''; they shall endeavor to harmonize their policies as appropriate; and they ''shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment'' from such fixtures. Under Article 214 coastal states shall enforce their own measures adopted according to Article 208, and act to ''implement applicable international rules and standards established through competent international organizations or diplomatic conference'' relevant to such pollution ''arising from or in connection with seabed activities subject to their jurisdiction'' and from such fixtures under their jurisdiction. While the dearth of binding international rules for mobile offshore facilities gives coastal states little against which to measure national measures adopted under Article 208 and enforced under Article 214, adopting regional measures could help fill that void.

OSPAR, the Convention for the Protection of the Marine Environment of the North-East Atlantic, is a robust regional convention with Arctic initiatives, an offshore industries strategy, and a well-coordinated Joint Assessment Monitoring Program (JAMP) for assessing the marine environment. It is the only international instrument that applies explicitly to offshore installations used to explore for or exploit hydrocarbons.[4] OSPAR's Region 1, Arctic Waters, includes a sector of the Arctic Ocean. OSPAR's 15 members include all five Nordic members of the Arctic Council, but not Canada, Russia, or the United States. The Arctic Council's AMAP Working Group is one of OSPAR's sixteen intergovernmental observers; the IMO is another and maintains a Memorandum of Understanding with OSPAR. The PAME and the Conservation of Arctic Flora and Fauna (CAFF) Working Groups are not observers but are considered relevant to OSPAR's oil and gas initiatives and JAMP, respectively.

These interlocking interests combine to suggest at least a model character for some OSPAR measures relevant to offshore oil and gas activity in the Arctic. Indeed, the PAME Guidelines describe without attribution OSPAR measures (e.g., on flaring or produced water) as worthy of consideration by all Arctic states, and point explicitly to an OSPAR protocol on testing of chemicals used in offshore oil and gas activity. OSPAR's 2010 North-East Atlantic

[2] IMO Legal Comm., *Information Relating to Liability and Compensation for Oil Pollution Damage Resulting from Offshore Oil Exploration and Exploitation,* 98th Sess., Agenda Item 13, Doc. No. LEG 98/13 (Feb. 18, 2011).

[3] IMO Legal Comm., *Report of the Legal Committee on the Work of Its Ninety-Ninth Session,* Agenda Item 14, Doc. No. LEG 99/14, §13, at 23–28 (Apr. 24, 2012).

[4] Art. 1(g), (j)–(m).

Environment Strategy promotes coordination with the Arctic Council. By its terms, if not in practice, contracting parties are to assess the suitability of existing measures to manage oil and gas activities in Region 1, and offer to contribute to PAME's related work. Contracting parties participating in other forums, e.g., the Arctic Council, the London Convention and Protocol, and the European Community, will endeavor to ensure that initiatives relevant to the work of OSPAR's Offshore Industry Committee (OIC) developed within those forums are compatible with any OSPAR programs and measures.[5] The OIC implements the Offshore Industry Strategy (OIS),[6] whose Strategic Directions include coordinated regional information collection, environmental monitoring, and assessment; progressively developing best available technologies and best environmental practices; promoting information- and experience-sharing between contracting parties; and maintaining an offshore hydrocarbon installation inventory. These are just some examples of potential venues for cooperation with non-OSPAR Arctic Council states on offshore hydrocarbon activity.

The work of the Arctic Council is not to regulate, but rather to conduct research, convene discussions, and offer guidance on issues important to the Arctic environment and sustainable development in the region. The Council has no power to issue or enforce any shared international standards for Arctic offshore oil and gas activity that might be developed as recommended by, e.g., the Final Report of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011.[7] However, the Council can encourage and contribute to discussions between national regulators, industry, and other stakeholders to improve how offshore oil and gas activity will be conducted in the Arctic. The outcomes of the Kiruna Ministerial in May 2013, including the Arctic Ocean Review,[8] a survey of international instruments relevant to the Arctic Ocean, will provide clearer indications of just how the Arctic Council intends to move in this direction.

[5] Section 5.1.

[6] The North-East Atlantic Environment Strategy, Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020 (OSPAR Agreement 2010-3), Part 2.2 of Offshore Strategic Objectives, http://www.ospar.org/html_documents/ospar/html/10-03e_nea_environment_strategy.pdf.

[7] The United States should ''[l]ead in the development and adoption of shared international standards, particularly in the Gulf of Mexico and the Arctic.'' Recommendations, at 6.

[8] http://www.arctic-council.org/index.php/en/environment-and-people/oceans/arctic-ocean-review/156-aor.