Canada’s Submission to the Commission
on the Limits of the Continental Shelf and
the Legal Protections for Inuit Rights to the Arctic Ocean

Paper commissioned by Senator Charlie Watt

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Table of Contents

I. Introduction .................................................................................................................................................. 2
II. Inuit Nunaat .................................................................................................................................................. 3
III. State Sovereignty over the Continental Shelf under UNCLOS ............................................................ 7
IV. Canada’s Partial Submission for the Atlantic continental shelf and its Arctic Ocean plans ............. 11
V. Canada’s claims must respect Inuit rights to the Ocean ......................................................................... 13
   A. Territory cannot be acquired by force or without consent .................................................................... 14
   B. Respect for the rights of Indigenous peoples ......................................................................................... 15
      i. Treaties made in recognition of Inuit rights ....................................................................................... 15
      ii. Rights to land and ocean based territory ......................................................................................... 16
      iii. Resource rights ................................................................................................................................. 18
      iv. Free, prior and informed consent ..................................................................................................... 20
   C. Canada cannot acquire territories and resources that Inuit have rights over without consent ........... 21
VI. Moving Ahead: Consultation, Courts and and Win-Win Solutions ...................................................... 22
I. Introduction

This paper, commissioned by Senator Charlie Watt, focuses on Inuit rights to the Arctic Ocean, in areas that are part of the Inuit homeland, called Inuit Nunaat, including the rights to the natural resources contained in the seabed. The rights of Inuit have been largely ignored by Canada and the other Arctic coastal States as they attempt to establish their sovereignty over large portions of the Arctic Ocean seabed through the law of the sea and the process set up under the United Nations Convention on the Law of the Sea (UNCLOS).¹ The “scramble for the Arctic”, as it is sometimes called, is motivated by the Arctic States’ desire to control and benefit from the vast deposits of oil, gas and other natural resources found within the seabed of the Arctic Ocean.

What cannot be forgotten is that Inuit have rights to the Arctic Ocean. In some areas of Inuit Nunnat, Inuit have title or sovereignty over the Arctic Ocean ice, waters and resources, which include governance and decision-making rights, as well as the right to the natural resources within these areas. Other areas of Inuit Nunnat are governed by Treaties between Inuit and Canada, which cover large portions of the Canadian north. These create an on-going Treaty-relationship between Inuit and Canada and set up co-management regimes for these areas. All of this requires Canada to ensure that Inuit rights are respected, meaningfully engage with Inuit and guarantee that Inuit have a voice in decisions that affect their Arctic homeland.

The Arctic Ocean seabed has enormous oil and natural gas deposits. Once thought too remote to even contemplate accessing, the changing climate in the Arctic and technological advancements have made it possible extract some of the Arctic Ocean’s natural resource wealth. The entire Arctic covers only 6% of the Earth’s surface, but is thought to contain immense amounts of undiscovered but recoverable oil and natural gas resources.² It is estimated that 84% of the undiscovered oil and gas occurs offshore on the continental shelf, and the total undiscovered oil and gas resources are estimated to be about 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids.³

Canada, Russia, Denmark (Greenland), United States (Alaska), and Norway, known as the five Arctic coastal States, would like to control as many of these resources as possible. They have agreed to use the law of the sea as the primary legal framework to determine who has

³ Ibid.
sovereignty over Arctic seabed and the natural resources it contains. As Canada, Russia, Denmark, and Norway have signed on to UNCLOS, they will use the system it has created to validate their claims. In particular, this involves submitting information to the Commission on the Limits of the Continental Shelf (the Commission) within 10 years of ratifying UNCLOS, to ensure that each State’s claim to the continental shelf meets the UNCLOS rules. The United States has not signed UNCLOS, but is following a similar system of rules under the law of the sea.

Canada’s first step in seeking international recognition of its claim from the Commission occurred on December 6, 2013, when Canada transmitted its “Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Atlantic Ocean” (the Partial Submission). The Partial Submission, which covers only the Atlantic Ocean continental shelf claim, along with comments made by of government officials regarding the pending Arctic Ocean submission indicate that Canada will be seeking to have the Commission confirm Canada’s sovereignty over large portions of the seabed that is already included within Inuit Nunaat.

II. Inuit Nunaat

Inuit Nunaat reaches across the Arctic, moving east from the coastal regions of Chukotka, Russia, to Alaska, within the United States (US), covering most of northern Canada and all of Greenland. Inuit Nunaat covers not only the lands within this area, but also large portions of the Arctic Ocean and some northern portions of the Atlantic Ocean. At least until recently, the Arctic Ocean within Inuit Nunaat has been largely covered by ice for most, if not all, of the year. This has made it possible for Inuit to live on and use the frozen ocean waters as part of their territory. Unlike anywhere else in the world, these portions of the ocean have supported human populations and are a vital part of the Arctic Indigenous peoples’ homelands. As Inuit state in the Circumpolar Inuit Declaration:

From time immemorial, Inuit have been living in the Arctic. Our home in the circumpolar world, Inuit Nunaat, stretches from Greenland to Canada, Alaska and the coastal regions

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of Chukotka, Russia. Our use and occupation of Arctic lands and waters pre-dates recorded history.\textsuperscript{6}

Portions of Inuit Nunaat are covered by Treaties between Canada and Inuit. As expanded upon below, Canada and Inuit have made a series of Treaties that cover most of northern Canada. In entering these Treaties, Canada recognized that Inuit had rights to the Arctic lands and waters covered by the Treaties. The Treaties established a Treaty partnership between Canada and Inuit that has the potential to be mutually beneficial. For Canada, the Treaties solidified Canada’s sovereignty over these portions of the Arctic relative to the other Arctic States, by basing its sovereignty on Inuit’s historic use and occupation of these areas of their homeland. The Treaties also protect many Inuit rights within the Treaty territories, including various governance rights. The Treaties are agreements that ensure that Canada and Inuit both have a role to play in the governance of the Canadian Arctic. As a result, Canada should be engaging in in-depth consultations with its Inuit Treaty partners over its claims to the Arctic Ocean seabed within the Treaty areas.

Inuit also have rights to portions of the Arctic Ocean that are outside of the Arctic coastal States’ sovereignty. There are portions of the Arctic Ocean that lie beyond the territorial boundaries of Canada, the United States, Russia and Greenland but are completely within Inuit Nunaat. These rights arise from Inuit use and occupancy of the sea ice as part of their territory as well as their reliance on the resources within the Arctic Ocean. International law provides support for Inuit having jurisdiction over these areas of the Arctic Ocean, as well as rights to the resources within this area.

This paper focuses on areas of the Arctic Ocean seabed and the resources within those areas that Canada is claiming under UNCLOS which are already part of Inuit Nunaat but have not been included in any Treaty with Inuit. This paper describes how the rules developed by States within the 20\textsuperscript{th} century and codified in UNCLOS in 1982 now allow coastal States to claim sovereignty over the adjacent continental shelf, giving the State the rights to the seabed floor resources within this area. These new areas of State sovereignty overlap with portions of Inuit Nunaat. As posited in this paper, Canada and the other coastal States cannot use the technical UNCLOS process, which focuses almost exclusively on the geography of the seabed, as an excuse to ignore Inuit rights to these areas of the Arctic.

Canada’s recent statements have made it very clear that it wants as much of the Arctic Ocean seabed as possible under its sovereign jurisdiction, including the seabed at the North Pole. The Arctic coastal states are vying for sovereignty over the largest possible portion of the continental shelf because, under UNCLOS, sovereignty gives the State the right to explore and exploit the natural resources of its extended continental shelf. Under UNCLOS, the rights to the continental shelf are considered exclusive rights, in that no other State or entity may access the continental shelf resources or explore the area without the consent of the State. Even if the State does not explore or exploit the resources of its continental shelf, it does not lose its sovereignty over this area. Gaining exclusive control to the large oil and gas deposits of the Arctic Ocean is driving the Arctic coastal States to have their sovereignty over their continental shelves recognized.

As will be expanded on in this paper, the concept that States could own or have sovereignty over the resources within the seabed is a relatively new one. Up to the post-World War II era, most of the world’s oceans were seen as open access resources, not belonging to any one State. Until that time, States displayed little interest in trying to establish ownership of the resources in the seabed floor for the simple reason that the ability to explore or extract resources from the bottom of the ocean did not exist. However, within the last 65 years, technology has been developed that now makes it possible to identify resource rich areas in the Ocean and allows for the extraction of oil, gas and other natural resources that are contained within the Ocean floor. As the capacity to access these resources grew, so did States’ interest in controlling these areas and owning the resources. They therefore developed the international law around these resources, so that a coastal State could claim sovereignty, or ownership, over the seabed of portions of the continental shelf adjacent to their coasts. This provided States with the right to control the exploration and extraction of the resources within these areas. These rules became part of the 1982 UN Convention of the Law of the Sea (UNCLOS). Under UNCLOS, the continental shelf of a coastal State is considered to automatically be part of the coastal State’s territory.

The “automatic” expansion of a State’s sovereignty into the Arctic Ocean might be unproblematic if the Arctic Ocean was truly a res nullius, an area owned by no one. But this is not the case – large areas of the Arctic Ocean already fall within Inuit Nunaat. UNCLOS is itself silent on Indigenous peoples’ rights, but this does not give Canada and the other Arctic coastal States permission to act as if Inuit rights to the Arctic Ocean do not exist. In fact, the law of the

7 UNCLOS, supra.
8 Ibid., at art. 77(2).
9 UNCLOS, supra, at arts. 76 and 77.
sea and UNCLOS make up only one of several international legal frameworks that apply to the Arctic. Just as important as the law of the sea in the Arctic are:

1) the norms that prevent states from claiming sovereignty over an area already within another’s territory without consent; and

2) the international recognition and protection for the rights of indigenous peoples.

Taken together, these laws prohibit Canada and any other State from ignoring Indigenous peoples’ territorial and resources rights within the Arctic Ocean or from surreptitiously trying to take their territories through a highly technical process that does not have protections for Indigenous peoples in place. Inuit may have recourse to the courts of Canada if their rights are not respected and if Canada continues to exclude them from decision-making processes that affect their rights.

Canada has not acknowledged that it is prohibited from claiming sovereignty over areas of Inuit Nunaat that are not covered by Treaties with Inuit or that it must consult with its Treaty partners in regards to its claims to areas where Inuit hold Treaty rights. Its Partial Submission to the Commission makes no mention of Inuit rights to the areas of the Atlantic Ocean that it claims are within its sovereignty. The Partial Submission completely ignores that the area Canada claims in the north Atlantic overlaps with an existing treaty area that protect Inuit rights to the seabed and potentially with areas of the Arctic Ocean that are not the subject of Treaties and are still fully within Inuit jurisdiction. It would not be surprising if it intends to take the same approach to its claim to the continental shelf in the Arctic Ocean.

Canada must respect that portions of the Arctic Ocean are part of Inuit Nunaat. This requires Canada to obtain the free, prior and informed consent of Inuit before claiming areas of the Arctic Ocean over which Inuit hold title or rights. Canada must consult with its Inuit Treaty partners in regards to any changes to the status of the seabed within the Treaty areas of Inuit Nunaat. In addition, international law requires that Canada refrain from claiming those portions of the continental shelf that are within non-Treaty areas of Inuit Nunaat without the consent of Inuit. Prior to claiming sovereignty over these portions of the continental shelf, it must seek the consent of Inuit, perhaps through the negotiation of a Treaty. Where Canada has claimed areas of the continental shelf covered by Inuit peoples’ rights without their consent, it has failed in its international obligations.

Ironically, Canada stands to benefit a great deal by working with Inuit and seeking their consent to its continental shelf claims. This is because the same process that allows Canada to automatically extend its sovereignty over the continental shelf allows the other coastal States to do the same. As a result, there are overlaps in the areas claimed by Canada and the other
coastal States. As explained below, Canada’s Partial Submission identifies several areas where it is claiming the same portion of the Atlantic continental shelf as another coastal State. It is anticipated that there will be large areas of overlap in the Arctic, not the least of which is the area around the North Pole. Many of these overlaps include areas thought to contain vast deposits of natural resources. If rather than pretend that Inuit rights do not exist, Canada instead works in partnership with Inuit, in order to use Inuit rights as a foundation for its claim to sovereignty in the Arctic, its claims relative to other States would be strengthened.

III. State Sovereignty over the Continental Shelf under UNCLOS

UNCLOS creates a situation whereby a coastal State is able to automatically extend its sovereignty over its continental shelf. Article 77 provides that “[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”\(^\text{10}\) In other words, under UNCLOS, a State does not have to do anything to secure its sovereignty over the continental shelf. This is what Canada is referring to in its Partial Submission when it states that “the rights of a coastal state over its continental shelf exist ipso facto and ab initio.”\(^\text{11}\) However, a State only has sovereignty over the areas of the continental shelf that meet the complex definition contained in UNCLOS Article 76.

In order to ensure that a State exercises sovereignty only over its continental shelf and not beyond that area, it must submit its claim to the Commission. Each State that has joined UNCLOS has 10 years as of the ratification to submit its claim for the continental shelf to the Commission.\(^\text{12}\) The Commission does not declare whether or not the State has sovereignty over its continental shelf, but it does verify if the coastal State’s claim is in conformity with the technical requirement of UNCLOS. Norway submitted its claim in 2006 and Russia is preparing to resubmit its claim to follow the recommendations made to it by the Commission with regard to its original submission in 2001.\(^\text{13}\) Denmark is slated to make its submission in 2014. The United States cannot make a submission to the Commission, as it is not currently a signatory to UNCLOS, but it is nevertheless collecting data on the extent of its continental shelf.\(^\text{14}\)

The Commission reviews the claim from an independent stand point to validate that the boundaries drawn by the coastal State conform to the requirements of UNCLOS. If the State is

\(^{10}\) UNCLOS, supra, at art. 77.

\(^{11}\) Partial Submission, supra, at 3.

\(^{12}\) UNCLOS, supra, Annex II, at art. 4


\(^{14}\) U.S. Extended Continental Shelf Task Force, “Extended Continental Shelf Project”, available online at: http://continentalshelf.gov/about.html
found to have misinterpreted UNCLOS or included more area of the seabed than UNCLOS allows, the Commission will provide the State with recommendations and the State will be able to revise its submission. Russia has already experienced this with its claim to the continental shelf in the Arctic. This occurred in 2002, when after an extensive review of Russia’s 2001 submission, the Commission asked Russia to revise its claim and provided it with a series of recommendations to aid it bringing its submission in line with the requirements of UNCLOS.¹⁵

The automatic extension of coastal States’ sovereignty from their coast on to the ocean floor is premised on the idea that the seabed floor and the ocean above it, at least past 12M off shore, is owned by no one else. For hundreds of years, international law did not recognize that any State could own a portion of the ocean. In large part, this was for the practical reason that States could not control the waters of the Oceans and seas in the same way that they exerted jurisdiction over lands. From the 17th to 19th century, international law was largely based upon the Western world view and the practice of European States. Prior to the 20th century, it would have been very difficult for any of the western states to exercise sovereignty over the Oceans. Not only did the vast (and watery) oceans lack permanent populations who would swear allegiance to a sovereign State, it would have been nearly impossible for a State to exclude all others from its claimed portion of the Ocean – a condition of sovereignty.¹⁶ That there were peoples who lived on the frozen Arctic Ocean was likely not considered by the western theorists and certainly did not influence the development of the law of the seas in its early days.

Instead, the foundational principle of the law of the sea became that the waters of the seas and oceans were open to all States.¹⁷ This was known as *mare librum*, which means “freedom of the seas”. This principle facilitated trade, exploration and exploitation of resources. The high seas were seen as being open to ships from all corners of the world, and no State was permitted to prevent a ship from navigating across the open sea. The resources of the sea were also open to everyone – for hundreds of years, the most important of these were fish and other natural resources. The only exception to this was the small band of water surrounding coastal states, which provided a buffer between the high seas and a State’s land based territory. Known as the territorial sea, this band was considered to be fully under the sovereignty of a

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The size of the territorial sea has increased over time, first to a distance of 3 nautical miles (M) from shore – the range of a cannon shot, to 12 M in the 20\textsuperscript{th} century.\textsuperscript{18}

Eventually, the competition for resources in off-shore areas and conservation concerns led coastal States to exert sovereign claims over the natural resources within the waters and seabed over larger and larger areas. The concept of coastal states having exclusive access to the natural resources in their off-shore waters began in the 1940s and was termed the Exclusive Economic Zone (EEZ) in the 1970s.\textsuperscript{19} Today, UNCLOS recognizes that a State’s EEZ extends over 200 M from its coast.\textsuperscript{20}

As knowledge of the oil, gas and other natural resources contained in the seabed grew and the technology to extract those resources developed, so did States’ interest in controlling and benefiting from these resources. The turning point came in 1945, when President Truman proclaimed that the resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States were under the United States’ jurisdiction and control.\textsuperscript{21} This in turn led others to do the same. As more and more States began to claim sovereignty over their continental shelves, a major international effort was launched to set down the rules that would apply to the Oceans.\textsuperscript{22} The result was UNCLOS.

As a summary, under UNCLOS and the law of the sea, States have the following rights to the seabed:

- Sovereignty over the natural resources within the waters and seabed within 200 M from the coast.\textsuperscript{23} This area is known as the **Exclusive Economic Zone (EEZ)**. This does not include sovereignty over the water itself. Other States can also use this area, for instance, ships may pass through the EEZ without having to request permission of the State.

- Sovereignty over the seabed and subsoil of the **continental shelf**, which extends from the State’s coast to the point where the continental shelf dips into the deep ocean floor, which a State may calculate as either 350 M from the coast or 100 M from the point


\textsuperscript{20} UNCLOS, *supra*, at art. 57.

\textsuperscript{21} “150 - Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf”, available online at: [http://www.presidency.ucsb.edu/ws/?pid=12332](http://www.presidency.ucsb.edu/ws/?pid=12332)


\textsuperscript{23} UNCLOS, *supra*, at art. 57.
where the depth of the water reaches 2,500 metres. Should the limit of the continental shelf be less than 200 M from the coast, under UNCLOS it is assumed to extend to a distance of 200 M. A State has the right to explore and exploit the non-living resources of the seabed and subsoil of its continental shelf. The State does not have sovereignty over the water or the natural resources within the water above the continental shelf, as past 200 M from the coast, these are the high seas, which are not owed by any one State.

It is important to note that UNCLOS does not once reference Indigenous peoples and does not provide any express safeguards to protect their rights. UNCLOS’s silence on the rights of Indigenous peoples should not be taken as an intentional decision to override Indigenous peoples’ rights in these areas. When the United Nations conferences that led to UNCLOS were convened, starting in the 1950s and continuing into the 1970s, Indigenous rights were not well developed in international law. Instead, Indigenous peoples’ issues were either addressed through the decolonization movement and the growing human rights protections for minorities, or were marginalized by the colonizing States. Internationally, Indigenous peoples’ rights began to gain international attention after the UNCLOS was already drafted. UNCLOS was adopted in 1982, the same year that the United Nations Working Group on Indigenous populations was created, the body that become the focal point of the international Indigenous rights movement.

The lack of any express recognition of Indigenous peoples’ rights should not be taken by States as permission to ignore or violate Indigenous peoples’ rights within Ocean areas. Other areas of international law step in to ensure that these rights are not violated. The same process occurs when the application of UNCLOS rules leads two coastal States to claim the same territory. UNCLOS is not overly helpful when these overlaps occur. Article 76(10) specifies that using the UNCLOS technical criteria to establish the extent of a State’s continental shelf is “without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.” In addition, UNCLOS states that the “actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.” These are protections provided to States, but it does not help resolve the question of how to address overlapping claims. Further, the Secretariat of the Commission has

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24 Ibid., at art. 76(5).
25 Ibid., at art. 76(1).
27 Ibid. at 29-36, 40-52.
28 UNCLOS, supra, at art. 76(10)
29 Ibid., Annex II, at art. 9
indicated that it is not the role of the Commission to act as a dispute settlement mechanism.\textsuperscript{30} Therefore, States with overlapping claims must avail themselves of solutions outside of the UNCLOS system. The five Arctic coastal States resolved among themselves to undertake “the orderly settlement of any possible overlapping claims”.\textsuperscript{31} This has occurred, at least for the preparation of Canada’s Partial Submission, through the transmission of diplomatic notes to the United Nations Secretary-General, which is elaborated upon below.

IV. Canada’s Partial Submission for the Atlantic continental shelf and its Arctic Ocean plans

The following review of the content of Canada’s submission is based upon the information contained in the Executive Summary to the Partial Submission,\textsuperscript{32} which is the only portion of the submission that Canada has publicly released. The remainder of the submission is currently confidential.

Canada’s submission is only partial, rather than complete, because it does not include any detailed information regarding its claim to the Arctic Ocean continental shelf. The Partial Submission is focused only on Canada’s mapping of the Atlantic Ocean continental shelf. Canada writes in its Partial Submission that:

Information with respect to the limits of the continental shelf beyond 200 nautical miles in the Arctic Ocean will be submitted at a later date ... Canada reserves the right to submit information in respect of other areas or portions of continental shelf.”\textsuperscript{33}

Immediately before and after making its Partial Submission, Canada made official statements indicating that Canada would hold back on submitting its claim to the Arctic Ocean until it included information to support Canada including the continental shelf beneath the North Pole. At a press conference held on December 9, 2013 to discuss Canada’s Partial Submission, Minister Baird, Canada’s Foreign Affairs Minister, explained that the government of Canada has “asked our officials and scientists to do additional and necessary work to ensure that a submission for the full extent of the continental shelf in the Arctic includes Canada’s claim to the North Pole.”\textsuperscript{34} Prime Minister Harper, in explaining the government’s position has stated that, “[t]he view of the government, as a whole, is that at this stage we should make the

\textsuperscript{30} Note by the Secretariat at Open Meeting of CLSC, 1 May 2000, Doc. CLSC/26, 20 January 2005, para. 9
\textsuperscript{31} Ilulissat Declaration, supra.
\textsuperscript{32} Partial Submission, supra.
\textsuperscript{33} Ibid. at 3
maximum claim we can make, plausibly and with scientific evidence. Everything we have
indicates that such an approach would include the North Pole.\textsuperscript{35}

The Partial Submission does not directly indicate that Canada will claim the North Pole. In fact,
it makes almost no reference to its extended continental shelf claim in the Arctic Ocean, other
than to state that “[i]nformation with respect to the limits of the continental shelf beyond 200
nautical miles in the Arctic Ocean will be submitted at a later date”.\textsuperscript{36}

The focus of the Partial Submission is on the limits of Canada’s claim to the extended
continental shelf in the Atlantic Ocean. It explains which of various methods allowable under
UNCLOS article 76 Canada has used to measure its continental shelf. A description is provided
of each of the three regions covering the Atlantic continental shelf. In the south is the Nova
Scotia region, the Grand Banks region extends from Newfoundland and in the north is the
Labrador region. The Partial Submission contains maps of the continental shelf in each region
and provides the geographical coordinates for the boundary of the maximum extent of the
continental shelf.

The Partial Submission also references areas of overlap or potential overlap between Canada
and other coastal States’ continental shelf claims. The Partial Submission notes that in the
preparation of Canada’s submission, regular consultations took place between Canada and
Denmark, which “revealed overlaps in their respective continental shelves in the Labrador Sea.”
Canada and Denmark subsequently came to an agreement that would allow each State to
proceed with making their submission to the Commission. Canada explains that, through an
exchange of notes concluded on March 15, 2012, Canada and Denmark reached an
understanding that each State will send a diplomatic note to the Secretary General of the
United Nations when the other submits its claim to the Commission, for the purpose of
confirming that any recommendations made by the Commission will be without prejudice to
the delimitation of boundaries between the two States.\textsuperscript{37} Canada’s Partial Submission therefore
notes that the establishment of the final outer limits of the continental shelf of Canada in the
Labrador Sea region “will depend on delimitation with the kingdom of Denmark.”\textsuperscript{38}

To address potential overlap between Canada’s and the US’s continental shelf, which occurs at
the border of the two States, Canada’s Partial Submission indicates that the establishment of
Canada’s outer limits of the continental shelf in this region will also depend on the delimitation

\textsuperscript{35} Steven Chase, “‘We should make the maximum claim we can make’ Stephen Harper explains his hopes for the North”, Globe and Mail, January 18, 2014, A13.
\textsuperscript{36} Partial Submission, supra, at 3.
\textsuperscript{37} Partial Submission, supra, at 8.
\textsuperscript{38} Ibid. at 7
with the US.\textsupERS[39] These overlaps were also revealed in the regular consultations that Canada and the US undertook in the course of Canada preparing its submission. The Partial Submission states that:

Canada has been advised by the United States of America that it does not object to the consideration of Canada’s submission without prejudice to both the delineation of its own shelf and to matters relating to delimitation between Canada and the United States of America.\textsupERS[40]

Canada also addresses a potential overlap with France in relation to the islands of St. Pierre and Miquelon. Although Canada rejects potential claims that France has or may make in relation to certain areas of the continental shelf around these islands, it addresses these issues through diplomatic means. The Partial Submission refers to a diplomatic note that Canada addressed to the Secretary-General of the United Nations in 2009 rejecting such claims and reserving the right to make additional comments on a submission that France made to the Secretary-General of the United Nations concerning the same islands.\textsupERS[41]

In marked contrast to the several pages that are devoted to addressing issues of overlap with other States, the Partial Submission does not once reference Inuit rights to the northern areas of the Atlantic Ocean and the overlap with existing treaties. Yet, an examination of the areas included in the Labrador Sea region in the Partial Submission indicates that Canada is claiming sovereignty over areas off the coasts of Labrador and Nunavut. Portions of the seabed off these coasts are covered by the Labrador Inuit Land Claims Agreement. This is not acknowledged in the claim. Nor is the possibility that Inuit retain title to territorial rights in this area, outside their Treaty areas but inside Inuit Nunaat.

It can be anticipated that when Canada does submit its claim to the Arctic Ocean, it will likewise include areas of the continental shelf that are similarly included in Treaties with Inuit as well as areas that are part of non-Treaty areas of Inuit Nunaat.

V. \textbf{Canada’s claims must respect Inuit rights to the Ocean}

Canada’s ratification of UNCLOS allows it to participate in an international process to obtain validation that its continental shelf claim meets the highly technical mapping criteria that UNCLOS set out. Participation in the process does not in any way remove Canada’s obligations under international and domestic law to refrain from taking another’s territory and to respect

\textsupERS[39] Ibid.
\textsupERS[40] Ibid. at 8.
\textsupERS[41] Ibid. at 9.
and protect Indigenous peoples’ rights. As will be developed below, Canada will still be required to meet these obligations even if it uses the UNCLOS process. As a result, Canada will be required to consult with Inuit regarding their rights in the Arctic Ocean and will be prohibited from claiming any portion of the Arctic that is part of Inuit Nunaat unless Inuit have given their free, prior and informed consent to transfer these rights to Canada.

A. Territory cannot be acquired by force or without consent

The Arctic coastal States are prevented under international law from acquiring the territory of another without consent or by force. It is a general principle of international law that States cannot take territory that belongs to another. The United Nations Charter prohibits “the threat or use of force against the territorial integrity ...of any state.”42 As a result, conquest, which is the taking of territory through war or annexation, is no longer permitted under international law. A State can only gain new territory if the territory does not belong to anyone else or with the consent of the holder of the title to the territory.

There are only four ways that title to a territory can be acquired under modern international law: occupation, cession, prescription, and accretion.43 A territory that is already held under title can only be acquired by a State with express or implicit consent. For the title to territory to be transferred through cession, the title holder must consent to transfer the title to the acquiring State.44 For instance, a cession of title could be accomplished through a Treaty, under which one State transfers title to a portion of territory to another State. The use of force to obtain a cession obtained by force will invalidate the transaction under the United Nations Charter and the Vienna Convention on the Law of Treaties.45

A State may also obtain the title to a territory owned by someone else through prescription, if the State had occupied that territory openly in full knowledge of the title holder for a long period of time, without the title holder objecting or trying to assert its own jurisdiction over the territory. This means of acquiring sovereignty can be seen to be based on the acquiring State obtaining the unspoken consent of the title holder. Since the title holder did not object to another State exercising sovereignty over the territory, it is seen as implicitly agreeing to that State’s sovereignty over the territory. It also goes back to the definition of what it means to be a sovereign state – the state must exercise its governance over the territory to be a sovereign.

42 Charter of the United Nations, at art. 2(4).
44 Ibid.
A State that does nothing when another State continues to exercise sovereignty over the territory for a long time will no longer be exercising its own jurisdiction over that territory and therefore no longer meets the definition of being a sovereign State.

Acquisition through occupation and accretion are permissible means of obtaining territory that is *res nullius* (does not belong to anyone else). When a State’s territory is enlarged by natural forces, for instance, if volcanic activity leads to an increase in the size of a State’s territory, the additional territory is said to be gained through accretion. Finally, a State can acquire territory through occupation if the territory is *res nullius* and if the State exercises effective control over the territory.

**B. Respect for the rights of Indigenous peoples**

International law and Canadian law require Canada to respect the rights of Indigenous peoples, which involves not only refraining from violating Indigenous peoples’ rights but also ensuring the protection of the rights. As described below, these rights include Indigenous peoples’ right to territory and resources. The rights of Inuit to the Arctic are fully protected by these laws. This was affirmed in “A Circumpolar Inuit Declaration on Sovereignty in the Arctic” (“Circumpolar Declaration”), an international declaration by Inuit across the circumpolar world.

i. **Treaties made in recognition of Inuit rights**

Canada’s recognition of the rights of Inuit to their territories and the resources is implicit in the treaty process that it has engaged in with Inuit in northern Canada in the last 40 years. Beginning in the 1970s, Inuit peoples and Canada signed modern Treaties based on the recognition of Inuit rights to the lands and waters of the Arctic. Starting with the *James Bay and Northern Quebec Agreement* in 1975, the Treaties now extend east and west, to include the *Western Arctic Claim–Inuvialuit Agreement* (1984), the *Nunavut Land Claim Agreement* (1993), the *Labrador Inuit Land Claims Agreement* (2005), and the *Nunavik Inuit Land Claim Agreement* (2007). Each of the modern Treaties receives constitutional protection through section 35 of the *Constitution*. It is to be noted that the first amendment to the 1982 *Constitution* clarified, through the addition of section 35(3), that the land claim agreements are treaties that provide constitutionally protected rights for Inuit.

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46 As a side note, although accretion was once seen as the least significant means of gaining territory, changing weather patterns and the rising of ocean levels could result in some States gaining new territory, while others, such as small island States, stand to lose their entire territory.

47 Kindred et al., *supra*, at 433.

48 *Circumpolar Declaration, supra.*
The importance of the treaty making process and its significance in the establishment and building of Canada is treated in greater depth in an earlier paper commissioned by Senator Watt, entitled “Inuit: Canada’s Treaty Partners or Free Agents? An Argument for an Inuit-Canada Joint Approach to Addressing Sovereignty Disputes in the Arctic” by Hutchins Legal as well as in “The Third Sea: Inuit, the Treaty Tradition, a Thawing Arctic and rebus sic stantibus”, a 2010 paper prepared by Peter W. Hutchins for the Canadian Council on International Law. These argue that “Treaty-making has always been about creating a mutually beneficial alliance, based on Canada’s recognition of the historic occupation and rights of Aboriginal peoples”. For Canada and Inuit, the signing of Treaties was a step within a continuing relationship, with each Treaty setting out a framework for future collaboration between the Treaty partners. Canada must respect both the Treaty rights and also the Treaty partnership when it is claiming areas of the continental shelf covered by Treaties with Inuit, in both the Atlantic and Arctic Oceans. This requires Canada to engage with its Treaty partner, so that Inuit have the opportunity to participate in decisions that affect the areas covered by the Treaties.

ii. Rights to land and ocean based territory

It is now well established in international law that Indigenous peoples have rights to their traditional territories. These rights are affirmed in Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, which provides that indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.49 Indigenous peoples’ right to their territories have been upheld by international tribunals, including the Inter-American human rights system.50

Just as importantly, international law requires States to respect and protect Indigenous peoples’ right to their territories.51 For instance, the Inter-American Court has held that States must recognize Indigenous peoples’ rights to territory within the State’s legal system by granting the Indigenous peoples concerned title to their lands. 52 In the Awas Tingni case, the Inter-American Court found that,

51 Declaration, supra at art. 26(3)
52 Awas Tingni case, supra, para. 153
the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled. 53

Canadian law provides constitutional protection to Indigenous peoples’ rights to their territories. 54 Thus, section 35 of the Canadian Constitution Act, 1982 states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.” 55 The Supreme Court of Canada confirmed that Aboriginal peoples have rights to their territories. Starting with the 1973 case of Calder and reaffirmed it in Guerin in 1984 and in Delgamuukw in 1996, the Supreme Court has confirmed that Aboriginal peoples hold Aboriginal title to their lands, based on their occupation and governance of their lands.56 Crucially, Aboriginal title cannot be extinguished without the consent of the Aboriginal title holders. 57

Inuit hold Aboriginal title to their territories in Canada, 58 unless they have consented to transfer these rights to Canada. This has occurred under some of their Treaties with Canada. However, they retain Aboriginal title to any portion of Inuit Nunaat that is not included in one of the Treaties.

International and Canadian law provide support for Inuit having territorial rights over Arctic waters, ice, as well as the resources that lie above and below the ice. It is increasingly recognized in Canadian and international law that portions of an ocean or sea can be included as part of Indigenous peoples’ territories. Internationally, the Declaration affirms that Indigenous peoples have the right “to maintain and strengthen their spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”.59 In Canada, the same principles that apply to finding Aboriginal title to land could equally apply to establishing Aboriginal title to ocean or sea areas. 60

53 Ibid.
54 Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (UK), 1982, c 11
55 Ibid. ss. 35(1) and (2).
57 Guerin, ibid.; see also Jack Woodward, Native Law, looseleaf (Toronto: Carswell, 2014), section 8.2(d)
59 Declaration, supra, at art. 25.
The right to areas of the ocean are also found within Treaties, and therefore provided with constitutional protection. The Labrador Inuit Land Claims Agreement protects Inuit rights to 18,800 square miles of tidal waters and 6,100 square miles of the seabed within the treaty area. As discussed above, Canada’s Partial Submission includes areas to the Labrador Inuit Claims Agreement within the boundaries of its continental shelf, without reference to the Treaty or rights that Inuit may also have in the Atlantic Ocean outside the Treaty area.

iii. Resource rights

The Declaration recognises that Inuit have the right to own, use, develop and control their natural resources. Article 26(2) provides that:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

In Canada, the Supreme Court has considered that Aboriginal title encompasses natural resources. For instance, in the landmark Delgamuukw case, the Supreme Court specified that Aboriginal title includes rights to oil, gas and mineral rights within that territory. These cases can be used to show that the Inuit have a right to the oil and natural gas in their traditional territories.

Importantly, Indigenous peoples have the right to benefit economically from the use of their resources, for instance through royalties, as well as the right to govern the use, access and conservation of these resources. In entering Treaties with Inuit, Canada recognized that Inuit have rights to the natural resources within their traditional territories. Some of the Treaties therefore provide for resource sharing arrangements. In areas of Inuit Nunaat outside of the Treaty areas, Inuit retain their rights, which include their right to control and benefit from the use of the natural resources. Canada must respect these rights in its attempts to extend its sovereignty over the Arctic Ocean seabed.

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61 Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada, (2005) (Labrador Inuit Land Claims Agreement), ch. 4.
62 Partial Submission, supra, at 8, 14
64 Delgamuukw, supra.
Recently, the UN Special Rapporteur on the Rights of Indigenous Peoples emphasised in a special Report focused on resource development that Indigenous peoples are to have a central role in the decision making process and profit sharing when it come to the extraction of natural resources from their traditional territories. Key points to be respected include:

- New models of resource extraction are to be implemented that are consistent with Indigenous rights;
- A preferred model for natural resource extraction within indigenous territories is one in which Indigenous peoples themselves control the extractive operations, through their own initiatives and enterprises. Inuit may benefit from partnerships with responsible, experienced and well-financed non-indigenous companies to develop and manage their own extractive enterprises;
- When Indigenous peoples choose to pursue their own initiatives for natural resource extraction within their territories, States and the international community should assist them to build the capacity to do so, and States should privilege Inuit initiatives over non-indigenous initiatives;
- Indigenous peoples have a right to decline to pursue such initiatives in favour of other initiatives for their sustainable development;
- Free, prior and informed consent is required, as a general rule, when natural resource extraction activities are carried out within indigenous territories;
- States should ensure good faith consultations with Indigenous peoples on extractive activities that would affect them and engage in efforts to reach agreement or consent. States are bound to respect and protect Indigenous peoples’ rights;
- Conditions for State or third party business enterprises to achieve and sustain agreements with Indigenous peoples for extractive projects include: adequate State regulatory regimes (both domestic and with extraterritorial implications) that protect indigenous rights; participation in strategic State planning on natural resource development and extraction; corporate due diligence; fair and adequate consultation procedures; and just and equitable terms for the agreement.
- Agreements with Indigenous peoples allowing for extractive projects within their territories must be crafted on the basis of full respect for their rights in relation to the
affected lands and resources and, in particular, should include provisions providing for impact mitigation, for equitable distribution of the profits.\textsuperscript{65}

\textit{iv. Free, prior and informed consent}

The \textit{Declaration} makes it explicit that Indigenous rights cannot be affected without their free, prior and informed consent. The breadth of this principle is demonstrated by the requirement in Article 19 of the \textit{Declaration} that States are to obtain the free, prior and informed consent of Indigenous peoples “before adopting and implementing legislative or administrative measures that may affect them”.\textsuperscript{66}

The \textit{Declaration} protects the right of Indigenous peoples to have returned to them any lands taken from them or used without their consent.\textsuperscript{67} It also prevents the forcible removal of Indigenous peoples from their territories, specifying that no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned.\textsuperscript{68}

The United Nations (UN) Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has recently provided its advice on the duty of States to obtain Indigenous peoples’ free, prior and informed consent, making explicit the link between the principle and the right to natural resources and economic development.

[I]ndigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination.\textsuperscript{69}

In Canada, the constitutional protection provided to Aboriginal rights, including Aboriginal title, under section 35 has meant that rights cannot be extinguished or surrendered without the


\textsuperscript{66} \textit{Declaration, supra}, at art. 19.

\textsuperscript{67} \textit{Ibid.}, at art. 28.

\textsuperscript{68} \textit{Ibid.}, at art. 10

consent of the Aboriginal peoples concerned.\(^{70}\) There are only certain conditions under which Canada would be allowed to infringe Aboriginal title or rights,\(^{71}\) and that infringement cannot amount to extinguishment.

In recent years, the duty to consult and accommodate has become an important means of protecting Aboriginal title and rights and ensuring that Aboriginal peoples have a voice in decisions that could affect them. When a governmental decision of action poses a risk of causing a negative impact on territories or resources that are the subject of Aboriginal rights or title, Canada must consult with the Aboriginal people asserting the right of title and, if appropriate, must accommodate those rights.\(^{72}\) If the rights have been substantiated through the Courts or are contained in a Treaty, Canada must undertake deep consultation and is required to protect the right through accommodation measures.

**C. Canada cannot acquire territories and resources that Inuit have rights over without consent**

The States developing the rules under UNCLOS based their system on the assumption that the world’s oceans did not belong to any one particular State and therefore could be acquired by the coastal States automatically. This is akin to occupation, in that it is premised on the assumption that the Oceans are available for appropriation. However, unlike the acquisition of territory through occupation, the coastal State is not required to have any presence in the Ocean to ground its sovereignty over the territory. Article 77 is clear: the rights of the coastal shelf do not depend on occupation.\(^{73}\)

The assumption that the Ocean does not belong to anyone is probably true in some areas of the world. However, it cannot be overlooked that portions of the Arctic Ocean, unlike any other Ocean, has been occupied and governed by the indigenous peoples of the Arctic. Indigenous peoples have rights to their territories, sometimes referred to as historic title or Aboriginal rights. In the areas where the Arctic Ocean is included as part of Inuit Nunaaqt it is not a res nullius or even part of a common resource, open to all. The international community has rejected the idea that Indigenous peoples’ lands are terra nullius, capable of being acquired without regard to the rights of the Indigenous peoples already there and without their consent. In the landmark 1975 *Western Sahara case*, the International Court of Justice (ICJ) rejected the

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\(^{70}\) Woodward Native Law, *supra*, §§750.


\(^{72}\) *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; for a discussion on the extensive jurisprudence on the duty to consult and accommodate, see Woodward Native Law, *supra*, chapter 5, section C, starting at §§1190.

\(^{73}\) **UNCLOS**, *supra*, at art. 77.
notion that land controlled by Indigenous peoples was empty land, capable of being appropriated by another State through occupation. The ICJ found that Western Sahara was not *terra nullius* at the time of colonization, but rather occupied by people “which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”\(^7^4\) The ICJ held that these peoples’ occupation of the territory in Western Sahara and the subsequent agreements they made with Spain were the derivative roots of Spain’s title to Western Sahara.\(^7^5\)

As developed above, there is a growing recognition that Indigenous peoples also have rights to their Ocean based territories. These ocean-based territories cannot be treated as *res nullius* and cannot be acquired by a State through the UNCLOS system without the requisite consent.

**VI. Moving Ahead: Consultation, Courts and and Win-Win Solutions**

Applying the international prohibition against taking another’s territory without consent and the respect for Indigenous peoples’ title means that the Arctic coastal States must respect Inuit peoples’ rights to the portions of the Arctic Ocean covered by Inuit Nunaat. Canada must engage in consultations with Inuit for any portion of the Arctic Ocean that it is claiming as part of its continental shelf which is also covered by Treaties or Aboriginal title and rights. It must ensure that it does not attempt to take, through the UNCLOS system, territories that are owned by Inuit. Inuit rights to these areas must be respected. If Canada wishes to claim sovereignty over areas covered by these rights, it must engage with Inuit for the purpose of obtaining their free, prior and informed consent. This could occur through the negotiation of new treaties or the extension of the existing treaties to these areas. Such a situation could result in a win-win situation, if it provides for a continued role for Inuit in the governance of the Arctic and protects Inuit rights to benefit from the extract of natural resources within the territory, while at the same time strengthening Canada’s sovereignty over the Arctic.

The interaction of the Inuvialuit Final Agreement with the dispute between Canada and the US over a portion of the Beaufort Sea demonstrates Canada’s use of a Treaty with Inuit to strengthen its claim to portions of the Arctic Ocean against another State. This is a clear demonstration of Canada’s acknowledgment of the importance of obtaining treaties with Inuit to strengthen its claim to sovereignty over the Arctic. As the terms of this Treaty include

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\(^7^5\) *Ibid.* at para. 80.
In this instance, the dispute concerns an approximately 21,000 km$^2$ area of the Beaufort Sea that is claimed by both Canada and the United States. Canada asserts that the Canada-US border in the Beaufort Sea extends straight north from its land-based border with Alaska, following the 141°W meridian. The US, on the other hand, asserts that the border is much further east, placing the line at an equal distance between the coasts of Alaska and the Yukon. That Canada and the US did not agree on the location of the border only came to light in the 1970s, as Ottawa began granting oil and gas concessions within this area.

This area of the Beaufort Sea is not only reported to be extremely rich in oil and gas deposits, the shallow depth of the sea and its relatively southern location make it more accessible to would-be developers than other, less hospitable, areas of the Arctic Ocean. Canada has long believed that the Arctic had potential for resources development, and has been investing in oil and gas exploration since the 1950s. Important discoveries have been made in the Arctic Islands, the Mackenzie Delta and especially in the Beaufort Sea Basin. Since the 1970s, dozens of wells have been drilled in the Beaufort Sea alone. Recent resource discoveries, major investment by industry and regulatory updates mean that the Beaufort Sea will be a source of resource revenues. It is this potential for resource development that makes it extremely desirable to both Canada and the US.

To protect its claim to this area, when the 1984 Inuvialuit Agreement was negotiated with the Inuvialuit, Canada made sure to include in the Agreement the area disputed by the United States, using the 141°W meridian as the border. The Inuvialuit had historically used the sea ice and included portions of the Beaufort Sea in their territory. The inclusion of the off-shore areas in the Agreement was a strategic move on the part of Canada to bolster its claim against the US. The Agreement allows Canada to ground its rights to the area to Inuit’s historic title (or Aboriginal title) of these portions of the Beaufort Sea, based on their historic use of the sea ice and governance of this area. Just as Spain convincingly grounded its claim to Mauritania through the agreements it had with “local rulers” in the Western Sahara case, so too can Canada can ground its claim to the disputed area through the agreement it made with Inuvialuit.

Should Canada fail to engage with Inuit towards a win-win solution and instead ignores or sidelines Inuit involvement in its attempts to solidify its sovereignty over the Arctic and northern Atlantic Oceans, it is open to Inuit take Canada to court. For instance, Inuit may have

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78 Natural Resources Canada, “Arctic Oil and Gas,” 2007.
recourse to the judicial system over any violations to their Treaty rights or their rights to their territories that occur. In addition, recourse to the courts is possible if Canada is not living up to its obligations to consult and accommodate Inuit in respect of its claims to the continental shelf. Ultimately, it would be much preferable if Inuit and Canada can work together, potentially as existing treaty partners, to work together to a mutually beneficial solution.