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The Legal Future of the Arctic Region
– Challenges and Opportunities
Facing the World's Northernmost Area

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Summary

The main purpose of this thesis is to examine whether or not the legal framework to govern the Arctic can be said to be in place already, or if additional judicial measures need to be taken, given the future that awaits the region as a result of the ongoing rapid ice melt. For many decades, or even centuries, it was the common perception that the Arctic would remain permanently ice-covered, and because of this the prospects of any commercial development were small. With no commercial activities in sight, there was no real need to consider if legal measures needed to be taken concerning such issues. The climate change has during the last 40 years or so proved that the Arctic does, and will to an even further extent, practically melt. This will bring with enormous consequences for the Arctic and international environment: Wildlife will have to adjust to a whole new way of living, and sea levels around the world will rise and engender a new cartography – just to name two. Less ice in the Arctic will also bring with more positive consequences. Transpolar shipping will be much easier and safer to conduct, hydrocarbon resources located in the sea bed will be easier to extract, and other commercial activities such as fishing and tourism can be developed and turn the Arctic into a blooming economy. This is precisely why there might be a need to revise the legal framework in place for the Arctic region, and develop whatever instruments are missing in order to achieve a sustainable development where environmental protection is not infringed in favor of making the largest profits possible.

While most of the Arctic region is under national jurisdiction, there are also communal areas that cannot be claimed by any state. The region is not regulated by any comprehensive treaty or similar legal instrument, as opposed to the other polar region - the Antarctic. The multilateral or international legal instruments governing the Arctic are among others: The 1982 Law of the Sea Convention (UNCLOS), regulating the sea in general and containing provisions on maritime jurisdictional delimitation and maritime environmental protection. And, the international Convention for the Prevention of Pollution from Ships (MARPOL), focused on limiting, or prohibiting, oil and other harmful substances from being discharged into the sea. Extra protection is offered to so-called *special areas*, of which the Arctic Ocean has none.

Since it has been projected that the Arctic Ocean Sea Bed will contain large amounts of hydrocarbon resources, coastal states are eager to claim rights to exploit such resources by acquiring extended Continental Shelf areas. This is done in collaboration with the UN Commission on the Limits of the Continental Shelf, in which the process is very lengthy. Not many delimitation recommendations have been produced so far to clarify the possible extended Continental Shelves in the region.

An ice-free Arctic will equal more accessible shipping routes, which will be much shorter than the ones currently in use for transcontinental shipping. The remoteness and special character of the Arctic Ocean will place rigorous demands on vessel construction and crew capacity. Shipping and vessel-source pollution is dealt with through a number of international organizations and instruments, as well as on a national level. On a regional level the Arctic Council has recently produced legally binding instruments on Maritime Search and Rescue and Oil Spill Prevention and Response. Within the International Maritime Organization (IMO) work for creating a mandatory Polar Code on Arctic shipping is currently being undertaken.

In the Nordic countries there seems to be a will to transform the Arctic Council from a decision-shaping to a decision-making body, and widen the mandate in regards to what policy issues that are being dealt with. There is also a strive towards more and especially more detailed legal regulations of the Arctic region. A will to intensify cooperation on military and security issues can also be detected.

Regulatory gaps can thus be perceived especially when it comes to new and up-and-coming activities in the Arctic. Another issue is the fact that not all Arctic states are parties to all relevant conventions protecting the Arctic environment. There seems to be an unambiguity regarding which level certain cooperation should be conducted at. The legal status of the Arctic Council is somewhat unclear, and to a certain extent innocuous. Consideration need also be paid to the fact that the Arctic *could* – although this in no way is certain – be subject to more confrontation between surrounding states, all depending on economic and security interests and developments.

Even if there are major differences between the Arctic and the Antarctic, the Arctic could find inspiration within the Antarctic Treaty when creating further legal instruments. Given the enormous interest in the Arctic shown by outside states it is important that the region is thoroughly regulated, so that it will be easier to face the possibilities and challenges of the future. In some regards, the Arctic states have shown aversion to developing a comprehensive legal instrument, why a first step towards a solution could be an instrument that geographically solely covers the Arctic areas not under any claim of national jurisdiction and only regulates issues of peculiar interest to the Arctic region.

Sammanfattning

Det huvudsakliga syftet med denna uppsats är att undersöka om ett fullgott juridiskt ramverk i syfte att skydda den arktiska regionen redan är etablerat, eller om ytterligare juridiska instrument behöver tillkomma för att så ska vara fallet. Frågan diskuteras med bakgrund av det faktum att den arktiska isen smälter i en hög takt, och att framtiden för regionen sannolikt kommer att se väldigt annorlunda ut än vad som hittills har varit fallet. Under flera årtionden, eller till och med århundraden, var den allmänna uppfattningen att Arktis fortsättningsvis skulle vara täckt av permanent packis, varför också utsikterna för någon kommersiell utveckling i regionen var små. Utan kommersiell utveckling framträdde heller inget tydligt behov att fundera över eventuella kompletterande juridiska åtgärder gällande en sådan. Under de senaste 40 åren har klimatförändringarna dock visat prov på att Arktis de facto smälter, samt att denna avsmältning kommer att fortsätta. Detta kommer att medföra enorma konsekvenser för såväl den arktiska som den internationella miljön: Djurlivet kommer att behöva anpassa sig till ett helt nytt levnadssätt, och havsnivån kommer att öka för att ge upphov till en helt ny kartbild – bara för att nämna två. Ett minskat arktiskt istäcke kommer också att innebära positiva konsekvenser. Transpolar sjöfart kommer att kunna genomföras säkrare och i större omfattning, fossila bränslen och andra naturresurser kommer att vara lättare att utvinna ur havsbotten, och även kommersiell aktivitet såsom fiske och turism kommer att kunna utvecklas och förvandla Arktis till en blomstrande ekonomi. Just därför kan det finnas ett behov av att analysera det gällande juridiska regelverket för Arktis, och utveckla sådana instrument som idag fattas och som skulle möjliggöra en hållbar utveckling av regionen, vari skydd för den speciella miljön inte får stå tillbaka till förmån för så stor ekonomisk vinning som möjligt.

Merparten av den arktiska regionen är redan under nationell jurisdiktion, men det finns också gemensamma områden (*res communis*) som inte kan åberopas av någon enskild stat. Det finns inget omfattande fördrag som reglerar regionen, såsom är fallet vid ”motpolen” – Antarktis. De multilaterala eller internationella juridiska instrument som gäller för Arktis är bland andra: Förenta Nationernas Havsrättskonvention (UNCLOS), som reglerar havet i stort, och innehåller föreskrifter gällande avgränsningen av maritima zoner för olika stater och skydd för den marina miljön. Samt Konventionen för förhindrande av förorening från fartyg (MARPOL), som fokuserar på att begränsa eller förbjuda att olja och liknande skadliga substanser släpps ut från fartyg till havet. Extra skydd erbjuds så kallade speciella områden (*special areas*). Inget sådant finns för nuvarande i Arktis.

Eftersom att det har förutspåtts att Arktis havsbotten innehåller stora mängder fossila bränslen är de arktiska kuststaterna angelägna om att skaffa sig den juridiska rätten att utvinna dessa, vilket görs genom att etablera en förlängd kontinentalsockel. Detta sker genom samarbete med FN:s

kommission för avgränsning av kontinentalsockeln, hos vilka processen tar mycket lång tid. Hittills har bara ett fåtal rekommendationer utfärdats för att klargöra möjliga förlängningar av kontinentalsocklar i regionen.

Ett isfritt Arktis betyder mer tillgängliga rutter för sjötransport, som kommer att vara betydligt kortare än dagens vid transkontinentala resor. Arktis speciella karaktär och avlägsna placering ställer dock särskilt höga krav på skeppskonstruktion och besättningens kapacitet. Sjöfart och fartygshänförliga föroreningar regleras genom ett antal internationella organisationer och instrument, men också på en nationell nivå. Regionalt har Arktiska rådet nyligen tagit fram två juridiskt bindande instrument gällande sök- och räddningsoperationer till sjös och förhindrande och bekämpning av oljeutsläpp. Inom Internationella Sjöfartsorganisationen arbetar man för nuvarande med att skapa en bindande Polar-kod rörande arktisk sjöfart.

I de nordiska länderna kan det urskiljas en vilja att utveckla Arktiska rådet från ett besluts-formande till en besluts-fattande forum, samt att bredda föremålet för samarbete till att innefatta ytterligare frågor. Det finns också en strävan mot ytterligare, och särskilt mer detaljerad, juridisk reglering av den arktiska regionen. En vilja att intensifiera samarbetet rörande militära säkerhetsfrågor kan också märkas.

Luckor i gällande reglering kan uppfattas särskilt gällande aktiviteter som är nya eller under utveckling i Arktis. Alla arktiska stater är vidare inte ännu parter i samtliga relevanta konventioner som syftar till att skydda regionens miljö. Det verkar råda en tvetydighet gällande på vilken nivå som olika aspekter av arktiskt samarbete ska utspela sig. Arktiska rådets juridiska status är något otydligt, och organisationen i förlängningen något tandlös. Det måste också beaktas att Arktis *kan* – även om detta inte på vis är säkert – bli föremål för mellanstatlig konfrontation, beroende på ekonomiska och säkerhetsrelaterade intressen och utvecklingar.

Även om det finns stora skillnader mellan Arktis och Antarktis skulle Arktis kunna hämta inspiration från Antarktisfördraget vid skapandet av ytterligare juridiska instrument. Givet det enorma intresset från övriga stater är det av vikt att Arktis blir genomgående juridiskt reglerat, så att man där lättare kan möta framtidens möjligheter och utmaningar. De arktiska staterna har i vissa fall visat en motvilja mot ett sådant större instrument, varför ett första steg mot att nå en lösning skulle kunna vara ett juridiskt instrument som geografiskt täcker det Arktis som inte är taget i anspråk såsom tillhörande nationell jurisdiktion och behandlar frågor som är av speciell karaktär just för den arktiska regionen.

Preface

My interest for the Arctic region arose whilst doing an internship at the Swedish Ministry for Foreign Affairs, more specifically with the Swedish Chairmanship of the Arctic Council. To partake in international negotiations concerning such an intricate and delicate region was most certainly rewarding and fruitful, and made me think closely about the legal aspects of what can be done, and how it can be done, to govern an area that will be of the utmost importance for the future development of the world. The awakening of this interest I of course have the people involved with the Swedish Chairmanship of the Arctic Council during 2011-2013 to thank for.

It became clear for me from very early on that the special needs of the Arctic region call for well thought through responsive measures from the surrounding states and the rest of the world. I hope that this thesis can shed some light on how the future Arctic could, or better yet should, be governed and regulated.

This thesis would not have been possible without the help and support of my supervisor, professor Proshanto K. Mukherjee, not to mention his useful insights and great knowledge of Arctic legal issues.

I would also like to extend a warm and heartfelt thank you to my family and friends, for their constant support and encouragement during my years spent at the Lund University Faculty of Law.

Abbreviations

| | |
|---------|--|
| AC | Arctic Council |
| ACIA | Arctic Climate Impact Assessment |
| AEPS | Arctic Environmental Protection Strategy |
| AMAP | Arctic Monitoring Assessment Program |
| AMSA | Arctic Marine Shipping Assessment |
| APMs | Associated protective measures |
| ATCM | Antarctic Treaty Consultative Meeting |
| ATS | Antarctic Treaty System |
| AWPPA | Arctic Water Pollution Prevention Act |
| CAFF | Conservation of the Arctic Flora and Fauna |
| CDEM | Construction, Design, Equipment and Manning |
| CLCS | Commission on the Limits of the Continental Shelf |
| EEZ | Exclusive Economic Zone |
| EFTA | European Free Trade Association |
| EIA | Environmental Impact Assessment |
| EPPR | Emergency Prevention, Preparedness and Response |
| EU | European Union |
| GAIRAS | Generally accepted international rules and standards |
| GHG | Greenhouse gases |
| HNS | Hazardous and Noxious Substances |
| IAMSAR | The International Aeronautical and Maritime Search and Rescue Manual |
| ICJ | International Court of Justice |
| IMO | International Maritime Organization |
| ISBA | International Seabed Authority |
| IUCN | International Union for Conservation of Nature and Natural Resources |
| MARPOL | International Convention on the Prevention of Pollution from Ships 1973/78 |
| MOU | Memorandum of Understanding |
| MPA | Marine Protected Area |
| NATO | North Atlantic Treaty Organization |
| NAVAREA | IMO Regional navigation areas |

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| NGO | Non Governmental Organizations |
| Nm | Nautical Miles |
| NORDREG | Arctic Canada Traffic System |
| OECD | Organisation for Economic Co-operation and Development |
| OILPOL | International Convention for Prevention of Pollution of the Sea by Oil 1954 |
| OPRC | International Convention on Oil Pollution Preparedness, Response and Co-operation |
| OSPAR | Convention for the Protection of the Marine Environment of the North-East Atlantic |
| PAME | Protection of the Arctic Marine Environment |
| PLT (II) | Polar Law Textbook (II) |
| PP | Permanent Participant |
| PSI | Project Support Instrument |
| PSSA | Particular Sensitive Sea Area |
| SAO | Senior Arctic Official |
| SAR | Search and Rescue |
| SLCF | Short-live Climate Forcers |
| SOLAS | International Convention on Safety of Life at Sea, 1974 |
| START | Strategic Arms Reduction Treaty |
| UN | Unites Nations |
| UNCLOS | 1982 United Nations Convention on the Law of the Seas |
| UNEP | United Nations Environmental Programme |
| US/USA | The United States of America |
| USSR | Union of Soviet Socialist Republics |
| WTO | World Trade Organization |

1 Introduction

The first pages of this thesis will serve to provide the reader with an overview of what is to be expected throughout the remaining chapters. A purpose section presents the focus of discussion: Is there a need for additional legal instruments in order to accommodate a future more accessible Arctic region? The Arctic region is delimited to include all eight states partaking in the Arctic Council, and the discussion is delimited to make room for an advanced analysis on a few particular issues.

1.1 Purpose

The primary object of this thesis consists of examining and analyzing the legal framework for the future of the Arctic region. This future could of course mean a multiple of different things, and thus a need to look at a variety of legal aspects is looming. To give a preface to what legal questions can arise, the following illustration can be made. The average temperature has increased twice as fast in the Arctic as in the rest of the world. The most obvious result of this is the rapidly disappearing sea ice cover. Last year, 2012, the world witnessed the lowest summer sea ice extent recorded since 1979, when satellite measurements began.¹ The Arctic will soon no longer be an ice-covered and vast continent, it will be a main focus for shipping, exploitation of natural resources and tourism. It is not at all a farfetched thought that the Arctic will be of the utmost commercial importance within the foreseeable future.

The specific geographical features of the region, in containing the shortest travel and shipping routes between America and Eurasia, make it rather likely that the use of the Arctic from a transport perspective will continue to evolve. Increased shipping will mean regular all-year shipping of merchandise and materials in an area that before has had approximately 5-10 scientific research vessels passing through each year. This will engender a need for pollution regulations, a clear plan for who will save whom, where and how, and a division of the responsibility to build harbors for re-fueling and repairing. The amount of fishing is also likely to expand, and if so were to happen one can spot issues such as who will regulate the legal issues of what will be allowed to be fished and where. Decisions have to be taken on whether fishing should be an industry to expand or should the fish in the Arctic Ocean be protected from such exploitation. It must further be ensured that the fishing industry does not cause irreparable harm to the Arctic ecosystem and its habitants. It is also likely that the so far undiscovered natural (hydrocarbon) resources in the Arctic Ocean seabed will lead to increased offshore drilling activities. These would in turn also need heavy regulation and a supervisory body would need to monitor and ensure that such regulations are obeyed. It needs to be perfectly clear who holds the

¹ Koivurova, PLT II, p. 68.

responsibility to clean up where and how. This list of possible new developments in the Arctic could go on at length, and mention aspects such as the human dimension, wildlife protection and biodiversity as well, and the reader should be aware of these many dimensions of the Arctic future.

Given that the Arctic is a region, though primarily delimited by national jurisdictions, to a certain extent under “sovereignty investigations” or belonging to no one², there is an uncertainty regarding who has the right or obligation to do one thing or the other. That the Arctic is changing is beyond any doubt – the ice is rapidly melting and creating a new geographical setting with new possibilities and challenges. In order to benefit and cope with this the legal framework of the Arctic needs to be clear and unambiguous. If this is already the case or if further actions need to be taken will thus be the object of discussion throughout this thesis. Focus will be on comprehensive international legislation, as opposed to purely national such. In a best-case scenario, the latter could suffice to govern the Arctic (since most of the region is under national control). Although – if one is to consider that the continent most likely is, and to an even greater extent will be, used for international shipping, research, commerce and tourism, broader and more trans-boundary instruments (e.g. multilateral agreements) would be preferred, paving the way for consistency and clarity throughout the Arctic region.

The issues that will be dealt with are specifically as follows:

- With the development of the Arctic region into a more or less ice-free and navigable ocean where natural resources exploitation and shipping can be carried out in a greater extent than today – is the legal capacity for this to function well in place?
- If there is a need for additional legal instruments or governing structures, what would be the best way to construct those?

1.2 Delimitation

1.2.1 Subjects for Discussion

The Arctic is one of the seven continents, and to try to cover all legal issues that can arise within such a large area (physically as well as regulatory) is of course not possible; especially not within the scope of this graduate thesis. Some crucial issues have been excluded from this exposition, in order to keep focus and make in depth analyses on a smaller amount of, and perhaps more pressing, issues. The following areas mentioned are ones the author would have wished to develop, and they are listed to shed some light over vital issues in the Arctic region, and to illustrate the great effect that the Arctic has on the world and vice versa.

² As will be described in chapter 2 – much of the Arctic Ocean is categorized as high seas, belonging to the common heritage of mankind, and some of the soils within prospective continental shelves are unclear in regards to sovereignty.

It may be a well-known fact that the indigenous peoples of the Arctic live their lives in a remote area of the world, and that their civilization is unlike any other. There is a great need for respect and consideration for, as well as continuous cooperation with, the indigenous peoples, and the outside world has a responsibility for their prosperity and wellbeing. This being said, the rights of indigenous peoples is not further discussed within this thesis.

Apart from being mentioned as a potential legal issue to consider in the above purpose section, the fishing industry will not be further debated. Arctic fishing is a very political issue, hence the discussion might turn political and focus would be pulled out from real underlying legal issues.³

Another issue of great importance is the Arctic environment, and how existing ecosystems can be saved and continue even with the melting of ice, heightened sea level and increased temperature. Legal aspects here would be dividing obligations between states, conducting thorough Environmental Impact Assessments and applying hunting restrictions – to name a few. The environment will not be fully treated as a separate section in this thesis, but will be incorporated in the chapters below. This approach is the reason why wildlife protection and other important aspects of the environment will not be discussed.

1.2.2 Definition of the Arctic Region

Sadly for the clarity of this thesis, there is no generally acknowledged definition of the Arctic – neither geographically nor in international law. The problem is where to draw the southern border.⁴ Sometimes, the treeline is used to make this definition. We also have the 10°C July isotherm – where the July average temperature is below ten degrees Celsius the Arctic begins. Both these definitions leave out most of Scandinavia, because of the Gulf Stream and its warming effect on this area. Professor Pharand made the suggestion that the Arctic Region could include all areas north of 60° North Latitude. This would be a rather liberal approach, and would include countries such as the UK. The leading forum on Arctic Cooperation today (the Arctic Council) chose to define the Arctic using the Arctic Circle criterion, where the southern boundary roughly correlates with the midnight sun.⁵ If this is the delimitation used for the leading Arctic cooperation body today, it may serve well as the definition of the Arctic region used throughout this thesis as well.

³ See for example Ebinger & Zambetakis. Fish cannot recognize national boundaries, are of the utmost economic importance and vital for the indigenous peoples survival. Such aspects thus make fishing industry management a highly political issue.

⁴ Timtchenko, p. 44.

⁵ Koivurova, p. 25-28.

1.3 Method and Material

The jurisprudential method includes using sources such as legal instruments including legislation in force, applying and analyzing different facts relating to such regulations, using a comparative method and taking into account other sciences such as economics and philosophy to widen the discussion (being careful to thoroughly integrate these aspects with the purely judicial ones).⁶ This is the method used for producing this thesis, which is a descriptive study of *de lege lata* and an analytical presentation of *de lege ferenda*.⁷ The ambition has been to use a qualitative, as opposed to a quantitative, approach when processing available sources, which hopefully has led to a high quality end product.⁸

Thoughts on the Arctic and its future are developed in the different Arctic states as well as other states with scientific or economic interests in the Arctic, but also in international organizations such as the EU. The ambition has been to present the views from these different sources of opinion, to make way for the analysis of what would be the best and most suitable way to build the legal framework for the future Arctic region. It should be clear that international law can be produced and shaped in many informal ways, for instance through diplomatic negotiations within the cooperative forum the Arctic Council. Even if the legal products developed there or in similar formations might only be considered legally non-binding soft law they can have a large impact on the future of international law.⁹

Since this thesis holds a comparative part, the methodological approaches for that study needs to be mentioned as well. The author has used a comparative method, and in a rational way studied the different national views in order to compare them.¹⁰ The comparative sections will hopefully serve the purpose of not locking the discussion into typically national legal solutions and models, but to look at the ideas spreading and prospering in the rest of the (concerned) world as well. To keep a broad perspective might be the only way to reach the best possible solution. This being said, it is also necessary to study foreign legal doctrine whilst using a pair of critical glasses, and to know that what is suitable in one state might be completely absurd in another. The society and the legal traditions of any state will set the framework for how the law is constructed there, so naturally it would be nearly impossible to simply “copy/paste” an existing legal regime into the Arctic.

A separate chapter has been dedicated to the Nordic Perspective of Arctic development. This is not because the best suggestions or views on this necessarily are Nordic ones, neither is it a strive to put the Nordic views

⁶ Sandgren, p. 36-39, 41.

⁷ Bogdan, p. 23-24.

⁸ Sandgren, p. 36-39, 41.

⁹ Sandgren, p. 50-51.

¹⁰ Bogdan, p. 23-24.

above any other. The Nordic states have, judicially speaking, much in common, and is of specific relevance and knowledge to the author as well as perhaps potential readers of this thesis, why it seemed appropriate to include a more analytical section describing the Nordic perspective on Arctic issues.

There are many publications written on the issue of legal aspects of the Arctic region, especially since the 1970's. As will be described further on, this is when the region became a focal point for military investments and when climate change started melting the Arctic ice at a rapid pace. During the last 20 years Arctic cooperation has intensified, not least through the creation of the Arctic Council, while climate change has increased as a threat to the global environment. This has brought with it even more literature on the subject. For one wanting a deeper knowledge of Arctic legal issues, there is a lot to take in. This thesis could be used in such studies, as a guide to legal measures that have been taken (primarily) in the fields of Arctic shipping, natural resources exploitation and frameworks for regional cooperation, and as a prognosis of what might be written on the subject in the near future.

1.4 Structure

To introduce the reader to the Arctic and the legal issues that may face this region in the years to come, chapter two will offer a general overview of the concerned aspects of international law and the concept of maritime zonal delimitation. After this, focus will be narrowed and peculiar issues relating to the Arctic will be described and discussed. Subjects within this section include science, arisen and potential legal issues and the established regional cooperation governing the Arctic. After this rather thorough presentation the Nordic perspective will be portrayed. What are the interests especially governed by the Nordic states, and how do “we” view the regulation and future of the Arctic region? Chapter five will then go on to focus on producing and presenting answers to the two questions pointed out in the purpose section, and analyze the different views on how the Arctic future could best be governed. To sum up, the last chapter will offer the conclusions that can be drawn from this thesis. On the last pages of the thesis two maps depicting Arctic shipping routes and jurisdiction and boundaries in the region have been included as supplements, to provide a more graphic view on these matters.

2 A General Arctic Overview

This chapter focuses on the different aspects of international law that are especially applicable to the Arctic. Because of the Arctic geography emphasis is on the Law of the Sea. The jurisdictional issues dealt with concern delimitation of the Sea primarily according to the rules on Continental Shelves as expressed in UNCLOS.

2.1 Relevant Aspects of International Law

2.1.1 *Res communis*-areas

It is possible for states to have exclusive, although limited, powers of jurisdiction over areas outside their own territory. Jurisdiction over such “outside areas” can be shared by a multiple of states, or purely by those with an interest recognized by the world. The jurisdiction may very well be under restriction with reference to the rights of other states concerning the area in question. It is important to point out that the jurisdiction herein referred to does not imply the same rights as within the territory of a state, but certain jurisdictional rights nevertheless. Spaces outside the maritime zones of any state may be completely out of sovereign control, and is in that case said to be *res communis* (communal). Such areas are not free for acquisition by any state. They must instead, perhaps, be used for “the common heritage of mankind”.¹¹ *Res communis* areas exist in the vicinity of both poles.

The Antarctic

The southern polar region, the Antarctic, consists partly of permanent and temporary sea ice, and partly, and more importantly, of a frozen land mass. Within this land mass it is fairly certain that one will find valuable reserves of natural resources – such as coal, oil, gas and metals. Exploitation of these resources could be undertaken on the basis of state sovereignty, but certain states argue that the entire international community should be allowed to share in the wealth that possibly lies hidden beneath the Antarctic ice and that the area should thus be a part of *the common heritage of mankind*. In whatever way the Antarctic would be “used”, this had to be done under regulation of “a comprehensive and effective system of international controls”, to ensure the survival and prosperity of the sensitive environment. These arguments led to an international regime governing the Antarctic – the Antarctic Treaty¹². Being signed in 1959 the treaty recognized the great importance of keeping the Antarctic environment intact and set out that the area must be used solely for peaceful purposes.¹³ It concluded that “no acts or activities taking place while the treaty is in force shall constitute a basis

¹¹ Dixon, p. 175. Areas falling under the category *res communis* are the Deep Sea Bed and the High Seas.

¹² The Antarctic Treaty, United Nations Treaty Series, Vol. 402, p. 72, No. 5778.

¹³ Dixon, p. 176-177 (quote p. 176).

for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights in Antarctica” (Art. 4) – meaning no claims of sovereignty were longer allowed. The Antarctic Treaty has 50 parties, including 28 “Consultative Parties” who gather every second year to make Recommendations in the auspices of the treaty. In 1991, the Consultative Parties agreed upon a Protocol on Environmental Protection to the Antarctic Treaty¹⁴, which turned the South Pole into a *free zone* where all mining and exploitation activities would be prohibited. This protocol will be in force for 50 years, and thereafter be the object of re-negotiation.¹⁵

The Arctic

Looking north at the Arctic, it is (unlike the Antarctic) to a large extent consisting of mainly frozen sea ice (permanent pack-ice). Regardless of, parts of the Arctic ice are under sovereignty claims from states such as Russia and Canada. These claims have generated resistance by other states in turn claiming that the Arctic should fall under the same legal definition as the high seas. Given this, the legal status of the Arctic today is *somewhat* unclear. Also unlike Antarctic, there is no treaty regime governing the Arctic. This is undoubtedly “a reflection of the fact that the prospect of valuable mineral resources being found in the Arctic is remote, although it is of considerable military importance”.¹⁶ Even if there is no over-arching international legal instrument, multiple global/regional/bilateral conventions are in force to govern the Arctic region.¹⁷

2.1.2 The Law of the Sea

2.1.2.1 Sources of Law

What has come to be known as the *Law of the Sea* in international law covers matters of state sovereignty and jurisdiction and rights over water, the sea bed, its subsoil and the airspace above the sea. This is an important field of law since the sea is used for vital interests such as international trade and transportation as well as exploitation of natural resources such as fish, oil and gas and minerals. A vast legal framework governing the sea has been constructed by the United Nations, and is known as the 1982 Law of the Sea Convention¹⁸ (UNCLOS). Apart from this multilateral treaty, the *Law of the Sea* largely consists of customary law, bilateral as well as multilateral.¹⁹

¹⁴ 30 International Legal Materials 1455 (1991), available at http://www.ats.aq/documents/recatt%5Catt006_e.pdf

¹⁵ Dixon, p. 177.

¹⁶ Dixon, p. 178 (incl. quote).

¹⁷ Timtchenko, p. xiii-xiv. Examples of conventions in force are: The 1982 Convention on the Law of the Sea, the 1963 Nuclear Test Ban Treaty, the 1944 Chicago Convention on International Civil Aviation, the regional 1973 Agreement on Conservation of Polar Bears, and the bilateral 1988 US – Canada Agreement on Arctic Cooperation, 1988 Soviet-Norwegian Agreement on Polar Studies, 1992 Russian-Canadian Agreement concerning the Arctic and the North.

¹⁸ U.N. Convention on the Law of the Sea, Dec. 10, 1982, United Nations Treaty Series Vol. 1833, No. 31363, p. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁹ Dixon, p. 217.

UNCLOS is generally applicable, meaning it is not confined to any certain parts of the sea. If any particular issue is not regulated within UNCLOS, or if a state is not party to UNCLOS (such as USA – the only one of the five Arctic Coastal states choosing to remain outside the Convention²⁰) the four multilateral Geneva Conventions from 1958 is the second source of law.²¹ The third choice, if dealing with states not even parties to the Geneva Conventions, is customary international law – which recent case law has confirmed that large parts of UNCLOS have codified.²² This is the case for concepts such as *Continental Shelf* and *Exclusive Economic Zone (EEZ)*, taken directly from UNCLOS, which thus have been deemed to exist in the international customary law.²³ Besides UNCLOS, there are special conventions to govern specific issues. Of importance for this thesis is particularly agreements such as the International Convention for the Safety of Life at Sea 1974 (SOLAS) and the International Convention for the Prevention of Pollution from Ships 1973 and Protocol 1978 (MARPOL).²⁴

2.1.2.2 Zones of the Sea

Territorial Sea

Art. 1 of the Territorial Sea Convention 1958²⁵ as well as Art. 2 of UNCLOS define the Territorial Sea as a belt of sea adjacent to the coast of a state. Apart from the land territory, the particular state will have sovereignty also over this sea area, its airspace and subsoil. The sovereignty includes full legislative jurisdiction, although it is stipulated that a coastal state should not, under normal circumstances, exercise any criminal jurisdiction over foreign vessels or stop/divert them by using any civil jurisdiction (UNCLOS, Art. 27-28). UNCLOS Art. 17 also grants the right of *innocent passage*²⁶ for all ships passing through a Territorial Sea, a right that is “non-suspendable through straits used for international navigation” (UNCLOS Art. 45, Corfu Channel Case 1949 ICJ).²⁷ The Territorial Sea may not exceed 12 nautical miles (nm²⁸) in width (UNCLOS Art. 3) from the low-water mark of the coast extending straight out into the sea. The principle of a maximum 12 nm territorial sea *can* be said to be customary international

²⁰ McDorman, p. 159. USA recognizes most UNCLOS provisions as Customary Law, but did not support Part XI on dispute settlement, and to prevent being bound to this section chose to not be a party of UNCLOS at all. The USA National Strategy for the Arctic Region (May 10, 2013), p.2, states that USA will work toward an accession to the Convention. See also Koivurova & Molenaar, p. 38.

²¹ Dixon, p. 218. The four conventions being: The 1958 Geneva Conventions on The Territorial Sea and Contiguous Zone, on The Continental Shelf, on The High Seas and on The Fishing and Conservation of Living Resources of the High Seas.

²² Dixon, p. 218: Case Concerning Maritime and Territorial Questions between Qatar and Bahrain 2001 ICJ, Eritrea/Yemen Arbitration 1999.

²³ Dixon, p. 219.

²⁴ United Nations Treaty Series, Volume 1148, No. 18961, p. 2 (SOLAS) and Volume 1340, No. 22484, p. 61 (MARPOL Protocol 1987).

²⁵ United Nations Treaty Series, Volume 516, No. 7477, p. 205.

²⁶ For more on the term “innocent passage”, see UNCLOS Art. 19.

²⁷ See Dixon, p. 220-221.

²⁸ One nautical mile, 1 nm, equals 6,080 feet or 1,852 meters (OILPOL Art. 1).

law, even if such a conclusion is not absolutely certain.²⁹ If the mentioned technique of drawing Territorial Sea borders is complicated due to a severely broken coastline the more practical method of using *straight baselines* is an option. These are straight lines drawn between certain points of the coastline, which give a base from where to draw the 12 nm border more easily. UNCLOS Art. 7 gives a thorough description of what is acceptable for a state when drawing a straight baseline (as to not include too much out of greed for further sovereign jurisdiction).³⁰

The Exclusive Economic Zone (EEZ)

Where the Territorial Sea ends, the EEZ begins. This belt of sea extends up to 200 nm from the same baselines used to measure the width of the Territorial Sea. Within the EEZ, which does not naturally belong to a state but has to be claimed, a state has sovereign rights to explore and exploit what living and non-living natural resources that may exist. The coastal state is thus the only state enjoying the right to fish and drill for oil within its EEZ.³¹ These exploitation rights are the only ones in force though, and the coastal state cannot interfere with any commercial activities by other states taking place in the EEZ unless those would directly challenge the sovereign rights of the coastal state. The use of the EEZ by its coastal state is under scrutiny by the international community, and under regulation by UNCLOS.³² Other states still enjoy the freedom to navigate, fly over, lay down submarine cables and use the sea of the EEZ in other internationally lawful ways whilst respecting the coastal state's exclusive rights as mentioned above (UNCLOS Art. 58).³³

If two coastal states have competing claims for their EEZ's, the most frequently used solution is to draw a maritime boundary based on the principles of equidistance and equity for both the Territorial Sea and the EEZ for each state.³⁴

The Continental Shelf

UNCLOS Art. 77 declares that a state does not have to claim its Continental Shelf, since it is an extension of its continental landmass. The state has sovereign rights over this area, for the purpose of exploring and exploiting the natural resources found at the floor of the ocean. The water above the shelf though, is still considered high seas (UNCLOS Art. 78).³⁵ The legal basis for the authority of a coastal state over a Continental Shelf is adjacency. With the 1969 North Sea Continental Shelf Cases came the

²⁹ Dixon, p. 222. It is the UK view that the 12 nm Territorial Sea is a customary law principle, although a handful of states have claimed that their Territorial Sea is in fact wider.

³⁰ Dixon, p. 222-223. Moreover, between opposite and adjacent coastal states, the territorial sea delimitation is done by using the *equidistance-median rule* – the border will thus be "the median line which is equidistant from the nearest points of the baselines of the" states.

³¹ Dixon, p. 225-226.

³² Dixon, p. 226.

³³ Dixon, p. 226.

³⁴ Dixon, p. 226-227.

³⁵ Dixon, p. 228, 235.

introduction of the term *natural prolongation*, meaning that a coastal state has rights over “the area of [the] continental shelf that constitut[es] a natural prolongation of its land territory.” This has turned out to be the primary legal basis for jurisdictional authority over the Continental Shelf. The principle was adopted in UNCLOS Art. 76(1).³⁶ Through its Continental Shelf regulations, UNCLOS to a large extent reflects both the geopolitical and the economic importance of coastal states being able to control offshore hydrocarbon exploitation in their coastal seafloor beds.³⁷ It can be debated whether or not the natural prolongation-rule will fall under customary international law, although it is apparent that only a small number of concerned states will have a dissenting opinion regarding this (perhaps solely the USA).³⁸

It should be noted that the physical (geomorphological) limit of the Continental Shelf does not necessarily correspond with the legal one. Legal limits here being the primary concern, these are the ones that will be presented.³⁹

UNCLOS Art. 76 states that: All states have a legal continental shelf up to 200 nm from the baselines used to map the territorial sea. This is regardless of how the shelf is actually configured. If the actual shelf extends beyond these 200 nm the state’s legal shelf will be constructed by the natural prolongation of its land territory to where the continental margin has its outer edge. The shelf cannot exceed 350 nm from the baselines used, or 100 nm from the 2,500 meter isobath (the “line of equal depth”). This is the seaward maximum limit.⁴⁰

To obtain a maximum legal Continental Shelf, one has to determine the foot of the continental slope, and use this to draw a line connecting the points farthest away, where the sedimentary rocks are at least as thick as 1% of the shortest distance from one of these points to the continental foot slope, or, draw a line connecting such abovementioned points no further out than 60 nm from the continental slope foot.⁴¹ The criteria used to draw the outer limits of an extended Continental Shelf are “not easily applicable in any given situation because of the technical and definitional difficulties of determining the thickness of the sedimentary rocks, the foot of the continental slope, the 2,500 metre isobaths, and distinguishing among submarine ridges, oceanic ridges, and submarine elevations that are natural components of the continental margin”⁴². The existence of hydrocarbon resources clearly plays a role here, since the sediment thickness criteria ensures secured jurisdiction over all such resources that possibly will exist in the offshore areas adjacent to the coast. The thought was that if sediments

³⁶ McDorman, p. 163 (incl. quote).

³⁷ McDorman, p. 163.

³⁸ Dixon, p. 230.

³⁹ Dixon, p. 229.

⁴⁰ UNCLOS Art. 76 & Dixon, p. 229. The 2,500 meter isobaths is a line connecting the depth of 2,500 meters.

⁴¹ McDorman, p. 168.

⁴² McDorman, p. 169.

were thick enough to hold hydrocarbon, they should belong to the coastal state in question. This might be of economic advantage for some states and not point out the most natural and logic boundary, a criticism the rule has endured.⁴³

If a state can claim shelf rights beyond 200 nm that would mean a derogation from the principle of *common heritage* otherwise applicable to the deep sea bed. Because of this, a coastal state exploiting resources within this prolongation of Continental Shelf is obliged to make payments to the *International Sea Bed Authority* (ISBA), who will distribute this to other states (UNCLOS Art. 82).⁴⁴

For dealing with competing claims and other matters of uncertainty the *Commission on the Limits of the Continental Shelf* (CLCS) was established under UNCLOS. CLCS is concerned with the various aspects of shelf-delimitation exceeding the 200 nm-limit and receives submissions from coastal states on how their shelf beyond the 200 nm should be delimited.⁴⁵ If two states have competing claims, there are a few ways of solving the issue (as demonstrated by the ICJ): The Convention of the Continental Shelf (1958) stated that delimitation was to be made using “a median line equidistant from the nearest points of the baselines of the territorial sea of each state, subject only to variations for special circumstances” – the *equidistance-special circumstance rule*.⁴⁶ Apart from this rule, it has later been said that the shelf should be divided based on natural prolongation, if this would mean achieving a more equitable result.⁴⁷ Such a result was namely the purpose of the equidistance-special circumstance rule to begin with.⁴⁸ The need for special attention to the circumstances in each case is thus strong.⁴⁹ An important factor in delimiting Continental Shelves where competing claims exist has been to look at the proportionality of the situation – if state A has a much longer coastline than competing state B, state B may get a wider shelf to “compensate”.⁵⁰ Most recent case law⁵¹ has shown that a judgment made with reference to the principles above can be done using three steps: Draw an equidistance line following real geography, adjust it for special circumstances, check that the result is not disproportionate. This will lead to a result compatible with UNCLOS and (most likely) accepted as customary law.⁵²

⁴³ McDorman, p. 170.

⁴⁴ Dixon, p. 230.

⁴⁵ Dixon, p. 230.

⁴⁶ Dixon, p. 231 (incl. quote).

⁴⁷ An equitable result is the only demand set for delimitation by UNCLOS, Art. 83.

⁴⁸ Dixon, p. 231 – according to ICJ decisions from 1979 and 1993.

⁴⁹ Dixon, p. 232.

⁵⁰ Dixon, p. 232.

⁵¹ See for example the Maritime Delimitation in the Black Sea (Romania v. Ukraine) Case (2009) and the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, (Bangladesh/Myanmar) (2012).

⁵² Dixon, p. 234. The process is also thoroughly described by McDorman, see p. 175.

The Deep Sea Bed

One can be rather certain that it is a matter of customary law that the seabed and its subsoil, beyond any limits for national jurisdiction, is the *common heritage of mankind*, and it shall thus be used to benefit mankind as a whole. Here, all “mineral activities should be governed by an international regime and [...] the area should be used for peaceful purposes only”.⁵³ This is also stated in UNCLOS Art. 136-137. The International Sea Bed Authority oversees the Deep Sea Bed,⁵⁴ and can grant states the right to conduct mining in therein. This comes at the price of a levy and an amount proportional to the market value of extracted minerals, and will be distributed equitable to the parties of the treaty (UNCLOS Art. 140).⁵⁵ The UNCLOS Part governing the Deep Sea Bed was somewhat controversial, and its entry into force prompted an additional Agreement (in 1994), giving extended protection for the rights and profits of states that actually do conduct mining activity in these areas.⁵⁶

The High Seas

Customary law and UNCLOS Art. 86 define the High Seas as all parts of the sea excluding internal waters, Territorial Sea, EEZ's and archipelagic water belonging to an archipelagic state. Generally the High Seas are *res communis*, and can be enjoyed by any state (through the freedoms to fish, navigate, lay submarine cables, research etc.) while no state can claim sovereignty over any area belonging to the High Seas (UNCLOS Art. 220). The High Seas shall only be used for peaceful purposes and with due regard to the rights of other states and the rules governing the Deep Sea Bed. Military exercises and weapon testing are allowed (so long as they are not atmospheric testing of nuclear weapons).⁵⁷

International Straits

One can pass through a navigable channel, a strait, without any complication when the strait in question is located within the High Seas – this is purely exercising the freedom of navigation. If the strait however lies in the Territorial Sea or other maritime zone of a coastal state, problems could likely arise.⁵⁸ The ICJ has earlier deemed an international navigational strait comprised of Territorial Sea to be subject to a constant right of innocent passage for all ships going through the strait.⁵⁹ Today, this might be an exaggeration. UNCLOS introduced the term *transit passage*, and the right for such exists through straits being at least partly comprised of Territorial Sea and used for international navigation between an area of the High Seas/an EEZ and another area of the High Seas/an EEZ. This new way of [transit] passage, is currently not a part of customary law.⁶⁰

⁵³ Dixon, p. 237 (incl. quote).

⁵⁴ Dixon, p. 238.

⁵⁵ Dixon, p. 239.

⁵⁶ Dixon, p. 239-240.

⁵⁷ Dixon, p. 241.

⁵⁸ Dixon, p. 242.

⁵⁹ Dixon, p. 242.

⁶⁰ UNCLOS Art. 37-44 & Dixon, p. 243.

2.1.3 Protecting the Marine Environment

UNCLOS includes rules giving primacy to the flag state to enact legislation and enforce measures for controlling pollution against vessels of their nationality, as well as providing for coastal state jurisdiction on areas of pollution control and management. International law already includes general obligations in order to prevent serious harm to the marine environment, and prevent pollution from ships as well as dumping of any radioactive waste.⁶¹ Multiple conventions and customary rules further control the protection of the seas, such as: the International Convention for Prevention of Pollution of the Sea by Oil 1954 (OILPOL)⁶², the International Convention for the Prevention of Pollution from Ships 1973 and Protocol 1978 (MARPOL) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (INTERVENTION)⁶³. What the international community can hope for, is that UNCLOS will mean an “ensuring of a more enforceable code for the protection of the marine environment”⁶⁴.

To briefly highlight MARPOL, it can be said that the convention came to be as a result of a common concern for the serious pollution being caused by the release of oil and alike harmful substances from ships, and a desire to eliminate such pollution.⁶⁵ The methods prescribed within the Protocol include surveying large oil tankers and ships to detect any flaws in equipment or systems and a certificate arrangement ensuring that surveyed vessels comply with the demands in the convention (Regulation 4). Annex I, Regulations for the Prevention of Pollution by Oil, Regulation 9, further (naturally) prohibits discharge of oil/oily mixtures from a ship into the sea, the prohibition under a number of preconditions and with various exceptions. Regulation 1 (10) define so called *special areas* – a sea area that because of its oceanographical and ecological condition is in need of special mandatory methods for preventing pollution caused by oil. These special areas are practically always subject to a total pollution prohibition and are under more scrutiny than other areas of the sea (Regulations 10-11).

As a provision granting coastal states special regulatory powers, UNCLOS Art. 234 turned out to be somewhat controversial. The article deals with ice-covered areas and gives special regulatory and enforcement rights to coastal states in order to prevent pollution from vessels occurring within a 200 nm-limit (the EEZ):⁶⁶

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine

⁶¹ Dixon, p. 245. The sources in law regarding this is the Draft Regulations on the Protection of the Environment taking effect under UNCLOS part XII, and the High Seas Commission 1958.

⁶² United Nations Treaty Series Volume 327, No. 4714, p. 3. Amendments were made in 1962, 1969 and 1971. OILPOL can be viewed as somewhat of a predecessor to MARPOL.

⁶³ United Nations Treaty Series Volume 970 No. 14049, p. 211.

⁶⁴ Dixon, p. 245-246 (quote, p. 246).

⁶⁵ United Nations Treaty Series, Vol. 1340, p. 184.

⁶⁶ Timtchenko, p. 124 & UNCLOS Art. 234 (quote following section).

pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

The Convention unfortunately does not offer any guidance regarding whether rules on transit passage (through straits used for international navigation) will prevail exceptions made under Art. 234, or if the latter will in fact trump the former.⁶⁷ Neither does there seem to be any clarity on what will happen when the Arctic is no longer sufficiently covered with ice, and Art. 234 no longer can be used to protect the sensitive environment.⁶⁸

There is currently no area in the Arctic Ocean designated as a *special area* under MARPOL. This means that pollution discharge standards can be (and in fact is) less strict for Arctic areas than Antarctic areas (where such special areas have been designated). If coastal states do not impose any stricter standards than the globally valid ones, by using the special legislative powers given through Art. 234 of UNCLOS, global standards will be the ones applicable. Insofar, Canada and Russia have imposed stricter discharge standards. Canada allows no oil, garbage or waste discharge from ships in the Arctic (this applies with limited exceptions) and Russia has prohibited the discharge of oily ballast water and garbage deposit in the Northern Sea Route.⁶⁹

OSPAR

The Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992 (OSPAR) governs the Atlantic parts of the Arctic maritime area, mainly through rules and principles on pollution from land-based sources, by dumping or incineration, from offshore sources and the assessment of the marine environment quality. Neither Russia, USA nor Canada is a party to the OSPAR Convention, although they can participate upon invitation from participating states. OSPAR regulates all human activities (minus fishing and with restrictions concerning shipping regulations) possible to have an adverse affect on North East Atlantic ecosystems and biodiversity. Important principles within this work are the precautionary principle, polluter pays principle and the use of best available techniques/practice. Many of the actions (decisions, guidelines etc) taken within OSPAR complement or in some way relate to actions taken within other international instruments such as the IMO or MARPOL.⁷⁰ Through Annex V of OSPAR, assessments have been initiated to identify the impacts of new and emerging activities in the Arctic, such as construction of artificial islands or placement of cables and pipelines. Such assessments should function as a basis for decision as to what measures needs to be

⁶⁷ Koivurova & Molenaar, p. 22.

⁶⁸ Legal Aspects of Arctic Shipping, p. 12.

⁶⁹ Vanderzwaag, PLT, p. 61.

⁷⁰ Koivurova & Molenaar, p. 15-17.

taken in the near future.⁷¹

2.2 Jurisdictional and Zonal Issues in the Arctic

2.2.1 Continental Shelf Investigations

The Commission on the Limits of the Continental Shelf (CLCS) facilitates the implementation of UNCLOS and its rules on establishing the outer limits of the Continental Shelf when this stretches beyond 200 nm from the baselines (as mentioned above). UNCLOS states that a coastal state shall establish such outer limits based on the recommendations of CLCS⁷². The recommendations from the commission though, shall not prejudice matters related to the delimitation of boundaries between states with coasts opposite or adjacent to each other. Bilateral agreements should in this case prevail.⁷³ In such cases where two states were to have overlapping claims to a Continental Shelf area, this issue should be solved through the use of international law and political negotiations.⁷⁴

From the date that UNCLOS comes into force for a state, that state has ten years to make a formal submission to the CLCS. This deadline will be considered met even if only a partial or preliminary submission can be made within the time frame. The Canadian submission should, according to this, be done in 2013. Because of its status as a non-party to UNCLOS, USA will not face any deadline before it chooses to join the Convention.⁷⁵ In December 2001, Russian decided to submit to the CLCS their “request” for extension of the Continental Shelves in the Arctic Ocean.⁷⁶ The Russian claim concerned for instance a wedge-shaped area stretching from the coast to the North Pole. The eastern limit of this area is fully based on a 1990 USA-Russia Agreement. The Russian CLCS proposal of a meridian line extends far beyond the place where Russia and USA potentially have overlapping claims for continental shelf delimitation and into an area that Canada might claim or might even be part of the deep ocean floor.⁷⁷ Moreover, many ridges included in the Russian claim seem to be submarine ridges, or oceanic ridges – neither which could belong to the coastal state adjacent under given circumstances. Russia could try and rationalize their claim stretching towards the USA by referring to the *sector theory*, a theory by which offshore jurisdiction could be claimed based on straight lines

⁷¹ Koivurova & Molenaar, p. 18.

⁷² UNCLOS Art. 76(8).

⁷³ Oceans & Law of the Sea United Nations,

http://www.un.org/depts/los/clcs_new/commission_purpose.htm#Purpose

⁷⁴ McDorman, p. 161.

⁷⁵ Baker, p. 66.

⁷⁶ Press Release SEA/1729, <http://www.un.org/News/Press/docs/2001/sea1729.doc.htm>.

See map: http://www.un.org/depts/los/clcs_new/submissions_files/rus01/

RUS_CLCS_01_2001_LOS_2.jpg.

⁷⁷ McDorman, p. 160 & 176.

projected from the coast margin to the North Pole (more on the sector theory in section 2.2.2). Perhaps the Russian meridian line was a suggestion directed at the other Arctic coastal states that the Arctic Ocean Seafloor could be sectorally divided using a sector theory take on delimitation.⁷⁸ The US made the objection that the Alpha-Mendelev Ridge was of volcanic oceanic origin, and that the Lomonosov Ridge was freestanding in the deep oceanic Arctic Ocean Basin, hence none of these could be under Russian “control”.⁷⁹ The CLCS decided as follows: In the case of the Barents and Bering seas, the Commission recommended to the Russian Federation, upon entry into force of the maritime boundary delimitation agreements with Norway in the Barents Sea, and with USA in the Bering Sea, to transmit to the Commission the charts and coordinates of the delimitation lines as they would represent the outer limits of the continental shelf of the Russian Federation extending beyond 200 nautical miles in the Barents Sea and the Bering Sea respectively.⁸⁰ As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.⁸¹

Five years later, in November 2006, Norway submitted to the CLCS its proposal of extended Continental Shelves for three areas in the north: the Barents Sea *Loop Hole*, the Arctic Ocean *Western Nansen Basin* and the Norwegian Sea *Banana Hole*.⁸² In March 2009, the CLCS adopted recommendations saying that they acknowledge that the information within the Norwegian submission regarding the Loop Hole satisfies the requirements of a submission to extend the Continental Shelf (in accordance with UNCLOS Art. 76). The only issue left was the delineation of the extent of Norway’s and Russia’s Continental Shelf in the Loop Hole, which should be handled through a bilateral agreement.⁸³ The CLCS also made delimitation recommendations concerning the Western Nansen Basin area as well as the Banana Hole area (where final outer Continental Shelf limits may depend on interstate delimitation).⁸⁴

⁷⁸ McDorman, p. 176-177.

⁷⁹ McDorman, p. 177-178.

⁸⁰ Para. 39, UN General Assembly 8 October 2002, Fifty-seventh session, Agenda item 25 (a), Oceans and the law of the sea, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement>.

⁸¹ Para. 41, UN General Assembly 8 October 2002, Fifty-seventh session, Agenda item 25 (a), Oceans and the law of the sea, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement>.

⁸² CLCS, Submissions to the Commission: Submission by the Kingdom of Norway, 20 August 2009, http://www.un.org/depts/los/clcs_new/submissions_files/submission_nor.htm. See also: http://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf (p. 7).

⁸³ Paragraph 22, Summary of the recommendations of the commission on the limits of the continental shelf in regard to the submission made by Norway in respect of areas in the Arctic ocean, the Barents sea and the Norwegian sea on 27 November 2006, http://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf.

⁸⁴ Para 40 & 80, Summary of the recommendations [...] 27 November 2006, (see previous footnote).

In April 2009, Denmark (joined by the Government of the Faroe Islands) made a submission regarding an area north of the Faroe Islands. The submission was only partial, to be completed with submissions regarding maritime areas south of the Faroes, but also around the coast of Greenland. Until these further submissions have been received, the CLCS will wait on making any recommendations.⁸⁵ So far only one supplementary submission, regarding the southern Continental Shelf of the Faroes, has been sent in to the CLCS by the Kingdom of Denmark, in December 2010.⁸⁶

Although no CLCS submission has been made, Canada has drawn up a map showing its possible and significant continental margin area exceeding 200 nm in the Arctic Ocean. Canada agrees with Russia in the sense that they see the Alpha-Mendeleev and Lomonosov Ridges as possible parts of the continental shelf – although the two states have made this observation in favor of the own state. The desktop study map Canada has produced makes no reference to the previously cherished sector theory as a basis for jurisdictional claims in the Arctic Ocean.⁸⁷

Even if the US is not a party to UNCLOS, its 2009 Policy for the Arctic Region states that using the CLCS procedure and following the UNCLOS provisions applicable when proposing an extended Continental Shelf will be the most effective way of achieving legal certainty and international recognition for such a desired larger Shelf area.⁸⁸ The US has followed the Canadian example and produced a map based on a desktop study. The primary focus is the Chukchi plateau, which potentially has significant oil and gas reserves. A prospective US Chukchi claim could extend quite far into the sea, as far as 600 nm from the coast of Alaska.⁸⁹

In order to successfully claim an extended Continental Shelf, a state needs to provide scientific evidence supporting that claim.⁹⁰ This means acquiring scientific data concerning the geological composition as well as other physical properties of the area claimed to constitute the Continental Shelf.⁹¹

Even if the CLCS is the forum receiving Continental Shelf “extension applications”, it is not so that the existence of a state’s extended Continental Shelf is dependent on any recognition from the CLCS. The rights of the coastal state will exist even if no CLCS submissions have been made – but if the case for an extended shelf has not been sufficiently built and presented, there will always be a lack of security as to how far out one’s

⁸⁵ CLCS, Submissions to the Commission: Submission by the Kingdom of Denmark, 13 April 2011, http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_28_2009.htm.

⁸⁶ CLCS, Submissions to the Commission: Submission by the Kingdom of Denmark, 20 August 2009, http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_54_2010.htm

⁸⁷ McDorman, p. 181-182.

⁸⁸ Baker, p. 68.

⁸⁹ McDorman, p. 182-183.

⁹⁰ McDorman, p. 156.

⁹¹ McDorman, p. 160.

Continental Shelf rights actually go.⁹² It is even fully expected that any Arctic State that is a party to UNCLOS and have not made submissions to the Commission (currently meaning Canada), will do so before the deadline has passed.⁹³ This being said, the CLCS is in no way a court judging on extended Continental Shelves, the coastal state themselves will determine the outer limits of their respective shelves. In reality though, the CLCS opinion matters a great deal, and states that have submitted an “application” to the CLCS will most likely follow the CLCS recommendations.⁹⁴ The CLCS does not however conduct any dispute resolution between states with competing claims for Continental Shelf area, in fact, a dispute between two states would hinder a CLCS recommendation. States can circumvent this by agreeing with potential opponents that the Commissions recommendations on areas that might be subject of future disputes will not have any prejudice to following bilateral delimitations, by obtaining the consent of such states.⁹⁵ As mentioned, states with opposing claims shall reach an agreement to resolve these (UNCLOS Art. 83). Negotiations to achieve a solution will likely be very political, although third-party adjudicative tribunals have developed somewhat of an international law on maritime boundary delimitation.⁹⁶

Why then are the Arctic Coastal states so concerned with acquiring an extended Continental Shelf? This is most certainly a result of indications that rather large amounts of hydrocarbon and other energy resources can be found in the Arctic Sea Bed, a source of revenue of key interest for the states in question.⁹⁷ Recent reports state that 30% of the world’s undiscovered gas and 13% of its undiscovered oil is likely to be found in the Arctic region.⁹⁸ Exploitation of onshore areas within the area above the Arctic Circle have already resulted in more than 400 oil and gas fields being discovered, which has led to 40 billion barrels of oil, 1100 trillion cubic feet of natural gas and 8 billion barrels of natural gas liquids. Most of this comes from the West Siberian Basin of Russia and the North Slope of Alaska. So far, exploratory drilling offshore has only been conducted in a limited amount, but has led to the US Geological Survey conclusion that the Arctic in fact is one of the more prospective areas globally where it is reasonable to expect significant new discoveries.⁹⁹

In 2008, the estimate was that the “extensive Arctic continental shelves may constitute the geographically largest unexplored prospective area for petroleum remaining on Earth”.¹⁰⁰ The highest probability rate for finding natural resources exists within areas of national jurisdiction, and not outside

⁹² McDorman, p. 165-166.

⁹³ McDorman, p. 166 (incl. quote).

⁹⁴ McDorman, p. 171.

⁹⁵ McDorman, p. 172.

⁹⁶ McDorman, p. 173.

⁹⁷ McDorman, p. 156.

⁹⁸ Bankes, PLT, p. 102 & Clark, Environment: Frozen Frontiers, Financial Times.

⁹⁹ Bankes, PLT, p. 102.

¹⁰⁰ McDorman, p. 157.

the 200 nm limit.¹⁰¹ Even if this is true, there are and have been some Continental Shelf claims of overlapping nature in the Arctic¹⁰²: Canada and the US claims in the Beaufort Sea, Canada and Denmark (Greenland) for parts of the Lincoln Sea, Denmark (Greenland)¹⁰³ and Norway (Spitsbergen) for parts of the northern Greenland Sea and Norway (Spitsbergen) and Russia in the north parts of the Barents Sea.¹⁰⁴ A few disputes have been solved through the conclusion of bilateral treaties, namely: The Agreement on the Maritime Boundary, U.S.-U.S.S.R., June 1, 1990, which is not currently in force, and the Agreement Concerning the Delimitation of the Continental Shelf and the Fisheries Zones in the Area Between Greenland and Svalbard, Den./Green.-Nor., Feb. 20, 2006, which only regulates the 200 nm zone.¹⁰⁵ In September 2010, the lengthy negotiations between Norway and Russia finally came to an end and resulted in the signing and ratification of the Treaty on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. In November 2012, Canada and Denmark reached an important (though tentative) agreement establishing maritime boundaries in the Lincoln Sea. After ratification, this agreement will mean a modernization of the earlier 1973 agreement between the two states concerning the same maritime boundary.¹⁰⁶

Given that there seems to be potential for extracting a reasonable amount of hydrocarbon from the Arctic Seabed, it is understandable that coastal states try to maximize their potential area of gathering such natural resources – through the establishment of an extended Continental Shelf. This of course would be more favorable than to let resources pass to another state or to the ISBA.¹⁰⁷

2.2.2 The Sector Theory

In 1925, Canada made claims of jurisdictional sovereignty all the way to the North Pole, based on what came to be known as the *Sector Theory*. Soon Russia (then, the USSR) followed, by 1926 proclaiming that all lands and islands which did not belong to any other state at that time and was located north of the Russian coast all the way up to the North Pole were to be considered USSR territory.¹⁰⁸ In practice, meridians of longitude were used to claim sovereign territory over areas up to the North Pole.¹⁰⁹ The sector

¹⁰¹ McDorman, p. 157. US Geological Survey referenced: “Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle,” fact sheet, 2008. Available at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

¹⁰² See Supplement B.

¹⁰³ Canada has reached the early stages of negotiations with the USA and is engaged in negotiations on some of the matters concerning the Danish dispute. See McDorman, PLT II, p. 89.

¹⁰⁴ McDorman, p. 158.

¹⁰⁵ McDorman, p. 158.

¹⁰⁶ Loukacheva, PLT II, p. 32.

¹⁰⁷ McDorman, p. 160-161.

¹⁰⁸ Timtchenko, p. 73.

¹⁰⁹ Pharand, 1988, p. 11.

theory proved to be somewhat popular, not at least among Americans, and a sector-wise dividing of the Arctic between the states closest thereto could reasonably be convenient. Thorough analysis has concluded though, that bilateral boundary treaties (such as the 1867 Boundary Treaty between the USA and Russia, defining limits of territory and dominion for the two states – not state boundaries but solely devices for simplifying the cartography¹¹⁰) cannot serve as a legal basis for the sector theory, neither has this theory become any principle of customary law or has contiguity to serve as legal basis for sectorial division. This leaves no legal arguments for applying the sector theory in the Arctic.¹¹¹ In recent years, the sector theory has lost ground among Russian legal professionals, who now strive towards delimitation through generally accepted principles and international law regulations.¹¹² Canada spent the early 20th century claiming that the sector theory was “very generally recognized” and that this theory gave them sovereignty within “their” sector up to the North Pole. During the 1950’s the government clarified that they only had sovereignty claims over actual land within their sector.¹¹³ Arctic states such as USA, Norway and Denmark have in various ways expressed their rejection of the sector theory.¹¹⁴

2.2.3 The Archipelago Theory

Another way of claiming jurisdiction over waters adjacent to the coast is by use of the *Archipelago Theory*. A state would under this theory claim that all waters within the archipelago make out areas of national water, water under jurisdiction of the claiming state. This conclusion would be drawn without any regard to the breadth of the Territorial Sea.¹¹⁵ To base claims of sovereignty on the Archipelago Theory is somewhat risky, given that the archipelago may be very broken and stretch over a very vast area. To gain acceptance from other concerned states may thus be very difficult. Canada had thoughts about claiming sovereignty according to the Archipelago Theory, before deciding on the Sector Theory instead, and made the archipelago claim part of its “Arctic Waters Pollution Prevention Act” (AWPPA), a legislation to prevent any massive environmental disaster in the Canadian Arctic region pointing out that the Arctic waters also largely were Canadian.¹¹⁶

¹¹⁰ Timtchenko, p. 84.

¹¹¹ Timtchenko, p. 75-76.

¹¹² Timtchenko, p. 78.

¹¹³ Timtchenko, p. 79.

¹¹⁴ Timtchenko, p. 82-83.

¹¹⁵ Reid, p. 129.

¹¹⁶ Reid, p. 131, 135. For more on AWPPA, see footnote 178.

3 Specific Issues Peculiar to the Arctic

If the previous chapter served to provide the reader with an overview of the international law most noticeably associated with the Arctic region and issues of delimitation originating from this legal framework, this chapter will deal with problems or solutions that have come to be as a result of the specific character of the Arctic environment and the region's distant position on the world map. Chapters two and three have a number of points in common, why it is important to bear what is stated above in mind when continuing the study reflected in this thesis.

3.1 Scientific Aspects

Throughout the history of the world, the Arctic climate has seen dramatic shifts, for a long time simply caused by oceanic and atmospheric variability and/or variations in solar intensity. These earlier shifts occurred in cycles, long-term or short-term, giving a “balanced” end-result. Since the industrial revolution, the Arctic has had to face a less natural climate driver with major repercussions: Anthropogenic greenhouse gases (GHG) emissions. In fact, most of the global (and Arctic) warming seen in the last 50 years can be attributed to human activities.¹¹⁷ In the Arctic, the climate changes are shown through warmer air temperatures, diminishing extent and duration of snow and sea ice and thawing permafrost. The particular sensitivity of the region makes it highly likely that human-induced factors such as a rise in GHG concentrations will result in very large climate changes in the Arctic.¹¹⁸ The climate change has a large effect on the Arctic ecosystem and lives. Observations show that the changing environment, and the changes in food availability that have followed, has caused nutritional stresses on many animals; new species have established themselves, and many already existing species have extended their living area much further north.¹¹⁹

The ongoing dramatic melt of the Arctic region is thus directly attributable to the industrial emissions of various greenhouse gases. The rays of the sun also strike the North Pole area at a much sharper angle than elsewhere which contributes greatly to the intensive warming. The melted ice turns into open, dark, water, with the possibility to absorb solar radiation to a much greater extent than the white and bright ice would do. The fact that the region is more exposed to warming caused by sunrays and that the melting initially occurring through these sun rays will make the region even more susceptible to the warming effect is called the *ice-albedo feedback loop*.¹²⁰

¹¹⁷ Arctic Climate Impact Assessment (ACIA), p. 990-991.

¹¹⁸ ACIA, p. 991.

¹¹⁹ ACIA, p. 993.

¹²⁰ Borgerson, p. 65.

The continuous warming has meant that much of the multiyear ice is now gone, and the Arctic will most likely become a sea solely covered by a thin layer of seasonal ice during the winters, and this will mean that shipping can be carried out year-round. This scenario is not far away, perhaps only a few years or decades.¹²¹ What is even more alarming is that the melt will make way for extracting more resources of the kind that is behind global warming in the first place – fossil fuels. The price of oil is peaking, and geologists are eager to discover more resources under the Arctic icecap. Indications are that the last remaining undiscovered hydrocarbon resources on earth may be hidden at the bottom of the Arctic Ocean, and that there might be one quarter of the oil and gas deposits yet to be found.¹²²

Another Arctic feedback phenomenon is the permafrost thawing, which most probably will lead to additional release of GHG.¹²³ As a result of imbalance between the processes of photosynthesis and decomposition, carbon has been stored in lake/ocean sediments and in the soils of forest and tundra for over thousands of years. This has been possible due to low temperatures, which retarded the microbial decomposition more than the photosynthesis. The projected increases in temperature can likely lead to older as well as more recently captured carbon to be released into the atmosphere. Releasing this stored carbon will lead to increased concentrations of atmospheric GHG, which will cause harm to the climate system. Meanwhile, these increased temperatures also have high potential to actually increase the photosynthetic capture of carbon released into the atmosphere (provided that other conditions in the environment do not hinder this process). The plants on land will grow faster causing more productive vegetation. This will result in a balance between the two opposing carbon processes, which will be decisive for the future changes in carbon feedback from the Arctic and into the global climate. So far though, calculations on this balance have not been fruitful.¹²⁴

The Arctic warming and melting has had a major environmental impact on the region. Previously common species such as polar bears are now becoming endangered, while fish never before found in the area now appear and temperate forests replace what once was tundra. It is now possible to grow crops successfully on Greenland, and the access to fish, timber, minerals and freshwater is greater than ever.¹²⁵

Oil spills would cause more severe harm in the Arctic than in most other oceans. So far it has been impossible to find adequate technology or infrastructure to clean up after oil spills in broken sea ice. When weather conditions are harsh and conditions hazardous, spill response could be severely delayed. Apart from the problem that spill response often is a lengthy process, oil stays in the Arctic waters longer than anywhere else. It

¹²¹ Borgerson, p. 65-66.

¹²² Borgerson, p. 66.

¹²³ ACIA, p. 994.

¹²⁴ ACIA, p. 1015.

¹²⁵ Borgerson, p. 66.

can be locked within the ice cover, and fades much slower than it would in warmer temperatures.¹²⁶

The most important measure to reduce Arctic warming is to mitigate GHG emissions. This cannot be done overnight though, and therefore there is a need to also work on reducing the so-called *Short-Lived Climate Forcers* (SLCF) such as black carbon, tropospheric ozone and methane. Especially black carbon has been reported to have a major effect on Arctic warming, both through warming of the atmosphere and through its accelerating effect on the ice and snow melting. Given this, reducing black carbon emissions could mean a slowing of ice melt and limiting the fast warming of the Arctic.¹²⁷

3.2 Security and Military Aspects

By the middle of the last century, military growth and the development of new sorts of weapons was a matter of fact. Military planners of the USA, the USSR, and their allies at that time cast their looks on the Arctic. By the 1980's the Arctic in fact had become the "most probable bridgehead for World War III"¹²⁸, and the East-West military confrontation had reached a critical stage in the region. The turning point came when Soviet leader Gorbachev in the middle of the 1980's proposed a number of initiatives to relax international tension and reduce the ongoing arms race. One proposal – the Murmansk Initiative from 1987 - also suggested a six-point program aimed at creating a new legal regime in the Arctic, built on the principles of neighborhood as well as mutually beneficial cooperation in various fields.¹²⁹

In the 1990's the Cold War era so came to an end, which meant a reduction in both military and political tension, and steps were taken towards international cooperation and stability. Disarmament proceeded through for example the Comprehensive Test Ban Treaty of 1996 and the 2010 START (Strategic Arms Reduction Treaty) between Russia and USA. NATO (North Atlantic Treaty Organization) was also formed during this period. This change had its effect on the Arctic as well as the rest of the world, making the theme of security issues shift from more traditional military aspects to other less tangible ones like the environment.¹³⁰ Aspects of environmental security do include military activities (one example is nuclear accidents, another is pressures on the environment from chemical weapons being destroyed as a result of disarmament), but also other factors such as exploitation of natural resources, oil spill as a result of transportation and sea traffic issues.¹³¹ This new and much broader security concept is a policy field that needs to be given careful and thorough consideration in the Arctic.

¹²⁶ The Pew Charitable Trusts, Oceans North, <http://oceansnorth.org/oil-spills>.

¹²⁷ Sveriges strategi för den arktiska regionen, p. 26.

¹²⁸ Timtchenko, p. xiii (incl. quote).

¹²⁹ Timtchenko, p. xiii.

¹³⁰ Heininen, PLT II, p. 37-38.

¹³¹ Heininen, PLT II, p. 41.

But this is of course true also when looking at Arctic security in a more traditional sense – the weapon-oriented and national military security, that includes routine patrolling as well as all other aspects of normal national defense. Although there currently is no military tension in the area, it is often the host site for important military structure and army trainings and is often used to test new weapons and arms system, not excluding the nuclear weapons system of the USA and Russia.¹³² The military-political importance of the Arctic is thus still very much a matter of fact. Some military bases and (radar) stations have closed, and some military activities have seized or at least decreased. But in other parts of the region activity has instead increased, and new areas of land are being used for military purposes. Such is the case in Alaska, Northern Greenland and the Kola Peninsula. Marine areas in the Arctic Ocean and the Barents Sea have also seen military activities rising in extent. The military presence in the Arctic thus consists of multiple military structures and activities, whether it be for routine military defense, controlling national borders or for deploying nuclear weapon systems.¹³³ The political stand seems to be that the Arctic is suitable for various military exercises, testing and training since it is relatively sparsely-populated and remote. Caution needs to be taken though, since military activities likely will cause environmental pollution and threaten both human and environmental security.¹³⁴

As a result of climate change, some Arctic states have undertaken a (although moderate) modernization of their military equipment, as well as made adjustments to their level and structures of force. This not so much because of any potential power projection in the region, but rather the fact that defending national sovereignty and security has become a larger issue since the melting ice has meant opening of important sea routes. Climate change is a potential threat to national sovereignty making it a relevant traditional security factor.¹³⁵ This said, there are no indications of any rising tensions that could transform into armed conflicts in the Arctic. The region is highly stable and protected by “a well-established process of institutionalized international cooperation”.¹³⁶ All Arctic coastal states except Russia are parties of NATO, making its highly unlikely that they would initiate any firing at one and other.¹³⁷

Even if the Arctic Council specifically has excluded military issues from their scope of cooperation¹³⁸, such issues have recently emerged on the agenda at a meeting focused on Arctic cooperation. In 2012 the chiefs of defense of all eight Arctic states met and discussed the Arctic situation. This

¹³² Heininen, PLT II, p. 46-47 (quote on p. 47).

¹³³ Heininen, PLT II, p. 47 & SIPRI ”Military Capabilities in the Arctic” (Wezeman 2012).

¹³⁴ Heininen, PLT II, p. 48.

¹³⁵ Heininen, PLT II, p. 48.

¹³⁶ Heininen, PLT II, p. 50.

¹³⁷ North Atlantic Treaty Organization webpage, Homepage > Organization > Member countries (http://www.nato.int/cps/en/natolive/topics_52044.htm) & Clark, Environment: Frozen Frontiers, Financial Times.

¹³⁸ The International Institute for Strategic Studies, Strategic Comments, Volume 19, Comment 16 & Koivurova, p. 85.

could be a sign of moving towards more partnership even in a field as sensitive as military collaboration, and might change the image of security in the north.¹³⁹

3.3 Shipping and Maritime Governance

3.3.1 New Opportunities

Given that the Arctic ice is rapidly melting, it has become an inevitable fact that new international maritime trade routes will be established. Already today, shipping exists for supplying the populations of the North and supporting the industries of hydrocarbon and mineral resources production in the Arctic areas of Norway, Russia and Canada. Even cruise ships have begun to sail along the coast of Greenland. In recent summers it has become possible for smaller ships to navigate parts of the Northwest Passage. It is clear that the Arctic is and will be an opportunity for economic development and growth.¹⁴⁰ Discussing trade routes¹⁴¹, three of those could virtually transform how international shipping is conducted between major markets. The first one likely to become operational is the *Northern Sea Route* through the Russian waters, which will link Asia with the northern Europe. The journey from Hamburg to Yokohama will be approximately 5,000 miles shorter than using the Suez Canal route.¹⁴² The *Northwest Passage* links North America, Europe and Asia through the seven routes available through Canadian Arctic waters. The passage is probably able to use during the summers, and will mean a 6,500-mile shorter journey than the Panama Canal route or a 9,000-mile shorter journey than the Cape Horn route. A third possible shipping route will be the *transpolar route*, going from the Bering Strait across the North Pole towards Iceland, which would mean 5,000 miles saved compared to using the Panama Canal route.¹⁴³ Many actors are preparing for this shift in shipping practices, and a great number of polar classed vessels are under construction.¹⁴⁴

Much of the expected development of the Arctic region will be dependent on shipping. In order to facilitate this increased international shipping, the infrastructure needs to be geared up and adapted to the future, and the navigation challenges in the Arctic needs to be appropriately handled.¹⁴⁵ The remoteness and special character of the Arctic will create specific demands for shipping taking place: Safety and environmental standards comparable to no other, regulations for construction standards concerning ships, crewing and operation requirements much higher than would be the case in other more easily navigated areas, widely available marine

¹³⁹ Loukacheva, PLT II, p. 32.

¹⁴⁰ Chircop, p. 355.

¹⁴¹ See Supplement A.

¹⁴² Chircop, p. 356.

¹⁴³ Chircop, p. 356.

¹⁴⁴ Chircop, p. 356-357.

¹⁴⁵ Chircop, p. 357.

insurances at reasonable costs, coastal states of the region must offer affordable support services on a non-discriminatory basis.¹⁴⁶ To develop the new Arctic trade routes can hopefully be an opportunity not to let opportunism and conflict prevail, but for planning based on experience and insight and for an equitable and methodical cooperation.¹⁴⁷

It is important to note that just because predictions are that the Arctic will be ice-free during the summer, this does not mean that the sea will be able to navigate as one were in non-polar regions. This is why instead of calling it ice-free, “open water” would be more suitable. This is because there will still be ice, even if in smaller amounts, and this remaining ice will move in unpredictable patterns and the ice conditions may change significantly and rapidly causing major safety concerns.¹⁴⁸ Another issue is the mapping, or rather lack of updated mapping, of the Arctic. On a journey one will stumble upon choke-points and narrow channels hard to navigate. To do so without sufficient charts will be even more difficult given that the fog often lies thick over the Arctic region, and the visibility often is limited. To send vessels regularly through the open Arctic waters will thus demand maritime training and preparations beyond what is carried out today.¹⁴⁹

Since the cost of ice breakers is very high, and there are not a large number around for use, many vessels crossing the Arctic Ocean do so unescorted. Canada and Russia use their ice breakers only for the most icy parts of the ocean. If anything goes wrong and a breaker is not present, the risk of disaster is alarming and the lack of rescue services in the Arctic will present itself clearly. The lack of, and expensive character of, ice breakers will cause a halt to the increase in Arctic shipping. It will take a long time until the ice breaker industry can keep track with maritime transport of goods.¹⁵⁰

The routes that most likely will be used are, as mentioned, located in remote areas of the Arctic. Even though some Arctic shipping-safety control zones do exist (for example in the Canadian areas), the service available for shipping vessels cannot compare with the “regular” sea routes. There is a great need to resolve this and other shortcomings, for example through a larger number of harbors where vessels can stock up on supply and make reparations after possible ice-damages, and also improve the capacity for salvage and pollution response and search and rescue operations.¹⁵¹ Regarding pollution response, the Arctic has specific needs due to its low temperatures and circulation patterns, which means that even “a low “dissipation rate” prevails for a pollutant such as oil”. In theory, it only takes a few ships to threaten the Arctic environment, since “a small discharge of a pollutant such as fuel oil can cause significant damage.”¹⁵²

¹⁴⁶ Chircop, p. 357.

¹⁴⁷ Chircop, p. 358.

¹⁴⁸ Chircop, p. 359.

¹⁴⁹ Chircop, p. 360.

¹⁵⁰ The Economist Special Report, Short and Sharp.

¹⁵¹ Chircop, p. 360.

¹⁵² Chircop, p. 361.

Given the risks here presented, it is clear that Arctic shipping requires more demanding rules, regulations and best practices standards than other maritime regions do. The question is at what level should such regulations be adopted.¹⁵³

3.3.2 Legal Framework for Arctic Shipping

International Level

Arctic shipping will fall under the United Nations (UN) body International Maritime Organization (IMO) and its governance structures (including processes, rules and standards) for international shipping. These promote “the highest practicable standards for maritime safety, navigation efficiency and vessel-source pollution, encourages the removal of discriminatory practices by States and supports the availability of shipping services to world commerce.”¹⁵⁴ The maritime safety tools developed by the IMO can help promote suitable construction, equipment and seafaring standards for the Arctic region. Such tools can be found for instance in the International Convention on Safety of Life at Sea (SOLAS), adopted in 1974, consisting of a large range of rules for basically all aspects of ship construction, equipping, crewing and operation.¹⁵⁵ All rules applicable to the Arctic are ones of general character though, and even if voluntary guidelines are in force, no mandatory regulations governing the particular challenges of navigating the Arctic Ocean exist.¹⁵⁶

Through the International Convention on the Prevention of Pollution from Ships 1973/78 (MARPOL) the IMO has – as mentioned in section 2.1.3 – the authority to designate *special areas* where the marine environment is particularly sensitive and vessel discharges therefore are further restricted. Of relevance for a study of Arctic shipping, it should be noted that the Antarctic Waters, the Baltic Sea and the North Sea have been designated as such sensitive areas. The IMO can demonstrate the need of special protection for certain areas by adopting special mandatory measures and/or establish a so called *Particular Sensitive Sea Area* (PSSA) and taking *associated protective measures* (APMs). Today, the PSSA nearest the Arctic is located in Western European waters. To further protect and conserve the environment, the IMO has also approved routing measures. Neither of the now listed protective measures have yet been taken in Arctic waters.¹⁵⁷ The IMO has not ignored the safety issues particular for the Arctic though, and has adopted, for example, Guidelines for ships operating in polar waters¹⁵⁸ and has proposed new regional navigation areas (NAVAREAs) in the

¹⁵³ Chircop, p. 361.

¹⁵⁴ Chircop, p. 361 (incl. quote).

¹⁵⁵ Chircop, p. 361-362.

¹⁵⁶ Chircop, p. 362.

¹⁵⁷ Chircop, p. 363.

¹⁵⁸ ”Polar Guidelines”. Available at

<http://www.imo.org/Publications/Documents/Attachments/Pages%20from%20E190E.pdf>. See also section 3.3.3.

Arctic, an approach that would impose further responsibilities on affected coastal states.¹⁵⁹

Given that no MARPOL “special areas” exist within the Arctic Ocean, MARPOL permits certain discharge levels, such as oily water discharges up to 1/15k-1/30k (maximum allowed discharge quantity being e.g. 1/15,000 of the cargo capacity or cargo carried) and a maximum discharge rate of 30 liters/nm no closer than 50 nm from nearest land. Discharge of plastic is prohibited, packing materials further than 25 nm from land and other materials (such as glass, metal and paper) further than 12 nm from land are allowed though.¹⁶⁰ Perhaps these rules aren’t enough. This seems to be the opinion of Canada and Russia, who both have a zero-tolerance against oil discharge.¹⁶¹ One could argue that the Arctic needs to be granted some special area designation under MARPOL, but the region today has a shortage of ports being able to receive the oil and garbage that would be prohibited to dump in the ocean.¹⁶² In order to designate special areas and for example set higher discharge standards or mandatory routing schemes as APMs under MARPOL, the Arctic coastal states could join forces and propose the entire Arctic region becoming a large PSSA, or groups of/individual Arctic states could submit proposals concerning different parts of the Arctic Ocean. A relatively limited amount of shipping could prove sufficient for PSSA designation, if shipping qualitatively has potential to seriously pose a threat to the marine environment.¹⁶³ Apart from Russia, the Arctic states have little experience with marine salvage. A salvor should use the best environmental option to take the salvaged vessel somewhere safe – this equation can be challenging due to ice conditions and coastal state regulations.¹⁶⁴

Vessel-source pollution is also dealt with in UNCLOS Part XII, where provisions are directed at flag and coastal states. The general UNCLOS rule is that prescriptive jurisdiction practiced by a coastal or flag state is linked to the term *generally accepted international rules and standards* (GAIAS). This especially means the technical rules adopted within the IMO. UNCLOS stipulates a mandatory prescriptive jurisdiction for flag states in regard to vessel-source pollution, which must at least reach GAIAS level. There is only a voluntary mandate for coastal state prescriptive jurisdiction regarding vessel-source pollution, and if a state uses this alternative the domestic rules cannot be harsher than the GAIAS level.¹⁶⁵

The Arctic Council (AC) is not an observer at the IMO (nor is the IMO at the AC) and no cooperation agreement exists between the two. Even if the

¹⁵⁹ Chircop, p. 363.

¹⁶⁰ MARPOL Annex I Regulation 9 & Annex V Regulation 3. See also Chircop, p. 375.

¹⁶¹ Chircop, p. 375.

¹⁶² Chircop, p. 375-376.

¹⁶³ Chircop, p. 376.

¹⁶⁴ Chircop, p. 376-377.

¹⁶⁵ Koivurova & Molenaar, p. 22.

member states of the AC participate in the work of the IMO they do so individually and not as a part of the greater Arctic community, possibly failing to “project a systematic regional approach to Arctic issues at IMO”. Industry as well as NGO’s concerned with the Arctic can participate in IMO meeting and affect rules and standards being adopted. It might also be a good idea for the IMO to apply for observer status is the Arctic Council.¹⁶⁶

Regional Level

UNCLOS Art. 122-123 offer a definition of *semi-enclosed sea* as a sea surrounded by a number of states and connected to another part of the sea by a narrow outlet or a sea consisting of the Territorial Seas/EEZs of at least two coastal zones. The definition is there to give ground to “encourage regional cooperation in marine areas within such a constraining geography”.¹⁶⁷ The Arctic coastal states have an obligation to either directly or through a suitable regional organization endeavor:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.¹⁶⁸

States are also under an obligation to undertake regional cooperation, as appropriate, to formulate international rules, standards and practices in line with UNCLOS, to protect and preserve the marine environment, paying attention to special regional features.¹⁶⁹

The fact that the Arctic Council only partially consists of Arctic coastal states has had certain implications for the work on regulating shipping within the AC, which has been primarily focused on developing a knowledge base for general issues and cooperation in the fields of contingency planning and response.¹⁷⁰ The Arctic coastal states do not shy away from stepping outside their Arctic Council cooperation when this can be beneficial. Apart from being members of the AC, the five coastal states also have a separate form of cooperation, formed through the Ilulissat Declaration¹⁷¹ by the ministers in 2008. This declaration touched on three key issues:

First, in response to proposals for a new comprehensive international legal regime for the Arctic Ocean, they stated that such a comprehensive legal instrument was unnecessary. Second, presumably as an assertion of their rights as coastal States, they espoused their readiness to undertake responsible management by using the existing framework for the

¹⁶⁶ Chircop, p. 364 (incl. both quotes within the section).

¹⁶⁷ Chircop, p. 364.

¹⁶⁸ UNCLOS, Art. 123.

¹⁶⁹ UNCLOS, Art. 197.

¹⁷⁰ Chircop, p. 366.

¹⁷¹ The Ilulissat Declaration, Arctic Ocean Conference, May 28, 2008. Available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

international law of the sea. Third, and most significantly for shipping governance, they expressed the common intention to continue working together directly and through IMO to strengthen existing and develop new safety measures to prevent and reduce vessel-source pollution.¹⁷²

Because of the potential mineral resources hidden under the Arctic ice as well as the above mentioned shipping and trade possibilities that will be available in the foreseeable future, the Arctic is of great interest not only to Arctic states, but to the rest of the world as well. It seems as though non-Arctic states have a non-territorial interest that the Arctic area is being properly governed. UNCLOS recognizes such outside interest in regional seas by obliging the Arctic (regional) states to “endeavor to invite other States or international organizations to cooperate with them on furthering cooperation in the region”¹⁷³. Such a possibility has been given to outside states by the AC through the concept of Observer status in the Council.¹⁷⁴ All in all, it could be stated that:

Clearly the regional governance level has an important role to play in the governance of Arctic shipping, but most likely as a political rather than a standard-setting forum. It has the potential to enable Arctic States to better coordinate their national and IMO efforts to regulate shipping. It is probably in the collective interest of Arctic States to have the Arctic Council assume a more visible institutional presence at IMO, thus alerting the rest of the maritime community that a viable regional cooperative arrangement exists which is beneficial to international shipping. The Arctic Council also has the potential of further engaging important and interested non-Arctic States or organizations, such as the EU.¹⁷⁵

National Level?

National governance can (as stated above) be practiced through the use of UNCLOS Art. 234, which enables coastal states to set higher standards for pollution prevention as a result of shipping than the international norm set by the IMO¹⁷⁶. National standards then become an add-on to the protection standards already in force:¹⁷⁷ Canada adopted the Arctic Waters Pollution Prevention Act¹⁷⁸ (AWPPA) in 1970, applicable to waters north of 60° and (by amendment in 2008) encompassing Canada’s entire EEZ. Regulations within the AWPPA include designation of shipping-safety control zones (so far 16 such zones have been designated), polar standards for ships, zero discharges from ships, requirements for an ice navigator aboard, and voluntary (to be made mandatory) reporting to the Arctic Canada Traffic System (NORDREG) for any ships weighing over 300 tons that enters the

¹⁷² Chircop, p. 366.

¹⁷³ UNCLOS, Art. 123 (d).

¹⁷⁴ Chircop, p. 367.

¹⁷⁵ Chircop, p. 367.

¹⁷⁶ One question of importance is whether such “extra protection” legislation must be limited to the direct prevention of pollution or if safety regulations which in practice would be of utmost importance for preventing incidents or casualties that could seriously harm the Arctic Marine environment also can fall under the Art. 234-exception. See Chircop, p. 371.

¹⁷⁷ Chircop, p. 368.

¹⁷⁸ Arctic Waters Pollution Prevention Act (R.S., 1985, c. A-12), available at <http://www.tc.gc.ca/eng/acts-regulations/acts-1985ca-12.htm>.

Canadian Arctic Waters.¹⁷⁹ The Russian Federation has also legislated requirements for safety and pollution-prevention for vessels passing through the Northern Sea Route, setting out “standards for polar classes, ship inspection, emergency and repair supplies, ice-navigation qualifications of the master, pilotage requirements (compulsory in some straits), ice-breaking, civil liability for pollution damage, a compulsory notification system including advance permission to use the route, and fees for services. Ship transits are monitored by the authorities”.¹⁸⁰ States that use the Art. 234-exception will do so without any IMO approval on their adopted regulations. Instead, UNCLOS settled for requiring that the national regulations be based on the best scientific evidence available.¹⁸¹

To protect the Arctic marine environment in a time of increased shipping activity, unilateral efforts are not enough though. When taking place on the high seas (such as through the transpolar route), shipping is regulated by the IMO, and not any single state. Besides, when the Territorial Sea or straits are being used for international navigation – the right of innocent/transit passage will apply and states may not be able to enforce any Art. 234-regulations.¹⁸² Because of this, “a better approach to the use of Article 234 is to use the powers conferred as part of a broad cooperative approach to the setting of polar shipping rules and standards.” Some rules, of more strict safety character, would anyhow need to be obtained through the IMO.¹⁸³ A possible conclusion is that:

Arctic coastal States (in consultation with the other Arctic and interested States, possibly using the Arctic Council as a vehicle) should take the lead in IMO to establish appropriate safety and environmental rules and standards, and then use their Article 234 powers to effectively enforce them. It is reasonable to interpret Article 234 as providing a basis for them to exercise a leadership mandate for this purpose.¹⁸⁴

3.3.3 Mandatory Arctic Guidelines

As has been indicated, there is a need to legislate on marine protected areas to protect them from the consequences of increased shipping in the Arctic. A large step in the right direction would be to adopt and implement a legally binding Polar Code – drawn up by the International Maritime Organization (IMO), to replace the voluntary Polar Guidelines currently applicable. Such a legally binding instrument is expected to be in place by 2015-2016.¹⁸⁵ The (voluntary) guidelines already in force address the special conditions of Polar waters, such as remoteness and dangers associated with ice. They include a Circular (MSC. 1/Circ. 1184) on Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from Search and

¹⁷⁹ Chircop, p. 368-369 (quote, p. 369).

¹⁸⁰ Chircop, p. 369-370 (quote, p. 370).

¹⁸¹ Chircop, p. 372.

¹⁸² Chircop, p. 372. See discussion in section 2.1.3.

¹⁸³ Chircop, p. 372 (incl. quote).

¹⁸⁴ Chircop, p. 372.

¹⁸⁵ Loukacheva, PLT II, p. 33.

Rescue (SAR) Facilities (2006). This part urges passenger ships companies operating in areas far from an search and rescue facilities to develop its own emergency plans which could preferable include “voyage pairing” – meaning that other passenger ships located in the same area will be used as SAR facilities. Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas (2007), further urges passenger ships to produce detailed voyage and passage plans. These should address issues such as safe distance from icebergs, safe speeds in ice-covered waters and which areas to not enter. Further parts of the Polar Guidelines provide requirements for construction and technics of Polar Class Ships.¹⁸⁶ For example, such a ship should not carry any pollutants against the outer shell of the vessel, in order to minimize the risk of contaminating the water if an accident should occur. It should also be equipped with enclosed lifeboats and carry survival kits fit for Polar weather conditions.¹⁸⁷ Operational suggestions are also included, such as: Each Polar classed vessel should have at least one qualified *ice navigator* aboard. As stated above, the process of making these Guidelines mandatory is currently underway. This was originally meant to happen in 2012, but the various discussions concerning geographical scope of application, appropriate training to require for vessel personal and ice navigators and many other aspects of such a mandatory instrument have taken quite some time.¹⁸⁸

Even if the IMO has developed rules and standards for shipping, it is doubtful whether these are practically useable in the Arctic. In the Arctic, evacuation from ships may very well happen by foot on ice blocks instead of on free water in lifeboats, and a ship may be prohibited from changing its course when approaching another ship because of surrounding ice conditions.¹⁸⁹ The lack of full safety rules is made visible also through the somewhat narrow scope of the Polar Guidelines – and the fact that these Guidelines on shipping construction and operational standards are not mandatory.¹⁹⁰ The Guidelines do not include any liability or insurance requirements, nor any discharge, emission, navigation or contingency standards, solely CDEM (construction, design, equipment and manning) standards. Many of these though focus on mitigating vessel-source pollution. The guidelines are only applicable for international voyages of ships according to the SOLAS definition, which excludes naval vessels and smaller fishing/cargo vessels.¹⁹¹

¹⁸⁶ Vanderzwaag, PLT, p. 58.

¹⁸⁷ Vanderzwaag, PLT, p. 59.

¹⁸⁸ Vanderzwaag, PLT, p. 60.

¹⁸⁹ Chircop, p. 372-373.

¹⁹⁰ Chircop, p. 373.

¹⁹¹ Koivurova & Molenaar, p. 24.

3.4 The Arctic Council and Regional Cooperation

3.4.1 Development and Legal Status

Arctic cooperation in a modern form started in the late 1980's, and was back then entirely focused on environmental issues. In 1991, the Rovaniemi Declaration was signed, and after this followed the adoption of the Arctic Environmental Protection Strategy¹⁹² (AEPS), a goal-oriented document lacking any real resemblance to an international treaty.¹⁹³ AEPS included very ambitious objectives and action plans to reduce and ultimately eliminate the pollution problems identifiable. The strategy also required the Arctic states to form working groups for the various pollution problems at hand and founded the Arctic Monitoring and Assessment Program (AMAP) in order to measure and assess the effects of anthropogenic pollutants in the Arctic. AEPS stressed the importance of UNCLOS and the need to follow international environmental treaties in force, and also encouraged the Arctic states to become parties to significant international instruments with the aim to protect the marine environment. Cooperation in the fields of Emergency Prevention, Preparedness and Response (EPPR) as well as Conservation of the Arctic Flora and Fauna (CAFF) was also emphasized and structured.¹⁹⁴ In 1993, the Arctic states convened in Nuuk, Greenland, where they extended the institutional structure presented in AEPS. The EPPR and Protection of the Arctic Marine Environment (PAME) were dubbed working groups as well, and a task force for sustainable development saw the light of day. Another evolution of the cooperation was the inclusion of meetings of Senior Arctic Officials (SAO). A meeting 1996 in Inuvik, Canada then further followed up AEPS. This meeting meant the start for the Arctic cooperation in its current form, and a few months later the establishment of the Arctic Council was a fact.¹⁹⁵ The objectives widened, to now include common Arctic issues, focusing on issues of sustainable development and environmental protection in the region. The use of *common issues* as a concept meant giving the AC a very wide mandate. The only explicit exclusion was that the cooperation did not include matters relating to military security.¹⁹⁶

The procedural rules of the AC include decision-taking by consensus of the members (members are the eight Arctic states – USA, Canada, Russia, Iceland, Denmark, Norway, Sweden and Finland) and representation by

¹⁹² Arctic Environmental Protection Strategy, June 14, 1991. Available at <http://www.arctic-council.org/index.php/en/document-archive/category/4-founding-documents>.

¹⁹³ Koivurova, p. 70-71.

¹⁹⁴ Koivurova, p. 71-73.

¹⁹⁵ See Declaration on Establishment of The Arctic Council (The Ottawa Declaration), September 19, 1996. Available at <http://www.arctic-council.org/index.php/en/document-archive/category/4-founding-documents>. See also Koivurova, p. 80-81, 83.

¹⁹⁶ Koivurova, p. 85.

indigenous peoples organizations labeled Permanent Participants (PP's) who must be consulted prior to any decision-making.¹⁹⁷ The SAO's meet regularly and produce recommendations for the ministers of the Arctic Council member states to approve through signing a declaration at their biennially meetings.¹⁹⁸ The process within this Arctic cooperation has doubtlessly become more and more institutionalized, even if the definition of what the cooperation should be labeled in the international law community is ambiguous. This seems to fit in to recent practice though, where new kinds of cooperation arrangements have replaced traditional concepts such as treaties and international organizations.¹⁹⁹

At the same time, the above-mentioned ambiguity in some ways creates a problem, since the "legal status of the cooperation process in general and of the instruments adopted in the process in particular" is unclear. Even if the AEPS document is viewed upon as binding, it is unclear how and to what extent. Available comments regarding the legal status of AC is reluctant to call it an intergovernmental organization.²⁰⁰ Even so, its agreements should be considered binding in international law based on the aspect that the decisions are not taken by any organ of the council, but through meetings of participating state parties.²⁰¹

Although it might have had some weaknesses in legal terms in the past²⁰², the institutional aspect of the AC has recently been greatly strengthened by the standing secretariat established in Tromsø, Norway, in 2013.²⁰³ The prior lack of any structural funding has also been dealt with through PSI, the Arctic Council Project Support Instrument. The PSI gathers funds from AC stakeholders and will when operational dispense these to AC projects in need of additional funding.²⁰⁴

Regarding the issue of whether the Arctic Council has been able to function as a platform for the member states, on which they can act together to fight global climate change, following points can be made. The AC had a substantive influence on the Stockholm 2001 negotiations for a Convention on Persistent Organic Pollutants, and has agreed to support IMO negotiations on transforming the Polar Code into a binding instrument. These actions show that the AC indeed is capable of advocating a strong

¹⁹⁷ Koivurova, p. 85-86.

¹⁹⁸ Koivurova, p. 90.

¹⁹⁹ Koivurova, p. 94.

²⁰⁰ Koivurova, p. 94 (incl. quote).

²⁰¹ Koivurova, p. 124.

²⁰² The two issues mentioned were previously mentioned as governance/regulatory gaps within the AC, see Koivurova & Molenaar, p. 5.

²⁰³ See Meeting of Senior Arctic Officials Stockholm, Sweden 20-21 March 2013 Final Report, 2.3, and Arctic Council webpage, "Contact Us", <http://www.arctic-council.org/index.php/en/contact>.

²⁰⁴ See Meeting of Senior Arctic Officials Stockholm, Sweden 20-21 March 2013 Final Report, 3.10, and Arctic Council webpage, "U.S. allocates 5 million to the environment in the Arctic", <http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/492-us-allocates-5-million-to-the-environment-in-arctic>.

international environmental policy.²⁰⁵ AC member states have also taken on the role of spearheading efforts on emission cuts and addressing SLCF, and urged the global community to follow. Other actions include their ambition to limit global temperature rise to below 2 degrees Celsius – a strong statement coming from states such as USA, Russia and Canada. The climate policies of these states fail to deliver the same will though. Canada withdrew from the Kyoto Protocol²⁰⁶ in 2012, and USA never even became a party to begin with. Russia refrained from renewing their commitment to the protocol for a second term. What can be concluded from this is that climate policy is a major political field for these states, and Arctic considerations alone cannot dictate the way this policy is shaped;²⁰⁷ unfortunate, but perhaps understandable.

3.4.2 Legislative Work Protecting the Arctic

3.4.2.1 Search and Rescue Cooperation

Through the 2011 Ministerial (Nuuk) Declaration, the Arctic Council announced their first successfully negotiated legally binding agreement – the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic.²⁰⁸ This SAR Agreement was concluded between the governments of the eight Arctic Council member states, who are all members of UNCLOS/accepts majority of UNCLOS principles as part of Customary Law (USA) and the two “related” conventions: The 1979 International Convention on Maritime Search and Rescue and the 1944 Convention on International Civil Aviation. The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR) provide guidance on the implementation of the SAR Agreement.²⁰⁹ The Arctic states entered into the SAR Agreement in order to strengthen the cooperation and coordination on aeronautical and maritime search and rescue in the region.²¹⁰ Obligations in the agreement include that each state shall “promote the establishment, operation and maintenance of an adequate and effective search and rescue capability within its area” and inform the other states of changes made regarding its competent authorities, SAR agencies, and rescue coordination centers.²¹¹ To pursue the objectives of the agreement, a state shall for instance “take urgent steps to ensure that the necessary assistance is provided” and “may request assistance” from the other states if it is to receive information that someone appears to be in distress and immediately

²⁰⁵ Koivurova, PLT II, p. 73-73.

²⁰⁶ An international agreement under the UN Framework Convention on Climate Change, setting binding targets for participating states for reducing GHG emissions. Is currently in force until 2020. See http://unfccc.int/kyoto_protocol/items/2830.php.

²⁰⁷ Koivurova, PLT II, p. 73.

²⁰⁸ Nuuk Declaration, On the occasion of the Seventh Ministerial Meeting of The Arctic Council, 12 May 2011, Nuuk, Greenland, p. 2. Available at <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations>.

²⁰⁹ Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic (SAR Agreement), preamble & art. 7. Available at <http://www.arctic-council.org/index.php/en/document-archive/category/20-main-documents-from-nuuk>.

²¹⁰ Art 2, SAR Agreement.

²¹¹ Art. 3 (quote), 4-6, SAR Agreement.

forward all relevant information to a state in which territory there is reason to believe that a person, vessel or aircraft is in a state of emergency.²¹² If a state for SAR purposes needs to enter into another state's territory, the second state shall advise on this enquiry and apply the quickest border crossing procedure possible.²¹³ Other provisions include an "obligation" for states to enhance cooperation in SAR matters, exchange information that may improve the effectiveness of SAR operations and promote mutual SAR cooperation by "giving due consideration to collaborative efforts" – such as conducting joint SAR exercises and training.²¹⁴

Not only is the SAR Agreement built on "soft" responsibilities and obligations of the *shall* and *may* character, a participating state may simply withdraw from the agreement by notifying the depositary 6 months in advance.²¹⁵ It seems possible to conclude that this instrument is more a manifestation of the good will to cooperate between the Arctic states rather than a strong legal instrument.

One Russian view seems to be that the agreement is focused on better regional cooperation and coordination with the purpose of offering free help to people when in distress in the Arctic Ocean – no matter what their reason for being there is. The issue of salvage of ships or aircraft is outside the scope of the agreement, but it should not be ruled out that subsequent agreements will also address this area of cooperation. Even if the principles set out in the SAR Agreement build on international instruments formerly in place, it has not solely copied their contents – it has a significant added value, and is thus a major contribution to Arctic law.²¹⁶ Clarifying the SAR responsibility zones of the parties to the Agreement is significant in a practical sense, since it will eliminate possible misjudgments regarding who has the responsibility to initiate and coordinate a pending operation. This will lead to a quicker search and rescue-process, with fewer misinterpretations and a clearer labor division. Provisions included in the agreement are ones of utmost importance since saving lives is an extremely time sensitive operation.²¹⁷ With this agreement, there is no longer any need to spend time on lengthy interstate communications before action can be taken. All known phases of rescue activities have now been assigned with responsible actors.²¹⁸ Entry into the territory of another Arctic state has also been made easier. It is now a legally binding obligation to administer border crossings through the most expeditious procedure possible during a SAR operation.²¹⁹ Despite all its advantages, cooperation on SAR cannot substitute efforts to enhance national capabilities – and such should therefore be prioritized. Hopefully such efforts will only gain from the light shed on SAR in the Arctic during the negotiations for the Arctic Council

²¹² Art. 7, SAR Agreement.

²¹³ Art. 8, SAR Agreement.

²¹⁴ Art. 9, SAR Agreement.

²¹⁵ Art. 19, SAR Agreement.

²¹⁶ Vasiliev, PLT II, p. 57-59, 64.

²¹⁷ Vasiliev, PLT II, p. 60.

²¹⁸ Vasiliev, PLT II, p. 60.

²¹⁹ Vasiliev, PLT II, p. 61.

SAR agreement. Russia has already taken steps to improve national SAR capacity, and has decided to establish (by 2015) ten new stations for SAR monitoring and coordination in towns and ports along the Northern Sea Route. Today's Arctic SAR capabilities are limited, but could be strengthened by the use of military vessels and airplanes in the near distance. This has not been discussed under the SAR agreement negotiations, and is not dealt with in the final product. At the chief of defense meeting in 2012 it was a major subject of discussion though. The possibility to cooperate with the military to implement the agreement would be a major asset.²²⁰

3.4.2.2 Oil Spill Prevention and Response

Recently, at the 2013 Ministerial meeting in Kiruna, Sweden, the Arctic Council signed the second legal instrument negotiated within its auspices. This was the Agreement on Marine Oil Pollution Preparedness and Response in the Arctic (Oil Spill Agreement). Also this agreement was concluded between the governments, and referred to other international legal instruments – such as the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation and the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. The preamble expressed consciousness of “the threat from marine oil pollution to the vulnerable Arctic marine environment and to the livelihoods of local and indigenous communities”, “that in the event of an oil pollution incident, prompt and effective action and cooperation among the Parties is essential in order to minimize damage that may result from such an incident” and “the Parties’ obligation to protect the Arctic marine environment”.²²¹

Once more, the objectives focus on strengthened cooperation, coordination and mutual assistance, this time in order to protect the marine environment from oil pollution.²²² Each state shall keep a national system to ensure a prompt and effective response to oil pollution incidents, including contingency plans, and establish a minimum level of oil spill combating equipment, exercises and training programs and plans for response in case of an oil spill incident.²²³ Many provisions within the agreement concern contact points and exchange of information between parties. If an oil spill occurs and this is likely to affect the interests of another state, the state which was first aware of the spill shall without delay inform the second state of the situation and what measures have been taken.²²⁴ The importance of monitoring is also noted, and the agreement encourages the parties to work together and conclude bi- and/or multilateral agreements. A state may

²²⁰ Vasiliev, PLT II, p. 63.

²²¹ Agreement on Marine Oil Pollution Preparedness and Response in the Arctic (Oil Spill Agreement), preamble. Agreement available at <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting>.

²²² Art. 1, Oil Spill Agreement.

²²³ Art. 3-4, Oil Spill Agreement.

²²⁴ Art. 6, Oil Spill Agreement.

request assistance from another state in case of an oil pollution incident, and the latter state shall then cooperate and provide assistance. Afterwards, the helping state shall be reimbursed by the state requesting the help.²²⁵ To promote cooperation and coordination, the parties shall endeavor “to carry out joint exercises and training”.²²⁶ To assist in the implementation of the agreement, the parties thereto shall develop Operational Guidelines.²²⁷

To settle any potential disputes concerning application/interpretation, direct consultations shall be used. Also this agreement has an easy exit for a state wishing to withdraw, where the only demand is a notification six months in advance.²²⁸

Apart from the recent AC Agreement, there is a vast number of bilateral/regional instruments in force to protect and prepare the Arctic for environmental disasters such as oil spills. These include a 1983 bilateral agreement between Canada and Denmark, a 1988 bilateral agreement between Canada and USA (including the provision that all US icebreakers passing through Canada’s internal waters will need consent to do so), a 1992 bilateral agreement between Norway and Russia on Cooperation on Environmental Matters, the 1993 Nordic Agreement focused on monitoring maritime zones and cleaning after potential pollution incidents, the 1994 bilateral agreement between Norway and Russia for cooperation on oil pollution combat in the Barents Sea, a joint contingency plan of USA and Russia concerning pollution in the Bering and Chukchi Seas and the Canada-USA Joint Marine Contingency Plan.²²⁹

Despite it being a primary concern for oil spill situations, there is today no global instrument/governance body comprehensively regulating offshore hydrocarbon activities. The various regulations at least brushing on the issue are: UNCLOS Art. 133, that identifies hydrocarbon as a resource for which the UNCLOS relevant provisions do apply, meaning that offshore drilling must be done in accordance with the Convention. The relevant provisions are found in Part XII, Section 5, which states that coastal states shall, through adopting regulations and taking other necessary measures, prevent, reduce and control marine pollution as a result of seabed activities within the Continental Shelf. Regulations must at least be on par with international standards. Regional harmonization is desired and states shall work together to establish global/regional rules, standards and practices to mitigate marine environmental pollution. The fact that no real global rules apart from MARPOL exist makes the reference to international standards as a minimum level of protection rather innocuous. MARPOL includes fixed/floating platforms in its definition of what constitutes as a ship, why also the provisions therein at least must be followed (discharge and emission standards). On a regional level, also OSPAR contains some provisions on

²²⁵ Art. 7-8, 10, Oil Spill Agreement.

²²⁶ Art. 13, Oil Spill Agreement.

²²⁷ Art. 21, Oil Spill Agreement.

²²⁸ Art. 18, 22, Oil Spill Agreement.

²²⁹ Koivurova & Molenaar, p. 24-25.

offshore activities. Many regional and bilateral agreements generally dealing with pollution of the marine environment also include provisions on offshore hydrocarbon activities.²³⁰

²³⁰ Koivurova & Molenaar, p. 25-27. See agreements in the prior section/attribution to the foregoing footnote, all but the 1998 USA-Canada agreement deal with offshore activities, as does the OPRC 90 and its 2000 HNS Protocol.

4 The Nordic Perspective

*The Nordic states have a very pragmatic and cooperative view on Arctic development. Important steps within this development seem to be keeping the Arctic a security policy-wise low tension area, strengthening the role of the AC and other cooperative forums active in the region, work together with the Arctic states to form a common policy and plans for concrete projects benefitting the region, promote the involvement of the EU in the Arctic future and work to ensure that the Arctic development follows the regulations within international law.*²³¹

4.1 Views on Measures Taken

Section 3 made the attempt to briefly evaluate the work of the Arctic done so far. From a Nordic perspective, the following observations are significant. Denmark holds the view that the AC needs to advance, and take the step from being a decision-shaping to a decision-making organization.²³² Finland is of the opinion that the recommendations developed within the AC are a good basis for “furthering joint goals”. To complement this, the AC could “look at international treaties central to the Arctic Region and identify potential regulatory gaps and overlaps”. It would also be fruitful to expand the AC activities to include other sectors that would add important value.²³³ Iceland seems to share the view that there is room for improvement regarding the AC, and states the importance of promoting and strengthening the Council – making it the most important consultative forum for dealing with Arctic issues – and making it the forum for international decision-making on Arctic issues.²³⁴

Oil Spill Prevention and Response

The Arctic Council Oil Spill Agreement has been criticized for not being sufficiently obligating. The Nordic Council has expressed concern that cleaning up after an oil spill has occurred might be closely to impossible, given the technical challenges and harsh weather conditions in the region. The Agreement, though being a step in the right direction, is not enough. The better solution would be an agreement which legally binds the Arctic states to implement the at each given time best practice in national legislation regarding oil- and gas exploitation in the Arctic region.²³⁵ At the

²³¹ A conclusion drawn from the various Nordic Strategies for the Arctic region. See Sveriges strategi för den arktiska regionen, p. 18, and Kingdom of Denmark Strategy for the Arctic 2011–2020, p 11.

²³² Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 52.

²³³ Finland’s strategy for the Arctic region, p. 38.

²³⁴ Iceland Arctic Policy, p.1.

²³⁵ The Nordic Council, ”Nordiska rådet: Arktiskt avtal inte tillräckligt”, <http://www.norden.org/en/news-and-events/news/nordiska-raadet-arktiskt-avtal-inte-tillraeckligt>

same time, the Nordic Council states that the two AC legally binding instruments are of an importance that cannot be overstated, and they show the transformation of the AC from an advisory body into a more politically and practically influential one.²³⁶

4.2 Future Needs

It is the Swedish opinion that while functioning well as something resembling an “international organization”, the AC preferably could widen its mandate to also include future important issues such as a common security policy, infrastructure and economic development. To achieve this it is thus important to strengthen the AC in both an institutional and political way.²³⁷ Legal developments needed in the Arctic region have been pointed out by Sweden as the following: An effective international agreement to minimize and ultimately eliminate mercury emissions, regional cross-border cooperation to enable SAR operations and stricter security regulations for transportation at sea and the adoption and entry into force of the IMO mandatory Polar Code.²³⁸

The Danish strategy for the Arctic has also spotted a few areas in which legal development could be needed. It is pointed out that while UNCLOS provides a solid foundation for Arctic maritime cooperation, “there may be a continuous need for more detailed regulating of certain sectors”. The SAR agreement is presented as an example of such.²³⁹ The establishment of internationally high safety standards for ship navigation is also mentioned, as is the necessity of adopting the IMO Polar Code.²⁴⁰ Also in the field of maritime safety, Denmark has expressed the need to introduce global rules of binding character for navigating in the Arctic, pressing the high priority to within the IMO conclude an agreement focusing on global regulation of shipping. If it proves impossible to reach such an agreement based on global rules, non-discriminatory regional safety and environmental rules taking into account international law (such as UNCLOS provisions on ice-covered waters) could be implemented after consultation with the Arctic states.²⁴¹ The Danish strategy also addresses the need to continuously enforce the own sovereignty, not at least because of the increased activity that is expected in the region, but also notes the importance on cooperation that should increase regarding surveillance of the Arctic and could be enhanced in regard to the tasks of armed forces.²⁴² Denmark has also expressed the will to actively work to establish an international liability and compensation convention for pollution damage as a result of offshore oil exploitation,

²³⁶ Loukacheva, PLT II, p. 29.

²³⁷ Sveriges strategi för den arktiska regionen, p. 19.

²³⁸ Sveriges strategi för den arktiska regionen, p. 24, 30.

²³⁹ Kingdom of Denmark Strategy for the Arctic 2011–2020, p 14 (incl. quote).

²⁴⁰ Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 16, 18.

²⁴¹ Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 18.

²⁴² Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 20-21.

under the auspices of the IMO (or other international forum).²⁴³ Furthermore, Denmark will implement and ratify the OPRC-HNS (Hazardous and Noxious Substances) Protocol on compensation and liability for damages arising from hazardous and noxious substances, as well as the Ballast Water Convention (protects the marine environment from invasive species).²⁴⁴ In its strategy for the Arctic, Denmark states that the starting point for the strategy is the assumption that “requisite international legal basis” has already been achieved²⁴⁵, a statement likely meaning that within the international law there are rules that could govern the Arctic well – but given the above mentioned need for various legal instruments it is unlikely that Denmark suggests that the legal work for the Arctic is done. Regarding the environment for example, the Kingdom of Denmark notes that it will work for a globally binding mercury agreement (under UNEP).

Norway is also of the opinion that the presence of armed forces in the Arctic is necessary to meet the national security needs and to functionally manage crises in the region.²⁴⁶ Regarding climate change, Norway promises to spearhead efforts to achieve a climate agreement following the Kyoto Protocol, this time with an even more ambitious tone.²⁴⁷ Norway’s Arctic strategy points to the potential for more intensified cooperation in the Arctic, but also makes reference to the existing conflict of interest regarding future offshore petroleum exploitation. This conflict should be resolved in accordance with international law, and to reach a solution is very important to ensure a prosperous future.²⁴⁸ Regarding the environment, Norway will work for the development of a legally binding global instrument dealing with mercury (possibly complemented to include other metals as well).²⁴⁹

The development of Russia could be one cause for concern according to Norway. Even if Russia is evolving from what it once was, it is nevertheless crucial to keep a trans-boundary dialogue regarding human rights, principles of rule of law and political rights. Since Russia’s engagement in Arctic issues and collaboration with Norway is needed to ensure sustainable resource use and sufficient environmental management, a strengthened and pragmatic cooperation is vital. There is also a Norwegian wish to intensify defense cooperation between the two states, since military contact would be valuable in case of an emergency or other “delicate situations”.²⁵⁰ Given its interest to collaborate closely with Russia, and to increase bilateral trade between the two, Norway also stresses the importance of a Russian WTO/OECD membership and the advantages of a free trade agreement between EFTA and Russia.²⁵¹

²⁴³ Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 25.

²⁴⁴ Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 46.

²⁴⁵ Kingdom of Denmark Strategy for the Arctic 2011–2020, p. 49.

²⁴⁶ The Norwegian Government’s High North Strategy, p. 7.

²⁴⁷ The Norwegian Government’s High North Strategy, p. 14.

²⁴⁸ The Norwegian Government’s High North Strategy, p. 16-17.

²⁴⁹ The Norwegian Government’s High North Strategy, p. 46.

²⁵⁰ The Norwegian Government’s High North Strategy, p. 18, 20.

²⁵¹ The Norwegian Government’s High North Strategy, p. 71.

Also Finland makes the assumption that the Arctic situation will focus on closer cooperation as opposed to any head-on collisions. Cooperation is namely the only way to deal with the challenging circumstances facing the region.²⁵² Regarding transport and infrastructure, the Finnish objectives include harmonizing international rules on safety of shipping and environmental protection in the Arctic region.²⁵³ Concerning international regulations, treaties or other mechanisms, Finland notices a problem in the fact that only a few of these are specifically directed at the Arctic region or at specific Arctic issues. Like Denmark, Finland considers the existing international treaty basis – and especially UNCLOS, “a sufficient regulatory basis to deal with Arctic issues. The execution of UNCLOS can, if necessary, be supplemented by sector-based regulation that takes into consideration the specifics of the Arctic Ocean, as regards, for instance, the use of living natural resources, environmental protection or maritime safety”. Apart from UNCLOS, also other treaties need to be monitored. It may even be necessary to, when dealing with special issues, apply stricter and more detailed arrangements than currently in use. The AC could have a leading role in coordinating such.²⁵⁴

According to its strategy for the Arctic region, it is the Finnish opinion that the Arctic sea routes likely will not become important international shipping routes for some time to come. This is due to the ice conditions, which most probably will continue to stay difficult for the coming decades. To break the remaining ice would be very costly, and the voyage could still be very risky because of icebergs, occasional shallow waters and drifting ice floes. When the sea routes do become operational in a larger scale though, coastal states will show an interest of gaining economically from this development, but also of protecting the Arctic marine environment. Issues of a legal character would be for example the Russian view that UNCLOS entitles them to monitor and collect fees for passage through the Northeast Passage, while Canada considers the Northwest Passage as part of their internal waters making only vessels with a permit allowed to enter.²⁵⁵

In the Icelandic view all the Arctic states support UNCLOS and are determined to abide the Convention. Such determination cannot rule out that any disputes in the field of the Law of the Sea will not arise, for instance concerning Continental Shelf delimitation. Even if states currently disagreeing on delimitation have expressed their ambition to solve such disputes peacefully, there is no guarantee that these disagreements will not result in increasing tension in the Arctic region.²⁵⁶

Iceland also notes that any militarization of the Arctic region needs to be prevented. Focus needs to be on cooperation instead, and bilateral agreements on common security interests (surveillance, maritime accidents

²⁵² Finland’s strategy for the Arctic region, p. 10.

²⁵³ Finland’s strategy for the Arctic region, p. 25.

²⁵⁴ Finland’s strategy for the Arctic region, p. 35 (incl. quote).

²⁵⁵ Finland’s strategy for the Arctic region, p. 27.

²⁵⁶ Iceland Arctic Policy, p. 4.

etc.) are a large part of this. Future agreements should focus on deepening the cooperation on pollution prevention – given the prognosis of increased vessel activity in the Arctic Ocean.²⁵⁷

²⁵⁷ Iceland's Arctic Policy, p. 10.

5 How Best to Ensure a Bright Arctic Future

Moving to the more analytical and operationally focused section of this thesis, chapter five will discuss detected regulatory gaps for the Arctic region, and put forward possible solutions to them.

5.1 Regulatory Gaps to Fill

Even if the above exposition has presented many examples of legal instruments governing or at least addressing the Arctic region, potential gaps in the international governance of maritime areas have been identified, for example in a WWF report published in 2009.²⁵⁸ Concerning the Arctic Council, the following gaps were noticed: The Council is not empowered to adopt legally binding obligations, nor is it an operational body that evaluates whether or not its non-legally binding guidelines are being followed by the participants. Non-Arctic states are not allowed to participate in the AC more than on an observer level, which puts a limit on the role and power of the council.²⁵⁹ Widening the scope to an international legal regime, and focusing on activities in the High Seas, gaps consist of the lack of any operational regulatory regime for marine scientific research, bio-prospecting, laying down cables and pipelines and conducting military activities. Up-and-coming activities such as deep-sea tourism or activities related to hydrocarbon sequestration are also not adequately regulated. There are further no demands for designating Marine Protected Areas (MPA's), adopting Cross-sectoral Ecosystem-based Ocean Management or conducting Environmental Impact Assessments (EIA's).²⁶⁰

Looking at sectoral governance and the regulations for the marine Arctic, gaps can be located as follows: All Arctic states need to participate in all relevant international regulatory instruments; for example, it is vital that Russia becomes a party to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 90. There are no globally established rules concerning “special IMO discharge, emission or ballast water exchange standards for the Arctic marine area”. No regional approach has been taken to ensure that applicable international rules are being complied with. There are no obligatory rules of general character, global or regional, governing offshore hydrocarbon activities in the Arctic.²⁶¹

²⁵⁸ Koivurova & Molenaar, p. 5. See also Baker, p. 78.

²⁵⁹ Koivurova & Molenaar, p. 5.

²⁶⁰ Koivurova & Molenaar, p. 7.

²⁶¹ Koivurova & Molenaar, p. 8.

5.2 Bilateral Legal Measures as a First Step

Canada and USA have recently worked together to map the continental shelves of concerned parts of the Arctic Ocean. The collaboration has been possible even though the two states have a longstanding disagreement over the Beaufort Sea's maritime boundaries. The area subject to overlapping claims is made up of roughly 6,000 square nm of potentially hydrocarbon-rich maritime territory.²⁶² To solve this existing disagreement, a model can be used by which cooperation is built on the same science-based foundation as the scientific cooperation currently taking place. It would be a sort of hydrocarbon cross-border unitization agreement or a joint development area but with a much broader scope of use.²⁶³ Solutions like this one could exemplify how "national legal systems can interrelate to fill gaps in arctic governance and regulation".²⁶⁴

Since there is an understanding among some scholars and experts that "a new comprehensive treaty for management and governance of the Arctic, particularly along the lines of the Antarctic Treaty, is neither necessary nor feasible at this time"²⁶⁵, adopting a bi-national model could be a suitable middle-way solution – especially given that it will be based on the principle that international law, in any area, is only as strong as the national legal systems that implement it.²⁶⁶ Two states with like legal cultures combined with a longstanding tradition of neighborly and diplomatically characterized cooperation can further be presumed to easier achieve common goals and ambitions than a larger group consisting of all five or eight Arctic states.²⁶⁷ These first-step measures towards a comprehensive bilateral Arctic cooperation could perhaps also be the first steps towards a joint Arctic legal regime. To have 3-4 groups of legal collaborations joining forces for a major judicial instrument, or – perhaps more likely – *a governance approach*, could prove much easier than having all independent 8 states doing the same. If each Arctic state already has proven its willingness to cooperate on a binding legal level with the neighbor, the step towards the clusters of neighbors also actively collaborating in the same field might not be at all farfetched.

²⁶² Baker, p. 57.

²⁶³ Baker, p. 58.

²⁶⁴ Baker, p. 59.

²⁶⁵ Baker, p. 60-61.

²⁶⁶ Baker, p. 61.

²⁶⁷ Baker, p. 61.

5.3 Clarifying the Legal Status of the Arctic Council

One constant “problem” for the international law is the matter of creating binding legal instruments. The problem arises primarily when an instrument lacks the regular formalities that otherwise would indicate legal obligations and/or rights. Such instruments are quite often looked upon as non-binding in a legal sense, although they might be considered as belonging to the soft law field, or simply as having a morally/politically binding character.²⁶⁸ In order for a new source of international law to be constructed, the states part thereof must accept that this in fact will happen and this must be evident. If one of the “participating” states does not see a new instrument as binding, it in fact will not be. Instruments solely looked upon as *soft law* has not yet “become an independent legal order to which states could subject their agreements”.²⁶⁹ Another aspect of the legal un-clarity that may arise in an international context is the status of different forums for cooperation. Applying this to the Arctic Council, the discussion may play out as follows: Can the cooperation be considered an inter-governmental organization in the international law meaning of the term? A criterion for qualifying as such is that the cooperation needs to be founded through an international agreement, established under international law, which creates at least one organ with an independent “will”. This requirement distinguishes organizations from purely bilateral or multilateral treaties. In such treaties the parties lay down a common will, but the will remains their own and does not transfer to any newly created body.²⁷⁰ Through the creation of the Arctic Council, the Arctic states have as a matter of fact laid down such common will – but it has remained their own, and no new organ has been formed to represent that will. All in all it must be concluded that the Council as of yet is no inter-governmental organization.²⁷¹ Even if this is possible to conclude through the studies of international law doctrine, it is also conceivable that some states within the Arctic cooperation are of the opinion that the Council in fact *should* hold the status of an international organization.²⁷²

One negative feedback the AC has received is that it fails to regularly evaluate whether the projects undertaken within its auspices and the guidelines produced by the Council manage to attain their goals.²⁷³ That the Council thus seems to come up short in terms of legal status as such, the mild character of the obligations within its two legally binding agreements as well as regarding follow-up and evaluation on launched projects triggers the suspicion that the AC might not be a legally adequate form of Arctic cooperation. The Council should endeavor to develop, and potentially

²⁶⁸ Koivurova, p. 96.

²⁶⁹ Koivurova, p. 99.

²⁷⁰ Koivurova, p. 120-121.

²⁷¹ Koivurova, p. 121.

²⁷² For this Russian argument, see Lyakhov & Fedyashin, *The Voice of Russia*, http://english.ruvr.ru/2013_05_14/Arctic-Council-session-opens-in-Swedish-Kiruna/.

²⁷³ Koivurova, PLT, p. 37.

attempt to become more of a hard-law forum. Perhaps the Council could agree on a test-phase, and apply a more advanced form of cooperation first solely to the central Arctic Ocean where no Arctic state have sovereignty, and leave it to be further developed from thereon.

5.4 Safeguarding a Peaceful Arctic

Although many political and scientific statements stress that the Arctic is not a conflict zone, but an area of peaceful cooperation and sustainable development²⁷⁴, due consideration has to be given to the possibility of this not always being the case. Because of its location and potential richness of hydrocarbon resources, the economic advantages that can be drawn from controlling an area of its kind could possibly tip the peaceful cooperation over and turn this into a hostile race among the concerned states to make as much money as possible. This has been known to happen in other parts of the world, such as in the South China Sea and the Spratly Islands. This group of numerous small islands holds a great amount of oil and gas resources and is highly important for the fishing industry. Having jurisdiction/sovereignty over the sea surrounding the islands would also mean the possibility of charging passing ships various tolls and fees which given the amount of ships passing through this gateway between Asia and Europe would be an ample extra income for any state.²⁷⁵

Even if the competing states in the example above are not the same as in the Arctic scenario, it is appropriate to raise a note of caution – when comprehensive economic gain is feasible, one cannot simply rely on the fact that the cooperation so far has been peaceful and for sustainable objectives. Anything could change, and there is thus a need to be prepared for whatever may come. If the Arctic will not be governed by something resembling the Antarctic Treaty, maybe some form of dispute resolution would be appropriate. When taking into account the extreme sensitivity of the region, the need to keep the peace and let sustainability be the leading word is absolutely vital. The fact that Part XV of UNCLOS, the dispute settlement mechanism, is not applicable in case of a disagreement between USA and any other Arctic state (parties to UNCLOS) must classify as a significant gap in what the Ilulissat Declaration refers to as an “extensive international legal framework”.²⁷⁶

Existing legal disputes in the Arctic concern the maritime boundary delimitations. The outcome of these disputes will have a large impact on the development within the region, because of the potential access to oil and gas deposits that tempts large and powerful energy companies. Because of the nature of the conflict, reaching a solution might require domestic/international energy law experts to help.²⁷⁷ Further it is not

²⁷⁴ See for example The Economist Special Report, Too Much To Fight Over.

²⁷⁵ Dokument utifrån – Spratlys – laglost land,

<http://www.svtplay.se/video/350723/spratlys-laglost-land>, air date 30.5.2013.

²⁷⁶ Ilulissat Declaration, p.1 & Koivurova & Molenaar, p. 39.

²⁷⁷ Loukacheva, PLT, p. 17.

absolutely clear which outcome these disputes will have, and it will surely depend on whose view on international law will prevail. For example, USA claims that international law appoints the Northwest Passage the status of an International Strait, while Canada opposes and insists that the strait is made up of Canadian historic waters – putting it under national control. It is also the Canadian view that the Arctic will be best protected through reinforcement of the application of domestic law. Different opinions on such issues will lead to the use of different legal arguments and theories for controlling the Arctic, as opposed to what a more partner-focused and collaborative approach might. Since much of the Arctic region is under national jurisdiction the use of domestic legal instruments is vital, and the concerned states have their own interest at heart when trying to meet the legal challenges facing the Arctic.²⁷⁸

A NATO officer made the statement in 2010, that although disputes in the Arctic so far have been dealt with in a peaceful manner, climate change could change this. Representatives from the Russian Government Offices have also expressed a similar opinion.²⁷⁹ A few special features of the Arctic make a confrontational future almost plausible. The region has for a long time been characterized as a wealthy resource for minerals and oil, national explorers, scientists and engineers have taken great pride in mapping and examining the distant Arctic, and military presence in the area has meant establishing the own state as an Arctic player of great importance.²⁸⁰

Despite possibilities of a conflict situation in the Arctic, the predominant view is that such a scenario is unlikely, and that the risks are exaggerated. Proponents of this peaceful view point to the fact that approximately 95% of the Arctic mineral resources lies within undisputed national boundaries and that the only area of any real disagreement is the Northwest Passage regarding whether this constitutes international or Canadian waters.²⁸¹ Some also point to three specific factors likely to promote a harmonious development of the region. First, *the profit motive*. It is more profitable to develop resources already in place than argue over what potentially could belong to a certain state. This is shown not least by the Russian-Norwegian maritime border agreement from 2011, concerning the oil-rich Barents Sea delimitation. Second, *the high costs* associated with operating in the region. Third, the reluctance among Arctic states to give other countries the excuse to partake in the affairs of the region. This *unwillingness to cooperate with the outside world* was for example illustrated through the wording of the Ilulissat Declaration from 2008 and the possible reluctance among AC Member States to grant applicants the status of AC Observers.²⁸²

²⁷⁸ Loukacheva, PLT, p. 18. For more on views of the Northwest Passage legal status, see Vanderzwaag, PLT, p. 53.

²⁷⁹ The Economist Special Report, Too Much To Fight Over.

²⁸⁰ The Economist Special Report, Too Much To Fight Over.

²⁸¹ The Economist Special Report, Too Much To Fight Over.

²⁸² The Economist Special Report, Too Much To Fight Over.

5.5 An Antarctic Treaty for the Arctic?

5.5.1 Similarities and Differences Between the Polar Regions

As described in section 2.1.1, the Antarctic is governed and protected by the Antarctic Treaty System (ATS). Such a solution never appeared in respect of the Arctic, most likely because this region was never expected to comprise navigable waters or be an object for major commercial development. When this was the forecast, there never came to be any comprehensive multilateral regulations or norms to govern such an evolution.²⁸³

It is inevitable to note the differences between the two poles. The Arctic consists largely of water, while the Antarctic is a continent solely surrounded by water. The Arctic is subject to many territorial claims or areas already of national jurisdiction while the Antarctic is frozen to such claims by the ATS.²⁸⁴ In the minds of the general public and even governments though, they might have more in common. Regimes are not always formatted according to rational factors, which makes this “imagined commonality” of the Arctic and the Antarctic useful when drawing lessons from one or the other, for example when it comes to crafting an Arctic environmental protection treaty. Many Arctic states are also parties to the ATS, and the Antarctic Treaty regime had a joint meeting with the Arctic Council in 2009. Even earlier, in 2000, the International Union for Conservation of Nature and Natural Resources (IUCN) initiated a project dealing with the issue of whether the Arctic could serve from being under the same high-quality environmental protection as the ATS provides for the Antarctic. No clear conclusion was reached at that time.²⁸⁵

In 2008, the European Parliament presented a resolution suggesting that the European Commission should prepare itself for international treaty negotiations for an Arctic protection treaty inspired by the Antarctic Treaty, although naturally respecting the differences between the two regions. Such a treaty could initially solely cover the areas unpopulated and unclaimed in the middle of the Arctic Ocean. The obstacles, when it comes to borrowing straight from the ATS in drawing up an Arctic equivalent, is that the Antarctic environmental protection is not based on national systems coming together, but on the Antarctic Treaty Consultative Meeting’s (ATCM’s) laying down international rules for environmental protection suitable for the entire region. In the Arctic meanwhile, the surrounding states have established territorial sovereignty/sovereign rights over land areas²⁸⁶ and many maritime areas as well, which are governed by the states in accordance with their national ambitions and judgement (whilst obeying the

²⁸³ Borgerson, p. 65.

²⁸⁴ Koivurova, p. 30-31.

²⁸⁵ Koivurova, PLT, p. 42.

²⁸⁶ Koivurova, PLT, p. 41. Concerning the EU resolution see also McDorman, p. 159.

rules of international law). This is a great structural difference that would make any copy/paste-model from the ATS very difficult to adopt in the Arctic.²⁸⁷

If the Antarctic Treaty were to act as a model to a similar instrument in the Arctic many sections and paragraphs would need revising because of the different natures of the two poles. As previously stated, the Antarctic is a continent – the Arctic largely an ocean. No major trade routes pass through Antarctic areas, as is the case in the north.²⁸⁸ Another major difference between the two poles is the fact that while the Antarctic is lacking any permanent human habitation; 10 million are residing in the Arctic. The major difference in permanent habitants makes the Arctic subject to much more invasive preparations and negotiations in order to accommodate everyone’s prerogative.²⁸⁹

5.5.2 The Arctic Future Calls for a Treaty-like Instrument

The ATS is constructed to conserve the Antarctic environment and ecosystems, but the outside pressure from increased tourism and biological prospecting will nevertheless surely be noticed in the Antarctic as well as the Arctic. The ATS might then need to become internationally active and join forces with the AC to deliver a strong message to the world concerning the harmful consequences climate change is causing in the Polar Regions.²⁹⁰ One could then imagine that the need for environmental protection would be far more highlighted if the Arctic was put under “the same” protectoral measures as the ATS provides for the Antarctic.

When taking into account that the Arctic is currently being, and to a greater extent will be, used for commercial activities, it seems even more pressing to attain such a comprehensive protectoral regime. It is in fact so, that because of the ongoing changes in environmental factors and economic development the discussion on a need for stronger Arctic environmental governance has been initiated among different Arctic communities.²⁹¹

In conjunction to proposing an “Arctic Region Council” in 1992, professor Donat Pharand also drafted a proposal for an Arctic Treaty. The treaty form was used due to the fact that a legally binding treaty would be necessary in order to ensure any effective multilateral form of cooperation. A treaty eliminates the uncertainty that for example declarations bring with, regarding whether or not they can be considered legally binding. The legal status of a treaty also makes any breach eligible for state responsibility.²⁹²

²⁸⁷ Koivurova, PLT, p. 42.

²⁸⁸ Borgerson, p. 73.

²⁸⁹ Koivurova, PLT, p. 35.

²⁹⁰ Koivurova, PLT, p. 42.

²⁹¹ Koivurova, PLT, p. 42.

²⁹² Pharand, 1992, p. 177.

The opinion of some experts is that ideally the Arctic would be managed by developing an overarching treaty that can guarantee that the region's wealth will be extracted in an orderly and collaborative manner. Such a treaty should preferably include relevant UNCLOS-provisions and cover all the emerging issues.²⁹³ Others will at least agree that the current status of the Arctic is not sufficient when it comes to coping with the problems at hand, and that the international community is realizing that the specifics of the Arctic require an independent legal regime in order to protect the environment and make way for a sustainable development.²⁹⁴

At the moment there are no “overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes”, something that makes the future very uncertain. In the same pace as ice turns into water, regulatory gaps show themselves, interstate rivalries are a matter of fact and newcomers such as China are being drawn to the resource-rich area.²⁹⁵ Regulatory gaps show themselves already by the fact that the AC expressively do not deal with military security concerns, and that applying UNCLOS to the Arctic is not done seamlessly – because of the unique Arctic natural circumstances. Challenges already waiting to be resolved include the multiple continental shelf delimitation investigations, adopting a legal definition of the Northwest Passage that agrees with Canada and determining maritime borders in the Beaufort Sea (Canada-USA) and the Barents Sea (Norway-Russia). Not only is UNCLOS not specifically suited for the Arctic, neither are all ongoing “Arctic” issues covered by UNCLOS. For example, during the latter half of the last century Russia dumped near 20 nuclear reactors into the Arctic Ocean, a hazard that needs to be cleaned up.²⁹⁶

When the Arctic Council first saw the light of day and drew up the preconditions for cooperating, the security agenda was slimmer than is the case today, and excluding military security policy from the scope of cooperation may have seemed like an understandable decisions. Today, this decision potentially should be revised. Environmental issues are a part of the new broader security agenda, and since environmental issues are a major part of Arctic governance, it could make sense that military security aspects are indeed considered within the scope of the Arctic Council cooperation. This is an issue that could be legally dealt with within a treaty-like instrument.

It is important to stress the fact that other states besides the Arctic ones are extremely interested in the Arctic – and even if the Arctic (coastal) states

²⁹³ Borgerson, p. 75.

²⁹⁴ Timtchenko, p. 89.

²⁹⁵ Borgerson, p. 71 (incl. quote). For more on outside interest in the Arctic region, see for example The International Institute for Strategic Studies Strategic Comment, Vol. 19, Comment 16, p. 2.

²⁹⁶ Borgerson, p. 72-73.

can manage without a new major legal regime – can the world? Multiple states have already shown a great interest in the Arctic, most likely because of the opportunity to use the soon available much shorter shipping routes. The interest is shown for example through the many applications for Observer status in the Arctic Council.²⁹⁷

An instrument along the lines of an “Arctic Treaty” is unlikely though, under current circumstances. In order to achieve such an instrument, one would have to find a way to go around the legal, economic and political limitations that would face the negotiations. Furthermore, the potential parties do not seem to agree on the necessity, content and scope of an Arctic Treaty. One must also consider that a comprehensive treaty might not address/resolve the Arctic legal challenges to a full extent and that its efficiency thus cannot be guaranteed.²⁹⁸ Five years ago, the Arctic coastal states explicitly proclaimed that they did not see any need for the development of “a new comprehensive international legal regime to govern the Arctic Ocean”. Even if a comprehensive legal regime is not desired, this would not preclude any international treaty instruments dealing with specific issues being developed.²⁹⁹

One specific issue that perhaps should be dealt with more thoroughly is the control of illegal pollution discharge from vessels, conducted by the port state wherein a vessel voluntarily docks. Art. 218 of UNCLOS provides the port state the right to investigate such discharge even if they have occurred outside the coastal state’s maritime zones. Port states also have the obligation to prevent unseaworthy ships from seafaring, according to UNCLOS Art. 219. A majority of the maritime regions around the world have signed Memoranda of Understanding (MOU) regarding port state control, with the result that maritime administrations cooperate to undertake ship inspections when a vessel enters the port in question. The object of this is to ensure that the key international agreements concerning maritime safety and pollution are being complied with. Given that Arctic commercial shipping is highly likely to significantly increase, it could be timely for the maritime authorities of the Arctic states to develop a new MOU specifically designed for port state control in the Arctic region.³⁰⁰

Whether major legal instruments are needed or not will depend on the possibilities to use the Arctic in new ways – and as already pointed out in this thesis the outlook for natural resources exploitation and advanced shipping is good. Even if the Arctic community has concluded that a major new legal instrument to govern the region is not needed under today’s circumstances, with new areas of use of the region this view might necessarily have to change. The world’s larger oil companies have started to explore the possibility of drilling in the Arctic. Even if progress made so far

²⁹⁷ See Arctic Council webpage, “Observers”: <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>.

²⁹⁸ Loukacheva, PLT, p. 130.

²⁹⁹ McDorman, PLT II, p. 86.

³⁰⁰ Vanderzwaag, PLT, p. 52.

has been rather slim, oil giants like Shell have spent billions of dollars setting up proper oil drilling facilities in the Arctic. Given the fact that oil prices continue to raise, and the more accessible oil field in the world (such as in the Middle East) are being depleted, chances are the Arctic oil drilling investments and efforts will only continue to increase.³⁰¹

As the case often is with the law, actual development happens faster than the legal equivalent – technical advances for example will find themselves being unregulated for some time until legislators have had the opportunity to update domestic law in accordance. The same can be said for other areas in transition/progress – such as the environment. As the climate and environment rapidly change and make way for new opportunities to ship and exploit natural resources it is natural that the law cannot quite follow at the same pace. Given that the Arctic Ocean is an area of cooperation between multiple states, legal development can be expected to take even longer than would be the case in a domestic situation. Eight or more states have to agree on a legal management and governance of an area that potentially can be used by the entire international community, preferable so that all prospective economic rewards can be gained while at the same time the sensitive environment is being protected and actions are taken to minimize the negative consequences for the Arctic region as well as the rest of the world.

³⁰¹ Section inspired by The Economist Special Report, Hidden Treasure.

6 Conclusions

It can be concluded that the Arctic region in multiple fields could enjoy more advanced and comprehensive legal instruments and solutions. These fields could be divided into two main categories: Protecting the Arctic environment and developing a commercial Arctic region. The former has to be deemed more pressing than the latter, although neither of the categories is possible to disregard. When it comes to developing a commercial Arctic region, issues that need legal revisiting are of course maritime delimitations, usage of new Arctic shipping routes and economic activities such as hydrocarbon exploitation. These issues will also be relevant when protecting the environment, but then from a different perspective. Even if it would be fruitful and clarifying to have strict jurisdictional borders between all Arctic states, this should not be a priority for any developers of Arctic law. The areas of dispute are relatively small, most likely low in natural resources and will take a long time to decide the “ownership” of. Twelve years have passed since the Russian claim was presented to the CLCS, and yet no final recommendation has been produced. If this process is any indication of how long these delimitation issues can take to resolve, the Arctic does not have time to wait for it to happen. It has been projected that an ice-free Arctic is a reality only a few decades away, and the international community cannot wait around for national jurisdictions to be in place and national legislation to be in place to mitigate the effects of global warming in the Arctic. Independent of whatever oil drilling rights that will exist in the future – actions to protect the Arctic should be taken on a multilateral, internationally legally binding level, right now.

It is understandably so, that the Arctic states are protective of their own respective interests, and will avoid any legal commitments to other states if possible. This is reasonable the explanation as to why some of them are holding back and not adopting all relevant conventions or proposing an Arctic cooperation with more legal depth than is the Arctic Council of today. It should be certain though, that if the international community is supposed to avoid oil spills being unattended to, GHG emissions turning even more ice into water and vessels shipping cargo across the North Pole not being able to adequately perform Search and Rescue operations, legal measures have to be taken in the near future. In order to achieve important environmental goals and objectives (such as the ones just now mentioned), while keeping Arctic states “comfortable”, first steps could be taken through which the “free” unclaimed Arctic Sea Bed and sea is turned into a zone where all activities are under the responsibility of the actors active therein. The Arctic states should there have the legal responsibilities appointed by the Arctic Council agreements on SAR and Oil Spill, preferably combined with a “penalty mechanism” if demands are not met. Such an instrument would show real cooperation and strive to save the environment, and not just be a sign of *good will* to do so. This advanced cooperation for the “free Arctic” could also include an oil drilling moratorium, before it can be

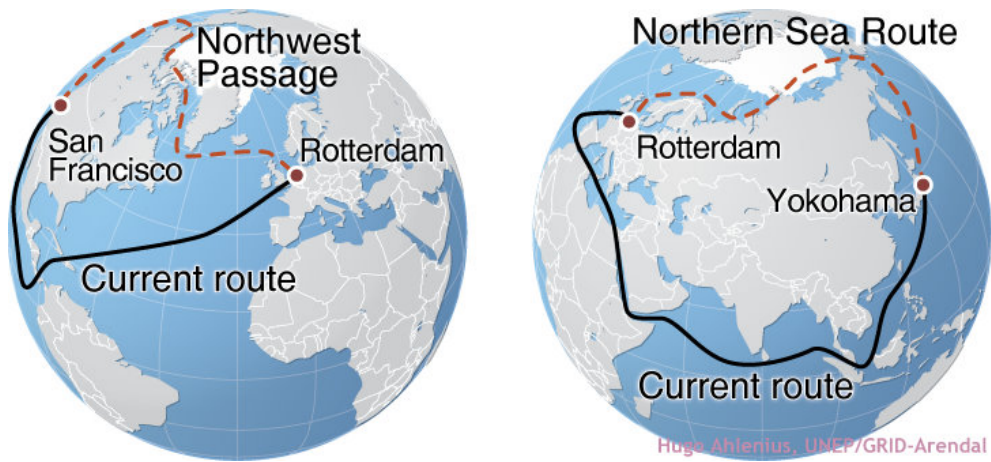
certain that oil spill prevention and response mechanism are set up and working in other Arctic areas.

This above mentioned Arctic legal regime could consequently be based on legal obligations, that if not observed will result in a punishment along the lines of a fine payable to a common fund from which money can be withdrawn when certain Arctic issues call for it. As a starting point, the Arctic sea and Sea Bed not under any national jurisdiction should be included, and the instrument should deal with vital environmental protection as opposed to issues of commercial importance. Given that the AC is an up-and-running establishment with a long history of successful research operations and diplomatically fruitful negotiations, the legal instrument should preferably be developed precisely there. After being adopted, the instrument should evolve to include a wider geographical scope as well as more “peripheral” issues. A dispute settlement mechanism for all Arctic states or all disputes relating to the specific Arctic issues would be wise to include, as would common objectives and development plans for (military) security cooperation.

Even if a new, treaty-inspired, legal instrument for the protection and sustainable development of the Arctic region would be preceded by lengthy, compromising and surely fiery negotiations, one should not write off the possibility that it might be a reality in the near future. The fact that the Ilulissat Declaration expressively stated that the Arctic coastal states saw no need for any new comprehensive legal instrument should not be awarded too much emphasis. This conclusion was drawn solely by five Arctic states, in a time when Polar research had not come as far as it has today. Statements within this thesis, and Observer applications to the Arctic Council offer proof that the outside interest in the Arctic is substantial. The views and perspectives of all states and organizations operating in the Arctic region will naturally have to be attended to when creating the future legal framework. The mere fact that five Arctic coastal states were of one opinion in 2008 does not mean that the legal future of the Arctic is ascertained.

There are numerous voices in the international law community affirming that the Arctic region is a low-tension one, and that no arms race is on its way concerning possible extended Continental Shelves. Today, this is most certainly the truth. Neither does it seem as if any Continental Shelf investigation is an issue that requires any further judicial measures being put in. The problem is likely not who has the legal rights over which area, but how these areas shall be governed in a larger perspective. Even if there is no real rush for the Arctic, the possibility of economical rewards associated with oil drilling and the usage of new transport routes renders much interest. Thus it is in reference to such activities that any legal gaps need to be sealed.

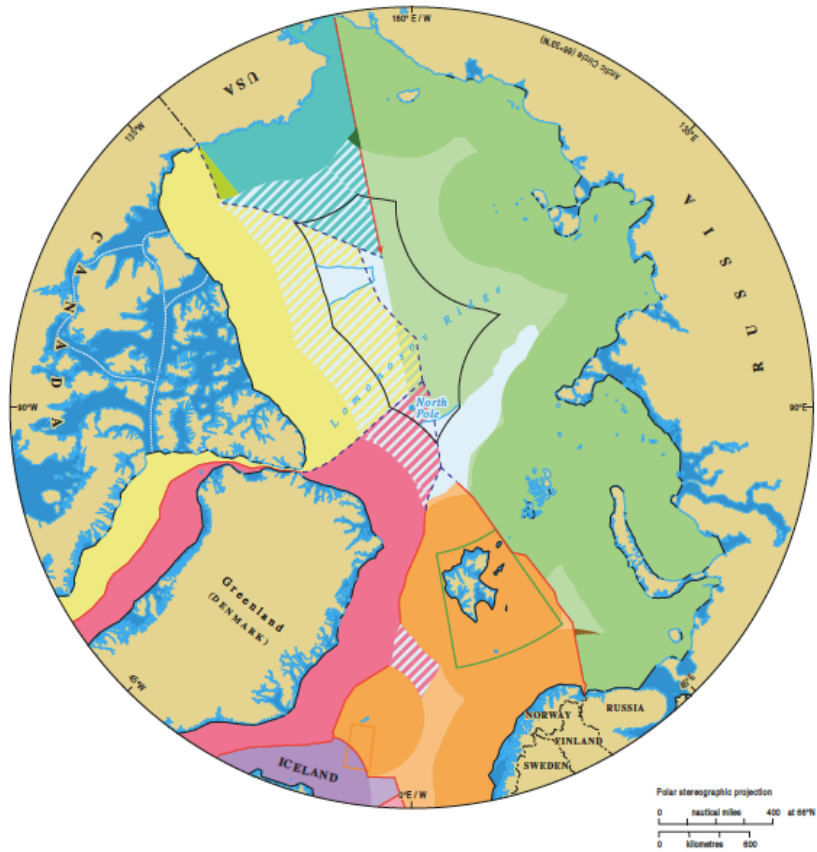
Supplement A



Map of Arctic Shipping routes

Source: <http://www.thearcticinstitute.org/2011/08/arctic-shipping-expected-to-double-in.html>

Supplement B



- | | | |
|--|---|--|
| Internal waters | Norway claimed continental shelf beyond 200 nm (note 3) | Straight baselines |
| Canada territorial sea and exclusive economic zone (EEZ) | Russia territorial sea and EEZ | Agreed boundary |
| Potential Canada continental shelf beyond 200 nm (see note 1) | Russia claimed continental shelf beyond 200 nm (note 4) | Median line |
| Denmark territorial sea and EEZ | Norway-Russia Special Area (note 5) | 350 nm from baselines (note 1) |
| Denmark claimed continental shelf beyond 200 nm (note 2) | USA territorial sea and EEZ | 100 nm from 2500 m isobath (beyond 350 nm from baselines) (note 1) |
| Potential Denmark continental shelf beyond 200 nm (note 1) | Potential USA continental shelf beyond 200 nm (note 1) | Svalbard treaty area (note 8) |
| Iceland EEZ | Overlapping Canada / USA EEZ (note 6) | |
| Iceland claimed continental shelf beyond 200 nm (note 2) | Eastern Special Area (note 7) | |
| Norway territorial sea and EEZ / Fishery zone (Jan Mayen) / Fishery protection zone (Svalbard) | Unclaimed or unclaimable continental shelf (note 1) | |

Maritime jurisdiction and boundaries in the Arctic region

Source: <http://www.dur.ac.uk/resources/ibru/arctic.pdf>

Bibliography

Books

- Bogdan, Michael *Komparativ rättskunskap*, 1st edition, 1993, Norstedts Juridik
- Dixon, Martin *Textbook on International Law*, Seventh Edition, Oxford University Press, 2013
- Koivurova, Timo *Environmental Impact Assessment in the Arctic*, Ashgate Publishing Limited, 2002
- Koivurova, Timo & Molenaar, Erik J *International Governance and Regulation of the Marine Arctic*, Overview and Gap Analysis, WWF International Arctic Programme, Oslo, 2009
- Loukacheva, Natalia (Ed.) *Polar Law Textbook (PLT)*, Nordic Council of Ministers, Copenhagen, 2010
- Loukacheva, Natalia (Ed.) *Polar Law Textbook II (PLT II)*, Nordic Council of Ministers, 2013
- Pharand, Donat *Canada's Arctic Waters in International Law*, Cambridge University Press, 1988
- Reid, Robert S "The Canadian Claim to Sovereignty over the Waters of the Arctic", *Canadian Yearbook of International Law*, p. 111-136, Volume 12; Volume 1974
- Sandgren, Claes *Rättsvetenskap för uppsatsförfattare*, 2nd edition, Norstedts Juridik, 2008
- Timtchenko, Leonid *Quo Vadis, Arcticum? The International Law Regime of the Arctic and Trends in its Development*, Kharkiv: State University Press <<Osnova>>, 1996

Articles

- Baker, Betsy Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-U.S. Cooperation in the Beaufort Sea, *Vermont Law Review*, Vol. 34:057, 2009, p. 57-120
- Borgerson, Scott G Arctic Meltdown: The Economic and Security Implications of Global Warming, *Foreign Affairs*, Vol. 87, No. 2 (Mar. – Apr., 2008), pp. 63-77
- Chircop, Aldo The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?, *The International Journal of Marine and Coastal Law* 24 (2009), p. 355-380
- Clark, Pilita Environment: Frozen Frontiers, *Financial Times*, February 6, 2013. Available at: <http://www.ft.com/intl/cms/s/2/a51a35e2-704c-11e2-ab31-00144feab49a.html>
- Ebinger, Charles K & The Geopolitics of Arctic Melt, *International Affairs*

- Zambetakis, Evie 85:6 (2009), p. 1215-1232
- McDorman, Ted The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean, *Journal of Transnational Law & Policy*, Vol. 18.2, Spring, 2009
- Pharand, Donat The Case for an Arctic Region Council and a Treaty Proposal, *Revue Generale de Droit*, Vol. 23, Issue 2 (1992), p. 163-196
- The Economist Special Report: The Arctic, *The Economist*, June 16th 2012. Available at: <http://www.economist.com/node/21556798>

National Strategies for the Arctic Region

- A Parliamentary Resolution on Iceland's Arctic Policy, Altingi, 2011
- Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011-2020, Ministry of Foreign Affairs, Government of Denmark, Greenland and the Faroes, Rosendahls-Schultz grafiska a/s, 2011
- Finland's Strategy for the Arctic Region, Prime Minister's Office Publications, Helsinki University Print, Helsinki, 2010
- National Strategy for the Arctic Region, The United States of America, The White House, Washington, May 2013
- Sveriges strategi för den arktiska regionen, Regeringskansliet, Utrikesdepartementet, XGS Grafisk Service, 2011
- The Norwegian Government's High North Strategy, Norwegian Ministry of Foreign Affairs, 2006

Legal agreements etc.

- Arctic Council Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*, <http://www.arctic-council.org/index.php/en/document-archive/category/20-main-documents-from-nuuk>
- Arctic Council Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*, <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting>
- Arctic Environmental Protection Strategy, June 14, 1991*
- AWPPA*, R.S., 1985, c. A-12. Available at: <http://www.tc.gc.ca/eng/acts-regulations/acts-1985ca-12.htm>
- Declaration on Establishment of The Arctic Council (The Ottawa Declaration)*, September 19, 1996
- IMO Guidelines for ships operating in polar waters*, <http://www.imo.org/Publications/Documents/Attachments/Pages%20from%20E190E.pdf>
- Meeting of Senior Arctic Officials Stockholm, Sweden 20-21 March 2013 Final Report*, <http://www.arctic-council.org/index.php/en/document-archive/category/451-final-report>
- Nuuk Declaration, On the occasion of the Seventh Ministerial Meeting of The Arctic Council, 12 May 2011, Nuuk, Greenland*
- The Ilulissat Declaration, Arctic Ocean Conference, May 28, 2008*, http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf

United Nations Treaty Series

| | |
|---|--|
| <i>Geneva Convention on the Territorial Sea and Contiguous Zone</i> | United Nations Treaty Series, Vol. 516, No. 7477, p. 205 |
| <i>MARPOL</i> | United Nations Treaty Series, Vol. 1340, No. 22484, p. 61 |
| <i>OILPOL</i> | United Nations Treaty Series Vol. 327, No. 4714, p. 3 |
| <i>SOLAS</i> | United Nations Treaty Series, Vol. 1148, No. 18961, p. 2 |
| <i>The Antarctic Treaty</i> | United Nations Treaty Series, Vol. 402, No. 5778, p. 72 |
| <i>UNCLOS</i> | United Nations Treaty Series, Vol. 1833, No. 31363, p. 397 |

CLCS Documents

CLCS, Submissions to the Commission: Submission by the Kingdom of Denmark, 13 April 2011,
http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_28_2009.htm

CLCS, Submissions to the Commission: Submission by the Kingdom of Denmark, 20 August 2009,
http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_54_2010.htm

CLCS, Submissions to the Commission: Submission by the Kingdom of Norway, 20 August 2009,
http://www.un.org/depts/los/clcs_new/submissions_files/submission_nor.htm

Press Release SEA/1729, <http://www.un.org/News/Press/docs/2001/sea1729.doc.htm>

Summary of the recommendations of the commission on the limits of the continental shelf in regard to the submission made by Norway in respect of areas in the Arctic ocean, the Barents sea and the Norwegian sea on 27 November 2006,
http://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf

UN General Assembly 8 October 2002, Fifty-seventh session, Agenda item 25 (a), Oceans and the law of the sea, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement>

Electronic/Miscellaneous sources

“Arctic Shipping Expected to Double in 2011”, The Arctic Institute,
<http://www.thearcticinstitute.org/2011/08/arctic-shipping-expected-to-double-in.html>

“Nordiska rådet: Arktiskt avtal inte tillräckligt”, The Nordic Council,
<http://www.norden.org/en/news-and-events/news/nordiska-raadet-arktiskt-avtal-inte-tillraeckligt>

Dokument utifrån – Spratlys – laglöst land, SVT Play, air date 30.5.2013.
<http://www.svtplay.se/video/350723/spratlys-laglost-land>

Legal Aspects of Arctic Shipping, European Commission, Directorate-General for Maritime Affairs and Fisheries, Legal Aspects of Arctic Shipping Summary Report, 2010

Maritime jurisdiction and boundaries in the Arctic region, Durham University, International Boundaries Research Unit, <http://www.dur.ac.uk/resources/ibru/arctic.pdf>

Strategic Comments, *Growing importance of the Arctic Council*, Volume 19, Comment 16, The International Institute for Strategic Studies. Available at: <http://www.iiss.org/-/media/Silos/Strategic%20comments/2013/Growing-importance-of-the-Arctic-Council/Growing-importance-of-the-Arctic-Council.pdf>

The Pew Charitable Trusts, Oceans North, Oil Spills, <http://oceansnorth.org/oil-spills>

United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php

US Geological Survey “*Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*,” <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

Lyakhov, Alexei & Fedyashin, Andrey

Arctic Council session opens in Swedish Kiruna, *The Voice of Russia*,

http://english.ruvr.ru/2013_05_14/Arctic-Council-session-opens-in-Swedish-Kiruna/

Weller, Gunter et al

Arctic Climate Impact Assessment (ACIA), Scientific Report, Cambridge University Press, 2005

Wezeman, Siemon T

Military Capabilities in the Arctic, SIPRI Background Paper, March 2012

Arctic Council webpage, various subsections

<http://www.arctic-council.org/>

North Atlantic Treaty Organization webpage

http://www.nato.int/cps/en/natolive/topics_52044.htm

United Nations, Oceans & Law of the Sea webpage

http://www.un.org/depts/los/clcs_new/commission_purpose.htm#Purpose

Cases

Case Concerning Maritime and Territorial Questions between Qatar and Bahrain 2001 ICJ

Eritrea/Yemen Arbitration 1999

Maritime Delimitation in the Black Sea (Romania v. Ukraine) Case 2009

Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) 2012