

An International Governance Framework for the Arctic: Challenges for International Public Law

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The Arctic Ocean

According to the Arctic Council and International Hydrographic Organization statistics, the Arctic Ocean and included Arctic seas cover approximately 20,000 km². The Arctic Ocean therefore covers an area which is eight times larger than the Mediterranean Sea.¹ The Arctic Ocean is predominantly a marine environment, which has an abundance of natural resources, including oil and hydrocarbons. The Arctic Ocean also has a relatively pristine and clean environment compared to most other areas of the world.² The area is also perennially “ice-covered”. The ice reaches to the coasts of some of the littoral States’ islands, such as the Canadian Arctic Islands and northern Greenland.³ Many of the Arctic seas – e.g. Kara, Barents, Bering, Laptev – and the Arctic Ocean itself are clogged with ice during the summer months, thus making it a very harsh environment, especially with regard to navigation and exploration. For this reason, the Arctic Ocean is often referred to as “the last frontiers of mankind on this planet”.⁴

Global warming as a result of climate change is affecting the Arctic region in a highly visible manner. In 2007, the Intergovernmental Panel on Climate Change (IPCC) reported that in this polar region there have been and continue to be observable and scientifically measurable decreases in snow and ice extent, including mountain glaciers and snow cover.⁵

Thus, on the one hand, navigational and exploratory opportunities in the region, including the potential for expanded marine shipping through the Arctic Ocean and the growth of some major Arctic fisheries, are increasing. On the other hand,

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The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

¹ See Boczek ‘The Arctic Ocean and the New Law of the Sea’ GYIL 29 (1986) 157.

² Arctic Council website (‘The Arctic Council’), see <http://arctic-council.org/section/the_arctic_council> (20 July 2009).

³ See Rothwell/Joyner ‘The Polar Oceans and the Law of the Sea’ in: Oude Elferink/Rothwell (eds.) *The Law of the Sea and Polar Maritime Jurisdiction and Delimitation* (Nijhoff The Hague 2001) 5 (footnote 22).

⁴ Boczek (note 1) 154.

⁵ Intergovernmental Panel on Climate Change (IPCC) ‘Summary for Policymakers’ in: Core Writing Team, Pachauri/Reisinger (eds.) *Climate Change 2007: Synthesis Report – Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC Geneva 2007) 2, 12, see <<http://www.ipcc.ch/index.htm>> (21 July 2009).

ecosystems and livelihoods are being damaged or altered, necessitating the adoption of integrated conservation, management and adaptation measures to prevent or reduce the decline or extinction of marine species due to the loss of their habitat.

Applicable Legal Regime

None of these actual or potential new uses of the Arctic Ocean can and will take place in a legal vacuum. The Arctic Ocean and its waters are, like any other ocean, subject to the regime of the United Nations Convention on the Law of the Sea⁶ (UNCLOS), which governs all human activities related to the oceans and seas.

UNCLOS was adopted as a package deal to address all aspects of ocean use, by balancing coastal State jurisdiction against navigational rights of other States. Not only did it codify prevailing customary international law, UNCLOS also created new limits for maritime zones and provided the basis for the continued development of a legal framework for the use and management of the seas.

The Arctic States,⁷ except the United States of America, are parties to UNCLOS. However, the United States recognizes UNCLOS as reflective of customary international law and applies its principles. Thus all the Arctic States are in a position to give full effect to the provisions of that instrument.

UNCLOS contains a number of provisions related to marine scientific research, conservation, sustainable use and management of marine resources, protection and preservation of the marine environment, as well as navigation, which have been further developed by other international instruments. Among them are the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks⁸ (United Nations Fish Stocks Agreement, 1995); the 1974 International Convention for the Safety of Life at Sea⁹ (SOLAS 1974) and the Protocols of 1978 and 1988;¹⁰ the 1973

⁶ United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

⁷ Members of the Arctic Council (Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America).

⁸ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (done 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

⁹ International Convention for the Safety of Life at Sea, 1974 (concluded 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2.

¹⁰ 1978 Protocol relating to the Convention of 1 November 1974 for the Safety of Life at Sea (with Annex, Appendix and Final Act of the International Conference on Tanker Safety and Pollution Prevention, 1978) (done 17 February 1978, entered into force 1 May 1981) 1226 UNTS 237; 1988 Protocol relating to the Convention of 1 November 1974 for the Safety of Life at Sea (done 11 November 1988, entered into force 3 February 2000), see <<http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE001015.doc>> (24 July 2009).

International Convention for the Prevention of Pollution from Ships,¹¹ as modified by the Protocol of 1978¹² relating thereto (MARPOL 73/78); the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal¹³ (Basel Convention); the 1992 Convention on Biological Diversity;¹⁴ and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation¹⁵ (SUA 1988). These international instruments, relevant to the Arctic governance, offer opportunities for strengthened cooperation and need first to be fully implemented, including through competent organizations.

Maritime Spaces

Across the globe, States, including Arctic States, have taken steps to exercise their sovereignty or jurisdiction, as the case may be, in the maritime zones in accordance with UNCLOS, for example to assess the resources of their waters and on the floor of the continental shelf.

Regarding the maritime space, UNCLOS recognized or established various maritime zones which fall either under the sovereignty or jurisdiction of coastal States, such as the territorial sea, the exclusive economic zone and the continental shelf. The limits of these zones are measured from baselines, which may be normal, straight or archipelagic baselines, depending on the peculiar characteristics of the coastline.

The exclusive economic zone (EEZ), which has a limit of up to 200 nautical miles, is one of the most revolutionary features of UNCLOS and has had a profound impact on the management and conservation of the resources of the oceans. Within this area, the coastal State has the right to exploit, develop, manage and conserve all resources – fish or oil, gas or gravel – to be found in the waters, on the ocean floor and in the subsoil.

¹¹ International Convention for the Prevention of Pollution from Ships, 1973 (signed 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL Convention).

¹² Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (with Annexes, Final Act and International Convention of 1973) (signed 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61.

¹³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (done 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.

¹⁴ Convention on Biological Diversity (concluded 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

¹⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (concluded 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221.

National Policies and Implementation of International Obligations

The Convention, just like any legal instrument, is only as effective as the extent to which it is implemented. In the case of international law, implementation is measured, among other things, by the development of national legislation to give effect to the provisions of a treaty and by an increased number of States Parties to the treaty.

In the Arctic Ocean, each of the five coastal States has developed legislation to implement the provisions of international law as reflected in UNCLOS, from baselines to the delimitation of the various maritime zones. They have made sizeable progress with regard to the establishment of their national jurisdiction and its limits. Since 1994 – the year of the entry into force of UNCLOS – Canada adopted its comprehensive Oceans Act of 1996;¹⁶ in 2004 Denmark extended the application of its Act No. 411 of 1996 on Exclusive Economic Zones to Greenland and delineated the outer limits of that zone for Greenland;¹⁷ Norway adopted acts and issued regulations and orders relating to its territorial sea around mainland Norway and around Svalbard;¹⁸ the Russian Federation adopted a series of federal laws applicable to the Arctic region, including the Federal Law on the Continental Shelf of the Russian Federation of 1995¹⁹ and the Federal Act on the Exclusive Economic Zone of the Russian Federation of 1998;²⁰ and the United States of America, in the Department of State Public Notice 2237 of 1995,²¹ announced the limits

¹⁶ Oceans Act, SC (1996) ch 31 (Canada).

¹⁷ See Royal Decree on the Entry into Force of Act on Exclusive Economic Zones for Greenland (15 October 2004), printed in *Law of the Sea Bulletin* 56 (2004) 126; Royal Decree on Amendment of Royal Decree on Delimitation of the Territorial Waters of Greenland (15 October 2004), printed in *Law of the Sea Bulletin* 56 (2004) 126-31; Executive Order on the Exclusive Economic Zone of Greenland (20 October 2004), printed in *Law of the Sea Bulletin* 56 (2004) 133-35.

¹⁸ See e.g. Act No. 57 relating to Norway's Territorial Waters and Contiguous Zone (27 June 2003), printed in *Law of the Sea Bulletin* 54 (2004) 97-98; Regulations relating to the Baselines for Determining the Extent of the Territorial Sea Around Mainland Norway, as laid down by Royal Decree (14 June 2002), as amended by Crown Prince Regent's Decree (10 October 2003), printed in *Law of the Sea Bulletin* 54 (2004) 88-92; List of Coordinates of Points Defining the Outer Limit of the Territorial Sea Around Norway Mainland (deposited by Norway with the Secretary-General of the United Nations under UNCLOS on 1 December 2003), printed in *Law of the Sea Bulletin* 54 (2004) 29-40; List of Coordinates of Points Defining the Outer Limit of the Territorial Sea Around Svalbard (deposited by Norway with the Secretary-General of the United Nations under UNCLOS on 1 December 2003), printed in *Law of the Sea Bulletin* 54 (2004) 41-80.

¹⁹ Federal Law on the Continental Shelf of the Russian Federation (25 October 1995), see <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf> (21 July 2009).

²⁰ Federal Act on the Exclusive Economic Zone of the Russian Federation (2 December 1998), see <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf> (21 July 2009).

²¹ Department of State 'Public Notice 2237 – Exclusive Economic Zone and Maritime Boundaries; Notice of Limits' Federal Register 60 (No. 163) (23 August 1995) 43825.

of the exclusive economic zone of the United States of America, including the limits off the coast of Alaska. The Presidential Directive of 9 January 2009²² established the policy of the United States with respect to the Arctic region and directed related implementation actions. It is worth noting that this Arctic Policy, among other things, calls for the accession to UNCLOS.

With regard to the exclusive economic zone and the continental shelf, coastal States are called upon, under UNCLOS, to effect delimitation of maritime boundaries by agreement to achieve an equitable solution. Also, pending agreement, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation. Several agreements have already been concluded regarding the delimitation on maritime boundaries in the Arctic Ocean.²³

The process of harmonization of national legislation with the provisions of UNCLOS and the related Agreements as well as the implementation of other obligations under that instrument, as appropriate, have not yet been finalized in the Arctic region. Further developments in this regard are expected both in terms of the expression of the consent to be bound by UNCLOS by the single State non-Party and in terms of full implementation of obligations under UNCLOS, including the obligations in relation to the establishment of maritime boundaries and deposit of charts or the lists of geographical coordinates of points in relation to straight baselines as well as the outer limits of the territorial sea, the exclusive economic zone and the continental shelf. Even though all four coastal States Parties have provided information of this nature to the Secretary-General, only one – Norway – has formally deposited it pursuant to UNCLOS.²⁴

Beyond the limits of national jurisdiction, all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal are open to all States, whether coastal or land-locked. This means that all States can exercise traditional freedoms of the high seas, which include freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, subject to certain conditions, and freedom of scientific research.

²² United States National Security Presidential Directive and Homeland Security Presidential Directive NSPD 66/HSPD 25 'Arctic Region Policy' (9 January 2009) <<http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>> (21 July 2009).

²³ E.g. the Agreement between the Government of the Kingdom of Denmark and the Government of Canada relating to the Delimitation of the Continental Shelf between Greenland and Canada (with annexes) (signed 17 December 1973, entered into force 13 March 1974) 950 UNTS 152, and the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary (done 1 June 1990, not yet in force) <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/USA-RUS1990MB.PDF>> (23 July 2009).

²⁴ Commission on the Limits of the Continental Shelf 'Receipt of the Submission Made by Norway to the Commission on the Limits of the Continental Shelf' (27 November 2006) CLCS.07.2006.LOS (Continental Shelf Notification).

The seabed and subsoil thereof beyond national jurisdiction are defined by UNCLOS as the Area, which is the common heritage of mankind, administered by the International Seabed Authority.²⁵ The process of determining the Area in the Arctic Ocean will be a lengthy one – only two States bordering the Arctic Ocean, namely the Russian Federation and Norway, have so far made their submissions to the Commission on the Limits of the Continental Shelf in relation to the delineation of the continental shelf beyond 200 nautical miles. The Russian Federation did so in 2001,²⁶ and Norway in 2006.²⁷ The submission to the Commission of information and data on the proposed outer limit of the continental shelf beyond 200 nautical miles is due for Canada by the end of 2013, and for Denmark by the end of 2014. As I have already mentioned, the United States of America, another coastal State of the region, is not yet a State Party to UNCLOS.

Regarding the submission by the Russian Federation, the Commission concluded its deliberations on the recommendations in June 2002 and adopted the recommendations of the Commission by consensus.²⁸ The Commission presented its recommendations to the Russian Federation in the four areas relating to the continental shelf extending beyond 200 nautical miles contained in the submission: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the Central Arctic Ocean.

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 the United States of America in the Bering Sea, that it transmit to the Commission the charts and coordinates of the delimitation lines, as they will 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.

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. No revised submission has yet been made by the Russian Federation.

The consideration of the submission made by Norway is still underway. However, it is expected that the Commission may make recommendations pursuant to Art. 76 UNCLOS this year.

²⁵ See Art. 1 (1) UNCLOS: “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

²⁶ Commission on the Limits of the Continental Shelf ‘Receipt of the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf’ (20 December 2001) CLCS.01.2001.LOS (Continental Shelf Notification).

²⁷ Commission on the Limits of the Continental Shelf ‘Receipt of the Submission Made by Norway to the Commission on the Limits of the Continental Shelf’ (note 24).

²⁸ For a short summary of the CLCS recommendation concerning Russia, see UNGA ‘Oceans and the Law of the Sea: Report of the Secretary General’ (8 October 2002) UN Doc A/57/57/Add.1, paras 38-41.

New Opportunities and Related Challenges

As in many other regions, in the Arctic region too, there are unresolved issues between the coastal States regarding straight baselines, maritime boundaries and the nature of passage. Continued efforts by parties concerned to avail themselves of means for the resolution of their differences under the Charter of the United Nations²⁹ and UNCLOS are essential for good governance of the region. The United Nations Convention on the Law of the Sea is unique, in that the mechanism for the settlement of disputes, including compulsory mechanisms entailing binding decisions, is incorporated within the Convention.

From an overall perspective, recent developments clearly demonstrate the intent on the part of the Arctic States to exercise their jurisdiction in this area in accordance with international law as well as their willingness to cooperate to implement the provisions of UNCLOS in an acceptable manner among all States. The five coastal States of the Arctic Ocean, in the recently adopted Ilulissat Declaration (2008), affirmed that UNCLOS provides an extensive international legal framework which applies to the Arctic Ocean and “provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea”.³⁰

The melting of the ice in the Arctic Ocean is now perceived as opening up new possibilities for maritime transit and associated trade and tourism, as well as expansion of fisheries and exploration of the non-living resources, including oil. For a number of reasons, the matters of passage in the Arctic Ocean are, of particular sensitivity, and it is hoped that the States concerned will manage in the spirit of cooperation to identify solutions within the framework of UNCLOS that would be acceptable to all.

In view of the fragile nature of the Arctic region, the protection and preservation of its marine environment is high on the agenda. There are six main sources of ocean pollution addressed in UNCLOS: land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere. UNCLOS establishes the fundamental obligation of all States to protect and preserve the marine environment. It further urges all States to cooperate on a global and regional basis in formulating rules and standards and otherwise take measures to protect and preserve the mari-

²⁹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 805.

³⁰ Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27-29 May 2008 <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>> (16 June 2009) para. 3; the conference was held at the invitation of the Danish Minister for Foreign Affairs and the Premier of Greenland, and drew representatives of the five coastal States bordering on the Arctic Ocean – Canada, Denmark, Norway, the Russian Federation and the United States of America – who met at the political level on 28 May 2008 in Ilulissat, Greenland, to hold discussions.

ne environment. Every coastal State is granted jurisdiction for the protection and preservation of the marine environment of its exclusive economic zone.

Moreover, a special Article – Art. 234 on Ice-covered Areas – was specifically included in UNCLOS in order to recognize the unique nature of the polar regions and to ensure the protection and preservation of these environments. It confers what may be called an “environmental jurisdiction” within the exclusive economic zones of coastal States in these areas.

It can reasonably be expected that the coastal States of the region, by virtue of the legal regime established by UNCLOS, will bear the major burden of preserving the unique marine environment of the Arctic Ocean. By their actions, they will be responding to the broader interest of the international community in the polar regions. Other States, especially those wishing to derive benefits, in conformity with international law, from the use of this body of water will have to accept their share of responsibility for the future of the Arctic Ocean. Cooperation and coordination between States appear as a general theme throughout UNCLOS, and applies to both the international and regional contexts. This theme can be said to have provided the foundation for bodies such as the Arctic Council, which works towards greater Arctic cooperation. At the regional level, and within the Arctic itself, it is important to recognize the work of the Arctic Council, which was formed in 1996 as an intergovernmental policy body to address environmental and other issues relating to the Arctic, particularly in the context of climate change and adaptation. Most recently, in the Ilulissat Declaration, the five coastal States of the Arctic Ocean pledged to continue to cooperate in their efforts to protect and preserve the Arctic marine environment.

Given the complex processes occurring in the Arctic region as a result of climate change, the freedom of marine scientific research, in accordance with UNCLOS, acquires also particular importance.

Conclusion

Implementation of UNCLOS and related instruments to the fullest extent in the Arctic seas is crucial in order for any outstanding maritime delimitation, delineation of maritime boundaries and sovereignty issues to be resolved. The fact that there are issues with regard to the interpretation and application of UNCLOS in particular, which have impacted on the present uses of the Arctic seas and are perceived to be likely to have an impact on future uses of the Arctic seas as they become more accessible, is not a negative reflection on the inadequacy of the Convention but rather a reflection on the degree to which States have not yet fulfilled their obligations under UNCLOS. It is clear that even under optimal circumstances, the full implementation of international obligations requires time and resources. In the Arctic Ocean, the implementation of existing obligations will have to evolve according to changes in circumstances, such as the effects of climate change and global warming, and national policies will have to be developed and adapted accor-

dingly. The search for an “Arctic governance framework” should therefore be complementary to the implementation of existing instruments and should not undermine the role of existing mechanisms.

This is an opportune time to call upon States to reaffirm their commitment to the legal regime established by UNCLOS by taking effective legal measures within their laws and policies to implement their rights and duties under the Convention. The Secretariat of the United Nations is ready, within its mandate, to continue to support the sustained efforts of the international community, in particular the coastal States of this and other regions, to further the implementation of the existing legal framework and instruments. Only through such a process will the international community, in particular the coastal States, be able to identify any possible, region-specific, regulatory gaps and identify adequate solutions.

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