

The Legal Regime of the Arctic Ocean

by Tomas H. Heidar*

The retreat of ice and the warming of the Arctic Ocean will, together with advances in technology, offer new opportunities for shipping and exploitation of natural resources in the Arctic region. However, the region contains uncontaminated ecosystems with unique biological diversity that must be protected. Care must be taken to ensure that the opening of new shipping routes and exploitation of natural resources will not endanger these sensitive ecosystems and to minimize detrimental effects on the marine environment.

In my paper, I will deal with the “Legal Regime of the Arctic Ocean”, first generally and then turning briefly to maritime delimitation, the continental shelf, fisheries, shipping and the protection of the marine environment.

The extensive debate in the world press on the legal status of the Arctic Ocean following the Russian expedition in 2007 to plant the national flag on the seabed of the North Pole was to a large extent misleading. A wild race to conquer the North Pole was described, a race that was not subject to any rules of international law. The oversimplified question was headlined: Who owns the North Pole?¹

The 1982 United Nations Convention on the Law of the Sea (UNCLOS),² which is the only comprehensive treaty concluded in this field, provides a legal framework for all oceans, including the Arctic Ocean, subject to the special regime provided for Svalbard and its maritime zones by the 1920 Spitsbergen Treaty.³ When considering the legal status of the Arctic Ocean, one must distinguish between the various maritime zones and the manifold uses of the sea. The Law of the Sea Convention contains provisions on, *inter alia*, the legal status of the different maritime zones, maritime delimitation, the definition of the outer limits of the continental shelf, exploitation of shelf resources, fisheries, marine scientific research,

* Legal Adviser, Ministry for Foreign Affairs of Iceland, Director, Law of the Sea Institute of Iceland.

¹ Rademacher ‘Flagge auf dem Meeresgrund: Wem gehört der Nordpol? Russland schickt U-Boote und sagt: Uns’ *FAZ* (3 August 2007); Graff ‘Fight for the Top of the World’ *Time Magazine* (19 September 2007) <<http://www.time.com/time/world/article/0,8599,1663445,00.html>> (26 June 2009); Schlindwein/Traufetter ‘Race for the North Pole: Nations Vying for Arctic Treasures’ *Spiegel Online* (21 August 2007) <<http://www.spiegel.de/international/world/0,1518,501034,00.html>> (26 June 2009).

² United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

³ Treaty Concerning the Archipelago of Spitsbergen (concluded 9 February 1920, entered into force 14 August 1925) 2 LNTS 7.

navigation, protection of the marine environment and settlement of disputes. Other, specialized treaties complement the Convention with more detailed provisions, including, in particular, in the fields of shipping and protection of the marine environment.

Before continuing I wish to address the question whether the Arctic Ocean may be considered an enclosed or semi-enclosed sea and whether Part IX of the UN Convention on the Law of the Sea is applicable to it. According to Art. 122 UNCLOS, the term “enclosed or semi-enclosed sea” refers to “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.⁴ It seems clear that neither of the two criteria of that provision is fulfilled in the case of the Arctic Ocean. Firstly, the connection between the Arctic Ocean and the North Atlantic Ocean can under no circumstances be considered as a “narrow outlet”. Secondly, it has been estimated that the exclusive economic zones of the five riparian States encompass about 60% of the surface of the Arctic Ocean and it is therefore difficult to maintain that it consists “primarily” of exclusive economic zones.⁵ Any speculations that the Arctic Ocean is a semi-enclosed sea are therefore, at best, *de lege ferenda* and not *de lege lata*.

There are some unresolved maritime boundary disputes between States bordering the Arctic Ocean. The UN Convention on the Law of the Sea only contains very general provisions on maritime delimitation but the jurisprudence of the International Court of Justice in this field is rich.⁶ Furthermore, there are possible overlapping continental shelf claims beyond 200 miles. Here there is not much case law but the Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic, done on 20 September 2006,⁷ provide an interesting example of a solution to such an issue. The Agreed Minutes provide for a provisional delimitation of the continental shelf between the three parties, subject to the successful documentation by each of the parties of its entitlement to its part of the shelf in accordance with Art. 76 UNCLOS.

⁴ United Nations Convention on the Law of the Sea (note 2).

⁵ Cf. Proelss/Müller ‘The Legal Regime of the Arctic Ocean’ ZaöRV 68 (2008) 684.

⁶ Cf. Scovazzi ‘Maritime Delimitation Cases before International Courts and Tribunals’ in: Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (OUP online edition 2008) <www.mpepil.com> (26 June 2009).

⁷ Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic (20 September 2007) http://www.regjeringen.no/nb/dep/ud/dok/lover_regler/retningslinjer/2006/Agreed-Minutes.html?id=446839 (26 June 2009).

Art. 76 UNCLOS defines the outer limits of the continental shelf. It also provides that coastal States with a shelf beyond 200 miles shall submit information on the outer limits to the Commission on the Limits of the Continental Shelf (CLCS) and describes the procedure for establishing the outer limits in a final and binding manner.⁸ Of the States bordering the Arctic Ocean, Russia has made a submission,⁹ and so has Norway with respect to the continental shelf north of Svalbard.¹⁰ Canada and Denmark are expected to make their submissions to the Commission within the next few years, while the United States will not be entitled to make a submission until it accedes to the Convention.

The extent of the continental shelf of the coastal States in the Arctic Ocean and of the international seabed area, respectively, will to a large degree depend on the categorization of the relevant sea floor highs, namely the Lomonosov and Alpha-Mendeleev Ridges. According to Art. 76, there are three categories of sea floor highs. First, in the general definition of Art 76 (3), the deep ocean floor with its oceanic ridges is excluded from the continental margin. Sea floor highs that are not a natural prolongation of a land territory in a morphological sense are thus not part of the continental margin but of the deep ocean floor. In this case, the continental shelf does not extend beyond 200 miles from the baselines. It should be noted, however, that an oceanic ridge can, of course, form part of the continental margin, for example if it surfaces so that there is an island on the top of the ridge. Art. 121 (2) UNCLOS makes it clear that an island has a continental shelf like any other land territory.

Art. 76 (6) then mentions two categories of sea floor highs that are both part of the continental margin but have different maximum limits. If a structure qualifies as a natural component of the continental margin and is classified as a submarine elevation, both the maximum limit of 350 miles from the baselines and of 100 miles from the 2500 meters isobath can be applied. If, however, a structure is qualified as a submarine ridge, only the first-mentioned maximum limit, 350 miles from the baselines, can be applied. It is not a simple task to distinguish between submarine elevations and submarine ridges since the Convention does not contain definitions of these terms and the CLCS Scientific and Technical Guidelines¹¹ do not address this

⁸ See Heidar 'Legal Aspects of Continental Shelf Limits' in: Nordquist/Moore/Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden 2004) 19-39.

⁹ 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); for an executive summary and maps, see <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm> (26 June 2009).

¹⁰ 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); for the executive summary, see <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf> (26 June 2009).

¹¹ Commission on the Limits of the Continental Shelf 'Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf' (13 May 1999) UN Doc CLCS/11.

adequately. Recent submissions to the Commission and recommendations by the Commission in response to those submissions, as well as the literature, are, however, of guidance in this respect.¹²

Sea floor highs that are an integral part of the prolongation of the land mass qualify as natural components of the continental margin and can be classified as submarine elevations. These features have by implication a continuous morphological and geological connection with the land mass. Art. 76 is neutral with regard to the oceanic or continental affinity of the rocks of the continental shelf. A submarine elevation that is a natural component of the margin can be either oceanic or continental in origin. What is required is that a natural prolongation, i.e. continuity of morphology, geological origin and history, of the rocks of the coastal State's land mass can be established.

Submarine ridges, on the other hand, are not natural components of the continental margin. The distinction between submarine ridges and submarine elevations may be based on assessing how integrally related the features are to the land mass. Submarine elevations that are natural components of the continental margin share crustal characteristics, geological origin and tectonic evolution with the adjoining land mass. In contrast, a submarine ridge may be a feature that is morphologically connected to the land mass, but is not an integral part of the prolongation of the land mass because it has a different geological origin and history. The geology of a submarine ridge can vary along its length, and may share its geological origin and history with the associated land mass along some, or none, of its length.

I do not wish to speculate on the categorization of the Lomonosov and Alpha-Mendeleev Ridges. That is a matter for the submitting coastal States and the Commission. But the consequences of the classification of these sea floor highs will be significant.

Concurrently with the warming of the Arctic Ocean, new opportunities will arise for fishing and various fish stocks may be expected to relocate. The UN Convention on the Law of the Sea only contains rather general provisions on high seas fisheries but they have been complemented and strengthened significantly by the 1995 UN Fish Stocks Agreement¹³ which has been ratified by all Member States of the Arctic Council, by the European Community and its Member States and most fishing States in the world. The Agreement provides that regional fisheries management organizations shall be established for areas where none exists.¹⁴ The Arctic

¹² For submissions to and recommendations of the CLCS see <http://www.un.org/Depts/los/clcs_new/clcs_home.htm> (26 June 2009).

¹³ 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.

¹⁴ *Ibid.* Art. 8 (5).

Ocean, which has a very large high seas area, is only partially covered by the Northeast Atlantic Fisheries Commission (NEAFC) and a process to establish a new organization responsible for the remainder of the area could be initiated within the Arctic Council.

The UN Convention on the Law of the Sea provides the overall legal framework for navigation, and governs the jurisdiction of coastal States over foreign vessels in various maritime zones, as well as the jurisdiction of flag States and port States. The jurisdictional status of some Arctic waters remains controversial, including the part of the Northwest Passage belonging to the Arctic Archipelago of Canada. The geographical scope of coverage of Art. 234 UNCLOS on ice-covered areas also gives rise to differing interpretations. One interesting aspect of these issues is that they may be influenced by a further retreat of ice and the warming of the ocean in the future.

In addition to the general framework, a number of international agreements address specific challenges raised by shipping, such as marine pollution prevention standards, ship safety, seafarer rights and qualifications, and liability and compensation for spills. The standards for global shipping are largely adopted at the international level. The International Maritime Organization (IMO) promotes safety, environmental protection, trade and security in international shipping.¹⁵ It provides the machinery for the adoption of legal, technical and training standards for most types of ships through its committees.

Ships operating in the Arctic environment are exposed to a number of unique risks and harsh conditions, including the sea and glacial ice concentrations which pose a structural risk to ships. Within its global mandate, the IMO has therefore focused attention on Arctic shipping and developed international voluntary Guidelines for Ships Operating in Arctic Ice-covered Waters (Arctic Guidelines)¹⁶ for the safety of ships and seafarers in the Arctic.¹⁷ The Guidelines are currently under review and the need for a legally binding code is being considered. Iceland strongly supports a mandatory Arctic code. This would include making the harmonized Polar Classes mandatory and requiring all ships operating in ice-covered waters to have on board at least one ice navigator with documentary evidence of completing an approved training program in ice navigation. Furthermore, in light of the increased navigation of cruise ships in polar waters, it is our view that specific interna-

¹⁵ See Blanco-Bazán 'Specific Regulations for Shipping and Environmental Protection in the Arctic: The Work of the International Maritime Organization' *International Journal of Marine and Coastal Law* 24 (2009) 381-386.

¹⁶ International Maritime Organization 'Guidelines for Ships Operating in Arctic Ice-covered Areas' IMO doc. MSC/Circ.1056 and MEPC/Circ.399 (23 December 2002).

¹⁷ On Arctic marine shipping in general, see VanderZwaag *et al.* 'Governance of Arctic Marine Shipping' Dalhousie University, Marine & Environmental Law Institute (10 October 2008) <<http://archive.arcticportal.org/391/>> (16 July 2009).

tional construction requirements for cruise ships operating in polar waters need to be adopted.

Iceland is of the view that the existing marine environment standards set by the International Convention for the Prevention of Pollution from Ships (MARPOL),¹⁸ in particular discharge standards, are not adequate for Arctic waters. Stricter environmental standards should be established through the IMO for these waters. This could be achieved by designating the Arctic Ocean beyond national jurisdiction as a “special area” under MARPOL where more stringent than normal standards would apply to oil, noxious liquid substances and garbage from ships.

Given the fragmented framework for the governance of shipping activities in the Arctic, including ship safety and protection of the marine environment, it is not surprising that it has been described as a “complicated mosaic”.

Suggestions have been made in the UN General Assembly that a new implementation agreement should be adopted under the UN Convention on the Law of the Sea on the protection of the marine environment. Iceland remains to be convinced of the need for such an instrument. Negotiating an implementation agreement would be extremely complicated and time and energy consuming, and the result would probably be another general framework. Therefore, time and resources are better used by focusing efforts on implementing the relevant provisions of the UN Convention on the Law of the Sea, other more specific international agreements and other instruments. What is needed are focused, practical and workable solutions and what is required is political will. The ever increasing interest of governments in the Arctic region leaves no doubt in my mind that the political will is there and the Berlin Arctic Conference certainly bears witness to that.

In this context, I would finally like to emphasize that it is imperative that the eight Arctic countries cooperate well and closely with one another. This cooperation should primarily take place within the Arctic Council which must have a full overview of the various issues on the agenda and serve as the coordination body for Arctic issues. The Member States of the Arctic Council should continue to welcome other relevant countries and parties as observers and be inclusive rather than exclusive.

¹⁸ 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).