

Current Endeavors with Respect to the Arctic Ocean: New Challenges for International Law and Politics

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The rapid melting of the ice in the Arctic has thrown up numerous questions. The Arctic – or to be more precise, the Arctic Ocean – suddenly finds itself at the center of a new geopolitical debate. This debate has been conducted at a series of international conferences, condensed into strategy papers, and has made itself felt in various Arctic policies since the beginning of 2008, if not earlier. It is far from over, in fact it is just getting going. Many questions, which – as evidenced by the informal conclusions of the Berlin Conference¹ – have yet to be conclusively answered, still await discussion. The following are just some of the main events and documents that chart the course since 2008:

The policy paper by the EU High Representative (March 2008),² the joint article by the German and British Foreign Ministers on the Arctic (March 2008),³ the Ilulissat Declaration adopted by the five Arctic coastal States (May 2008),⁴ the Ilulissat Conference of the Nordic Council of Ministers (September 2008),⁵ the European Parliament Resolution on Arctic Governance (October 2008),⁶ the Monte Carlo Conference (November 2008),⁷ the Commission Communication on the

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The opinions given in this piece are those of the authors and do not necessarily reflect those of the German Federal Foreign Office or other governmental agencies.

¹ See Chairman's conclusions by G. Witschel (in this volume).

² Council of the European Union 'Report 7249/08 from the Commission and the Secretary General/High Representative to the European Council – Climate Change and International Security' (3 March 2008) <<http://register.consilium.europa.eu/pdf/en/08/st07/st07249.en08.pdf>> (6 July 2009).

³ Steinmeier/Miliband 'Europe has to face up to the security policy impact of climate change' – joint contribution by Frank-Walter Steinmeier and his British counterpart David Miliband Federal Foreign Office, Press Communication 088/08 (13 March 2008).

⁴ Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27-29 May 2008 <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>> (7 July 2009).

⁵ See Nordic Council of Ministers *Common Concern for the Arctic, Conference Arranged by the Nordic Council of Ministers 9-10 September 2008, Ilulissat, Greenland* (Nordic Council of Ministers Copenhagen 2008).

⁶ European Parliament Resolution 'Arctic Governance' P6_TA(2008)0474 (9 October 2008).

⁷ See Final Declaration, Monaco Conference, Monaco, 9-10 November 2008 <http://eu2008.fr/webdav/site/PFUE/shared/import/1109_UE_Arctique/1109_EU_Arctic_Final_statement_1111_EN.pdf> (7 July 2009).

European Union and the Arctic Region (November 2008),⁸ the US Presidential Directive on Arctic Region Policy (January 2009),⁹ the NATO Seminar in Reykjavik (January 2009),¹⁰ the Arctic Conference in Berlin (March 2009)¹¹ and the Meeting of the Parties to the 1973 Agreement on the Conservation of Polar Bears (March 2009).¹² These will be described below and the relevant documents included in the annex. This list is by no means exhaustive. Arctic Council sessions, other Arctic strategies and expert meetings have been omitted for various reasons. The annex also contains the relevant Articles of the UN Convention on the Law of the Sea (UNCLOS).¹³

1. The Paper by the EU High Representative (3 March 2008)

On 3 March 2008, the European Commission and the Secretary-General/High Representative submitted a joint paper titled “Climate Change and International Security” to the European Council. It focused on the impact of climate change on international security and considered the impact of these international security consequences on Europe’s own security, and how the European Union (EU) should respond.

The paper distinguishes between various forms of conflict driven by climate change in different regions of the world: conflicts of resources, economic damage and risk to coastal cities and critical infrastructure, loss of territory and border disputes, environmentally-induced migration, situations of fragility and radicalization, tension over energy supply and pressure on international governance.

The Arctic is mentioned specifically: “The rapid melting of the polar ice caps, in particular, the Arctic, is opening up new waterways and international trade routes. In addition, the increased accessibility of the enormous hydrocarbon resources in the Arctic region is changing the geo-strategic dynamics of the region with potential consequences for international stability and European security interests. The resulting new strategic interests are illustrated by the recent planting of the Russian flag under the North Pole. There is an increasing need to address the growing debate over territorial claims and access to new trade routes by different countries

⁸ Commission of the European Communities ‘Communication from the Commission to the European Parliament and the Council – The European Union and the Arctic Region’ COM(2008) 763 final (20 November 2008).

⁹ 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>> (7 July 2009).

¹⁰ See Chairman’s Conclusions, NATO Seminar ‘Security Prospects In the High North’, Reykjavik, 28-29 January 2009 <<http://www.mfa.is/publications/aifs/nr/4801>> (7 July 2009).

¹¹ See Chairman’s Conclusions by G. Witschel (in this volume).

¹² Outcome of Meeting, Meeting of the Parties to the 1973 Agreement on the Conservation of Polar Bears, Tromsø, 17-19 March 2009 <<http://www.polarbearmeeting.org/>> (8 July 2009).

¹³ United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

which challenge Europe's ability to effectively secure its trade and resource interests in the region and may put pressure on its relations with key partners".¹⁴

2. The Joint Article by the German and British Foreign Ministers (6 March 2008)

Just a few days later, on 6 March 2008 on the sidelines of the NATO Summit in Budapest, Federal Foreign Minister Frank-Walter Steinmeier and his British counterpart Minister David Miliband published a joint article about the threats posed by climate change. The two Ministers stressed that they had put the security implications of climate change at the very top of the international agenda. The article stated that in 2007 the UK launched a debate in the UN Security Council on the impacts of climate change on peace and security, and during its EU Presidency in 2007, Germany initiated a report on a European response to the new security risks. Both the UK and Germany support a European response to the security challenges posed by climate change. The Ministers had the following to say with respect to the Arctic: "We need to consider now how climate change will affect the strategic context of European foreign and security policy in the years to come. For instance the shrinking Arctic icecap raises questions about resources, delimitation of maritime zones and sea-lanes in the far North. To avoid new tensions, the EU report on climate security proposes a European Arctic policy. It is vitally important for European security to implement governance structures for the Arctic region based on international law, aiming at a cooperative and peaceful management of resources and preserving the ecological heritage of mankind".¹⁵

3. The Ilulissat Declaration (27-29 May 2008)

The Declaration, known as the "Ilulissat Declaration" after the place in Greenland where the conference was held, is a carefully worded declaration adopted by the "Arctic 5" (A5) at the end of May 2008. It outlines the kind of cooperation the A5 (Canada, Denmark, Norway, the Russian Federation and the United States of America) are considering in the Arctic. From the text one can glean which principles will be applied as regards legal arrangements, research, managing natural resources and the ecosystem of the Arctic Ocean. In their Declaration the A5 emphasize their supremacy in this area. They speak out in favor of applying the international law of the sea to the Arctic and against the conclusion of

¹⁴ Council of the European Union 'Report 7249/08 from the Commission and the Secretary General/High Representative to the European Council – Climate Change and International Security' (note 2), ch III.6.

¹⁵ Steinmeier/Miliband (note 3); for the EU report on climate security see above "1. The Paper by the EU High Representative (3 March 2008)".

a specific agreement for the Arctic. This sends an important signal to other potential Arctic players and to the international community. While stating unequivocally that the A5 “remain committed to this legal framework and to the orderly settlement of any possible overlapping claims”,¹⁶ it is clear that issues relating to the outer limits of their continental shelves also played an unstated role¹⁷ in the Declaration, which has also been dubbed the Declaration on “Fixed Rules of Play for Dividing Up the Arctic Ocean”.¹⁸ This Declaration also covers further issues such as the protection and preservation of the fragile marine environment, tourism, shipping, research and scientific research. Repeated mention is made of cooperation among the five States and “with other interested parties”,¹⁹ and “among relevant states”,²⁰ without these being more closely defined.

4. The Arctic Conference of the Nordic Council of Ministers (9-10 September 2008)

Ilulissat was also the venue of a conference organized in September 2008 by the Nordic Council of Ministers entitled “Common Concern for the Arctic”. The focus of the conference was on the Arctic and the EU and how to best assist the different components of the EU in addressing Arctic issues more effectively and in a more coherent manner. In his conclusions, the Chairman Hans Corell referred to the main results of the five panels on terrestrial living resources, marine living resources, non-renewable resources/opportunities and concerns, local development/capacity building, as well as Arctic research/science and traditional knowledge.²¹ In a keynote address, EU Commissioner Joe Borg outlined the future EU strategy on the Arctic.²²

¹⁶ Ilulissat Declaration (note 4) para. 3.

¹⁷ This was among the subjects discussed at the senior officials meeting in Oslo (15-16 October 2007), which is referred to in para. 3 of the Declaration (ibid.).

¹⁸ Cf. Winkelmann ‘Fixed Rules of Play for Dividing up the Arctic Ocean: The Ilulissat Declaration of the Arctic Coastal States’ SWP Comments 18 (2008) 1.

¹⁹ Ilulissat Declaration (note 4) para. 7.

²⁰ Ibid. para. 6.

²¹ Corell ‘Chairman’s Conclusions’ in Nordic Council of Ministers *Common Concern for the Arctic, Conference arranged by the Nordic Council of Ministers 9-10 September 2008, Ilulissat, Greenland* (Nordic Council of Ministers Copenhagen 2008) 24-30.

²² Borg ‘Keynote Address: The Arctic: a Matter of Concern to Us All’ in Nordic Council of Ministers *Common Concern for the Arctic, Conference arranged by the Nordic Council of Ministers 9-10 September 2008, Ilulissat, Greenland* (Nordic Council of Ministers Copenhagen 2008) 45-48.

5. The European Parliament Resolution (9 October 2008)

Exactly one month later, on 9 October 2008, the European Parliament (EP) adopted a resolution that contained a reference to the Ilulissat Declaration and noted the outcome of the Conference of the Nordic Council of Ministers. The EP stated that it was deeply concerned at the effects of climate change on the sustainability of the lives of the indigenous peoples in the region. It also drew attention to the fact that the Arctic region, by virtue of its impact on the world's climate and its singular natural environment, merits special consideration as the EU develops its position for the UN Climate Change Conference, to be held in Copenhagen in late 2009. The EP emphasized the external aspects of energy policy and the role of the Arctic in the formulation of the Energy Policy for Europe,²³ and expressed its concern over the ongoing race for natural resources in the Arctic, which may lead to security threats for the EU and overall international instability. The EP recommended opening international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991.²⁴

6. The Monte Carlo Conference (9-10 November 2008)

France and the Principality of Monaco hosted a joint conference entitled "The Arctic: Observing the Environmental Challenges and Facing Their Challenges" in Monte Carlo from 9-10 November 2008. It was attended by numerous representatives of polar research institutes. The objectives of the conference were to increase public awareness of the urgent need for action to protect the Arctic from damage caused by degradation of the global environment; to provide a focus on scientific studies carried out in the Arctic within the context of the International Polar Year, broadening them into wider subjects around a central theme: the Arctic as a privileged observatory of global environmental changes, and especially the effects of climate change; and, additionally, to launch a political appeal to pursue scientific research beyond the International Polar Year and to create a network of Arctic observation stations for the protection of the environment.²⁵

The final declaration of the Conference contained various statements on the related issues of Arctic observation, arctic reporting and an information network, as

²³ Commission of the European Communities 'Communication from the Commission to the European Council and the European Parliament – An Energy Policy for Europe' COM(2007) 1 final (10 January 2007).

²⁴ Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71; Protocol on Environmental Protection to the Antarctic Treaty (done 4 October 1991, entered into force 14 January 1998) (1991) 30 ILM 1455.

²⁵ See preparatory documents for the conference (on file with authors).

well as on the importance of facilitating access to research sites in the Arctic.²⁶ It also referred to the need to have financial and human resources available.

7. The EU Commission Communication (20 November 2008)

On 20 November 2008, not long after the Monte Carlo Conference, the EU Commission presented a Communication on “The European Union and the Arctic Region”. In this document, the Commission emphasized that the EU is inextricably linked to the Arctic region by a unique combination of history, geography, economy and scientific achievements. As it stated, three Member States – Denmark (Greenland), Finland and Sweden – have territories in the Arctic, and two other Arctic States – Iceland and Norway – are members of the European Economic Area (EEA).²⁷ Furthermore, Canada, Russia and the United States are strategic partners of the EU. According to the Communication, the Arctic Ocean contains areas beyond national jurisdiction pertaining to the high seas and the seabed managed by the International Seabed Authority. It also stressed that EU policies in areas such as environment, climate change, energy, research, transport and fisheries have a direct bearing on the Arctic.

Referring to the paper presented by the High Representative for the Common Foreign and Security Policy,²⁸ the Commission pointed out that environmental changes are altering the geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests, calling for the development of an EU Arctic policy. On the whole, it stated, Arctic challenges and opportunities will have significant repercussions on the life of European citizens for generations to come. The Commission concluded: “It is therefore imperative for the European Union to address [these challenges] in a coordinated and systematic manner, in cooperation with Arctic states, territories and other stakeholders”.²⁹ The three main policy objectives of the EU are protecting and preserving the Arctic in unison with its population, promoting sustainable use of resources and contributing to enhanced Arctic multilateral governance.³⁰ The Communication includes a set of proposals for action on each of these priorities.

²⁶ Final Declaration (note 7).

²⁷ Provisions of the EEA Agreement (Agreement on the European Economic Area [signed 2 May 1992, entered into force 1 January 1994] [1994] OJ L1/3) ensure full participation of the EEA EFTA countries in the Internal Market and in these respects allow for cooperation in fields such as environment, research, tourism and civil protection, all of great importance for the Arctic.

²⁸ Council of the European Union ‘Report 7249/08 from the Commission and the Secretary General/High Representative to the European Council – Climate Change and International Security’ (note 2); see above “1. The Paper by the EU High Representative (3 March 2008)”.

²⁹ Commission of the European Communities ‘Communication from the Commission to the European Parliament and the Council – The European Union and the Arctic Region’ (note 8) ch 1.

³⁰ *Ibid.* ch 2, 3 and 4.

8. The US Directive on Arctic Region Policy (9 January 2009)

The United States of America announced its new Arctic strategy on 9 January 2009, in a Directive that was one of the Bush Administration's final foreign policy acts. The purpose of the Directive was to establish the policy of the United States with respect to the Arctic region and to direct related implementation actions. The directive superseded the previous Presidential Decision Directive (issued in 1994) with respect to Arctic policy but not with respect to Antarctic policy.³¹ The Directive sets out America's position on the following issues (in the order given): national security and homeland security interests in the Arctic, international governance, extended continental shelf and boundary issues, promoting international scientific cooperation, maritime transportation in the arctic region, economic issues (including energy, environmental protection and conservation of natural resources). As well as highlighting freedom of navigation as a "top national priority", the Directive also contains a reference to the application of the right of passage through the straits of the Northern Sea Route and the Northwest Passage, as well as a call for the US Senate to act favorably on US accession to UNCLOS.³² It should not however pass without remark that (military) security interests take pride of place in the Directive. Later in the text, it is stated that an Arctic Treaty is "not appropriate or necessary",³³ and that the Arctic Council should "not be transformed into a formal international organization".³⁴

9. The NATO Seminar in Reykjavik (29 January 2009)

For the first time since the end of the Cold War, NATO, too, turned its attention to the future of the Arctic. High-level representatives gathered at a "Seminar on Security Prospects in the High North" in Reykjavik, which had long been advocated by Iceland and Norway³⁵ and was attended by NATO Secretary General De Hoop Scheffer. Chairman's conclusions were adopted at the end of the meeting. These conclusions underscored the necessity of strengthening the cooperation between all relevant actors in the High North. They also noted that NATO has "legitimate security interests" in this region of "strategic importance".³⁶ At the

³¹ United States National Security Presidential Directive and Homeland Security Presidential Directive NSPD 66/HSPD 25 (note 9) ch I.A.

³² Cf. *B r i g h a m* 'Navigating the New Maritime Arctic' Proceedings 135(5) (2009) 46-47.

³³ United States National Security Presidential Directive and Homeland Security Presidential Directive NSPD 66/HSPD 25 (note 9) ch III.C.3.

³⁴ *Ibid.* ch III.C.2.

³⁵ The Chairman's Conclusions rightly refer to a follow-up seminar that Norway intends to arrange in 2010; see Chairman's Conclusions, NATO Seminar (note 10) para. 8.

³⁶ *Ibid.* para. 4.

same time it was also noted that “not all security risks and threats are best addressed by NATO”.³⁷ No Russian participants were invited to attend the Seminar.

10. The Berlin Arctic Conference (11-13 March 2009)

The Arctic Conference held in Berlin in March 2009 was entitled “New Chances and New Responsibilities in the Arctic”. It was organized by the Foreign Office of the Federal Republic of Germany in coordination with the Foreign Ministries of Denmark and Norway, and had the aim of identifying what concrete form cooperation between the five Arctic Ocean coastal States and third States, organizations and communities could take. The Ilulissat Declaration of May 2008 had referred in several paragraphs to the necessity of “cooperation”, without, however, describing concrete forms and ways of cooperation.³⁸ The Chairman’s conclusions of the Conference are published in this volume.³⁹

11. The Agreement on the Conservation of Polar Bears: First Meeting of States Parties (17-19 March 2009)

On 15 November 1973, Canada, Greenland, Norway, Russia and the United States of America concluded an Agreement on the Conservation of Polar Bears in Oslo, Norway.⁴⁰ In accordance with the provisions of the Agreement, including Arts. VIII and IX thereof, the five parties met in Tromsø, Norway, from 17–19 March 2009 with the objective of providing an update on the conservation status of polar bears, reviewing implementation of the Agreement, identifying useful polar bear conservation strategies and discussing mechanisms for enhanced implementation of the Agreement.

The meeting is of significance because this Agreement is the only international treaty specific to the Arctic that has been concluded by the five Arctic coastal States. It is also notable that this first official Meeting of States Parties took place some 36 years after the Agreement was adopted.

In the outcome document of the Tromsø meeting, the five States underscored that the impacts of climate change and the continued and increasing loss and fragmentation of sea ice – the key habitat for both polar bears and their main prey species – constitute the most important threat to polar bear conservation. The parties noted with deep concern the escalating rates and extent of changes in the Arctic induced by climate change to date and that future changes are projected to be even

³⁷ Ibid. para. 5.

³⁸ See above “3. The Ilulissat Declaration (27-29 May 2008)”.

³⁹ See Chairman’s conclusions by G. W i t s c h e l (in this volume).

⁴⁰ Agreement on the Conservation of Polar Bears (done 15 November 1973, entered into force 26 May 1976) (1974) 13 ILM 13.

larger. The parties agreed that long-term conservation of polar bears depends upon successful mitigation of climate change. They expressed concern that ultimately, opportunities for polar bear conservation are limited by the magnitude and rate of change in climate and sea-ice conditions. The parties were also concerned about their common obligations to protect the ecosystem of which polar bears are a part. This obligation⁴¹ can only be met if global temperatures do not rise beyond levels where the sea ice retreats from extensive parts of the Arctic. Polar bears are likely to be extirpated from most of their range within this century. Against this background, the parties recognized the urgent need for an effective global response that will address the challenges of climate change. Further, the parties recommended that ongoing efforts within appropriate forums to negotiate strategies to address climate change should be informed by the significance of climate change to the conservation of polar bears.

12. Conclusion: the Arctic Ocean and International Law of the Sea

In a short time, widespread agreement has been reached on the fact that the UN Convention on the Law of the Sea⁴² provides the basis for resolving many of the questions related to the new developments in the Arctic Ocean.⁴³ Even the USA, which has not yet acceded to UNCLOS, agrees with this assessment, as evidenced by its support of the Ilulissat Declaration.⁴⁴ However, on many issues UNCLOS provides no more than a general framework. It does not contain specific rules on many of the aspects that need regulation. The first Meeting of the Parties to the Agreement on the Conservation of Polar Bears was a good illustration of how legal obligations fail to make an impact when circumstances arise that are utterly different from those for which they were intended – such as global climate change. Numerous issues that UNCLOS touches on in general terms have yet to be resolved. These include questions such as:⁴⁵

What patterns will the recommendations made by the Commission on the Limits of the Continental Shelf develop in practice when faced with submissions by States concerning the Arctic Ocean (Art. 76 UNCLOS)? Will research by third countries remain as free as it is today in those areas beyond the baselines that States seek to claim as their continental shelves (cf. Art. 77 UNCLOS)? Will the relation-

⁴¹ This is one of the main obligations of the Agreement on the Conservation of Polar Bears (Art. 2: “Each Contracting Party shall take appropriate action to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns, and shall manage polar bear populations in accordance with sound conservation practices based on the best available scientific data”).

⁴² United Nations Convention on the Law of the Sea (note 13).

⁴³ Proelss/Müller ‘The Legal Regime of the Arctic Ocean’ ZaöRV 68 (2008) 651-687.

⁴⁴ See above “3. The Ilulissat Declaration (27-29 May 2008)”.

⁴⁵ See also the questions raised by G. Glosier (in this volume).

ship between the Commission and the International Seabed Authority that is responsible for “the Area”, from which the new outer continental shelf limits will be taken, as it were, remain free of tension (cf. Arts. 1 (1), 136 and 157 UNCLOS)? Is an UNCLOS implementing agreement on the protection of the Arctic environment necessary? Is the Arctic Ocean an enclosed or semi-enclosed sea (cf. Arts. 122 and 123 UNCLOS)? Just how far do concrete legislative powers actually extend in ice-covered areas (Art. 234 UNCLOS)? What legal status do Arctic sea lanes have? What forms of global or regional cooperation are conceivable in the Arctic Ocean (Art. 197 UNCLOS)?

The discussion has been launched. The following documents will provide further food for thought.