

The Arctic Challenge: UNCLOS and a new climate generated Arctic regime?¹

Dr. Kaare Bangert, Senior legal consultant, Soegaard, Denmark

kaare.bangert@wolfson.oxon.org

1. Introduction: five important issues as to legal regulation of the Arctic:

The change in the ice cover in the Arctic has generated a series of hitherto dormant issues as to which rules will apply to the new developing situation.² The five Arctic coastal states Canada, Greenland, Norway, Russia and the USA have already declared that the issues can best be solved under existing international law of the sea by the Arctic Councils Ilulissat Declaration of 2008:³

‘The Arctic Ocean stands at the threshold of significant changes. Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and the potential exploitation of natural resources.

By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea 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. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. ‘

The UNCLOS as the most extensive treaty law of the sea is generally given a pivotal role in the regulation of the new arising issues. At the preparatory meeting for the 2008 Ilulissat Conference, the purpose of the conference was stated to be ‘to reconfirm commitment to existing treaties and

¹ For the best updated overview with useful bibliography, see M. Byers, ‘Arctic Region’ in the Max Planck Encyclopedia of Public International Law (www.mpepil.com) Oxford University Press, Oxford 2010, electronic version.

² As to definition of the ‘Arctic’, there is no general formal definition, but the Polar circle 66° 30th Northern latitude is widely used as defining criterion, see e.g. L Lucchini and M Voelckel, *Le Droit de la mer*, Tome 1, *La mer et son droit ; Les espaces maritimes* (Pedone, Paris 1990) , p. 477.

³ See The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27 – 29 May 2008.

rules, especially the UN Convention on the Law of the Sea;...'.⁴ Similar view on the central role of UNCLOS can be found in the last report from the EU Commission.⁵

The problem of the UNCLOS as basis for regulation of the Arctic is that no explicit reference to the special issues as to ice is found the basis constituent regimes of the UNCLOS. No reference to issues of ice is found in the important regime of the territorial sea in Part II, the regime of straits in Part III, the regime of archipelagic states in part IV, the regime of the Exclusive Economic Zone in Part V, the regime of the continental shelf of Part VI, the regime of high seas in Part VII, the regime of islands in Part VIII, the regime of semi-enclosed and enclosed sea in Part IX, the regime of the area of part XI. The only short reference is found in Part XII, article 234 as to special protection of the environment in ice-covered areas.

This conspicuous lack of any reference to the Arctic or the Antarctic, except indirectly in art. 234, has lead commentators to the drafting process of the UNCLOS to conclude, that these issues were simply excluded as too sensitive or uncertain.⁶

The purpose of this paper is to take a critical look as to if and to what extent the both UNCLOS and the general international law actually have addressed the new issues? Or will these rules have to be modified in order to serve as legal framework for regulation of the new issues? The discussion will be focused around five main issues. First, the race for the North Pole will shortly be addressed. Second, the question of delimitation between land territory and sea in ice covered areas? Third, the question of drawing baselines in ice covered areas? Fourth, the question of maritime environment protection? Fifth, the question of maritime navigation through the two Arctic passages; the Northeast and Northwest Passage. Common for all issues is the lack of generally accepted operational legal or scientific definitions of important constituent elements of the Arctic legal regime such as what is ice (salt water and or freshwater), ice covered, permanent ice covered, non-permanent ice covered etc.? Certainly UNCLOS do not contain any answer to these questions

⁴ See Report of Meeting of Senior Arctic Officials, Final Report, 28-29 November 2007, Narvik, Norway, point 5.

⁵ See 'Legal Aspects of Arctic Shipping', European Commission, 23 February 2010, p. 6.

⁶ See Robert L. Friedheim and Robert E. Bowen, Neglected Issues at the Third United Nations Law of the Sea Conference, *Ocean Management*, 5 (1979) 309—339.

To try to address all these issues many of which are highly political controversial with strong positions more based on legal policy than legal doctrine would require a whole conference or more. I will, however, try to address the main issues, and will also deliberately sharpen some of the views. Moreover, it should be remembered that the UNCLOS is not an exhaustive regulation of the law of the sea although UN political rhetoric often seems to suggest that. Important regimes such as internal waters, historical waters, the question of law of the sea in armed conflicts, even including threat of maritime terrorism are not regulated by the UNCLOS. Moreover, even though UNCLOS to a certain extent might codify general international law, this do not change the separate existence and application of the underlying general international law even if similar in content, as stated explicit in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.⁷ Other questions such as the role of the sectorial principle has also had to be left out.⁸

2. The delimitation of the coastal state sovereignty over the continental shelf areas; or the race for the North Pole?

One issue however, will at least in the first period be solved according to the principles of UNCLOS. For the extension of coastal state continental shelf to a 350 mile limit or more, the UNCLOS article 76 will serve as the main legal basis. In that sense, the UNCLOS have had an all important role for the devolvement of the Arctic area. Without this quite exceptional treaty law entitlement for extension based on geographical criteria no state would have ventured to extend their continental shelf so far out. Moreover, as the continental shelf is independent of the superjacent sea, the status of this area as sea and or ice is irrelevant. In a different fictive geographical scenario where the ice of the polar sea had been stationary, interesting conflicts between extension of territorial sovereignty to the ice from one coastal state and the extension of the

⁷ See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 92-96, §175-179.

⁸ For an excellent overview see Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) p. 143-44 and *Oppenheim's International Law* 9th edn, Robert Jennings and Arthur Watts (eds) Volume I, 2 part (Longman, London 1992) p. 692-93. Moreover Donat Pharand, *Canada's Arctic waters in international law*, (Cambridge University Pres, Cambridge 1988) p. 2-87 contains in-depth overview on the sector theory compared to theory of proximity, contingency and adjacency. Although critical as to its legal validity, he concluded; 'In spite of its lack of validity as a legal root of title, the sector theory might prove to be a most convenient method for delimitation of various forms of State jurisdiction, including sovereignty.'

continental shelf of another state under that ice, could had lead to conflicts as how the continental shelf state could access to its continental shelf on ice areas subjected to the sovereignty of the other state.

This question of extension of the five Arctic coastal states continental shelves is at the moment uncontroversial at least as to which legal framework is applicable. The UNCLOS article 76 and related procedural rules are accepted as the legal framework. The interesting issue will remain how the delimitation of the overlapping claims will be settled. Presumable, again this will be done as other similar maritime delimitations within the framework of customary law developed by the International Court of Justice in the Haag (ICJ). Likewise, the broad discretionary framework of UNCLOS article 83 on delimitation of the continental shelf between states with opposite or adjacent coasts contains no changes from existing practice. Some special adaption to the Arctic environment as to difficulties to procure sufficient evidence will undoubtedly develop in practice. Moreover, the role of ice covered areas for the delimitation such as from where the extension of the outer limit shall be delimited remains to be seen.

3. The extension of coastal state sovereignty over land territory contingent to permanent and semi-permanent ice covered sea areas?

Another fundamental issue is, however, not covered by the UNCLOS, that is the extension of coastal state sovereignty over land territory contingent to permanent and semi-permanent ice covered sea areas. The issue has surfaced with some regularity in legal doctrine but submerged again unsolved.

The application of UNCLOS and of the law of the sea in general to Arctic areas depend of the unsolved doctrinal issues of extension of sovereignty over permanent and semi-permanent ice adjacent to or naturally prolongating the land area. These questions have still not been solved. Is there a difference if frozen sea or inland freshwater glaciers? What are the decisive criteria for permanent? Is it a geological criteria or functional as the degree of non-navigable and in that case by which types of ships. The average merchant ship? Highly specialised icebreakers? U-boats? These issues must be addressed someway or and other. UNCLOS, however, gives no solution to these questions.

Nor has any general accepted operational legal definition of what constitutes permanent ice covered and semi-permanent ice covered etc emerged in general international law. The unsolved doctrinal issue is important for the delimitation of the coastal maritime areas. If the question of what constitutes land territory, or area subsumed under this status is undecided, then the delimitation between maritime areas and land territory remain uncertain. Various options have been suggested from time to time. Moreover, the coastal state have dealt with the issue in national legislation, but often on a pure formal basis sometimes without any relation to actual natural formations, leading to extreme case of legal basis actual lying on inland areas.

Reflecting the lack of recent interest until now modern authoritative textbooks still rely on older doctrine for the fundamental issue of extension of and character of sovereignty over ice covered areas both permanent and semi-permanent.⁹ Waldock's paper of 1948 with e.g. Miller, Lakhtine, and Smedal are still referred to seen in e.g. both Brownlie, Jennings and Watts and Whiteman Digest of International Law.¹⁰ Whiteman chapter on sovereignty over Polar areas to which both Brownlie and Jennings and Watts refer for further elaboration consist of a verbatim reproduction of Waldock's paper supplied with Richardson's paper from 1957.¹¹ No independent commentary is given.

Generally, the issue of extension of coastal state sovereignty over the land territory unto adjacent ice covered area still is seen as unsettled. But it seems that the coastal state sovereignty over the land territory extends to permanent ice covered area, where the ice is resting on the sea bed. The view seems primarily to be based on the Antarctica based on Waldock and Richardson. But also

⁹ See Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) p. 143-44, *Oppenheim's International Law* 9th edn, Robert Jennings and Arthur Watts (eds) Volume I, 2 part (Longman, London 1992) p. 692-93 and M. M. Whiteman, *Digest of International Law* Vol. II (Government Printing Office, Washington 1963) p. 1051-61 and 1266-68.

¹⁰ See C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', XXV BYIL (1948) p. 314-317, David Hunter Miller 'Political Rights in the Arctic' 4 *Foreign Affairs* (1925), p. 47-60, W. Lakhtine, 'Rights over the Arctic' 24 *AJIL* (1930), 703-17, and Gunnar Smedal, *Acquisition of Sovereignty over Polar Areas*, (Gyldendal, Oslo 1931). This is of course not an exhaustive list of relevant older doctrine but representative only.

¹¹ See M. M. Whiteman, *Digest of International Law* Vol. II (Government Printing Office, Washington 1963) Problems of Sovereignty § 14, p. 1263-67 and Richardson, 'New Zealand's Claims in the Antarctic', 33 *N.Z.L.J.* (1957) 38, 39-40 quoted verbatim in Whiteman, II, on Polar Sovereignty, p. 1267.

Gidel hold similar view in his analysis of the issue of baselines in ice as seen below on the discussion of the baseline issue. Similarly, Van Essen finds the land territory ends where the permanent ice area ends.¹²

The question remains unsettled, and will undoubtedly be solved in state practice including bilateral agreements. But neither the general law of the sea or the UNCLOS contain any solutions to the issue of extension of coastal state sovereignty into adjacent ice covered areas either consisting of frozen seawater and/or freshwater glaciers.

Especially in Russian (and Soviet doctrine) the issue of extension of land territory in ice covered areas has been seen as vital for Russian interests. The various attempts of what is seen as Western internationalisation is criticised mainly as ignoring the factual and legal circumstances as expressed in E.P Andreyev and I.P. Bishchenko from 1988:¹³

‘A series of historical. Economic, political, geographical, environmental and other factors leads one to conclude that the Arctic sea areas cannot be viewed from the same angle as sea areas in general. However, most works by Western authors examine the legal status of the Arctic without regard for these factors. p. 128/ Bourgeois scholars such as Thomas Balch of Great Britain, Waultrin and Paul Fauchille of France, or Gustav Smödal (sic!) and Skagestad of Norway argue in favour of a multilateral condominium regime in the Arctic (that is in favour of its internationalization) and ignore, among other things, important factors such as the great economic, environmental and defence importance to the Soviet Union of Soviet peripheral seas and their being integrated into the mainland.’

But already Waldock, however, correctly noted in his 1948 paper that this condominium theory was built on the erroneous view that Arctic areas were not susceptible to occupation. The settlement of the sovereignty over Spitsbergen and Greenland made it clear that Arctic areas are subject to legal occupation. A view generally accepted as seen in Whiteman, Brownlie and Jennings and the condominium theory can no longer to be seen as accepted ‘bourgeois’ nor accepted general legal doctrine. The question how to delimit the extension of land territory in Arctic area must still be considered unsolved. In the case of permanent ice-covered sea, it seems that such areas can be claimed as part of the land territory. Again this view is based on the permanent ice barriers of the

¹² See Alfred van der Essen, Chapter 10 ‘The Arctic and Antarctic Regions’ in René-Jean Dupuy and David Vignes (eds), *A Handbook on the New Law of the Sea* Vol. 1 (Martinus Nijhoff, Dordrecht 1990-1992) p. 528.

¹³ See E.P Andreyev and I.P. Bishchenko (General editors), *The International Law of the Sea* (Progress Publications, Moscow 1988) p. 127-28.

Antarctica, and how this principle if accepted can be applied to the Arctic remains open. As to other situations as the status of areas adjacent to the land territory consisting of groups of island with permanent ice covered areas in between again the question remain open whether they form part of the land territory or an archipelago as the 1951 ICJ *Fisheries Case (UK v Norway)* . The fact that the waters areas are non-navigable could entitle to a special status similar to land territory? Moreover, the growing awareness of the Inuit and others actually having lived in these areas could play an important role. New concepts of sovereignty and new views on what constitutes relevant use of the ice covered areas could change the existing conceptual framework and raise new questions.¹⁴ The early view that Arctic areas were unsusceptible to legal sovereignty was based on the fact that they were inhabitable.¹⁵ As the Inuit have lived in these areas for centuries this might seem arrogant and reflect a Eurocentric bias in the basic conceptual framework as to sovereignty over Arctic areas. Moreover, the one-eyed focus on ice covered areas as potential navigable seas, could also conflict with the use of the areas as transport and hunting areas for the Inuit.

The lack of operational definition of ice, ice covered, permanent ice covered, and semi ice covered, or temporary ice covered etc gives additional difficulties to the clarification of this issue. No solutions to these questions can be found in the UNCLOS and for that sake in general international law of the sea. The legal framework will have to be found in general procedural frameworks as the duty to negotiate, and development of local solutions to local circumstances. In this question the Intuits and other local inhabitants could play a decisive role.

4. The drawing of baselines in ice?

The fact that the extension of the coastal state sovereignty over the land territory remains unsettled as to adjacent permanent or even semi permanent ice areas, has effect on the application of the

¹⁴ See the 2009 ‘Circumpolar Inuit Declaration on Sovereignty in the Arctic’ and the 2008 Report from the Inuit Circumpolar Council (ICC) ‘The Sea Ice is Our Highway. An Inuit Perspective on Transportation in the Arctic’.

¹⁵ See e.g. C.H.M. Waldock on sovereignty over polar regions in "Disputed Sovereignty in the Falkland Islands Dependencies", XXV BYIL (1948) 314: ‘The United States writers J.B. Scott and T. W. Balch expressed the view that the polar regions, being incapable or extremely difficult of permanent settlement by man, cannot be brought under sovereignty by effective occupation.’ (Quoted verbatim in Whiteman, *Digest of International Law*, II p. 1263)

baselines regime of both the UNCLOS as well as general international law.¹⁶ If the extension of the land territory is uncertain, how to draw the inner limit of the adjacent areas of sea subject to the coastal state modified sovereign over sea areas? Neither the UNCLOS nor the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone (signed 29 April 1958, entered into force 10 September 1964) contain any rule on drawing baselines in ice. Nor was the issue discussed at the preparatory conferences to these two conventions. How to explain this lack of explicit regulation of drawing baselines in ice-covered areas? Two solutions seem possible.

First, the solution suggested by some as the Ilulissat declaration, that the UNCLOS regime of baselines covers situations in ice as well. Second, the question of ice was deliberately left out due to its lack of practical importance or uncertainly. Personally, I adhere to the last view, that the question of ice was deliberately left out, as will be expanded below.

The basic rule of article 2 of the UNCLOS does not make any reference to the question of ice covered areas and their status as land or sea area.

Part II, Territorial Sea and Contiguous Zone, Section 1. General Provisions

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

The extension of sovereignty discussed in this article refers to water areas ‘an adjacent belt of sea’. The question of ice is not referred to. Nor does the extensive catalogue of practical application of the straight baselines principle make any reference to the question of ice. As the listing of applications in is evidently (an as seen in International Law Commission’s Reports 1949-56) is

¹⁶ See Bjørn Geirr Harsson, Chris Carleton, Ron Macnab and Olav Orheim, ‘UNCLOS and Ice Edge Base-line Problems’, Third Biennial Conference of ABLOS - Addressing Difficult Issues in the Law of the Sea’, International Hydrographic Bureau, Monaco 28-30 October 2003, (www.gmat.unsw.edu.au/ablos/index.html#ABLOS03) and Stuart B. Kaye, ‘Territorial Sea Baselines along Ice Covered Coasts: International Practice and Limits of the Law of the Sea’, Third Biennial Conference of ABLOS - Addressing Difficult Issues in the Law of the Sea, International Hydrographic Bureau, Monaco 28-30 October 2003, (www.gmat.unsw.edu.au/ablos/index.html#ABLOS03)

generated from a series of actual applications taken from state practice, and included both flexible cases as shifting sandbanks (art. 13) and non-geographical as ports (art. 11) and even pure functional cases without any permanent structures artificial or natural as roadstead (art. 12), the lack of reference of ice is conspicuous. As something new, even the special case of Pacific oceans was addressed art. 6 on reefs. Why not then include a rule or just a reference to the similar regional special case of the ice-covered areas? The answer to this can undoubtedly be found by at closer look at the drafting history of the baseline treaty law regime.

The UNCLOS regime of baselines in Part II is nearly verbatim reproduction of the regime of baselines in the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone as even a precursory reading will show. The regime of baselines in the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone was based on the extensive discussion of the 1926-1930 League of Nations Codification Conference on Territorial Waters. The main modification of the agreement achieved on the League of Nations Conference was the inclusion of the straight baselines after the 1951 ICJ *Fisheries Case (UK v Norway)*.

Consequently, the low-baseline got its basic substantive content on the League of Nations Conference which was based on a never repeated again extensive study of actual state practice. Precisely because of this inclusive practice based approach, the question of baselines of ice was put forward on the early stages of the conference due to the Soviet practice of drawing baselines from the outer rim of permanent ice covered areas. The League of Nations Committee of Experts decided, however, already at its Second Session, held in January 1926 not to include the question of ice in the discussion of baselines and the extension of territorial sea:¹⁷

'We must also abandon the attempt to settle the difficulties arising out of the presence of permanent ice near the coast. (For international practice, see Fauchille op. cit., page 203.) The cases mentioned by Fauchille (Spitzbergen, Alaska) are not sufficient to enable us at the present time to claim that there is a definite legal conception which could be used as a basis for a codified rule. No project of codification refers to the matter.'

No further reason for this exclusion was given nor was there any attempt to some the constituent element in this issue such as ice, ice covered, permanent ice covered, 'near the coast' etc. Fauchille, to which the Committee refers, make a distinction between area where the ice is permanent adjoined

¹⁷ See Shabtai Rosenne(ed), *League of Nations; Committee of experts for the Codification of International Law (1925-1928)*, (Oceana Publications, New York 1972) Vol. II, p. 68.

to the land and forms an extension of the land territory, in which case the end of the permanent ice form the baseline of the territorial sea. In areas, where the ice is temporary ‘temporaires’, the territorial sea extends as long as these areas extend into the sea.¹⁸

Gidel, outlines three different doctrinal suggestions.¹⁹ The first is to draw the baselines on the outer limit of permanent ice covered areas only.²⁰ The second solution is to draw the baselines on the outer limit of permanent as well as temporary ice covered areas.²¹ The third suggestion is to ignore to presence of ice and draw the baselines from the outer limit of the land territory (no mention of low waterline). This logical solution ‘opinion logiquement’ however, has according to Gidel the practical disadvantage by refusing the coastal state amongst other the benefits of an exclusive fisheries jurisdiction, which is other wise one of the benefits for the coastal state on the territorial sea.

Gidel finished his observations by reference to the exclusion of the question of ice covered coast from the draft rules of the League of Nations Codification Conference of the rules territorial waters. The contemporary extensive study of territorial waters made by Harvard Law School, just referred to Russian state practice without any discussion in the extensive comments.²² Perhaps the conclusion of the discussion of this issue in a contemporary study on territorial waters by Jessup reflects the general opinion:²³

¹⁸ See Paul Fauchille, *Traité de droit international public*, (Rousseau, Paris 1925) p. 203.

¹⁹ See Gilbert Gidel, *The Droit International de la Mer* (Châtenauroux, Paris 1932-1934), Vol. 3, Part 2, p. 529-30.

²⁰ See for this view in modern doctrine as expressed Alfred van der Essen, Chapter 10 ‘The Arctic and Antarctic Regions’ in René-Jean Dupuy and David Vignes (eds), *A Handbook on the New Law of the Sea* Vol. 1 (Martinus Nijhoff, Dordrecht 1990-1992) 525-560. Van der Essen draws the baseline on permanent ice covered areas from the low-water line of the end of the ice-formation according to art 3(1958) and art. 5 (1982), p. 528.

²¹ Gidel refers primarily to Louis Rolland, RGDIP, XI (1904) p. 340-45 for this view, see Gidel, op.cit., p. 529. Similarly, Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, Band I/1, 2nd ed.(Walter de Gruyter, Berlin 1989), refers to Rollands view and notes that the question is debatable (‘Die Frage ist streitig’) p. 352 note 19.

²² See Research of International Law of the Harvard Law School, ‘Draft Convention on Territorial Waters’, on article 2 on baselines, p. 257-58.

²³ See Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (C.A. Jennings, New York 1927) p. 71.

‘For these various minutiae it is useless to advance general rules. Their adjustment in individual cases must be left to the moderation and good sense of the states concerned. One can only predict that an unreasonable claim will meet with vigorous opposition.’

To sum up, no trace of this discussion of ice is found either in the preparatory works of 1958 Geneva Convention of Territorial Sea and Contiguous zone by the International Law Commission in 1949 to 1956 nor the 1958 Conference itself. Likewise no discussion as to baselines in ice covered areas is found in the preparatory works of the UNCLOS from 1973 to 1982 except for the article 234. It seems the most reasonable to conclude that this issue was simply kept outside of both the 1958 Geneva Convention of Territorial Sea and Contiguous zone and the UNCLOS precisely for the same reasons as it was kept out of the League of Nations Codification Conference. But the lack of any explicit regulation has not prevented pragmatic solutions in state practice; not without some interesting discrepancies between the legal regulation and the actual geographical local circumstances. In some cases legal baselines were found to be located on inland areas.

5. The protection of the marine environment?

The protection of Arctic marine environment is the only issue addressed explicitly by UNCLOS. On the insistence of three major Arctic states Canada, USA and USSR art 234 was inserted. Although often seen as relating only to Arctic due to its origin, no such limitation flows from the text.²⁴

Part XII, Section 8. Ice-Covered Areas

Article 234 Ice-covered areas

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

²⁴ See Myron H Nordquist, *United Nations Convention on the Law of the Sea; A Commentary* (Kluwer Law International, Dordrecht 1991) Vol. IV, p. 393.

The main thrust of the article is stress to special character of ice covered areas and to exclude these from the general application of the Part XII. Although often seen a special *lex Arctica* nothing in the text prevent application to Antarctic and even other areas as the Northern parts of the Gulf of Bothnia Bay a well.

The Arctic coastal states can based on article 234 (except USA as non-party) enact stricter measures as to own and more important foreign ships as long as they are based on relevant scientific evidence.

This reference to ‘relevant scientific evidence’ gives environmental science an important norm-creating role. Moreover, and just as important the accept of general international organisations as IMO is not necessary, as noted by a leading textbook on international environmental law.²⁵

The basic principles of the article 234 were already put in practice of Canada in the 1970 act, which now must be considered either as application of the treaty law of article 234, or rather as application of the underlying general principles of environmental protection restated by the three important Arctic states Canada, USA and USSR.²⁶ In this context especially the USA 1990 Oil Pollution Act should be mentioned.²⁷ By this act the USA three years before the UNCLOS even entered to force enacted an restricting of foreign shipping on the a the USA 200-mile EEZ. The 1990 Act is still in force without USA even being a party to convention so it must be presumed to be based on purely general international customary law.

The 1990 Oil Pollution Act was, however, a radical breach with existing state practice. First, the Act introduced the novel requirement for construction of all ships including foreign ships by demanding double hulls from all ships wanting to enter into the USA 200-mile zone. Consequently, all new ships constructed after 1990 must have double hulls in order to enter the USA 200-mile

²⁵ See Patricia Birnie, Alan Boyle and Cathrine Redgwell, *International Law and the Environment* (3rd ed. OUP, Oxford 2009) p. 419-20 on article 234 ‘... allows coastal states a broad discretion, free from IMO supervision, to adopt national stands for pollutions control..’

²⁶ Patricia Birnie, Alan Boyle and Cathrine Redgwell, *International Law and the Environment* (3rd ed. OUP, Oxford 2009) however states that ‘It remain uncertain whether this Article(art. 234) goes as far as Canada’s 1970 Arctic Waters Pollution Act in authorizing limitations on navigation.’ p. 420.

²⁷ See in general www.epa.gov/oem/content/lawsregs/opaover.htm

EEZ. ²⁸ As to existing ships all ships must by 2010 all ships over 5.000 gross tons must have double hulls. ²⁹

Second, an unprecedented augmentation of liability for foreign ships was introduced, including a potential unrestricted liability. Tank-vessels over 3.000 tons has a liability rate of 1.200 UsDol per gross ton. Moreover, unrestricted liability was introduced in case of gross negligence, willful misconduct, the violation of an applicable federal safety, construction or operating regulation. ³⁰ Similarly unrestricted liability was introduced if responsible party does not report the discharge or fails to cooperate with or abide by the orders of officials concerned with removal activities. ³¹ The previous USA legislation was based on a principle from 1851 whereby the liability could not exceed the value of the ship.

No process of negotiation with IMO was initiated nor any consultative process before the enactment of this severe restriction of foreign ships right of innocent passage. The USA law is a pure unilateral national legislative act. But as the Oil Pollution Act after initial wide-spread protests was accepted by all and applied in later international regulation this must be seen as accepted customary law. As the scope of this act was 'normal' sea areas and not special sensitive area as the Arctic, how much more can the other Arctic states introduce? In this context it seems contradictory that prolonged sets of non-mandatory guidelines are negotiated in a general forum in the IMO. ³² Such guideless are generally based on the lowest common denominator. As the view of non-Arctic states are irrelevant both according to the UNCLOS article 234 and customary law as initiated by the USA in 1990, why use this approach?

²⁸ See Oil Pollution Act § 4115 (adding new section 3703a to 46 U.S.C.).

²⁹ See Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(c)(3) and § 4115(a) (codified at 46 U.S.C. § 3703a(c)(4)).

³⁰ See Oil Pollution Act § 1004(c)(1).

³¹ See Oil Pollution Act § 1004(c)(2).

³² See the IMO homepage imo.org for the development of the non-mandatory Guidelines for ships operating in polar waters.

6. The Northwest and Northeast Passage?

The last question to be addressed is which role UNCLOS will have for solution of the controversial issue of the right of passage through the Northwest and Northeast Passage? Will the regime of transit passage in Part III apply or what? It is the view of this paper that this question will have to be decided on general customary law outside the treaty law of UNCLOS.

Not detailed discussion of the somewhat extensive literature on this subject will be attempted. The issues surrounding the Northwest passage is succinctly overviewed by Handl in 2010.³³

Unfortunately, a similar up to date exposition does not exist for the Northeast Passage.³⁴ Lucchini and Voelckel, however, address both the North West and North East Passage.³⁵ The important Russian legal doctrine as to the Northeast Passage has to be reconstructed out of older sparsely translated Russian legal doctrine, at least in the context of this paper.³⁶ Similarly no reference to the two Passages or the Bering straits is found in the preparatory study of straits for the First Law of the Sea Conference in 1958 by R.H. Kennedy.³⁷ The study comprises 33 straits, including straits now regulated by UNCLOS, regime of transit passage.

Initially, it should be remembered that the UNCLOS do not contain any definition of international straits, only the special treaty law regime of transit passage in Part III, the scope of which is somewhat limited, when compared to the general international law of straits. Consequently, the UNCLOS do not contain an exhaustive regulation of the question of international straits. The most

³³ See Günther Handl, MPEIL(Max Planck Encyclopaedia of Public International Law, electronic version, Oxford University Press, 2010) 'Northwest Passage (Canadian-American Controversy)'.

³⁴ See William E. Butler, *Northeast Arctic Passage* (Sijthoff and Noordhoff, Alphen aan den Rijn 1978)

³⁵ See L Lucchini and M Voelckel, *Le Droit de la mer, Tome 1, La mer et son droit ; Les espaces maritimes* (Pedone, Paris 1990) on the Northwest Passage, p. 489-96 and Northeast Passage, p. 496-500, Eric Franckx, *Maritime Claims in the Arctic ; Canadian and Russian Perspectives* (Nijhoff, Dordrecht 1993) and Bing Bing Jia, *The regime of Straits in International Law* (Oxford University Press, Oxford 1998)

³⁶ The otherwise excellent homepage of the Russian Foreign Ministry (www.mid.ru English version) contain no reference to this issue.

³⁷ See United Nations Conferences on the Law of the Sea, 1st. Conference, Official Records, Vol. I, p. 114-164, (A/CONF.13/6 and Add. 1), R.H. Kennedy, A Brief Geographical and Hydrographical Study of Straits which constitute Routes for International Traffic.

important existing regimes before UNCLOS are kept outside, according to article 35 of Part III. The general definition of international straits will have to rely of general international law as partly expressed in the ICJ 1949 *Corfu Channel Case (UK v Albania)* and the ICJ 1951 *Fisheries Case (UK v Norway)* on internal waters and Indreleia.³⁸ The main role of UNCLOS, Part III was to address the special sea lanes which hitherto had been high seas with free passage. But due to the new 12 mile outer limit of the territorial sea in UNCLOS, article 4, important long time established international sea lanes as the Malacca straits would come under coastal state sovereignty with restrictions of free passage and overflight as a consequence. But, as mentioned above, the existing straits regimes are not affected by Part III. The transit passage regime does consequently only apply to international sea lanes which had hitherto been part of the high sea. Moreover, it is questionable, whether this treaty law generated by the special situation in the Asian sea lanes, is part of general international law. In any case, the scope of such regime must be limited to already existing international sea lanes part of the high sea.

But both Canada and Russia claims that the potential passages are part of ether internal waters and or in the case of Russia both historical and internal waters. No right of passage exist according to general international law though either internal waters or historical waters.³⁹

Although often ignored or glossed over, it should be remembered that both the internal waters regime and the historical waters regime are still regulated by pure customary law, and are not included in the UNCLOS. The UNCLOS only regulates the regime of territorial sea, and the internal waters are by UNCLOS own definition in article 2 excluded from the concept territorial sea and forms a separate regime. Historical waters were also kept outside the codification process of both the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS. Both conventions only incidentally refers to historical bays in article 7.6 and article 10.6 respectively, where historical bays seen as outside the scope of the UNCLOS regime of straight

³⁸ See *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep p. 28 and *Fisheries Case (UK v Norway)* (Merits) [1951] ICJ Rep p. 132.

³⁹ The UNCLOS article 8.2 will not come into consideration for this case, as the article only areas which were not originally part of internal waters, but became internal waters due to drawing of straight baselines according to the UNCLOS treaty law. refers to straight baselines drawn as part of Straight baselines drawn as outer limit of the customary law regime of internal waters are not covered by the UNCLOS treaty law, but by the customary law only which not contains such limitation.

baselines. Again it should be stressed the historical waters regime is not necessarily restricted to bays or other geographical criteria but can also rely on pure functional jurisdiction recognised as historical. The question was studied in two separate studies by the United Nations, but kept outside as special safety valve for accommodation of the general treaty rules to actual local circumstances.⁴⁰ Without going to further details, the legal effect of this that the important question of foreign ships access to the two passages will have to be decided on pure customary law outside the treaty law framework of the UNCLOS.

If both Canada and Russia claims on the two Passages as part of internal or historical waters, the question if the regime of international straits or transit passage will apply is ab initio precluded, as the areas are neither territorial sea nor even former parts of high sea.

Any detailed discussion of this highly political loaded issues is of course outside this paper and will have be decided on a careful analysis of relevant state practice and the existing requirements for qualifying as internal and historical waters. An additional interesting question is to which extent the general rules of internal waters and historical waters are modified or applied to wholly or partly ice covered areas? But on an initial perusal, both Canada and Russia claims seems well founded in general international law. Especially, when the broad discretionary criteria of the internal waters and historical waters regime are considered, combined with overall purpose as safety valve for national vital interests. Canada's claim to Arctic baselines confirm to the requirements outlined in the 1951 ICJ *Fisheries Case (UK v Norway)*, which as the Court itself noticed is not an exhaustive definition of the relevant criteria for claiming areas as internal waters.⁴¹ Special considerations might apply to areas like the Canadian Arctic waters where the distinction between waters areas and ice covered areas are uncertain.⁴² Russia has similar both the geographical conditions as to claim internal waters especially if the special status of ice covered areas are taken into additional

⁴⁰ See United Nations Secretariat 'Historical Bays' (30 September 1957) UN doc A/CONF.13/1 'United Nations Conference on the Law of the Sea, Official Records', Vol. 1, 1-38 and United Nations Secretariat 'Juridical Regime of Historic Waters, including Bays' (9 March 1962) UN doc A/CN.4./143 ILC, Yearbook (1962) Vol. 2, 1-26

⁴¹ See e.g. *Fisheries Case (UK v Norway)* (Merits) [1951] ICJ Rep p. 132.

⁴² See in general still Donat Pharand. *Canada's Arctic waters in international law*, (Cambridge University Pres, Cambridge 1988).

consideration. Likewise Russia has since at least the 16 century exercised various state acts in these areas, including both national legislative act and international agreements.⁴³

In addition, the UNCLOS transit regime would mean free access of foreign missile carrying warships and aircraft carriers without previous notification to the sensitive areas of Russia and form a potential vital threat to mainland Russia. This could form a separate basis in strengthen the claim of Russia to these waters as especially sensitive.

But whatever the solution to these questions will be, the questions will have to be settled outside the UNCLOS by somewhat broader and discretionary legal framework of general international law. Moreover, both Canada and Russia will have to prove their claims according to general international law. But likewise would USA as non-party to UNCLOS have to prove that its claim of transit passage as general international law, and moreover to prove even, if that is case, which I do not, that the transit passage regime apply to the special Arctic waters.

Undoubtedly these question as to passage will be solved by bilateral negotiations and agreed solutions. But again it is important to underline that UNCLOS will not be the basis. On the contrary, the negotiated solutions will be application of already existing rules in general international law. The necessary special adaption to the Arctic circumstances will, however, in itself create a new regime which hopefully will address the still unanswered issues as to legal regulation of Arctic waters.

7. Conclusion:

The much published race for the North Pole will at least initially be solved on the basis on UNCLOS, as far as the extension of the continental shelves of five Arctic coastal state are concerned. But even in the application of UNCLOS treaty law interesting developments and modifications could be foreseen. Especially when states feel that their geographical data is not given sufficient weight by the advisory committee and unilateral extensions perhaps takes place.

⁴³ See e.g. E.P Andreyev and I.P. Bishchenko (General editors), *The International Law of the Sea* (Progress Publications, Moscow 1988), Chapter 4 The Legal regime of the Arctic, p. 124-131, Akademie der Wissenschaften der UdSSR, Institut für Staat und Recht, (transl. Elmar Rauch), *Modernes Seevölkerrecht; Die Rechtsordnung der Gewässer und des Boden des Weltmeers*, Schriftenreihe des Bundesinstituts für ostwissenschaftliche und, internationale Studien, Köln, Osteuropa und der internationale Kommunismus, Band 2 (Nomos Verlag, Baden-Baden 1978) p. 213-219 and T. A. Taracouzio, *Soviets in the Arctic* (Macmillan, New York 1938).

Moreover, basic questions of general international law such as the extension of the land territory in ice covered areas of sea and the legal status of such areas including seas areas temporarily covered by ice will undoubtedly be solved in the process. Dormant parts of the UNCLOS as the Part IX on enclosed and semi-enclosed seas could attract new interest as result of Russian practice in its Arctic areas. Some of the most important and potential controversial issues will, however, have to be addressed on general international law outside the codified treaty law such as the jurisdiction over foreign ships in the special Arctic waters and the status of the Northeast and Northwest Passage. The solution to these questions will in turn develop the customary law principles as well. The traditional remedies of international law as negotiations and agreed solution implemented by bilateral or regional treaties will serve as the constituent elements of the new Arctic regime. In this process of an merging international law of the Arctic, the main drivers will surely be the five coastal states modified by growing importance of the Inuits taken as representative for the indigenous peoples growing awareness of it own role in the development. The two statements of Inuit Council reveals an unnoticed but interesting dichotomy between the traditional international law framework and a new adapted Inuit concept of sovereignty, including statehood and other uses of the sea than traditional maritime ships-based transport without any relation to or advantage for local population. On the contrary, maritime transport only can be seen as potential risk etc. Why should the Inuit accept this intrusion? The Inuit factor will play a larger and larger role, and rightly so. Consequently, a new Arctic legal regime will emerge consisting of rule-making frameworks with Inuit input, developing localised regional regimes partly regional Arctic partly bilateral. The treaty law of UNCLOS will serve mainly as an expedient written restatement of some of the basic principles of the general law of the sea. Most of the important legal questions will have to be settled by international customary law regimes. The result will be a new composite regional Arctic regime.