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The Law of the Sea and the Arctic Ocean

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Abstract: Rather than proposing new legal instruments for addressing the contemporary significant changes of the Arctic Ocean, both the 2008 Ilulissat Declaration and the 2010 Chelsea ministerial meeting reaffirm the five Arctic coastal States' commitment to the Law of the Sea. Since then, several of them have strengthened their presence in the Arctic in order to protect their particular interests. Priority seems to be given to a selective application of the international norms that ensure the coexistence of coastal States in the Arctic Ocean, as well as the cooperation between them for enabling said coexistence. A good example would be the signing of the Treaty of 15 September 2010 between Norway and Russian Federation concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. However, the applicable law in the Arctic Ocean should be the comprehensive existing Law of the Sea frameworks, including any norms that do not rely on the geographic location of States, and that promote cooperation for protecting the general interests of the international community, particularly for the benefit of mankind as a whole. Without precluding work on further developing some of the existing frameworks, attention will be paid to the need for a teleological interpretation of the United Nations Convention on the Law of the Sea, in light of the new conditions or specificities of the Arctic Ocean.

Key Words: Law of the Sea (UNCLOS); Arctic Ocean; Sea-ice and Ice Islands; Trans-Arctic Passages; Arctic Outer Limits of the Continental Shelf; Arctic Maritime Zones beyond National Jurisdiction; Sub/Circumpolar Cooperation.

1. Introduction

As the 21st century unfolds, the Arctic sea-ice has been undergoing an unprecedented transformation through thinning, decreased seasonal coverage, and a substantial reduction in the area of (what seemed to be) perennial ice in the central Arctic Ocean.[1] This has led to a new international perspective on the Arctic Ocean.

The Statement, *The State of the Polar Research*, from the International Council for Science-World Meteorological Organization Joint Committee for the International Polar Year 2007–2008, provides compelling evidence that changes are occurring in the Arctic ice-atmosphere-ocean system, although the potential for the Arctic Ocean to undergo further rapid ice discharge remains the greatest unknown. However, the Statement reports a clear message: «what happens in the Polar Regions affects the rest of the world and concerns us all.»[2]

These changes are opening up new opportunities and posing new challenges. From the perspective of the traditional functions of international law, they are reflected in a classic legal question, namely, how to guarantee peaceful coexistence and to foster cooperation. That means how to seek a balance between the tendencies, sometimes conflicting, of independence-coexistence and of interdependence-cooperation between international actors.[3] In this sense the «Arctic question» presents a dilemma: on one hand it must address particular State interests, and on the other it is concerned with safeguarding common interests as a whole.

There is not now, nor does it seem likely there will be, a new international comprehensive legal regime that provides a specific solution to the «Arctic question.» Recently the legal regime of the Arctic Ocean was the object of the 2008 Declaration of Ilulissat, where the five Arctic coastal States – Canada, Norway,

1. AMAP 2009 Report on Selected Climate Issues is available at: http://www.amap.no/ [Last visit on 8 March 2011]
2. *The State of the Polar Research*, WMO Publications, February 2009, p. 16.
3. Salcedo Carrillo, Juan Antonio, «Droit international et souveraineté des États. Cours général de droit international public,»*RCADI* (257) 1996 pp. 35–222; *Curso de Derecho Internacional Público. Introducción a su estructura, dinámica y funciones*, Madrid 1991.

Denmark (Greenland), the Russian Federation and the United States[4] – explicitly expressed their commitment to the existing Law of the Sea.[5] The commitment was reiterated at the ministerial meeting between the five Arctic coastal States that took place in Chelsea (Canada) in March of 2010.[6]

Therefore, a balance between the interests of States and the interests of the whole international community should be sought by applying general rules of the Law of the Sea, mainly as codified in the United Nations Convention on the Law of the Sea (UNCLOS) to which all Arctic States, except for the United States, are State parties.[7]

The purpose of this study is essentially to address the dynamics of international norms of coexistence and cooperation through analysis of particular legal questions relevant to the Arctic, as well as discuss tools necessary for a feasible solution. Starting with an analysis of the legal status of ice in the Arctic Ocean (Section 2), the paper then focuses on matters relating to Arctic States' coexistence and cooperation (Section 3), and next common interests and concerns among both Arctic and non-Arctic entities are outlined (Section 4). Finally, the last section (Section 5) concludes that the most appropriate solution for the realization of broad common

4. There is not yet consensus on the exact definition in physical space of what is generally considered as «Arctic Ocean.» The author follows the Arctic Circle definition of the Arctic sea basin. See, *UArctic Atlas*: http://www.uarctic.org/AtlasMapLayer.aspx?m=642&amid=5955 [Last visit on 8 March 2011] or the geographical coverage of the *IMOGuidelines for Ships Operating in Arctic Ice-Covered Waters*[*IMO Doc. MSC/Circ. 1056-MEPC/Circ. 399*], or the FAO Arctic Fisheries Zone: Zone No. 18: http://www.fao.org/fishery/area/Area18/en. [Last visit on 8 March 2011]. However, it seems generally accepted that within the Arctic Region there are territories belonging to eight States, commonly called «Arctic States,» according with article 2 of the Declaration on Establishment of the Arctic Council (www.arctic-council.org/). Five of them are classified as coastal States – Canada, Denmark (for Greenland), United States, Russian Federation and Norway – while the remaining three – Finland, Iceland, Sweden – are partially in the space delimited by the Arctic Circle (Finland and Sweden), or in the space defined by the tree-line (Iceland) but land-locked in the corresponding Arctic sea basin.
5. Text of the Ilulissat Declaration is available at *Greenland Home Rule Government*: http://uk.nanoq.gl [Last visit on 8 March 2011].
6. More information is available at: http://www.international.gc.ca/polar-polaire/arctic-meeting_reunion-arctique-2010_index.aspx[Last visit on 8 March 2011].
7. The UNCLOS was adopted in 1982 and entered into force in 1994. It was integrated by two implementation agreements, i.e. the Agreement relating to the Implementation of Part XI of the United Nation Convention of the Law of the Sea of 10 December 1982, adopted on 28 July 1994, and entered into force on 28 July 1996; and the Agreement for the Implementation of the Provision of the United Nation Convention of the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on 4 August 1995, and entered into force on 11 December 2001.

interests lies in a teleological interpretation of the UNCLOS – that is, an interpretation according to its objective and purpose. A dynamic and evolutive interpretation of the UNCLOS would «contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole» and would «promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.»[8]

2. The Law of the Sea and the Arctic Ocean: The Legal Status of the Ice

Ice is solid crystallized water, and legal sciences are usually related to the regulation of physical matter in either a solid, liquid, or gaseous state, rather than a combination of these states. In the last century the question of the legal status of ice in the Arctic Ocean was raised in the following terms: Does the presence of ice change the legal status of the Arctic Ocean? In other words, is the Arctic Ocean subject, like any other ocean, to the general Law of the Sea?

As the analyses will show, there appears to be no doubt about the fact that sea-ice has the same legal status as sea-water (2.1). However, legal uncertainty remains regarding icebergs, namely those commonly known as ice islands (2.2).

2.1. The Historic Perspective of the Legal Status of Sea-ice

In the early twentieth century, the classic freedom of navigation on the high seas could not be exercised throughout the entire Arctic Ocean due to the presence of the polar cap and the formation of sea-ice adjacent to the coasts, particularly in winter. Although the sea-ice impeded navigation, in areas adjacent to the coast it allowed for its human occupation. The historic debate over the legal status of sea-ice in the contiguity of the coast, beyond what otherwise would be the outer limit of the territorial sea, revolved around two hypotheses: (1) to consider the *glacies firma* as *terra firma-res nullius* and, therefore, susceptible to State appropriation,

8. UNCLOS Preamble, paras. 5 and 7, respectively.

or (2) to have it qualified as *mare liberum-res communis*, which would make it a «good» not susceptible to appropriation by any State.[9]

The main weakness of considering *glacies firma* the same as *terra firma* – which led to its loss of support – lay in the fact that the *glacies* could not, by their very nature, be *firma*. Cyclically a portion of the sea-ice forms in the winter and melts during the summer, thus creating «a variable geometry zone.»[10] To this was added the success of the *glacies-mare* analogy, which was supported by those who never departed the opposite assumption, namely that the *de facto* presence of ice in the Arctic Ocean does not produce any change *de jure* of its legal regime. They simply found that despite the presence of the ice the Arctic Ocean was like any other ocean, divided into two regimes, under the general international law then in force: State sovereignty in territorial seas, and international freedom on the high seas.[11]

Ultimately the Arctic ice-covered marine areas have generally been considered the same as any other marine area.[12] In fact the exception that proves the rule is in the UNCLOS, which contains the so-called «Arctic exception» in article 234 (also known as «the Canadian clause») concerning the protection and preservation of the marine environment of ice-covered areas within the economic exclusive zone

9. A good example of the *glacies firma-terra firma* analogy would be the case raised in connection with the construction of a casino outside of what would otherwise be the limit of the territorial sea of Alaska. The intention was to circumvent the jurisdiction of the United States, but, finally, using the analogy *glacies-terra firma*, the court ruled in affirming the jurisdiction of the United State [Rolland, Louis, «Etats-Unis d'Amérique, Alaska. Maison de jeu établie sur les glaces au-delà de la limite des eaux territoriales» in *RGDIP* (XI) 1904 pp. 340–345]. In other very few cases the analogy *glacies-terra firma* was applied again. Following the most relevant, see the case *R. v. Tootalik E4–321 (1969)*, quoted by S. B. Boyd, «The Legal Status of the Arctic Sea Ice: A Comparative Study and Proposal,» in *The CanYIntlLaw* (98) 1984 pp. 98–152.

10. Bedjaoui Mohammed, «Le statut de la glace en Droit International» in M. Rama Montaldo (dir.) *El Derecho Internacional en un mundo en trasformación. Liber amicorum en homenaje al profesor Eduardo Jiménez Aréchaga*, Fundación de Cultura Universitaria, Montevideo 1994, pp. 713–729.

11. Balch, Thomas W., «The Arctic and Antarctic regions and the Law of Nations» in *AJIL*, (2) 1910 pp. 265–275; «Les Régions Arctiques et Antarctiques et le droit international,» *RDI* (XII) 1910 pp. 434–442; Scott, James B., «Arctic exploration and International Law,» in *AJIL* (3) 1909 pp. 928–94.

12. Pharand, Donat , «The Legal Status of the Arctic Regions,» *RCADI*, vol. 163, t. II, 1979, pp. 49–116.

(EEZ).[13] And beyond the EEZ, it seems that today the legal qualification of the area around the geographic North Pole, the polar cap, can only be that of high seas.

2.2. The Current Legal Gap on Ice Islands

According to an Arctic term, ice islands are huge floating tapped surfaces of frozen freshwater (icebergs).[14] They have been occupied and used increasingly for various technological pursuits and development. Since a gap exists regarding their legal status, two main approaches have generally been taken: to consider them as «ships», or a form of «use» of the sea. Following the ship-analogy approach, an ice island is a territorial property of the coastal State within its maritime boundaries, which becomes *res nullius* if left to drift unoccupied on the high seas, and assumes the jurisdictional status of a ship upon the moment of State occupation.[15] Following the use approach, the legal regime applicable to an ice island would depend on the use being made of it – drilling and/or drafting research installation, or freshwater resource.[16]

While considering the peculiarity of an ice island in itself without resorting to analogy, the use approach does not exclude the possibility of defining the legal status of the ice islands under Part XIII of UNCLOS, as *mutatis mutandis*, (natural) installations. And this brings up two more considerations: (1) that the occupation and use of an ice island by a State does not legitimize the exploration and exploitation of the natural resources in the marine zones generated by the temporal position of the island at a given place and time, although as ice, it never has a continental shelf. Indeed, article 259 UNCLOS clarifies that the installations do not possess the status of islands and, therefore, they do not create any legal (sub) marine zones; (2) Article 241 UNCLOS states that marine scientific research ac-

13. Stokke, Olav Schram, «A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention» in *Marine Policy*, (31) 2007 pp. 402–408; Huebert, Rob, «Article 234 and Marine Pollution Jurisdiction in the Arctic,» Oude Elferink, Alex G. and Rothwell Donald R. (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, London 2001 pp. 249–262.
14. Zubov, N.N., «Arctic ice islands and how they drift,» inDefence Research Board of Canada2005. Translation by E.R. Hope fromPriroda, (2) 1955 pp. 37–45; Sater, E., Arctic Drifting Stations, The Arctic Institute of North America, Washington D.C., 1968. Last August 2010, a new ice island broke off Greenland. See, «Ice Island Breaks off Greenland; Bigger Than Manhattan,» National Geographic, Daily News.com, 6 August 2010.
15. Auburn, F.M., «International Law and Sea-Ice Jurisdiction in the Arctic Ocean (based on US *v.* Escamilla)» in *ICQL*, (22) 1973 (3) pp. 552–557; Pharand, Donat, «The Legal Status of the Arctic Regions» in *RCADI*, (163,) 1979 (II) pp. 49–116.
16. Mouton, M.W., «The International Regimeof the Polar Regions,» in *RCADI* (107) 1962 (III) pp. 169–286.

tivities shall not constitute the legal basis for any claims to any part of the marine environment or its resources.[17] Therefore, future technological research activities on ice islands may allow the possibility, before their inevitable and increasingly-rapid disappearance in the Arctic Ocean, of exploiting them as natural sources of freshwater, being they are ultimately icebergs.[18]

3. States' Coexistence and Cooperation in the Arctic Ocean

From a historic and contemporary perspective, the Law of the Sea has been applied to the Arctic Ocean as a regulatory system for Arctic States' co-existence and cooperation, to safeguard sovereignty, sovereign rights, and national jurisdiction.

The claims of the Arctic States (those commonly classified as coastal Arctic States and Iceland)[19] resulted in several international disputes, whose solutions have not only facilitated the delimitation of marine and other submarines zones in the Arctic Ocean, but have marked important milestones in the process of development and codification of the Law of the Sea. Some of these issues have been resolved by the International Court of Justice (ICJ),[20] while other solutions have been reached with international agreements. Among the most recently reached agreements, on 15 September of 2010 Norway and the Russian Federation signed the Treaty concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. According with the Law of the Sea and the rules and principles for maritime delimitation, the Treaty ensures the continuation of fisheries cooperation in the whole of the Barents Sea. Therefore, the Grey Zone Agreement,

17. On the contrary, considering that ice islands are a way of using the sea and hypothesizing their position within the jurisdiction of a State, G.F. Graham affirms that: «[a]lthough there may be reason to regard floating islands as a third type of space (alongside lands and water) to which State sovereignty might address itself, it would seem more plausible to consider ice as a natural resource over which a State may presumably exercise sovereign rights. Such a concept might be quite useful within, for instance, the exclusive economic zone» ["Ice in International Law,» in *Thesaurus Acroasium*, (7) 1977 pp. 492–494].
18. Joyner, Christopher C., «The Status of Ice in International Law,» Oude and Rothwell, 2001 pp. 23–48; Trombetta-Panigadi, Francesca, «The Exploitation of Antarctic Iceberg in International Law,» Francioni, Francesco and Scovazzi, Tullio (eds), *International Law for Antarctica*, The Hague, London, Boston, 1996 pp. 225–257.
19. See *supra* note n. 4.
20. See, for examples: *Fisheries case (United Kingdom v. Norway), Judgment, ICJ Reports 1951; Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment, ICJ Reports 1974; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Judgment, ICJ Reports 1974; Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, ICJ Reports 1993.*

for fisheries control and enforcement in a specified area of the Barents Sea, will no longer apply when the maritime delimitation Treaty comes into force. In addition, the Treaty ensures efficient and responsible management of hydrocarbon resource cases, should any single oil or gas deposit extend across the delimitation line.[21]

However, the territories are far from being fully delimited. Following is the analysis of two of the most controversial issues currently outstanding in the Arctic Ocean. The first is the legal status of Arctic waters and trans-Arctic Passages (3.1) and, second, the ongoing delimitation of the Arctic outer limits of the continental shelves (3.2).

3.1. The Controversial Legal Status of Arctic waters and the Trans-Arctic Passages

The exact determination of which Arctic waters should be considered «internal» in light of the contemporary Law of the Sea, remains unresolved.

Currently the issue has particular significance because of increasing trans-Arctic navigation through both the commonly-known Northeast Passage (Northern Sea Route) and the Northwest Passage,[22] which are constituted by waters that, respectively, the Russian Federation and Canada claim as internal waters based on

21. More information is available at the Norwegian Ministry of Foreign Affairs website: http://www.regjeringen.no/en/dep/ud/campaign/delimitation.html?id=614002 [Last visit on 8 March 2011]

22. It is convenient to clearly differentiate between intra-Arctic and trans-Arctic navigation. While the so-called Arctic Bridge between Hudson Bay (Canada) and Murmansk (Russian Federation) might be a good example of intra-Arctic navigation, the Northeast Passage – or Northern Sea Route – and the Northwest Passage would be, by contrast, good examples of trans-Arctic navigation linking the Pacific and the Atlantic Oceans through the Bering Strait. The Northeast Passage refers to a set of routes which run from northwest Europe around North Cape (Norway) and along the north coast of Eurasia and Siberia through the Bering Strait. Otherwise, the Northwest Passage encompasses all routes along the northern coasts of North America that span the Canadian Arctic Archipelago and the northern coast of Greenland. See at UNEP/GRID-Arendal, *Northern Sea Route and the Northwest Passage Compared with Currently Used Shipping Routes*, *UNEP/GRID-Arendal Maps and Graphics Library*, June 2007, at: http://maps.grida.no/go/graphic/northern-sea-route-and-the-northwest-passage-compared-with-currently-used-shipping-routes; *Arctic Marine Shipping Assessment Report* available at: http://pame.is/amsa; *Legal aspects of Arctic Shipping* available at: http://ec.europa.eu/maritimeaffairs/arctic_overview_en.html [Last visit on 8 March 2011]

«historic title.»[23] In so doing, both States are excluding the possibility that the waters forming the Northeast Passage and the Northwest Passage can be considered «territorial seas,» as well as preventing consideration of the trans-Arctic Passages themselves as straits to be used for international navigation.[24]

Not all concerned States and/or international entities have yet taken a clear position on the legal status of trans-Arctic Passages. The ice cover is gradually becoming a less imposing physical barrier, and icebreaking technology is currently still progressing. But to base claims over newly navigable routes upon «historic title» would require review of the origins of the «history» of (international) trans-Arctic navigation.

Likewise, if the trans-Arctic Passages were finally to be considered as straits to be used (or usable in short-term perspective) for international navigation, this would raise the question of the applicability of Article 234 UNCLOS for regulating passage through them. Article 234 deals with, *inter alia*, issues related to navigation and environmental protection in ice-covered areas within the limits of the EEZs, such as those found in the Arctic. It is not clear what the «limits» are. In other words, whether article 234 UNCLOS is applicable to all waters – including the territorial sea – between the coastline and the 200 mile limit of the EEZ; or, alternatively, to the 188 mile waters – excluding the territorial sea – between the 12

23. Is has to be specified that Canada claims full sovereignty over the Northwest Passage as internal waters on «historic title» grounds, and in addition, or alternatively, as internal waters on the establishment of the straight baselines, whose legal requirements are less stringent than those of an «historic title.» However, since Canada is State party to the UNCLOS, under the straight baselines alternative foreign vessels would theoretically enjoy the right of innocent passage according to article 8.2 UNCLOS or, if it comes to it, the right of transit passage according to article 35 (a) UNCLOS. Against this position, Professor Donat Pharand argues that «nearly 20 years had elapsed before Canada accepted to be bounded by the applicable treaty provision [UNCLOS]. By that time the waters enclosed by the 1985 straight baselines had already the firm status of internal water, not subject to the right of innocent passage, and this status has not changed.» He clearly affirms: «the innocent passage provision of the law of the sea convention cannot apply retroactively to change established legal status» [Pharand, Donat, «The Arctic Waters and the Northwest Passage: A Final Revisit,» in *ODIL*, (38) 2007 (1), pp. 3–69]. See also the Canadian Parliamentary Information and Research Service, Law and Government Division, *Controversial Canadian Claims over Arctic Waters and Maritime Zones*, PRB 07–47E, 10 January 2008, at: http://www.parl.gc.ca/information/library/. [Last visit on 8 March 2011].

24. See, among others, Franckx, Erik, *Maritime Claims in the Arctic – Canadian and Russian Perspectives*, Dordrecht 1993; Scovazzi, Tullio, «The Baseline of the Territorial Sea: The Practice of Arctic States» in Oude Elferink and Rothwell, 2001, pp. 69–84.

mile (inner limit) and the 200 mile (outer limit).[25] Consequently, there is no clear-cut answer to the question as to whether a coastal State can apply article 234, and if so to what extent, and none as regards innocent passage through its territorial sea and transit passage through international straits.[26]

The issue remains unresolved, as follows: if considering trans-Arctic Passages as straits to be used for international navigation,[27] to what extent would the implementation of article 234 UNCLOS limit the right of transit passage, and innocent passage, through such waters? In any case, there would be no suspension of the exercise of those rights, in accordance with articles 44 and 45.2 UNCLOS, respectively.

This question is relevant not only if such Passages were to be considered as straits to be used for international navigation, but also whether the waters belong to the territorial sea, including whether they are internal waters enclosed by the straight baselines. To what extent would article 234 UNCLOS be applicable in such cases, and to what extent would an application limit the exercise of the right of innocent passage? Might this exercise be suspended? The lack of practice in this regard leaves these questions unanswered.

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25. Nordquist, Myron H., Shabtai, Rosenne and Yankov, Alexander, *United Nations Convention on the Law of the Sea 1982, A Commentary*, Dordrecht-Leiden-Boston, 1991 p. 397 ff.

26. *Huebert, Rob, «Article 234 and Marine Pollution Jurisdiction in the Arctic,» in Oude and Rothwel, 2001, pp. 249–262*; Kraska, James, «The Law of the Sea and the Northwest Passage,» (2) *IJMCL*, (22) 2007 pp. 257–282; *Scovazzi, Tullio, «Legal Issues relating to Navigation through Arctic Water,»* Looking beyond the International Polar Year: Emerging and Re-emerging Issues in International Law and Policy in the Polar Regions, *UNU-IAS Report, Akureyri, 2008*.

27. Since UNCLOS does not spell out the requirements of use for international navigation to transform an area into a strait, the criteria are usually derived from customary international law, mainly as interpreted and applied in the *Corfu Channel case[Corfu Channel case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 4.]* Although the threshold in the Corfu Channel case was fairly high, a considerably lower one would probably suffice for the trans-Arctic Passages, considering the special conditions of navigation and the difficult accessibility of the region. Following the logic of the jurisprudence of the Permanent Court of International Justice (PCIJ) in the *Legal Status of the Eastern Greenland* case of 1933, where the application of general principles of law to the Arctic was adapted to the special conditions of the region, comparatively little use for international navigation may be required in trans-Arctic Passages. Therefore a pattern of international navigation across the Arctic Ocean, even if developed over relatively few years, could be considered sufficient to make it international.

3.2. The Ongoing Delimitation of the Arctic Outer Limits of the Continental Shelf

Currently the work of the Commission on the Limits of the Continental Shelf (CLCS) in the Arctic Ocean is being developed in the submarine area, situated beyond two hundred nautical miles from the baselines of Norway, the Faroe Islands, Iceland, Jan Mayen, Greenland and the Svalbard Archipelago, in accordance with the submissions presented on 29 April 2009 by Iceland and Denmark with the government of the Faroe Islands.[28]

These submissions were made in implementation of the Agreed Minutes of 20 September 2006, adopted by Norway, Denmark and Iceland, that set out an agreed procedure for determining future delimitation lines in the aforementioned submarine area. According to the Agreed Minutes,[29] the definitive demarcation of the limits should be determined by bilateral agreements to be signed after each concerned State requests the CLCS to consider them and to make its recommendations.

In March 2009 the CLCS made its recommendations regarding the 2006 Norway submission, in which it accepted, with some refinements, the outer continental shelf limits proposed by Norway, including those related to the continental shelf of Svalbard.[30] That has raised new discussions between Norway and other States, Arctic and non-Arctic (Spain, for example),[31] regarding the implementation of the Svalbard Treaty of 1920 on the continental shelf of the archipelago of Svalbard, in

28. See, respectively, *The Icelandic Continental Shelf, Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, in respect of the Ægir Basin area and Reykjanes Ridge*; and, *The Partial Submission of the Kingdom of Denmark together with the Government of the Faroes to the Commission on the Limits of the Continental Shelf: The Continental Shelf North of the Faroe Islands*.

29. Doc. CLCS/64, 1 October 2009.

30. *Summary of the Recommendations of the Commission on the limits of the Continental shelf in regard to the submission made by Norway in respect to fares in the Arctic Ocean, The Barents Sea and the Norwegian Sea on 27 November 2006*. No legal Act on the outer limits of the Norwegian continental shelf has yet been adopted, but a White Paper to the Parliament for their delineation is in progress, in accordance with CLCS Recommendations.

31. See, Spanish Verbal Diplomatic Note, dated 3 March 2007 and Norwegian Verbal Note, dated 28 March 2007 referring to the note dated 3 March 2007 from Spain. Both of them are available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm [Last visit on 8 March 2011]

light of the contemporary International Law of the Sea which, *mutatis mutandis*, reflects old discussion over the Fisheries Protection Zones around Svalbard.[32]

However, the Norwegian submission and the CLCS recommendations have helped clarification. In the words of the Norwegian Foreign Minister, Jonas Gahr Støre: «In the discussion about who owns the North Pole – it's definitely not us.»[33]

A few years earlier, this discussion was indeed intensified by the Russian expedition Arktika 2007, and the dropping of the Russian flag under the North Pole because there now appears to be a single continental margin from Siberia across the North Pole to Greenland and Canada.

Arktika 2007 was conducted in order to collect additional technical information and geodetic data for preparing a new submission – estimated for 2012 – in support of the 2001 Russian submission, which in 2002 was considered by the CLCS to be improperly documented, and the Russian Federation was asked to review its submission within a reasonable time.[34]

While the United States is not State party to UNCLOS, neither Canada nor Denmark (for Greenland) has yet presented their submission to the CLCS[35] for the proposed outer limits of their continental shelves.

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32. See, Ulfstein, Geir, The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty, Oslo 1995; «Spitsbergen/Svalbard» in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, Oxford 2008. See also, Anderson, D., «The Status under International Law of the Maritime Area around Svalbard,»ODIL(40) 2009 pp. 373–384; Fife, R.E., «L'objet et le but du traité du Spitsberg (Svalbard) et le droit de la mer,» in Quéneudec, Jean-Pierre (ed.), La mer et son droit: mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec, Paris 2003; Fleisher, C.A., «The New International Law of the Sea and Svalbard,» paper presented at The Norwegian Academy of Science and Letters, 150th Anniversary Symposium, on 25 January 2007; Pedersen, Torbjørn, and Henriksen, Tore, «Svalbard's Maritime Zones: The End of Legal Uncertainty?» I JMCL (24) 2009 pp. 141–161.

33. *Limits of Norway's Arctic seabed agreed*, BarentsObserver.com, 16 April 2009.

34. CLCS/32-*Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission – Tenth session*, 12 April 2002.

35. Under article 4 of Annex II UNCLOS, a coastal State intending to establish the outer limits to its continental shelf beyond 200 nautical miles is obligated to submit particulars of such limits to the CLCS with supporting scientific and technical data as soon as possible, but in any case within 10 years of the entry into force of the UNCLOS for that State. For Canada the ten-year time limit for making submissions is 2013, while for Denmark it is 2014.

4. Cooperation for common interests between Arctic and non-Arctic entities in the Arctic Ocean

Beyond cooperation for coexistence, international rules of the Law of the Sea concerning the regulation and management of common interests between States and other international entities, both Arctic and non-Arctic, also apply (or should be applied) to the Arctic Ocean. This section concerns law applicable in marine areas beyond national jurisdiction, namely, the Arctic *res communis omnium* (4.1.), and also analyzes the Arctic States' «soft law» approach to common concerns for the Arctic Ocean (4.2.).

4.1. The Arctic *Res Communis Omnium*: the High Seas and the (potential) International Seabed Area

According to the Law of the Sea, the Arctic Ocean contains parts pertaining to the *res communis omnium* beyond areas of national jurisdiction: (*i*) the high seas and, as may be the case, (*ii*) the International Seabed Area.

(i) The Arctic high seas are characterized by a large central area surrounding the geographical North Pole, namely the polar cap.[36] Areas of the Arctic high seas which are not ice-capped must necessarily be regarded as *res communis omnium*, where, in principle, the traditional liberties of the high seas govern. Because of their shapes, these areas are commonly known as Banana Hole and Loophole, in the Norwegian and Barents Seas, respectively, and as Donut Hole in the Bering Sea. The Banana Hole and Loophole are located in the regulatory area of the North East Fisheries Commission (NEAFC),[37] while the Donut Hole is regulated by the Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea.[38] Moreover, the phenomenon of melting ice is opening more offshore areas not yet regulated as belonging to the EEZ. These are beyond the jurisdiction of Alaska, between the Chukchi Sea and Beaufort Sea.[39]

36. As if it were *terra nullius*, since 2003 a part of the polar cap has been temporarily occupied by a Russian settlement known as Borneo Camp, for a few months during the summer for research activities and tourism. Nevertheless, classification of the polar ice cap as high seas would prevent the possibility of any future claims of sovereignty based on the old *glacies-terra nullius* analogy. More information on Borneo Camp is available at: http://www.northpolextreme.com/
37. *Norwegian Ministry of Fisheries and Coastal Affairs*: http://www.fisheries.no/and the NEAFC: http://www.neafc.org/. [Last visit on 8 March 2011]
38. *Fisheries and Oceans Canada*: www.dfo-mpo.gc.ca/index-eng.htm [Last visit on 8 March 2011]
39. *North Pacific Fishery Management Council*: www.fakr.noaa.gov/npfmc [Last visit on 8 March 2011]

The main problem in relation to the aforementioned fisheries management mechanisms and the current limitations to the effective exercise of international freedoms in the international Arctic «holes,» lies as in any other high seas zone, in the need for coordination among national and international provisions and their implementation.[40] In other words, what has been generally described as State «creeping jurisdiction» beyond the EEZ, in order to protect national stocks.[41] However, it seems difficult to discern whether the exigencies of resource conservation stressed by the Arctic coastal States, coincide with the conservation interests of the international community.[42]

(ii) The seabed and subsoil of the Arctic Ocean beyond national jurisdiction could be proclaimed common heritage for all mankind. However, current trends in the practice of some Arctic coastal States seem to be moving in the direction of claiming sovereign rights over the North Pole.[43]

The Russian flag dropped on the seabed under the North Pole is the clearest evidence in this regard. Russians compare the success of Arktika 2007 with the first steps of man on the Moon[44] – «one small step for man, one giant leap for mankind» – historically marked by the crew of the Apollo XII mission and planting of the American flag.[45] But leaving aside rhetoric about the common benefit for

40. Molenaar, Erik J., «Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework», *YPL* (1) 2009 pp. 427–463; Stokke O.S., «Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreements» in *ODIL*, (32) 2001 (3) pp. 241–262. In more general terms, see Alcaide Fernández, Joaquín, «The Contemporary High Seas Fisheries Regime: Not a Free-for-All, but… How Free?» in Casado Raigón, Rafael (dir.), *L'Europe et la mer (pêche, navigation et marine environnement)*, Bruxelles 2005, pp. 315–331; Casado Raigón, Rafael and Cataldi Giuseppe (dirs.), *L'evolution et l'etat actuel du Droit International de la Mer. Mélanges du Droit de la Mer offerts à Daniel Vignes*, Bruxells 2010.

41. Vazquéz Gómez, Eva Maria, *Las organizaciones internacionales de ordenación pesquera. La cooperación para la conservación y gestión de los recursos vivos del alta mar*, Consejería de Agricultura y Pesca, Córdoba 2002.

42. Andreone, Gemma, «Fisheries in the Antarctic and in the Arctic», in Tamburelli Gianfranco (ed.), *The Antarctic Legal System. The Protection of the Environmement of the Polar Regions*, Istituto di Studi Giuridici Internazionali-Consiglio Nazionale della Ricerca, Giuffré Editore 2008, pp. 71–93.

43. «Arctic Map Plots New 'Gold Rush'- Maritime Jurisdiction and Boundaries in the Arctic Region» available in: http://www.dur.ac.uk/ibru/resources/arctic/. [Last visit on 8 March 2011]

44. «C'est comme le premier pas sur la lune!», Il n'est pas peu fier, le géologue Artur Chilingarov… », «La Russie mène la ruée vers l'or noir de l'océan Arctique», *Tribune de Genève*, 3 August 2007.

45. Among other comments and criticisms, the Canadian Foreign Affairs Minister, Mr. Peter MacKay, affirms: «This isn't the 15th century. You can't go around the world and just plant flags and say 'We're claiming this territory',» *BBC News*, 2 August 2007.

mankind and just looking at the facts, the Russian flag seems to represent symbolic support for the 2001 Russian submission to expand their continental shelf towards the North Pole – a very extensive zone extremely rich in natural resources, fully under the sovereign rights of the Russian Federation.

There has been no determination as to whether the North Pole legally belongs to any one or more particular Arctic coastal States – or whether by delimiting the International Seabed Area around the North Pole it could legally become the common heritage of all nations.

4.2. The «Soft Law» Approach to Common Concerns for the Arctic Ocean

Significant changes in the Arctic Ocean have led to the growing development of international cooperation at circumpolar and sub-circumpolar levels. Here the prospect of common concerns among the Arctic States, and between them and other entities, has mainly been addressed by a «soft law» approach, based on the establishment of new specific programs for regulating the Arctic, but which are not legally binding. At the circumpolar level, cooperation has materialized through the scientific and political role of the Arctic Council,[46] where it participates directly and indirectly with sub-circumpolar Councils (the Nordic Council, the Council of Baltic Sea States, and the Barents Euro-Arctic Council).[47]

Throughout the development of Arctic international cooperation, new techniques and tools for regulating the activities of various sectors of economic and social relevance have been implemented (in the pioneering fields of science, fishery management, maritime and air navigation, and hydrocarbons).[48] Increasingly they aim towards cross-sectorial activities from the perspective of environmental im-

46. See, among other activities within the Arctic Council, the ongoing Arctic Ocean Review Project by the PAME Working Group at: http://www.aor.is/

47. See, respectively, *Nordic Cooperation*: http://www.norden.org/en; *Council of Baltic Sea States*: http://www.cbss.org/; *Barents Euro-Arctic Council*: http://www.beac.st/in_English/Barents_Euro-Arctic_Council.iw3[Last visit on 8 March 2011]

48. T. Koivurova and E.J. Molenaar, «International Governance and Regulation of the Marine Arctic. Overview and Gap Analysis,» World Wildlife Fund 2009; Young, Oran R., «The Arctic in Play: Governance in Time of Rapid Change,» *IJMCL* (24) 2009 pp. 423–442; Stokke, Olav S., «Protecting the Arctic Environment: The Interplay of Global and Regional Regimes,» *YPL* (1) 2009 pp. 349–371.

pact assessment and an integrated ecosystem approach.[49] The areas of cooperation within and across sectors are characterized by a disordered interaction between hard and/or soft law, which is applied when appropriate in the entire circumpolar area or in specific sub-circumpolar areas.

This interaction seems to lead to a legal impasse: on one hand, there is the existing patchwork of general hard law which, while binding, does not deal with unique characteristics of the Arctic, and mostly ensures State sovereignty, sovereign rights, and jurisdiction. On the other hand, the impasse is embodied in the soft law approach to common concerns which, while specifically dealing with new conditions and needs of the Arctic Ocean and their impact at a global level, is not legally binding. And this impasse reflects the fact that the new international visibility of the Arctic encourages State self-interest, while leaving common interests and concerns in the shadows.

However, despite the legal impasse, or perhaps because of it, the international significance of the soft law approach lies in the fact that it provides immediately different instruments for regulation which, to some extent, lead to the proliferation of international actors in the Arctic Ocean, including non-Arctic actors, under a «de-formalized» law with various plans of action. In this sense, a good example

49. As for environmental impact, see Koivurova, T., *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms*, Ashgate, Aldershot, 2002; «The Regime of the Espoo Convention in the Arctic: Towards a Strategic Environmental Assessment Procedure» in T. Koivura, *Arctic Governance*, Rovaniemi, 2004, pp. 61–87; *Arctic Environmental Impact Assessment (AEIA)*, available at: http://arcticcentre.ulapland.fi/aria/ [Last visit on 8 March 2011]. For an integrated ecosystem approach, see *Norwegian, Danish, Swedish common objectives for their Arctic Council chairmanships 2006–2012*, *Integrated Management Resources*: http://arctic-council.org/article/2007/11/common_priorities. [Last visit on 8 March 2011]. In addition, regarding with the techniques and tools developed for ecosystem-based oceans management in the Arctic, see: http://www.pame.is/ecosystem-approach. [Last visit on 8 March 2011].

would be the emerging role of the European Union (EU) in the Arctic.[50] In its Communication, *The European Union and the Arctic Region*, the Commission led to a structured and coordinated approach to Arctic matters as the first layer of an Arctic policy for the EU,[51] based in principle on the application of the UNCLOS legal framework to which the EU (succeeding to the EC) has been party since 1994. However, the extent of the legal basis for such a political proposal is not yet clear. In accord with the Commission's perspective, the Council of the European Union requested that the Commission present an Arctic policy report on progress made by the end of June 2011.[52]

5. Conclusion

There is no specific and comprehensive regime for the Arctic established by treaty, and it currently seems that the Arctic States do not have the political will to establish one. In practice what happens now is basically the application of existing international legal frameworks, whose main pillar is the UNCLOS, which fulfills the traditional functions of international law (coexistence and cooperation between international actors), and provides the legal basis for the solution of problems related to maritime delimitation, the use of natural resources, navigation through new routes, environmental protection, and scientific research. Beyond areas of national jurisdiction, UNCLOS regulates the Arctic *res communis omnium*: the high seas and the (potential) International Seabed Zone. And so far, this has all

50. The Nordic Council of Ministers, with its Arctic and EU expertise, has recently made a valid contribution to the elaboration of the future EU approach to the Arctic. Following the adoption of the 2008 Ilulissat Declaration on the Arctic Ocean by the five Arctic coastal States, in which they affirm their unique position to address the possibilities and challenges of the changing Arctic Ocean pursuant to the Law of the Sea, the Nordic Council of Ministers hosted in the same town of Ilulissat, the Conference, *Our Common Concern for the Arctic*, where Arctic and non-Arctic entities participated. The Conference did not reach conclusive findings for facing new conditions or specificities of the Arctic, but rather ended up drafting of a list of common concerns. The common concerns for the Arctic were taken into consideration by the European Parliament (EP) in its Resolution onArctic Governance, adopted on 9 October 2008. It finally proposes adopting an international treaty for the protection of the Arctic, inspired in part by the Antarctic system, at least for the unpopulated and unclaimed area at the center of the Arctic Ocean.Nevertheless, the EP's perspective contrasts with the European Commission's perspective, which advocates the full implementation of the already existing obligations – namely the UNCLOS and other relevant related instruments – rather than proposing new legal instruments.
51. COM(2008) 763 final, 20 November 2008.
52. Council conclusions on Arctic issues 2985th Foreign Affairs, Council meeting, Brussels, 8 December 2009.

been without exploring the possibility of applying to the Arctic Ocean, Part IX of UNCLOS (Articles 122–123), dedicated to «closed or semi-enclosed seas.» Such an application could provide an opportunity for cooperation between the coastal States, either directly, or through an «appropriate regional organization» open to other interested entities. The legal applicable framework also includes a number of multilateral instruments (notably, the environment and biodiversity) which apply to the Arctic Ocean, but often without specific reference to it.

It may be necessary to develop specific rules for the Arctic Ocean, as indicated by a high-priority item of the International Maritime Organization, the development of a mandatory Code for ships operating in polar waters, with a targeted completion date of 2012.[53]

However, it seems the fundamental legal issues in the Arctic affecting the dynamics of international law are not a question of establishing new norms, because there are general rules and principles whose determination, interpretation, and eventual adaptation could address the opportunities and challenges posed by the new international visibility of the Arctic Ocean.

The adaptation of general rules and principles of international law to the unique conditions and strategic position of the Arctic has indeed made it possible to determine the legal status of the Arctic territories and islands in such a way that, except in the case of the dispute between Denmark and Canada over Hans Island, there are currently no outstanding legal questions over Arctic State territorial sovereignty. Therefore, *mutatis mutandis*, in principle nothing seems to exclude the possibility of adapting the Law of the Sea to the changing Arctic Ocean.

The problems in the Arctic Ocean affect more particularly the will of the Arctic coastal States, and a tendency to selectively prioritize those international rules of the Law of the Sea that generally maximize sovereignty, sovereign rights, and national jurisdiction. There is a willingness to relegate to a residual application – if its application is allowed – those rules that tend to ensure international freedoms, or more especially, to safeguard the interests of the international community for the benefit of all. This, moreover, is consistent with the meaning of the UNCLOS.

The EU is currently the only international non-Arctic actor that is laying the groundwork for a process of defining a specific policy for the Arctic from a global perspective, also based primarily on the legal framework of UNCLOS, but not all the rules of UNCLOS.

As the main problem is the lack of implementation of existing international norms for the realization of common interests in the Arctic Ocean, the most appropriate solution seems not to lie in the creation of more legal instruments, which

53. The IMO Maritime Safety Committee, 86th session, 27 May – 5 June 2009.

would probably remain *lettera morta*, but rather in the full implementation of all norms of the existing Law of Sea frameworks. This would open up new prospects for Arctic cooperation, pursuant to a teleological interpretation of UNCLOS as the all-inclusive Constitution for the Oceans.[54]

Just imagine, for example, the polar ice cap being classified similarly to any other international area of high seas, pursuant to Part VII UNCLOS. Or imagine the potential classification of trans-Arctic Passages as straits to be used for international navigation, in accordance with Part II UNCLOS, including the application of article 234 UNCLOS. Or finally, imagine ice islands being used as natural installations for scientific research and/or as a potential natural resource to be exploited as freshwater in the interest of all, under Part XIII UNCLOS. And, to further develop the wishful thinking, imagine the potential delimitation of an Arctic International Seabed, under Part XI UNCLOS and the 1994 Deep-Sea Mining Agreement.

Likewise, it is important to bear in mind that beyond the legal partitioning of marine and submarine zones which characterized the UNCLOS, successive developments, such as the 1995 Fish Stocks Agreement and the outcome of the 2010 Review Conference, have reinforced an international conviction about the need to protect seas and oceans as unique environments (ecosystems) that biologically are not partitioned.[55] In this sense, it has introduced innovation in the management of biological resources (from research activities to the effective implementation of management and administrative tools).[56] These developments, when applied in relation to Arctic ecosystems in light of the precautionary criterion, may dampen common concerns related to the preservation and protection of the Arctic environment flora and fauna.

The President of the last session of the Conference of Montego Bay, held from December 6 to 11, 1982, Mr. T.T.B. Koh, affirmed: «[t]he question is whether we achieved our fundamental objective of producing a comprehensive constitution

54. Koh, T.T.B., «A Constitution for the Oceans,» in Nordquist, M.H., Shabtai R. and Yankov A., *United Nations Convention on the Law of the Sea 1982, A Commentary*, Dordrecht-Leiden-Boston (I) 1991 p. 11.

55. The Review Conference on the the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, was held at United Nations Headquarters in New York, from 24 to 28 May 2010. An overview is available at: http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm

56. Particularly, as to the developing EU approach to ecosystems, see J. M. Sobrino Heredia, A. Rey Aneiros, E. López Veiga: La integración del enfoque ecosistémico en la Política pesquera común de la Unión Europea, Galicia 2010.

for the oceans which will stand the test of time.»[57] In this respect, the Arctic Ocean is a test of time for the UNCLOS. Its teleological interpretation could lead to constructive work in which its historic significance is normatively adapted to the new realities and needs that have led to the current increased international visibility of the Arctic.

In this sense, by transcending geographical boundaries (and the interests of the coastal States raised by their geographical location) it would be possible to look at the Arctic in its uniqueness, and in the context of an interdependent international order which is, therefore, circularly mapped, and where – either by chance or by fate – the Arctic Ocean curiously remains a basin in the center of the world, as depicted in the logo of the United Nations.

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Морское право в Северном Ледовитом океане

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Краткое содержание
Вместо того, чтобы создать новые правовые инструменты для решения проблем, связанных со значительными изменениями, происходящими в Северном Ледовитом океане, Декларация Илулиссат в 2008 и Встреча министров в 2010 году в Челси вновь подтвердили приверженность морскому праву пяти

57. «We have strengthened the United Nations by proving that with political will, nations can use the Organization as a center to harmonize their actions. We have shown that with good leadership and management the United Nations can be an efficient forum for the negotiation of complex issues. We celebrate the victory of the rule of law and of the principle of the peaceful settlement of disputes. Finally, we celebrate human solidarity and the reality of interdependence which is symbolized by the United Nations Convention on the Law of the Sea.» [Koh, T.T.B., 1991, p. 16].

прибрежных арктических государств. Некоторые из них с тех пор значительно расширили свое присутствие в Арктике для того, чтобы защитить их интересы. Судя по всему, предпочтение отдается избирательному применению международных норм, с помощью которых обеспечивается нынешнее сосуществование прибрежных государств в Северном Ледовитом океане, а также сотрудничество между ними в данном сосуществовании. Хорошим примером может послужить подписание договора от 15 сентября 2010 года между Норвегией и Российской Федерацией в отношении делимитации морских границ и сотрудничества в Баренцевом море и в Северном Ледовитом океане. Однако же, действующим законодательством в Северном Ледовитом океане должно быть всеобъемлюще действующее право в морской акватории, включая любые нормы, которые не зависят от географического положения государств и содействуют сотрудничеству в целях защиты общих интересов международного сообщества, и особенно в интересах человечества в целом. Без ущерба работе по дальнейшему развитию некоторых из существующих структур, внимание будет уделено необходимости телеологической интерпретации Конвенции Организации Объединенных Наций по морскому праву в свете новых условий или особенности Северного Ледовитого океана.

Ключевые слова: морское право (КМП); акватория Северного Ледовитого океана; Северный ледовитый океан; Северный морской путь; внешние границы континентального шельфа Арктики; арктические морские зоны за пределами национальной юрисдикции; приполярное сотрудничество.