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Reflections on the Possibilities and Limitations of a Binding Legal Regime

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This article argues three points:

1. There is already a binding legal regime that applies in the Arctic. Rather than focusing on new regimes, we should concentrate our resources on working with what we have – examine it to determine whether the present legal regime is sufficient and, if not, work towards strengthening it.
2. We should ensure that the existing regime is implemented and that States that have not yet acceded to or otherwise accepted elements of this regime do so.
3. We should work to build political support to achieve the necessary protection of the Arctic.

Some of these reflections are based on scientific material and, in particular, the Arctic Climate Impact Assessment, established at the request of the Arctic Council and first presented in November 2004.¹ This assessment is a significant document representing the first effort to comprehensively examine climate change and its impacts in the Arctic region.

The Assessment identifies two points relevant to this article. First, climate change will have great impacts in the Arctic. Second, and most importantly, these impacts are generated from outside the Arctic and their effects will also occur outside the Arctic. This is of tremendous consequence when one examines the possibilities and limitations of a binding legal regime for the Arctic.

There is Already a Binding Legal Regime in the Arctic

The title of this article may seem to suggest that there is no binding legal regime for the Arctic. But the fact is that there is already a wide-ranging legal regime, in particular under the United Nations Convention on the Law of the Sea (UNCLOS). Some of the global conventions for the protection of the environment should also be highlighted in this context.

Of special importance, Part V sets out UNCLOS's rules on the exclusive economic zone (EEZ) and Part VI, on the continental shelf, governs large portions of the Arctic. With respect to the exclusive economic zone, UNCLOS

prescribes that it shall not extend beyond 200 nautical miles from national baselines. UNCLOS also contains provisions on the rights, jurisdiction and duties of the coastal State in the zone, and rules on rights and duties of other States in the same.²

With respect to the continental shelf, this article briefly notes only two elements, namely the Russian and Norwegian submissions to the Commission on the Limits of the Continental Shelf (CLCS).³

The Russian Federation was the first country to make a submission to the Commission for the entitlement to the continental shelf beyond 200 nautical miles. Among four areas identified in the application, the claim included the Central Arctic Ocean, where it extended all the way to the North Pole.

The Norwegian submission to the CLCS was presented to the Commission on 27 November 2006 and identified three separate areas in the North East Atlantic and the Arctic. The northernmost point in that submission is not the North Pole but a point some six degrees south of the Pole.

Other States bordering the Arctic will no doubt make similar submissions to the CLCS, and Norway has indicated that a further submission may be made in respect of other areas. All this should be borne in mind when one discusses how to protect the Arctic.

Another important factor is shipping. Given the evidence that the sea ice in the Arctic is melting, larger areas of the Arctic will in the future be open to shipping. This may require the designation of special maritime regimes in the area. At the same time, there are limits to the possibilities for coastal states to adopt special regimes for traditional maritime shipping on the high seas.⁴

Finally, on this point, one question that is sometimes asked is whether it is possible to create a legal regime for the Arctic that is similar to the one that applies in Antarctica. A comparison of the two areas is appropriate. Antarctica is a continent of some 14 million square kilometres, surrounded by sea. In the Arctic, the situation is quite the opposite: it is an ocean of about the same size, 14 million square kilometres, surrounded by continents. The area north of the Arctic Circle is 21 million square kilometres. This area is larger than the entire territory of the US (over 9 million square kilometres), of Canada (10 million square kilometres), or of the Russian Federation (17 million square kilometres). However, as the author has elaborated in another context,⁵ his analysis of the possible application of the Antarctic regime has concluded that the Antarctic Treaty could hardly serve as a model for organising a com-

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prehensive legal regime for the Arctic. Instead, it is possible to create a specific environmental regime for the Arctic, perhaps on the basis of UNCLOS Articles 122 and 123 (on cooperation of States bordering enclosed or semi-enclosed seas, and Article 234 on ice-covered areas⁶).

A Non-sectoral Approach to Regulating the Arctic?

A sometimes expressed option recommends a sectoral approach to the regulation of the Arctic. This option is detrimental, as it would be better to have in place a comprehensive regime covering all aspects that need to be regulated. Such a regime would be easier to understand. Already, the rules that apply in the Arctic region's environmental sector are not always easy to comprehend – particularly with regard to their relationship to one another, and the extent to which they apply in the Arctic. Even experts complain that it is difficult to get a general overview.

However, as noted, the existing binding legal regime covers many different aspects of human activity in the Arctic. To create a separate, specific and non-sectoral legal regime for the Arctic would require a tremendous effort, including contributions from many States with no specific direct interest in or knowledge of the Arctic. Furthermore, to be authoritative, the regime would have to be accepted by the major players on the international arena. Rather than focusing on new regimes, it would be important to analyse the threats, and then act on them accordingly, mainly by making sure that the existing regime is implemented and that States that have not yet acceded to or otherwise accepted elements of this regime do so.

The Real Dilemma

The Arctic Climate Impact Assessment demonstrates the most difficult element in the equation – activities outside the Arctic. The real dilemma is that significant threats to the Arctic are not primarily generated in the Arctic. This is a decisive element.

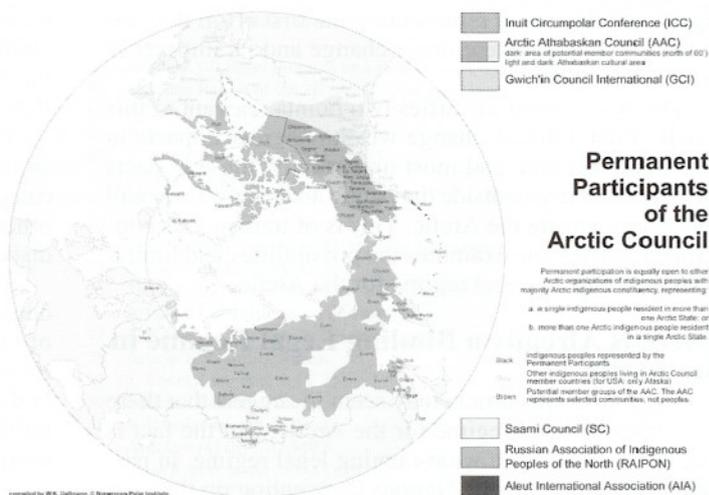
This dilemma is clearly understood by imagining a “fresh start” – that there is no pre-existing legal regime for the Arctic. To create a comprehensive legal regime, the first question is “Who should participate?” The Arctic States only have competence to deal with matters over which they have control. Would they be able to fully address the threats to the Arctic that are generated globally? It becomes clear that a meaningful agreement establishing a comprehensive legal regime in the Arctic would have to aim for global participation.⁷

The first question to ask before such an endeavour is undertaken would be: which are the most important issues to be addressed? Judging from their (sometimes diverging) views, scientists would choose emissions of carbon dioxide and other greenhouse gases, and threats to the ozone layer. This choice would place the new regime squarely in the realm of the Kyoto and Montreal Protocols and indeed the whole field of global environmental agreements.

Considering the example of eight UN conventions and protocols in the environmental field, it is useful to consider the number of parties to these conventions and protocols (remembering that there are 192 UN Member States). The latest available figures in the United Nations Treaty Database (as of 19 January 2007) are the following:

- Vienna Convention for the Protection of the Ozone Layer – 191 parties
- Montreal Protocol on Substances that Deplete the Ozone Layer – 191 parties
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – 169 parties
- United Nations Framework Convention on Climate Change – 190 parties
- Kyoto Protocol to the United Nations Framework Convention on Climate Change – 169 parties⁸
- Convention on Biological Diversity – 190 parties
- United Nations Convention to Combat Desertification – 191 parties
- Stockholm Convention on Persistent Organic Pollutants – 136 parties.

There is an almost universal participation in these agreements by the international community of States. This is an important factor when we look at the Arctic and the



Courtesy: NPI

possibilities of creating a comprehensive legal regime in a situation where the effects on the Arctic are mainly generated outside the region.

In addition, the UNCLOS comprehensive regime – often referred to as the Constitution of the Oceans – already applies specifically to the Arctic. It even contains the specific provisions on enclosed and semi-enclosed seas and ice-covered areas referred to above. Presently, UNCLOS has 152 parties.

For this and other reasons, it would be counterproductive to engage the world community in negotiating a single comprehensive binding legal regime for the Arctic. There is sometimes a superstition that everything will be

solved if new norms are developed – perhaps a comprehensive or overarching regime – in a field that is already regulated: but this may not be the case at all. It may even be missing the point, namely the issue of implementation.

We should Concentrate on Working with What we Have

Legal experience indicates, in the author's opinion, the need to focus on implementing the norms that are already binding upon States, irrespective of whether they are Arctic States or members of the global community at large. The use of national and international resources should be turned to determining if the present legal regime is sufficient, and identifying elements that need strengthening.

In this exercise, it is useful to distinguish norm-setting from implementation. Analysis of the existing regime should look at existing norms, both binding rules and soft law. This analysis must be done in a systematic manner using three separate steps: the situation in the Arctic, the situation in the northern region, and the situation at the global level. Distinct issues must be identified and addressed systematically – but always with awareness of the entirety of the regime.

This approach must be repeated systematically, sector by sector and topic by topic. The questions that need answers are: what are the threats? Are there norms to address the problem? Are these norms sufficient and established at the appropriate level? Are they applied? If not, why? Is it possible to correct this? What are the remedies? How can one achieve better respect?

The Arctic Climate Impact Assessment provides an excellent example of the way to do this. This assessment, by its terms, represents "the beginning of a process which should continue with a focus on reducing uncertainties, filling gaps in the knowledge identified during the assessment, and more explicitly including issues that interact with climate change and its impacts."

It is Necessary to Build Political Support

The next step is to engage politicians and non-governmental organisations to create political support, based on knowledge, to achieve results. For this, it is also important to engage the business community, which can make a tremendous contribution. Even if the final result of the process is legislation that business may not appreciate in every respect, business nevertheless appreciates clear rules to be observed by all concerned – that there is a level playing field.

New international legal regimes or amendments to existing international regimes are the product of a political process in which, ultimately, politicians at the highest level in the States concerned must be involved. This is a precondition for policy decisions that can give legitimacy to the results of the process – norms elaborated with the assistance of lawyers and other experts. Legally binding norms – at the national level in Statute Law, at the international level in treaties – embody the most sophisticated manner in which to adopt a policy.

As we know, tremendous advances have been made over the past years in the fields of human rights and inter-

national criminal law. However, over the same time, engagement in environmental matters has also increased. In this process, one must also bear in mind the political realities: politicians engage in matters that interest the electorate. In order to engage the electorate it is important that the appropriate information is disseminated, asking questions such as these: what facts do the general public need to know? Are those facts reliable? How does one deal with those who – for one reason or another – belittle or even deny these facts and their consequences? In this context the role of the media comes to the forefront, balancing human use and ecosystem protection.

The role of non-governmental organisations must also be highlighted. What support can one count on from these organisations? They are often the ones who inform and engage the general public in a manner that moves politicians into taking action. The relevant questions include: which organisations are particularly interested in these matters? What information do they have? Can they join hands in order to make more impact? Reference should also be made to the World Conservation Union (IUCN), a conservation network that brings together 82 States, 111 government agencies, more than 800 non-governmental organisations, and some 10,000 scientists and experts from 181 countries.⁹

The Arctic Council

Obviously, the Arctic Council plays a key role in the evaluation and implementation of the Arctic legal regime. In particular, is it possible for the Council to engage the general public, the non-governmental organisations and the media in a more effective manner and raise their awareness of the three pillars of sustainable development: the environmental, social and economic?¹⁰

The Tällberg Forum and the High North

In June last year, a Tällberg Forum workshop¹¹ discussed the dilemma that the melting of the ice in the Arctic is caused by sharply rising temperatures in that area. This impact, in turn, is caused by the burning of fossil fuel in other parts of the world. Serious effects of this melting will materialise in other parts of the world, as well as in the Arctic itself.

The workshop concluded that something must be done to reverse this threat. The environmental degradation and the continued burning of fossil fuel need to be addressed. In the Forum's plenary, the workshop made the following eleven pronouncements and recommendations:

- The Arctic is a high-speed indicator of global change.
- At the same time it is an emerging arena for fossil fuel exploitation.
- Thus, it is a region where the triple E-equation (economy/energy/environment) is put to the test.
- Nanook – the polar bear – is an indicator species. If and when the polar bear becomes extinct, oceans will have risen everywhere.
- Therefore, what happens in the High North is relevant to the entire world.
- There is already a legal regime in the Arctic, *i.e.* UNCLOS and other treaties. ➤

- We need to take stock of the existing norms and present the results in a manner that is accessible to laymen.
- We have to look to science, asking "Is the existing regime sufficient?"
- We need to draw conclusions, come up with ideas, and present these to the general public and politicians.
- In particular with respect to the extension of oil transport into new ocean areas: "Do we have a safe regime for that? What actions have been taken by the International Maritime Organisation?"
- The International Polar Year 2007–2008 provides a window of opportunity and a platform for change.¹²

These recommendations may be of assistance in future endeavours to strengthen the protection of the Arctic.

Conclusion

In conclusion, this article reverts to its initial three points: (1) There is already a binding legal regime for the Arctic; (2) Our focus should be on implementation, as well as examining whether the regime needs strengthening; (3) To achieve the necessary protection of the Arctic, we must increase our efforts of engaging the general public, business, politicians and governments.

Finally, it is essential to stress the importance of engaging the major players on the international arena – in matters relating to the Arctic. In particular, it is imperative to bring the USA on board in order to achieve results in these matters.

Notes

1 Available at <http://www.acia.uaf.edu/>.

2 For ease of reference, UNCLOS Articles 55 to 58 are included here:

Article 55

Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article 57

Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and

pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

3 See page 355.

4 See, e.g., "The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment" by Olav Schram Stokke available at <http://www.arcticparl.org/?element/elementid/conference7>.

5 Reference is made to an address on the same topic presented by the author on 3 August 2006 at Kiruna, Sweden, at the Seventh Conference of Parliamentarians of the Arctic Region. See <http://www.arcticparl.org/?element/elementid/conference7>.

6 Article 122 on Definition reads: "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

Article 123 on Cooperation of States bordering enclosed or semi-enclosed seas reads: "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organisation:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organisations to cooperate with them in furtherance of the provisions of this article."

Article 234 on Ice-covered Areas reads: "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."

7 The fact that only 45 of the 191 UN Member States are parties to the Antarctic Treaty could be invoked against this argument. But the nature of the Antarctic Treaty is very special and the most important rules to protect the Arctic are contained in global treaties.

8 Entered into force on 16 February 2005, in accordance with article 25 (1) of the Protocol.

9 See <http://www.iucn.org/>. An excellent overview of the situation appears in *The Arctic: Towards a New Environmental Regime* by Wolfgang E. Burhenne in collaboration with Carine Nadal. This article will be published in early 2007 in *Environmental Policy and Law*, Vol. 37, No. 2/3, IOS Press, Amsterdam. It can also be accessed through the International Council of Environmental Law, Godesberger Allee 108–112, 53175 Bonn, Tel.: ++49/228/2 69 22 28, Fax.: ++49/228/2 69 22 251, email: icel@intlawpol.org, www.i-c-e-l.org. Reference can also be made to the 2006 Newsletter from IUCN, available at http://www.iucn.org/themes/law/pdffdocuments/Newsletter_2006_en.pdf and to L. Nowlan, *Arctic Legal Regime for Environmental Protection*, IUCN Environmental Policy and Law Paper No. 44, 2001, available at <http://www.iucn.org/themes/law/pdffdocuments/EPLP44EN.pdf>.

10 In this context, attention is drawn to paragraph 28 of the Conference Statement of the Seventh Conference of Parliamentarians of the Arctic Region, Kiruna, Sweden, 2–4 August 2006, which contains a request to governments in the Arctic region and the institutions of the European Union to: "In light of the impact of climate change, and the increasing economic and human activity, initiate, as a matter of urgency, an audit of existing legal regimes that impact the Arctic and to continue the discussion about strengthening or adding to them where necessary." See <http://www.arcticparl.org/?element/elementid/conference7>.

11 <http://www.tallbergforum.org/>. This Forum takes place in Dalecarlia in Sweden every summer and brings together participants from different walks of life from all over the world: heads of state, politicians, businessmen, scientists, journalists, writers, artists, lawyers, representatives of non-governmental organisations and indigenous peoples. In 2006, there were some 450 people from more than 60 countries from all continents.

12 <http://www.ipy.org>.