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The Shipping Industry, Ocean Governance and Environmental Law in the Paradigm Shift In Search of a Pragmatic Balance for the Arctic



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Foreword

In contemporary Arctic, there are numerous specific issues, i.e. theories on how to delineate jurisdictional boundaries, regulatory codes to deal with ameliorated commercial shipping, regulations on how to prepare for the possibility of oil spills under Arctic conditions, rules to impose on tour operators and so forth. In short, it is apparent that there is no scarcity of legal framework for the Arctic zone; however, those legal frameworks are likely to give rise to vigorous debates that result in decisions that may well have significant impacts on human activities in the circum-polar north. Underlying such debates, however, are in-depth or broader issues circulating the legal frameworks the Arctic members have employed to operate in specific environmental situations. What has been left out is the inescapable truth that the doors of the Arctic are opening up and any door that is open in the ocean is bound to be utilized by the shipping industry for commercial advantage. The Arctic anticipates an era of 'high politics' marked by aggressive assertion of jurisdictional claims, increasing competition for control and rights over the Arctic's natural resources, a remilitarization of the region, and more or less frequent clashes among leading states active in the Arctic.¹ The Arctic Council has been the conglomeration for the Arctic States, which prescribes 'soft law' to address environmental issues, but it has remained silent on the most pressing challenges facing the region.

¹ Borgerson, Scott G., *Arctic Meltdown: The Economic and Security Implications of Global*, 2008, Foreign Affairs, Published by the Council on Foreign Relations, available at: <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown> (date accessed 6 August 2014), where the author has added the fact that the situation is dangerous because there are currently no overarching political or legal structures that can supplement for the orderly development of the region or mediate political disagreements over Arctic resources or sea lanes. Then again, '[t]he Arctic has always been frozen; as ice turns to water, it is not clear which rules should apply. The rapid melt is also rekindling numerous interstate rivalries and attracting energy-hungry newcomers, such as China, to the region. The Arctic powers are fast approaching diplomatic gridlock, and that could eventually lead to the sort of armed brinkmanship that plagues other territories, such as the desolate but resource-rich Spratly Islands, where multiple states claim sovereignty but no clear picture of ownership exists'.

Then again, many scholars and observers have relied on the umbrella Convention for answers. UNCLOS, in this context, might be the essential instrument to bring about an order, but considering the unique geographical scenario, it cannot be seamlessly applied to the Arctic. Hence, the Arctic still remains vulnerable and will increase in the level of susceptibility as the ice melts leaving the balance between environmental protection and increased commercialization in an unresolved position.

The book aims at supplementing a critique of the existing international instruments, regional responses and national legislation of the Arctic related to marine environmental protection. With this aim in view, the book satisfies its objective by proposing a Bipartite 'Arctic Council' acting as a conglomeration of the Arctic States and the Flag States with a hybrid 'Arctic treaty', which is an interplay of international and regional response. The 'Arctic Council', apparently, has been highlighted and envisioned as a platform that can provide a significant solution, if modified accurately, to balance sustainable development (marine environment) and international navigation (trade and commerce) in the event of rapid climate change.

In an endeavour to examine the pertinent environmental legal regime of the Arctic, it seemed important to delve into the maritime boundary delimitation issues that involve three major Arctic States. These issues, which subsist in two significant Arctic sea routes, have a subtle connection with the subject of marine protection, which is revealed after a detailed analysis of the geographical issues. While the landscapes are shaping up as a result of global warming, certain Arctic States have risen to the occasion to extend their maritime boundaries in the off-shore areas. They have not only resorted to contradicting theories to establish sovereign claims, but also adopted extreme standards and implemented them in national legislation. 'Conflict of law', which in turn distorts the international legal regime, is evident from the comparative study among the national legislation of significant Arctic States. More significantly, this distortion leaves a question on the face of Arctic marine protection. Investigations lead to the fact that the boundary issues have distracted the Arctic States from promulgating a parallel system to safeguard the pristine environment and have left the entire Arctic environmental protection regime in disarray. Inevitable as it is, climate change will accelerate international navigation and break any resistance which operates against 'due regard to navigation' as embedded in the *lex specialis* regime of UNCLOS. Moreover, areas beyond national jurisdiction have not received proper attention and till date none of the zones have been designated as MPAs. On the other hand, the international community, which supports 'freedom of navigation', only seeks commercial advantages of a shorter sea route. There is a vacuum of global concern. Moreover, the international instruments and regulatory conventions portray a lack of respect for the Arctic, which is seen as the 'last ecosystem on earth'. Apart from dealing with inconsistent geographical claims, the Arctic States have responded via Arctic Council, which is an intergovernmental forum established for the purposes of addressing questions of sustainable development as well as environmental issues. With no specific mandates, the five working groups under the Council suffer from low funding.

The 'soft law' character of the 'Arctic Council' has been viewed as a major drawback, and the Arctic legal regime is found to be much less comprehensive when compared to the treaty-based regime that regulates the Antarctic, a region with a very similar environment. As such, discussions have proceeded as to whether the Arctic is in need of a new legal regime, and whether the Antarctic treaty should be a model. What is truly needed is structure, and regardless of which shape the future Arctic legal regime takes, the most important aspect is that the existing 'Arctic Council' must take into consideration the geographical and environmental impacts of climate change and supplement a comprehensive legal order. It is not the single concern of the 'Arctic Council' to consider and supplement a legal order, but it should be a global consideration to work hand in hand with the Council to implement this order. If the shipping industry is to provide support, the 'Arctic Council' will need to provide further clarification concerning many questions, among of which one is, how this comprehensive legal order will correctly balance environmental governance and international trade.

The concept of 'Climate change', by now, has become a cliché when describing the catalyst behind geographical and environmental changes in the Arctic Ocean. As is understood, the impact of this catalyst in the Arctic ocean will, over the next decades, ascertain its transformation from a permanently ice-covered and virtually untraversable area into a seasonal navigable sea.² Before investigating the complex commercial implications of the Arctic region, it is important to analyse the controversial geographical issues among the Arctic States. Overlapping claims have provoked some States to put into place domestic laws which contradict international law. The Arctic States relate to theories which proceed in favour of territorial sovereignty as regards to disputed offshore regions, criticized in substance by the international community. This is, to a great extent, distorting the international regime and leaving the shipping industry frustrated. These innovative theories defy the international regime and the prospects of international trade and commerce. A number of MOUs exist which the Arctic States denounce spontaneously on certain events to establish opposing claims in those disputed regions. This complex situation defeats the very purpose of diplomatic relationship and, hence, instigates the Arctic States to act reluctantly towards the acceptance of innocent passage endorsed by international instruments.³ On the other hand, the Arctic States have committed themselves to the

² P.A. Berkman and O.R. Young, 'Science and Government: Governance and Environmental Change in the Arctic Ocean', *Science*, 324, 17 April 2009, pp. 339–340. Note that, as the northern ice cap changes in response to our changing climate, the northern passage will increasingly experience conditions considered conducive to shipping and other maritime activities. The melting ice is thawing its way to offshore landscapes which provokes Arctic States to claim extended sovereign control, on the other hand, the international instruments or regulatory conventions do not give proper attention to this part of the globe as the melting ice is inviting international vessel-source pollution.

³ Janet Pawlak, Gunnar Kullenberg and Chua Thia-Eng, 'Securing the Oceans: Executive Summary' in *Securing the Oceans: Essays on Ocean Governance-Global and Regional Perspectives*, Chua Thia-Eng, Gunnar Kullenberg and Danilo Bonga (eds.), January 2008, Published by GEF, UNDP and IMO in association with the Nippon Foundation, p. 4.

regional soft law 'Arctic Council' approach, the participation of which is voluntary. Then again, international instruments corresponding to Arctic environmental protection against intentional or voluntary vessel-pollution are either based on voluntary approach or relate to only a part of the Arctic. Hence, the Arctic has been left disregarded by the international policy makers. Although the umbrella convention, i.e. UNCLOS has a *lex specialis* provision for the Arctic, it has left a question mark on the face of this convention and other international regulatory regimes as to what extent it can relate to the future Arctic navigable routes which is predicted to be the result of this 'climate change' phenomenon.

The notion of climate change is, in fact, influencing geographical and environmental transformation. The push and pull factors of maritime boundary issues are on one side inhibiting international trade and commerce and on the other side, leaving the Arctic marine environment vulnerable. The increase of both intra- and trans-Arctic shipping, specifically poses great pressures and risks in terms of impacts to the Arctic marine environment, its living resources and its biodiversity, leaving the sea route susceptible. Climate change is not only bending the existing international regime, but also leaving the entire Arctic legal regime in obscurity and an undetermined position. Some scholars prefer stringent policies modelled after regimes which do not require balancing of interest and others support the existing voluntary approach which has not yet reached any success in dealing with safeguarding the sensitive Arctic marine ecosystem. The nexus between geographical issues and the environmental issues needs to be analysed in order to comprehend the changes and gaps in the Arctic legal regime. In short, the existing ocean governance system of the Arctic, i.e. international, regional and national legal regimes needs to be revised and examined to set aside stringency and complication and pave the way for international navigation. The existing legal regime needs to be replaced by an enforceable ocean governance strategy to combat the inevitable changes.

The book has been divided into three parts with eight main chapters comprising the main body. The main body starts with a detailed analysis of the existing Arctic international regime. Since the *lex specialis* provision of UNCLOS is significantly connected to the Arctic, the development and pragmatic applicability has been given detailed focus. The Flag State and Coastal State jurisdictions have been examined in a cursory manner since they constitute the general provisions of international marine environmental law and have been placed before the *lex specialis* analysis to maintain the numerical order of the UNCLOS provisions. The IMO regulatory regime follows this analysis with a study of operational discharges under MARPOL 73/78 coupled with a brief overview of the IMO Polar Shipping Guidelines related to the Arctic. In this chapter, the author has made an effort to extract and incorporate the international regime of deliberate dumping and accidental pollution to embody all categories of existing marine pollution provisions that can be related to the Arctic. Then again, since the Arctic has been portrayed as a pristine and sensitive area, the rapid response regime of 'intervention' for the Arctic has been brought under scrutiny. The philosophy behind the *raison d'être* of the intervention policy lies in the fact that pristine waters should be kept unharmed

and there is a growing need for an organized and parallel interventional policy for the entire Arctic. Following the contemporary international regime of the Arctic, a chapter on the pertinent national legislation embodies the first part. Chapter 3 is restricted to the historical development and a critical analysis of existing domestic legislation of the Arctic States, i.e. Canada, the Russian Federation and the USA, since their conflicts constitute a major part of geographical issues in the Arctic. Other Arctic legislation have been given a cursory analysis. It is also important to comprehend these Arctic national legislation which regulate the NWP and NSR, prior to examining the changes that are taking place in those sea routes as a result of climate change.

The second part of the book is designed to comprise two chapters dedicated to the impact of climate change where the former relates to the geographical issues and the latter pertains to the environmental issues. The author is of the view that in order to understand the modifications on the Arctic due to the results of 'climate change' followed by the distorting influence it has on the international regime; it is significant to research into the different theories of geographical issues and to delve into regional responses of the environmental aspect. The inherent reason for highlighting these two issues lies in the relative interconnections that they comprise which is essential to comprehend before discussing the recommendations for a completely new regime in the Arctic. The findings of this part also constitute a segment of the analytical part in the conclusion. Finally, the first half of the final part emphasizes on the 'what', 'why', 'how' and 'which' questions in dealing with Arctic ocean governance.⁴ This chapter investigates significant reasons underlying the interest of international trade in the Arctic and the rationale behind balancing commercial interests with interests to safeguard the marine environment. Prior to proceeding to the analysis with striking of the so-called 'balance', a chapter is dedicated to the understanding of the core concept of the 'stakeholder theory'. CSR is intrinsically connected to ocean governance and 'stakeholder theory' is an authoritative concept in relation to the Arctic. This leads to the final chapter where alternatives are examined which can embody an interplay among international, regional and domestic facets and act as a new legal regime which can restrain further distortions due to climate change and at the same time protect the pristine environment of the Arctic.

This book does not include any quantitative statistics of different types of marine pollution followed by the effects of global warming based on scientific analysis, sustainable development related to the indigenous peoples of the Arctic or safety aspects of navigation; such an undertaking would venture beyond the scope of this work. The book, moreover, does not relate to land-based pollution of the Arctic and is limited to the discussion of vessel-source pollution. Although there is

⁴ The four questions are: what are the economic incentives in the Arctic? Why is there a need to strike a balance between commercial implications and environmental protection? How can this goal be achieved and is there any regime that is closely connected? Which approach is more pragmatic and can be undertaken to strike the desired balance?

an effort to cover international instruments on operational discharges, accidental pollution and deliberate dumping, the analysis centres around the significant instruments which are internationally commendable, directly or technically applicable to the Arctic 'ice-covered' areas, have been ratified by the Arctic States or prescribe bilateral or multilateral cooperation which has the possibility of being implemented via existing 'soft law' approaches in the Arctic. With regard to the chapter on domestic legislation, the examples given are restricted only to three major Arctic States at an in-depth national level and consist of a detailed analysis with a comparative study among them.⁵ Those in the authors' opinion are sufficient to understand the 'conflict of laws' and the inconsistencies that persist in international law. The analysis of the national legal framework for marine environmental protection has been limited to the most coherent yet existing instruments of those three States. This is important to understand the existing legal regime of the NWP and NSR (comprising the Arctic sea route), which are the focal points of the book. Hence, in analysing the geographical issues due to climate change, the author elaborately highlights the overlapping issues that exist in those two routes and the domestic theories propounded therein. Then again, there is a plethora of different organizations and institutions that are currently active in the Arctic region, which will not be examined, rather mentioned when necessary. In this regard, the only focus is on the Arctic Council, although brief attention is given to the Arctic regional instrument OSPAR related to marine dumping, since it covers a part of the Arctic. In examining the economic incentives, the thesis does not provide a detailed list of benefits, rather adheres to the advantages of NWP and NSR as shorter sea routes, since it is an actual result of climate change.⁶

The book comprises a qualitative research method for comprehending and scrutinizing various perspectives and issues relating to climate change and the Arctic legal regime. This is followed by a descriptive study and a critical analysis of legal instruments. In brief, the authors have resorted to the dogmatic legal method pertaining to the legal analysis of available resources. The primary sources for the research analysis are coherent provisions of maritime law, both within the areas of domestic and international jurisdiction including but not limited to relevant international conventions, regulatory regimes, applicable treaties,⁷ interpretation of judicial decisions and the related jurisprudence. Secondary sources consist of book

⁵ This is done to maintain consistency in the chapters to come and so that the analysis remains focused on the NWP and NSR, the commercial implications of which is later balanced with the environmental aspect.

⁶ The perspective has been limited to climate change as the central element of discussion and its impact on the existing legal regimes.

⁷ In order to achieve the main objective of the thesis, the author has focused on instruments and institutions that are active at a multilateral level.

reviews,⁸ chapters in books, journals, compilation of articles, digests, official web-sites of international organizations, magazines, reports and newsletters.

The aim of this book is to propose a new and unique legal regime for the Arctic under the contemporary regional organization, which is to a certain extent modified, taking into account both the coexisting international and regional perspectives and the concept of good ocean governance as a part of CSR. However, emergence of a new legal system would have an adverse effect on other systems, making it important to set a system of balance, so that it could be in line with the emerging international trade and commerce. To propose a new set of rules, it was primarily essential to examine a series of *status quo* legal layers exclusively related to the Arctic or the ice conditions that subsist today.⁹ Although the tradition of commencing with an analysis of pertinent international law has been maintained, it was, eventually, important to observe how these provisions were implemented in the national layer.¹⁰ Since it is the Arctic that is in issue, it was impossible to proceed without revising and scrutinizing the Canadian legislation, i.e. AWPPA which is the only legislation of its kind in the world. Understanding the fact that Canada is faced with opposing interests regarding jurisdictional claims, it was mandatory to focus on other national legislation and their development. An integral part of the main objective of this thesis is to review the impact of climate change, which is, in reality the catalyst behind those 'opposing geographical issues'.¹¹ In an endeavour to extract and understand the geographical issues and scholarly theories, this book reveals how the environmental issues are left undone at the hands of a Council, which has no specific mandate and will not be able to respond to the increasing ship traffic no matter how stringent the Arctic states are at inhibiting international navigation.¹² All of this leads to the need to understand the aspect of CSR in terms of Arctic Ocean Governance. The 'stakeholder theory' is needed to understand the entities to whom the shipping industry needs to be accountable to. It is apparent that the theory is questionable in itself, but complexity begins to rise when the

⁸ As the research topic is current and numerous related topics are still being reviewed and assessed, the research and collection of data is focused mainly on recent technical papers and specialized conferences.

⁹ (Question) What is the existing international regime and regulatory regime of the arctic in respect of vessel-source pollution?

¹⁰ (Question 1) What are the pertinent national legislation of the Arctic zone? (Question 2) To what extent of the Arctic area are these legislative jurisdictions applicable?

¹¹ For the purpose of in-depth analysis, the Arctic sea route has been separately discussed in terms of NWP and NSR, (Question 1) What is the legal status of International Straits in the Arctic? (Question 2) Can NWP be termed as an International Strait? (Question 3) To what extent can Canada claim sovereignty in the NWP based on the Sector theory? (Question 4) How is this distorting the legal regime? (Question 5) How does MOU compromise equality in the NSR?

¹² (Question 1) How does the regional response of the Arctic Council based on a 'soft law' approach contribute as a catalyst of change in the Arctic legal regime? (Question 2) Will the Arctic Council be able to supplement a sufficient yet effective environmental protection management system in terms of the increasing ship traffic?

theory is applied to stakeholders of the Arctic. Then again, to follow with the development of this book, the CSR aspect only relates to protection of the marine environment of the Arctic and does not take into account the human safety and security aspect of shipping or the human element. This is because in trying to fulfil the objective of the book, it was inevitable to create and comprehend the clear nexus between 'geography and environment' of the Arctic. Moreover, the environmental aspect is apparently connected to economic incentives,¹³ the element of which needs to be exposed with a view to be balanced with a new legal regime under the domain of a slightly modified organization with a global participation.¹⁴ Finally, the new legal regime (which weighs the balance between interest groups) is explored and assessed and is followed by concluding remarks.

¹³ (Question 1) Why is there a need to address a strict Arctic ocean governance? (Question 2) Will this ocean governance be properly addressed if the Arctic is modelled after the Antarctic treaty?

¹⁴ (Question 1) What are the different approaches through which the Arctic legal regime can be addressed? (Question 2) How can the existing approaches be modified and amalgamated into a unique system under the regional response?

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Acronyms

ACIA	Arctic Climate Impact Assessment
AEPMT	Act of Environmental Protection in Maritime Transport (Finland)
AEPS	Arctic Environmental Protection Strategy
AFS	International Convention for the Safety of Life at Sea, 1974 (SopS 11/1981)
AMAP	Arctic Monitoring and Assessment Programme
ASPPR	Arctic Shipping Pollution Prevention Regulations
ATCP	Antarctic Treaty Consultative Party
ATS	Antarctic Treaty System
AWPPA	Arctic Waters Pollution Prevention Act, 1970
AWRM	Act of Water Resources Management (Finland)
AWS	Act of Water Services (Finland)
CAFF	Conservation of Arctic Flora and Fauna
CAP	Collaborative Accountability Paradox
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CDEM	Construction, Design, Equipment and Manning
CLC	Civil Liability for Oil Pollution Damage Convention of 1969
CSA	Canada Shipping Act, 2001
CSR	Corporate Social Responsibility
DMA	Danish Maritime Authority
DSDHAE	Decree on Substances Dangerous and Harmful to the Aquatic Environment (Finland)
EEA	European Economic Area
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EPA	Environmental Protection Act (Finland)
EPD	Environmental Protection Decree (Finland)
EPPR	Emergency, Prevention, Preparedness and Response
EU	European Union

FSAR	Finland's Strategy for the Arctic Regions
FUND	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971
GAIRAS	Generally Accepted International Rules and Standards
GATT	General Agreement on Tariffs and Trade
GCTS	Geneva Convention on Territorial Sea and Contiguous Zone, 1958
GDWRM	Government Decree on Water Resources Management (Finland)
GDWRMR	Government Decree on Water Resources Management Regions
GEF	Global Environment Facility
GHREO	Greenland Home Rule Executive Order, 2007
HNS	High North Strategy (Norway)
IAP	Iceland's Arctic Policy
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
IHSCO	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties
IMO	International Maritime Organization
IMP	Integrated Management Plan
INS	Integrated Northern Strategy
IO	International Organization
IUCN	International Union for Conservation of Nature and Nature protection
IWCO	Independent World Commission on the Oceans
LC72	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972
LOMA	Large Ocean Management Area
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MPEP	Madrid Treaty on Environmental Protection
NCA	Nature Conservation Act (Iceland)
NCA	Norwegian Coastal Administration
nm	Nautical Miles
NSR	Northern Sea Route
NWP	North-West Passage
OA	1997 Oceans Act (Canada)
OECD	Organization for Economic Co-operation and Development
OPRC 1990	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

OPRC-HNS Protocol	Protocol on the Preparedness, Response and Co-operation on Pollution incidents by Hazardous and Noxious Substances, 2000
OSI	Oil Spill Intervention
OSPAR	Convention for the Protection of the Marine Environment of the North-East Environment of the North-East Atlantic, 1992
PAME	Protection of Marine Environment
PES	Protection of the Environment in Svalbard
PSSA	Particularly Sensitive Sea Areas
SDWG	Sustainable Development Working Group
SPA	Sea Protection Act (Finland)
SSA	Societal Sustainability Assessment
SSA	Special Status Area
SSAR	Sweden's Strategy for the Arctic Region
TBT	Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships
U.S.	United States of America
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
United Kingdom	Government of the United Kingdom of Great Britain and Northern Ireland
USGS	United States Geological Survey
WCED	World Commission on Environment and Development
WTO	World Trade Organization
WWF	World Wide Fund