

DOCUMENTS IN INTERNATIONAL LAW



THE ARCTIC IN INTERNATIONAL LAW AND POLICY

Edited by Kristina Schönfeldt

B L O O M S B U R Y

The Arctic is an increasingly important region faced with major challenges caused not only by the effects of climate change, but also by a growing interest in its living and non-living resources, its attraction as a new destination for tourism, and as a route for navigation. It is not only the eight Arctic States that have paid an increased level of attention to the region; several non-Arctic actors from Asia and Europe also seek to gain more influence in the High North. At the same time, the evolving law and policy architecture for the Arctic region has recently played a more prominent role in the political and academic debate. Unlike Antarctica, where the coherent Antarctic Treaty System governs international cooperation, the legal regime of Arctic affairs is based on public international law, domestic law, and 'soft law'. These three pillars intersect and interact making Arctic governance multi-faceted and highly complex.

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Preface

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Finally, I would like to acknowledge all the materials for which I was kindly given permission to use in this collection. Although I have tried to trace and contact all copyright holders and obtain clearance before publication, this has not been possible in every case. If notified I surely will rectify any errors or omissions at the earliest opportunity.

A significant effort has been made to ensure the correct reproduction of documents. However, the use of British and US-American English in the documents has not been standardised; documents are rather reproduced in their original English language version. Moreover, only obvious typos in the texts have been corrected.

It goes without saying that comments and suggestions are highly appreciated. They should be directed to schoenfeldt@jura.uni-bonn.de.

*Kristina Schönfeldt
Bonn, December 2016*

Abbreviations

AC	Arctic Council
AEPS	Arctic Environment Protection Strategy
AEWA	Agreement on the Conservation of African-Eurasian Migratory Waterbirds
AMAP	Arctic Monitoring and Assessment Program
AMEC	International Programme for International Military Environmental Co-operation in the Arctic
ANWR	Arctic National Wildlife Refuge
ART	Article
AWPPA	Arctic Waters Pollution Prevention Act
BEAC	Barents Euro-Arctic Council
BRC	Barents Regional Council
CAFF	Conservation of Arctic Flora and Fauna
CBD	Convention on Biological Diversity
CGS	Coast Guard Station/Ship
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLCS	Commission on the Limits of the Continental Shelf
CO ₂	Carbon Dioxide
CTS	Consolidated Treaty Series
DEW	Distant Early Warning (line)
E	East
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
ICC	Inuit Circumpolar Conference
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling 1946
IHO	International Hydrographic Organization
ILM	International Legal Materials
IMO	International Maritime Organization
IPC	International Polar Commission
IPCC	Intergovernmental Panel on Climate Change
IPHC	International Pacific Halibut Commission
IPY	International Polar Year
ISA	International Seabed Authority

ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature and Natural Resources
IUU	Illegal, Unreported and Unregulated (fishing)
IWC	International Whaling Commission
LNTS	League of Nations Treaty Series
LOS	Law of the Sea Bulletin
MARPOL 73/78	International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto
MEPC	Marine Environmental Protection Committee
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MSC	Maritime Safety Committee
N	North
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organization
NM	Nautical Mile
NO	Number
NOAA	National Oceanic and Atmospheric Administration
NORDREG	Northern Canada Vessel Traffic Services Zone
NPAFC	North Pacific Anadromous Fish Commission
NSR	Northern Sea Route
OJ	Official Journal of the European Union
PAME	Protection of the Arctic Marine Environment
POPs	Persistent organic pollutants
PSC	Pacific Salmon Commission
PSSA	Particular Sensitive Sea Area
RAIPON	Russian Association of Indigenous Peoples of the North, Siberia and Far East
SOLAS	Safety of Life at Sea Convention 1974
SS	Steamship
TAC	Total Allowable Catch
TIAS	Treaties and Other International Acts Series (US)
USN	United States Navy
USSR	Union of Soviet Socialist Republics

UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USCGC	United States Coast Guard Cutter
USS	United States ship
USSR	Union of Soviet Socialist Republics
VMS	Vessel Monitoring System
WCPFC	Western and Central Pacific Fisheries Commission
WGS	World Geodetic System
WTO	World Trade Organization

ARCTIC REGION



Source: The World Factbook 2013–14 (Washington, DC: Central Intelligence Agency, 2013), www.cia.gov/library/publications/the-world-factbook/index.htm.

Analytical Introduction

Legal Framework

In the course of the last few decades the Arctic has gained a prominent role in political and academic debate. It has become the subject of many disciplines reflecting the myriad environmental, social and economic issues concerning the High North. From a legal perspective, the most virulent questions are: What does the legal regime that applies to Arctic affairs look like? How does it work? Are there any regulatory gaps? And if so, how can they be filled?

Unlike in Antarctica, where the legally binding Antarctic Treaty System¹ ‘freezes’ sovereignty on land and governs international cooperation, no single comprehensive treaty guides Arctic affairs. Instead the legal regime of the Arctic is based on three pillars: public international law, domestic law, and soft law.² These three pillars intersect and interact making the governance of the Arctic a very complex and multi-faceted issue.

Although a plea for a negotiation of a special Arctic Treaty System³ is occasionally voiced, it was firmly rejected by the Arctic coastal States with the adoption of the Ilulissat Declaration in 2008 in which it was confirmed that—at least with regard to the marine Arctic—the existing body of the law of the sea provides ‘*a solid foundation for responsible management by the five coastal states and other users of the Arctic Ocean through national implementation and application of relevant provisions.*’ Thus there is ‘*no need to develop a new comprehensive legal regime to govern the Arctic Ocean.*’⁴ Most academic commentators support the view underlining that ‘*there was no need then and there is no need now for a formal instrument.*’⁵

Hence it follows that the Arctic Ocean is first and foremost governed by the 1982 *United Nations Convention of the Law of the Sea* (UNCLOS)⁶ and its two implementing agreements, the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Part XI Deep-Sea*

¹ Done at Washington, 1 December 1959; entered into force 23 June 1961; 402 UNTS 72. See generally B Saul and T Stephens, *Antarctica in International Law* (Oxford, Hart Publishing, 2015).

² But see ET Canuel who distinguishes between four pillars (international hard law, soft law, domestic law, transboundary private law) ‘The Four Arctic Law Pillars: A Legal Framework’ (2015) 46 *Georgetown Journal of International Law* 735.

³ See, eg: The European Parliament adopted a resolution on 9 October 2008 expressing its wish for negotiations designed ‘to lead to the adoption of an international treaty for the protection of the Arctic’ (Doc 35). The *Parliamentarians of the Arctic Region* (Conference Statement, 5–7 September 2012, www.arcticparl.org/files/conferencstatement%2C-final-draft1-2.pdf) also urge for the development of a special Arctic Treaty. For a scholarly perspective: M Watson, ‘An Arctic Treaty: A Solution to the International Dispute over the Polar Region’ (2009) 14 *Ocean and Coastal Law Journal* 307, and T Koivurova and EJ Molenaar, *International governance and regulation of the marine Arctic. Three reports produced for the WWF Arctic international programme* (2009) 89. In 1992, the Arctic scholar D Pharand published a draft Arctic Treaty in (1992) 23 *Revue générale de droit*, 163, 190–195.

⁴ Ilulissat Declaration, Arctic Ocean Conference Ilulissat, Greenland, 27–29 May 2008, www.arcticgovernance.org/the-illulissat-declaration.4872424.html.

⁵ J Jabour, ‘Pharand’s Arctic Treaty. Would an Antarctic Treaty-Style Model Work in the Arctic?’ in S Lalonde and TL McCorman (eds), *International Law and Politics of the Arctic Ocean*. (Leiden, Brill Nijhoff, 2015) 87–107, 87.

⁶ Done at Montego Bay, 10 December 1982; entered into force 16 December 1994; 1833 UNTS 3.

Mining Agreement)⁷, and the 1994 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 (Fish Stocks Agreement).⁸

While Canada, Denmark, Finland, Norway, Sweden, and the Russian Federation have ratified the UNCLOS as well as both implementing agreements, the United States has only committed itself to the *Fish Stocks Agreement*. Nevertheless, the United States accepts the basic principles of the UNLCOS as reflecting customary international law and acts accordingly.⁹

Although the United States had shown interest in establishing a special legal regime for the Arctic region during informal consultations in preparation for the negotiations of UNCLOS, the Soviet Union 'were negative, urged that Arctic question be kept out of LOS negotiations entirely, and that there could not be international regime for Arctic' stressing 'that it is not possible to separate land and marine interests in Arctic area as each affects other.'¹⁰ So even within the UNCLOS regime the Arctic is not addressed by name, but at least Part XII concerning the protection and preservation of the marine environment includes Article 234 on 'Ice-Covered Areas' which reads as follows:

*'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.'*¹¹

The wording might indicate that the provision deals with polar regions in general, covering both the Arctic and Antarctica. However, from the negotiation of Article 234 UNCLOS, which was conducted primarily by Canada, the United States, and the Soviet Union, it can be concluded that Article 234 UNCLOS was drafted with special regard to the Arctic Ocean and can be regarded as the 'Arctic Exception'.¹² So far both Canada and

⁷ Done at New York, 28 July 1994; entered into force provisionally 16 November 1994, definitely 28 July 1996; 1836 UNTS 42.

⁸ Done at New York, 4 August 1995, entered into force 11 December 2001; 2167 UNTS 88.

⁹ See eg JA Roach, 'Today's Customary International Law of the Sea' (2014) 45 *Ocean Development & International Law* 239. The United States intends to ratify UNCLOS sooner or later, at least the last presidents as well as a myriad of high officials and US American scholars are in favour of accession (former US Secretary of State H Rodham Clinton, 'Statement on the UN Law of the Sea Convention' in MH Nordquist et al, *The Law of the Sea Convention. US Accession and Globalization* [Leiden, Martinus Nijhoff, 2012] 17).

¹⁰ LOS: US-Soviet consultations: May 13–15 (16 May 1974), Cable 1974MOSCOW07351_b, https://wikileaks.org/plusd/cables/1974MOSCOW07351_b.html.

¹¹ Done at Montego Bay, 10 December 1982; entered into force 16 December 1994; 1833 UNTS 3.

¹² For an excellent analysis of Article 234 UNCLOS see K Bartenstein, 'The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?' (2011) 42 *Ocean Development & International Law* 22 and P Luttmann, 'Ice-Covered Areas under the Law of the Sea Convention: How extensive are Canada's Coastal State Powers in the Arctic?' (2015) 29 *Ocean Yearbook* 85. See also U Jenisch, 'The Arctic Ocean and the New Law of the Sea' in B Vukas (ed), *Essays on the New Law of the Sea* (Zagreb, Sveucilisanaklada Liber, 1985).

the Russian Federation have relied upon Article 234 UNCLOS for establishing special regimes for the protection of their respective Arctic marine environments.¹³

Arctic Definitions, Geography, and Ecosystem

The term 'Arctic' has its roots in the Ancient Greek word *ἀρκτικός* (*arktikós*), meaning the region close to the constellation *Great Bear* that encompasses the *Polaris Star* located above the North Pole.¹⁴

Most of the Arctic is covered by the Arctic Ocean, which is, on the one hand, linked to the Pacific Ocean through a small passage in the Bering Strait and, on the other hand, connected to the Atlantic Ocean through the Greenland and Labrador Seas.¹⁵ It is 14,056,000 km² in size and, with an average depth of 1,038 m, the shallowest ocean in the world. The Arctic Ocean by and large consists of the territorial waters and the EEZ of Canada, Denmark—by virtue of Greenland—, Norway, the Russian Federation, and the United States. Finland, Iceland, and Sweden do not adjoin the Arctic Ocean but their territories extend north of the Arctic Circle. Together they are often referred to as the *Arctic Eight*.

Within the Arctic Ocean there are four high seas enclaves: the *Banana Hole* in the Norwegian Sea, the *Donut Hole* in the Central Bering Sea, the *Loophole* in the Barents Sea and finally the Central Arctic Ocean.

While there is no universally accepted definition of the Arctic,¹⁶—as one author correctly observes: 'Finding or choosing one definition of the Arctic to satisfy all purposes is nearly impossible.'¹⁷—it is most commonly described as the terrestrial and marine area north of the Arctic Circle (66° 34'N). However, the lower two-thirds of Alaska and the Bering Sea, which separates that part of Alaska from the Russian Federation, are not covered by this definition.¹⁸ The Faroe Islands and Iceland suffer the same fate. Although the Faroe Islands aim to be considered as belonging to the Arctic Circle, they are located about 4° south of what is currently considered the demarcation line of the Arctic Circle. A similar problem occurs with regard to Iceland, which has as a major policy goal to secure a seat at the table of the Arctic coastal States, based on the argument that the northern part of the Icelandic EEZ '*falls within the Arctic and extends to the Greenland Sea adjoining the Arctic Ocean*.'¹⁹

Other definitions of the Arctic are based on climatic or vegetational factors such as average temperature, meaning a region within which the average daily temperature in summer does not exceed 10°C (so-called *Köppen-Geiger* climate classification) or the

¹³ See Part 8.

¹⁴ SJ Hassol, *Impacts of a warming Arctic: Arctic Climate Impact Assessment* (Cambridge, CUP, 2004) 4.

¹⁵ V Golitsyn, 'The Legal Regime of the Arctic' in DJ Attard, M Fitzmaurice, and NA Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law Vol 1* (Oxford, OUP, 2014) 462. In 1953, the International Hydrographic Organization adopted a definition of the Arctic Ocean that is widely used. The definition is of no legal or political but only practical relevance [IHO, *Limits of Oceans and Seas* (Bremerhaven, 1953), 11 f].

¹⁶ For a comprehensive discussion of multiple definitions see AMAP, *Assessment Report: Arctic Pollution Issues* (1998) chapter 2.

¹⁷ CAFF/HP Huntington (eds), *Arctic Flora and Fauna: Status and Conservation* (Helsinki, Edita, 2001) 14.

¹⁸ R O'Rourke, *Changes in the Arctic: Background and Issues for Congress* (Washington DC, 2015) 1.

¹⁹ Doc 24.

northern tree line, which demarcates the northern limit of tree growth.²⁰ While the 10 C° isotherm definition, for instance, excludes Finland, Sweden, and certain parts of Alaska, it covers the entire Bering Sea as well as the Aleutian Islands. In any case since Arctic definitions based on climate-related factors are not very reliable and ‘*could circumscribe differing areas over time as a result of climate change*’,²¹ they should be used with great caution.

The broadest definition has been adopted by the Arctic Monitoring and Assessment Programme (AMAP), which is a working group of the Arctic Council. It essentially includes ‘*the terrestrial and marine areas north of the Arctic Circle (66°32’ N), and north of 62° N in Asia and 60° N in North America, modified to include the marine areas north of the Aleutian chain, Hudson Bay, and parts of the North Atlantic, including the Labrador Sea*’.²² In accordance with this definition the Arctic marine area includes the Arctic Ocean, the adjacent Beaufort, Chucki, East Siberian, Laptev, Kara, and Barents Seas, the Nordic Greenland, Norwegian, and Iceland Seas, the Labrador Sea, Baffin Bay, Hudson Bay, the Canadian Arctic Archipelago, and the Bering Sea.²³ In this collection, the term ‘Arctic’ will usually refer to the AMAP definition.

When thinking of the Arctic, many people will picture an inhospitable area of perennial snow and ice, where the sun hardly shines in winter and barely sets in summer. It is hard to believe that plants and animals can exist at such a harsh if not hostile place. But they do and, in particular during the bright summer months, they do it in all their great diversity. The current record of Arctic species lists approximately 21,000 animals, plants and fungi.²⁴ Whilst the flora ranges from collections of flowers with astonishing blooming beauty, like the Arctic poppy, to mosses, algae and lichens, trees are very rare in the tundra areas and more frequent in the boreal areas.²⁵ The Arctic fauna can be divided into marine and terrestrial. The marine environment is not only inhabited by the iconic polar bear, but also by other groups of marine mammals, like seals and whales, and many different species of fish. In contrast the terrestrial fauna comprises about 67 species such as the caribou, arctic fox or lemming and, depending on the season, is populated by round about 200 bird species, most of them of migratory nature.²⁶

Despite its vast biological diversity there is one unique feature of the fragile Arctic ecosystem that is common to all its parts: The fact that it is both highly sensitive and susceptible to outside interference, and subject to significant environmental stressors which originate from within as well as from outside the Arctic.

But plants and animals are not the only living creatures in the Arctic. It is also home to almost 4 million people, of which 10 per cent are indigenous people of different groups and communities.²⁷ Hence modern and traditional ways of life exist side by side and influence each other. In respect to living standards, health, income, and education, the disparities between indigenous and non-indigenous people in the Arctic have been

²⁰ AMAP, *AMAP Assessment Report: Arctic Pollution Issues* (Oslo, 1998) chapter 2, 9 f.

²¹ R O'Rourke, *Changes in the Arctic* 2.

²² AMAP, *Arctic Pollution Issues*, chapter 2, 10.

²³ AMAP, *Arctic Pollution Issues*, chapter 2, 20.

²⁴ This includes all species living in the high or lower parts of the Arctic.

²⁵ CAFF, *Arctic Biodiversity Assessment. Status and trends in Arctic biodiversity* (Akureyri, 2013) chapter 9.

²⁶ For a comprehensive study see CAFF, *Arctic Biodiversity Assessment*.

²⁷ Though the exact number depends on which Arctic definition is used and thus which boundary is drawn.