

Marine Pollution and International Law

Principles and Practice

Douglas Brubaker

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Preface

Recommendation for Study of National Environmental Law

It must be noted that chiefly the *international* legal aspects of environmental protection and prevention are addressed here. However an integral part of the regimes set forth by the international law is the *national* legislation, Court decisions and executive declarations implementing these provisions. It would be far beyond the scope of this project to carry out any analysis of the national environmental law of the countries which are Parties to the Conventions and Agreements discussed below. This also holds true concerning even the national environmental law of the countries involved in the Barents Sea Case Study, the States bordering the Arctic.¹ Such a study however would be of great benefit in clarifying the law applicable to the Barents Sea as well as providing a better basis for establishing new international provisions where required.² For the first an analysis of Arctic rim State legislation, Court decisions and executive declarations would indicate any legal areas from which it could be presumed environmental principles have entered into customary law though *State practice* and *opinio juris*. This is very important since as will be seen below in PART I Section 2.1. customary law *could* provide legal coverage in areas lacking conventional coverage, a situation not too uncommon.³ The present state of international customary law however is that only a *few* general principles appear to have become customary law, and they do not provide the specificity required to deal actively with environmental problems. An analysis of the national anti pollution law of the Arctic rim States, especially that of the Soviet Union and the United States, both superpowers and sea powers, might add specificity to this vague yet important area of international law.

For the second, upon such an analysis a comparison could be made of national law, and the international provisions as set forth in the environmental conventions ratified by each Arctic State, as well as the United Nations Convention on the Law of the Sea (LOSC).⁴ This would indicate any areas of *non compliance* by the Arctic rim States. Additionally in conjunction with the recommendation above, it might be argued that certain provisions of the

international environmental conventions have passed into international customary law for the Arctic if all the Arctic rim States have complied with them over time. This comparison is especially important as regards the LOSC, which is not in force yet which often is referred to as a codification of customary law, but under which legal authors vary to a great extent as to which provisions represent customary law. Additionally since industrial States seem reluctant to ratify the LOSC, parallel Arctic rim State national law might assist in firming up the customary law, and hence negate the need for State ratification of this Convention. A very brief outline of Arctic State national implementation of LOSC is presented in PART I Section 9.1.⁵

For the third an analysis of national Arctic State law would give an idea of the starting point for any negotiations involving new environmental provisions such as included in the Arctic Convention and Protocols proposed below in PART II Chapters 10 - 17. If as is noted by one author⁶ that the Soviet legislation regarding dumping and vessel-source pollution generally follows LOSC provisions, then their starting point regarding negotiations in these areas can be presumed. If a similar comparison and analysis could be done for all the Arctic States and covering the pollution sources together with liability provisions and contingency plans, then drafts could be formulated even more concisely than has been done with the Arctic Convention and Protocols. Both environmental provisions and political realities could be much more in balance with a consequent more probable Arctic rim State interest in ratification of the proposed environmental regime. Additionally it would be more evident where stronger environmental provisions should be proposed.

Finally as part of any analysis suggested above there should as well be included an examination of the national law in *practice*. Are these rules *effective* or are they merely paper without any teeth similar to some of the international agreements mentioned below? This information would as above contribute to more concise and substantial proposals being made providing for Arctic environmental protection.

Saying this I would like to thank Associate Professor Geir Ulfstein, University of Oslo, for the interesting and illuminating discussions giving direction in this complicated area of law. Additionally I would like to thank Senior Lecturer in Law Robin Churchill, University of Wales, for taking the time to give illuminating comments as well as co-authoring an incredibly concise book covering the law of the sea, without which this work would have been much more difficult to conduct. As well thank you should be addressed to Research Scholar Olav Schram Stokke, Fridtjof Nansen Institute (FNI) for his ready assistance in providing up to date information in a legal area characterized by rapid developments, Office Manager Grete F. Haram for her essential aid in preparing this work for publication, Computer Consultant Ivar

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Tromsø, January 8, 1992
Douglas Brubaker

Notes - Preface

1 Canada, Denmark/Greenland, Norway, the Soviet Union, and the United States. These will hereafter be referred to as the 'Arctic rim States.' Note that due to the dissolution of the Soviet Union only some time ago it is impossible to state whether Russia will follow the international environmental policies established by the Soviet Union. For this reason any reference to the Soviet Union in this work is left standing until such a time as Russian policies especially in the Arctic become clear.

2 There do exist a few works of this nature. Erik Franckx with the Free University of Brussels has reportedly written a doctorate thesis concerning national legislation covering shipping in the Arctic, conversation Professor David Caron, Boalt Law School, University of California at Berkeley, July 24, 1990. In addition a study of indefinite scope involving Arctic environmental legislation of the Soviet Union, Norway, Denmark/Greenland, Canada and the US - Alaska is currently being carried out by J. Enno Harders, Institut für Internationales Recht an der Universität Kiel, correspondence July 1, 1988.

3 This is especially evident in the area of State liability for transboundary environmental damage.

4 This latter Convention is generally known as the 'Constitution of the Law of the Sea.'

5 Along these lines but on a basis broader than just that related to the Arctic, study also needs be done establishing concretely which LOSC environmental provisions have passed into international customary law.

6 Franckx, Erik, 'The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone,' *International Journal of Estuarine and Coastal Law*, Vol. 1, No. 2, 1986 (Franckx) pp. 156-159.

Abbreviations

ACOPS: Advisory Committee on Pollution of the Sea (ACOPS), Survey of Oil Pollution around the Coasts of the United Kingdom, 1986-87. 3 Endsleigh Street, London WC1H 0DD.

Aftenposten: Norwegian newspaper published in Oslo, Norway.

CBT's: Clean ballast tanks, on ships under MARPOL 73/78 Annex I.

CFC's: Chlorofluorocarbons, ozone depletion substances.

COW's: Crude oil washings, on ships under MARPOL 73/78 Annex I.

dwt: Dead weight ton, used in shipping conventions.

ECA: Economic Commission of Africa.

ECLA: Economic Commission for Latin America under the United Nations.

ECWA: Economic Commission for Western Asia.

ECOSOC: Economic and Social Council of the United Nations.

ECU: European Currency Unit.

EEC: European Economic Community.

EMEP: Cooperative Programme for Monitoring and Evaluation of Long-range Transmission of Air Pollutants in Europe, under the ECE Convention.

EPA: United States Environmental Protection Agency.

ESCAP: Economic and Social Commission for Asia and the Pacific under the United Nations.