

## Legal Status of the Arctic: Some Contemporary Issues

High contemporary importance

Global warming; receding of ice; increased interest in mineral potential; new sources of energy.

Increasing political interest.

Look at following issues.

Status of waters

Ownership of the seabed

Maritime boundary delimitation

### **Arctic basin (slide)**

It is an ocean; water not land (Antarctica)

Surrounding basin states Canada; US; Russia; Norway; Denmark (Greenland)

Who owns the land?

### *Legal Status of Eastern Greenland Case*

Uniqueness of frozen areas

Qualify traditional concepts of use and occupation to take account of limited human habitation and activity

Only land dispute is Hans Island (Canada-Denmark) (slide)

Kennedy Channel between Ellesmere Is and Greenland

Svalbad/Sptizbergen – Norway; land not in dispute; treaty rights; interpretation

### **Waters of the Northwest Passage (slide)**

Islands and the waters north of the Canadian mainland

Fabled passage from Europe to Asia in the 19<sup>th</sup> century

Divided from Greenland by a narrow channel

1911 Sector theory

Historic waters

1969 Manhattan voyage

AWPP 100 nm pollution prevention zone

Set standards

Arrest ships

Protests  
 Extension of notion of self protection (self defence) to  
 environmental damage  
 Necessity  
 Reservation to the jurisdiction of the ICJ

*Arctic Waters and International Straits*

Are they Canadian waters or international strait

*Corfu Channel*  
 LOS Article 37      Part III

*Article 37*

*Scope of this section*

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Geographic test; joining two parts of the high seas  
 Functional test; used for international navigation

Limited shipping in Arctic – does not meet functional test

Canadian campaign in UNCLOS

LOS Article 234      Part XII

*Article 234*

*Ice-covered areas*

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.

Polar Sea      US icebreaker without asking Canadian permission

1985 Straight baselines      US and EU protests

Withdrew reservation to jurisdiction of court

Straight baselines

*Anglo-Norwegian Fisheries Case*

LOS Article 7      Part II

*Article 7*

*Straight baselines*

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

...

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

...

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

...

LOS Article 35(a)      Part III

*Article 35*

*Scope of this Part*

Nothing in this Part affects:

(a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;

...

...

Did the baselines create or confirm  
 Does it enclose areas previously used for navigation?  
 At this time Canada not a party to LOS

1988 Arctic Cooperation Agreement  
 Consent by US to icebreaker voyages

Internal Canadian debate over whether “sovereignty” is being upheld  
 Canada-US issues are highly charged

Summary: 3 possible regimes  
 Internal waters  
 Art 234 – no transit passage  
 International strait – transit passage – international standards

Would Canada’s position be upheld by the ICJ?

No-one challenging. Canada seeks to ensure permission requested

Functional test; how much shipping  
 Straight baselines – length; scale  
 Indigenous use  
 Unique land/water environment

Is there any difference between the three options?  
 Canadian domestic standards vs international standards  
 Power of arrest

### **Eastern Arctic**

Russia claims sovereignty; controls passage but does not exclude foreign shipping

Adheres to sector theory.

**Why is it so important at the moment?** (slide) – thinning ice)

Thinning ice; potential for traffic (slide – distance compared with Panama Canal)

Likelihood of traffic; arctic bridge (Arctic bridge slide)

Local traffic – resource development

Implications for Article 234?

**Who owns the seabed of the Arctic Ocean?** (slide)

Russian flag at the North Pole summer 2007

EEZ and extended continental shelf

Article 76 Part VI

#### *Article 76*

##### *Definition of the continental shelf*

1. The continental shelf of a coastal State comprises the *seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.*
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the *seabed and subsoil of the shelf, the slope and the rise.* It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.
4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
  - (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed

points at each of which the *thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope*; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points *not more than 60 nautical miles from the foot of the continental slope*.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of *maximum change in the gradient at its base*.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either *shall not exceed 350 nautical miles from the baselines* from which the breadth of the territorial sea is measured or *shall not exceed 100 nautical miles from the 2,500 metre isobath*, which is a line connecting the depth of 2,500 metres.

...

Natural prolongation outer edge of margin  
Sedimentary thickness; 60 nm from foot of slope  
350 nm from baselines

The Problem of Ridges

Lomonosov Ridge (Slide)  
Alpha Ridge

Article 76(6)

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are *natural components of the continental margin*, such as its plateaux, rises, caps, banks and spurs.

Are these ridges connected to the continental shelves of Russia; Greenland, Canada (slide)

Are there morphological breaks?

Can the Arctic states claim the whole of the Arctic seabed? (slide)

## The Problem of Delimitation

Outer Limit of Extended Continental Shelf – who decides?

### Article 76

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8. *Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.*

CLCS – who are they; what do they do?

## Annex II

### Article 2

1. The Commission shall consist of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities.

### Article 3

1. The functions of the Commission shall be:

(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

Problems of timing 10 years, but what if do not file; or file late?

Problems of role? Independence? Scientific

Problems of conflict between making recommendations and giving advice.

*Lateral Delimitation* (slide)

Norway-Greenland part agreement; part Jan Mayen decision

Norway Russia – interpretation of Svalbard Treaty

Russia US agreed on the basis of 1825 treaty between Russia and GB

Canada - Greenland mostly agreed, (Hans Island and baselines)

Canada – US Beaufort Sea (slide)

Opposing positions

Historical

141<sup>st</sup> Jusqu'a la mer glaciale

Equidistance

Assessment

LOS Treaty or customary int law

Does it matter?

Agreement in accordance with int law in order to achieve an equitable solution

Equidistance as a first step then modify

Generally irrelevance of non-geographical factors

But Jan Mayen took account of fisheries

Relevant circumstances in Beaufort Sea

*Delimiting the Arctic Basin*

Extended continental shelf as opposed to EEZ

Should the factors be the same?

Distance of land from the area being delimited

Sector approach (slide)

Equidistance approach (slide)

Co-operative approach

**Options for the Future (slide)**

1. General regime defined by LOS
2. Individual bilateral regimes
3. A regional basis approach – Arctic basin states
4. A basin approach involving regional and non-regional states

Antarctic Treaty approach