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A Legally Binding Regime for the Arctic

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Leiðbeinandi: Ágúst Þór Árnason

„Ég lýsi því hér með yfir að ég einn er höfundur þessa verkefnis og að það er ágóði eigin
rannsókna.”

Stefán Þór Hauksson

„Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A. prófs
í Hug- og félagsvísindadeild.”

Ágúst Þór Árnason

Abstract

Currently there is no single comprehensive legal regime governing the Arctic region that compares to *the Antarctic Treaty System*. The *Ilulissat declaration* in 2008 stated that *the Law of the Sea Convention* is providing solid foundation responsible management. The main focus of this paper will be to answer whether or not it is necessary to implement a binding legal regime to the Arctic region. During the last fifty years a significant decrease in the quantity of ice has been measured due to increased global and regional temperature. The consequences of this development are among other things that seasonal freight routes are beginning to be accessible for longer periods each year. It also means easier access to natural resources such as oil, gas, marine species and various raw materials. Industrial activities all over the world are likely to bring outside pollutants to an ecosystem that is especially fragile because of the cold weather conditions that leads to slow decomposition of chemicals and slow regeneration of plants. The current legal regime seems unperfected when it is compared to *the Antarctic Treaty System* (ATS). It is made up from non-binding soft law legal bodies such as *the Arctic Environmental Protection Strategy* (AEPS) that later developed into *the Arctic Council*. *The Law of the Sea Convention* (UNCLOS) is legally binding on nations who have ratified and forms the only legal framework for cooperation forums and future development in laws in the Arctic. Creating a comprehensive legal regime for the Arctic similar to the one in the Antarctic would most defiantly take many years to form and would not be an easy project. Many scholars have suggested that it would be better to focus on strengthening the soft law regime in relation to the UNCLOS.

Útdráttur

Sem stendur er ekkert eitt heilstætt regluverk um málefni norðurheimskautasvæðisins í líkingu við regluverk suðurheimskautsins. Í *Ilulissat yfirlýsingunni* frá 2008 er því lýst yfir að Hafréttarsáttmálinn sé viðunandi grundvöllur fyrir stjórn svæðisins. Aðaláhersla þessarar ritgerðar verður að svara spurningunni hvort nauðsynlegt sé að koma á bindandi regluverki fyrir allt svæðið. Mælingar undanfarinna 50 ára sína fram á umtalsverða minnkun á magni íss vegna þess að loftslagshækkunar í heiminum. Þær afleiðingar sem þessi þróun hefur í för með sér er að árstíðabundnar siglingarleiðir eru aðgengilegar mun lengur. Einnig hefur þetta í för með sér auðveldari aðgang að náttúruauðlindum svo sem olíu, gasi, sjáfarafurðum og ýmsum málum. Aukin umsvif í iðnaði eru líkleg til að færa utanaðkomandi mengun í þegar viðkvæmt lífríki. Lífríki sem er viðkvæmt sér í lagi vegna kalds veðurfars og hversu hægt spilliefni leysast upp við þær aðstæður. Núverandi regluverk er alls ekki fullkomið sér í lagi ef það er borið saman við regluverki suðurheimskautsins. Það er byggt upp á valkvæðum ákvæðum ýmissa ráða svo sem *the Arctic Environmental Protection Strategy (AEPS)* og heimskautaráðsins. Hafréttarsáttmálinn grundvallar heimildin fyrir samvinnu ríkjanna og þróun laga á norðurheimskautinu. Ákvæði Hafréttarsáttmálans eru bindandi fyrir þau lönd sem hafa viðurkennt hann. Það að búa til regluverk fyrir allt norðurheimskautið sem svipar til þess á suðurheimskautinu mun reynast erfitt. Fræðimenn hafa stungið uppá, í stað þess að koma á nýju regluverki, væri einfaldara að styrkja það regluverk sem nú er notast við í tenglum við Hafréttarsáttmálann.

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Introduction

According to the *2004 Arctic Climate Impact Assessment* and more recent research the Arctic environment is changing because of climatic changes.¹ With the rising of global temperature the ice starts to decrease, the temperature in the Arctic has risen twice as much as the rest of the planet since 1950. The changes occur both on land and in the ocean. The decrease in the quantity of ice impacts species dependent on ice, such as polar bears.²

The quantity of ice in the Arctic fluctuates naturally between winter and summer. The unusual decrease in ice that we are facing now is more severe. *The University of Illinois Department of Atmospheric Sciences* have detected a decrease in average quantity of ice during the last 50 years, the most significant changes in the Arctic air temperature are measured during the summer months and have been measured up to 30 percent.³

The potential effects of the incline in ice on human activities in the Arctic region are for example increased traffic all year round on freight routes that normally were only open part of the year. The decrease in ice also means easier access to natural resources such as oil, gas, fish stocks and many kinds of metals.⁴

The most important legal issue in the Arctic is protection of the environment against outside pollutants that comes with industrial activities. All parts of the world are impacted by environmental pollution. However pollution has a greater impact in the Arctic than it does in a warmer environment. Both Polar Regions have been described as the sink of the earth for hazardous substances. Most of the pollution comes from somewhere else such as reprocessing plants in the UK, fallout from Chernobyl and French nuclear testing decades ago and the list goes on. What makes the matter worse is that the ocean currents in the Arctic cause concentration of pollutants in the area.⁵

Commercial fishing is among the greatest threats to marine biodiversity. With the melting of the ice, fishing-ships can go further into the Arctic Ocean. Unregulated fishing could have devastating effect on the fish-stocks previously protected by ice.⁶

Unregulated fishing is not the only danger facing the marine environment. With decreasing ice-coverage come increased industrial activities and shipping. For decades

¹ Arctic Climate Impact Assessment (ACIA), *Impacts of a Warming Arctic* (Cambridge: Cambridge University, 2004) at p. 1

² Rob Huebert & Brooks B. Yeager, "A New Sea: The Need for a Regional Agreement on Management and Conservation of the Arctic Marine Environment". (Oslo: WWF International Arctic Programme, 2008). At p. 4

³ Arctic Climate Research at the University of Illinois, "Observed Climate Change", The University of Illinois Department of Atmospheric Sciences, April 05, 2008 (accessed 26th April 2009) <http://arctic.atmos.uiuc.edu/>

⁴ *Ibid* at p. 4

⁵ *Ibid* at p. 1

⁶ *See supra* note 2 at p. 8

nuclear powered submarines have been free to roam the Arctic. The traffic of nuclear powered ships is of great concern, it should be enough to mention the Chernobyl accident to make that point clear.⁷

The Arctic ecosystem is fragile and any increase in non-regulated industrial activities can be devastating for the environment.⁸ With increasing traffic on the freight routes, the likelihood for accidents increases and even a small accident involving a ship wreck could be disastrous. In 1989, a Russian nuclear powered submarine sank off the Coast of Bear Island with two nuclear warheads onboard. Leakage of radioactive material from the nuclear reactor and nuclear warheads currently poses a problem for the environment, and severe pollution of the surrounding waters remains possible. The hull of the ship was sealed in 1995 and is considered to be safe for about 20 to 30 years.⁹ Cleaning up after for example oil spills in the Arctic can be more difficult than otherwise because of the harsh environment of the Arctic Ocean. When thinking of oil spills the accident that involved the Exxon Valdez off the coast of Alaska comes to mind. An accident on that scale could have dramatic influence on the ecosystem and because of the difficulty of cleaning it up it could have long lasting influence on fisheries and birdlife in large areas for years to come.¹⁰

The Arctic area is extensive in size, it covers about one sixth of the earth's surface, more than nine million square kilometres. It has a population of about four million, including over thirty different indigenous peoples and dozens of languages.¹¹

The Arctic area is a semi-enclosed sea surrounded by five countries, Canada, the United States, Russia, Greenland and Norway.¹² It is mostly made up from frozen sea water, although some parts of what is described as the Arctic region is on the various islands and coastal states. Its counterpart in the south, the Antarctica, is a continent with 98 percent of its surface covered with ice.¹³

The Arctic region is often defined by heat measurement. The 10 °C July isotherm is considered to be most accurate way of establishing the boundary between the Arctic and sub-

⁷ Linda Nowlan, "Arctic Legal Regime for Environmental Protection" [2001]. *International Council of Environmental Law*, 44. at p. 10

⁸ Encyclopædia Britannica, "Law of the Sea", Encyclopædia Britannica Online, 2009 (accessed 20th February 2009) <http://search.eb.com/eb/article-9066428>

⁹ Centennial, "Hazardous Duty: Nuclear Submarine Accidents", Michael Young (accessed 16th April 2009)

¹⁰ Encyclopædia Britannica, "Arctic", Encyclopædia Britannica Online, 2009 (accessed 16th January 2009) <http://search.eb.com/eb/article-57891>

¹¹ Arctic Council, "About Arctic Council," October 22nd 2007 (accessed 30th January 2009) <http://Arctic-council.org/article/about>

¹² Sweden, Finland and Iceland are also referred to as Arctic nations although they do not border the Arctic Ocean

¹³ Donald R. Rothwell, *The Polar Regions and the Development of International Law*, 1st ed. (Cambridge: Cambridge University Press, 1996). At p. 21

Arctic. Another way is to measure the tree line, where the trees stop to grow and Tundra takes over. This is considered an easier approach.¹⁴

However because of some natural and environmental variations the two methods can make it difficult to measure the Arctic precisely. To set the southern limit of the Arctic to 60°N would include all significant maritime areas and is more accurate.¹⁵ The countries that have a claim to the area defined by those methods are Canada, Denmark (through Greenland), Finland, Iceland, Norway, Russia, the United States and Sweden.¹⁶

For more than 20 years there have been speculations about the possibility of an Arctic legal mechanism that deal directly with the issues facing the region. In 1991 *the Arctic Environmental Protection Strategy (AEPS)* was founded. It was the first step in cooperation in the Arctic. In 1996 *the Arctic Council* replaced the AEPS. The council had in common with the AEPS the fact that it is only a discussion forum and has no binding legal status.¹⁷

The soft law system in the Arctic has been under debate, mainly whether or not a soft law or hard law system would serve the region better. Soft law regimes are often the foundation for further development into hard law. It has been shown by experience that the current soft law regime has been effective in addressing urgent issues. Intergovernmental cooperative efforts such as those of *the Arctic Council* and many other proved efficient to tackle issues.¹⁸ Then again *The International Union for Conservation of Nature and Nature Protection* along with many other organizations has suggested that a binding legal regime for the Arctic could be formed based on the one in the Antarctic.¹⁹

Ambassador Hans Corell stated that there is already a binding legal regime in the Arctic. By that Hans Corell is referring to *the Law of the Sea Convention*. He suggested that instead of trying to form a new legal regime we should strengthen the existing one.²⁰ Olav Schram Stokke has also suggested in his article “*A legal regime for the Arctic? Interplay with the Law of the Sea Convention*” that there already exists a legal regime although not a

¹⁴ *Ibid* at p. 24

¹⁵ Julia Jabour & Melissa Weber, “Is it Time to Cut the Gordian Knot of Polar Sovereignty?” *Review of European Community & International Environmental Law*, (2008), 17:1, at p. 29

¹⁶ *Ibid* at p. 25

¹⁷ Alternatives for an Arctic Treaty – Evaluation and a New Proposal at p. 14

¹⁸ Natalia Loukacheva, *Legal Challenges in the Arctic*. The 4th NRF open meeting, Oulu, Finland and Luleå, Sweden, October 5th – 8th, 2006. At p. 193

¹⁹ Olav Schram Stokke, “A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention”. *Marine Policy*, (2007), 31:4 at p. 2

²⁰ Hans Corell, *Innovation in the Arctic Governance: The possibilities and Limitations of a Binding Legal Regime for the Arctic*. Seventh Conference of Parliamentarians of the Arctic Region, Kiruna, Sweden, August 3rd, 2006. at p. 2

binding one which can be strengthened, and that a binding legal regime would not serve its purpose.²¹

Eight coastal states border the Arctic area. Those eight nations have undisputed sovereign control over their Exclusive Economic Zone. The most difficult issue when forming a binding legal regime for the Arctic is to get those nations to agree upon diminished rights in their sovereign area.²²

The solution might be as Olav Schram Stokke suggested a combination of soft law and *the Law of the Sea Convention*. The Convention could serve as a foundation for further soft law development.²³ All of the eight Arctic countries except for the United States have agreed upon *the Law of the Sea Convention*. Article 234 of *the Law of the Sea Convention* sets the framework for environmental protection.²⁴ However it was not built with the Arctic in mind and is therefore inadequate by itself.²⁵

In this paper it will be attempted to answer the question whether or not there is a need for a comprehensive legally binding regime for the Arctic. To be able to answer that question it is necessary to take a look at the current regime and to judge if it is adequate to deal with issues facing the Arctic. The current regime is based on various soft law agreements and *the Law of the Sea Convention*. Olav Schram Stokke stated that the current regime is sufficient in addressing environmental issues.²⁶ But when compared with the comprehensive Antarctic Treaty System it appears to be inferior.

The current Arctic Legal Regime

The United Nations Convention on the Law of the Sea is sometimes described as the Constitution of the Sea. In relation to the Arctic it is not perfect and might be described to be too general. It has articles that concern the Arctic directly like article 234 on ice covered areas but that article is very open to debate and is very general.²⁷

The 1991 Declaration on the Protection of the Arctic Environment and *the Arctic Environmental Protection Strategy* provided the base for the Arctic environmental regime.

²¹ See *supra* note 19 at p. 10

²² *ibid* 18 at p. 2

²³ *Ibid* at p. 10

²⁴ Encyclopædia Britannica, "Law of the Sea", Encyclopædia Britannica Online, 2009 (accessed 20th February 2009) <http://search.eb.com/eb/article-9066428>

²⁵ See *supra* note 2 at p. 21

²⁶ see *supra* note 17 at p. 10

²⁷ The United Nations Convention on the Law of the Sea, 10 Dec 1982, 263 U.N.T.S. 48, 33 ILM 1309 (1994)

The strategy provided the Arctic with non-binding soft law regulations and agreements unlike the Antarctic that is governed with a binding legal regime.²⁸

The reason behind the soft law decision instead of the binding one is that the Antarctic is an ice-covered continent while the Arctic is a marine environment surrounded by land governed by eight sovereign nations. Those nations come from different legal background each with a different understanding of environmental laws. It is hard to put all those different nations under one roof and tell them what they can and cannot do within their sovereign areas. For those reason the protection strategy was created, whose provisions are not binding as those of the *Antarctic Treaty System*.²⁹

The Arctic environmental protection framework is provided by domestic laws of the Arctic states. Domestic law development is influenced in accordance to international norms and treaties.³⁰

The current Arctic legal regime is built upon so called soft laws such as *the 1991 Declaration on the Protection of the Arctic Environment* and *the Arctic Environmental Protection Strategy (AEPS)*. When *the Arctic Council* was created in 1996 the AEPS was intergraded into it as a strategy for various working groups of *the Arctic Council*. The latest soft law agreements are *the 1998 Regional Program of Action for the Protection of the Arctic Marine Environment from Land Based Activities* and the 2000 *Arctic Council Action Plan to Eliminate Pollution of the Arctic*.³¹

The Arctic Council is the highest forum of international cooperation in the Arctic. The council does not have a legal personality which means that it cannot make legally binding agreements upon member nations. It is instead a high level forum meant to promote environmental protection development. This is stated in the declaration made in Ottawa, 1996 when the council was formed.³²

²⁸ Vodazasve, "Environmental regimes of the two Polar regions", Vladimir Lukic, 2007 (accessed 23rd January) <http://www.vodazasve.net/pdf/PolarEnvRegimes.pdf>. at p. 5

²⁹ *Ibid* at p. 5

³⁰ *See supra* note 7 at p. 4

³¹ *See supra* note 7 at p. 5

³² Arctic Council, "About Arctic Council," October 22nd 2007 (accessed 30th January 2009) <http://Arctic-council.org/article/about>

Soft law

When it comes to environmental law, it can be difficult to make legally binding treaties. Instead those two fields of international law have created the term soft law that has no strict legal value but has a great political influence and constitutes an important statement.³³ The term soft law is more political than anything else. The term is given to laws that do not stipulate mandatory compliance, concrete rights or obligations to those legal persons that they are addressed to.³⁴

What is meant by describing soft law as a political mechanism is that they consist of standards, commitments, joint statements or declarations of policy or intention, not to mention resolutions set by the UN. Soft laws are normally set by international organizations such as *the Arctic Council*.³⁵

There are three common features of those institutions or documents that use soft law. First there are those organizations that tackle matters of concern that are emerging in the world. Second new matters of concern are dealt with, such as global warming.³⁶

The third is relevant to the Arctic and that is the matter of political and economic issues. In some circumstances a state cannot give a legally binding statement or sign a binding agreement. In those circumstances there is still a need for the statements or actions from the state that does not need to have legally binding obligations. Actions of the state will not have legally binding effect but will serve as a guideline or a policy in the subject matter.³⁷

The Arctic Environmental Protection Strategy and the Arctic Council

After World War II during the Cold War the Arctic turned into a political playground for the United States and the Soviet Union with frequent passage of nuclear weapons. The Arctic was one of the last areas of the world to adapt or develop a political region. Excluding Inuit's and whaling there were no activities in the area.³⁸ Since the end of the Cold War there have been attempts made to develop international strategies to initiate cooperation in the Arctic.

³³ Encyclopædia Britannica, "soft law", Encyclopædia Britannica Online, 2009 (accessed 24th February 2009) <http://www.britannica.com/EBchecked/topic/930536/soft-law>

³⁴ Martin Dixon, *Textbook on International law*, 6th ed. (Oxford, Oxford University press, 2007) at p. 50

³⁵ Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University press, 2005) p. 197

³⁶ *Ibid* at p. 197

³⁷ *Ibid* at p. 197

³⁸ David Vander Zwaag, Rob Huebert and Stacey Ferrara. "The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters" in Alex G. Oude Elferink & Donald R. Rothwell, eds. *The Law of the Sea and the Polar Maritime Delimitation and Jurisdiction*, 1st ed. (Hague: Kluwer Law International, 2001) p. 233.

Three of the most important initiatives are *the Arctic Environmental Protection Strategy (AEPS)*, *the Arctic Council* and *the Polar Code*.³⁹

After two major environmental disasters, Chernobyl in 1986 and the Exxon Valdez oil spill in 1989, and various others with industrial pollutants being spilled in the Arctic ocean, it became clear that there was a need for a stronger Arctic legal regime.⁴⁰ Meeting was held in the Finnish town of Rovaniemi. Two years later, after lengthy negotiations a declaration on the protection of the Arctic environment and the Arctic Environmental Protection Strategy (AEPS) was adopted.⁴¹

The AEPS was built on soft law agreements that are not binding. That fact raised concerns whether or not it could serve its purpose.⁴² The AEPS did not reach its expectations and was in some ways flawed. Its objectives were to protect the Arctic ecosystem, to provide protection for natural resources, accommodate the traditions and cultures of indigenous people, it was to review the state of the environment and find and resolve pollution problems. Despite the importance of dealing with those issues and good intentions the AEPS, did not add much to the existing environmental programs. One of the criticisms was that it was too general and lacked direction and a concrete goal that it should strive towards.⁴³

The AEPS relied on cooperation from member states and participation in voluntarily activities rather than trying to establish a binding international treaty. The main reason behind this approach was the reluctance of the United States to enter into a binding agreement.⁴⁴

The AEPS strategy had three focus points. The first was that the members of the strategy had to meet on a regular basis to keep the progress going. The second involved indigenous people's involvement in the process. The third and final was that the AEPS divided its activities between working groups. The four groups were the *Arctic Monitoring and Assessment Programme (AMAP)*, *Protection of the Arctic Marine Environment (PAME)*, *Emergency Prevention, Preparedness and Response (EPPR)* and *Conservation of Arctic Flora and Fauna (CAFF)*. Later the task force on sustainable development was added. Those groups like AEPS relied upon volunteer cooperation of Arctic nations.⁴⁵

The most successful accomplishments of the AEPS were to prove that it was possible for the eight Arctic nations to sit down and discuss the issues facing the Arctic and try to

³⁹ See *supra* note 2 at p. 18

⁴⁰ See *supra* note 7 at p. 7

⁴¹ *Ibid* at p. 7

⁴² See *supra* note 38 at p. 234

⁴³ See *supra* note 7 at p. 9

⁴⁴ See *supra* note 41 at p. 235

⁴⁵ *Ibid* at p. 235

solve problems. The AEPS also showed that it was possible to begin an international assessment on environmental problems. The fundamental problem facing the AEPS was not the lack of will to solve problems but the lack of independent funds and the fact that it was not a formal treaty. Its importance as a forum for discussion on Arctic issues had been proven but its power to provide remedies were limited maybe because of political restrictions.⁴⁶

The Arctic Council

Because of the limitations of the AEPS *the Arctic Council* was created. The Council was an answer to the demand of a strategy that dealt with other matters than environmental issues, although protecting the environment played a large role.⁴⁷

In 1991 the creation of the Council was proposed. The progress of the AEPS was hindered in some way by politics. Realizing this Canada proposed a new higher level forum to discuss and act on Arctic issues. The council came into force with the Ottawa declaration in 1996.⁴⁸

The Arctic Council had many of the same problems the AEPS had had. Its main focus was on environmental laws but not the whole Arctic as it was intended to be. The work groups from the AEPS transferred to *the Arctic Council* and with that their problems. It did not have its own funding but had to rely on donations from member states. This lack of funding hindered its development.⁴⁹

The Arctic Council has since it was established studied and assessed the impact of climate change on the Arctic. The study was performed by AMAP and CAFF along with the International Arctic Science Committee. The Council also has a working group focusing on maritime issues in the Arctic. The PAME working group focuses on protecting the marine environment. One of its projects is the 1997 update on international agreement guidelines on offshore oil development. It also implemented an action plan for protecting the marine environment from land based hazards.⁵⁰

Both *the Arctic Council* and the AEPS have made an important impact on the development of international cooperation in the Arctic. But they are more like a forum intended to identify problems rather than solving them. They bring forward important guidelines but do not have any authority to enforce them. For example one of the working

⁴⁶ See *supra* note 2 at p. 19

⁴⁷ See *supra* note 7 at p. 9

⁴⁸ *Ibid* at p. 9

⁴⁹ See *supra* note 2 at p. 20

⁵⁰ *Ibid* at p. 20

groups of the EPPR has created response guidelines in case of an oil spill however it has not been implemented into each nation's laws and the response to an oil spill is still up to each individual nation.⁵¹

The Law of the Sea Convention

The Law of the Sea Convention (UNCLOS) forms the framework for future legal development in the Arctic.⁵² Ambassador Hans Correl stated in his lecture on the subject that there is already a legal regime for the Arctic. What he means is that the Arctic is already governed by a binding legal regime that is *the Law of the Sea Convention*, especially the one on Exclusive Economic Zone and the continental shelf plus some global conventions on the environment.⁵³

The first conference held by the UN on the Law of the Sea was held in Geneva in 1958. Four conventions were produced there, on the high seas, the territorial sea and the contiguous zone, the continental shelf and fishing and conservation of the living resources of the high sea. The UNCLOS is an international body concerned with rules of the sea.⁵⁴ Today most of the laws are to be found in the third convention which was signed on December 10th 1982. It has been said that the convention is a constitution for the oceans. Its main objective is to codify rules and laws regarding territorial waters, sea-lanes and ocean resources.⁵⁵

The UNCLOS regulates all ocean areas, the sea bed and the air above the sea. The treaty provides regulations for resource management and scientific researches. The Convention establishes three new international bodies: The International Tribunal for the Law of the Sea in Hamburg, the *International Seabed Authority* and the *Commission on the Limits of the Continental Shelf*, which carries out the bulk of its work in New York.⁵⁶

The Law of the Sea Convention codified changes adopted from the Geneva Convention in customary international law. Most significant are the rights of nations to establish 200 nautical mile exclusive economic zones or EEZ.⁵⁷ With the EEZ, coastal nations got the power over their activities in the area such as resource management,

⁵¹ *Ibid* at p.21

⁵² See *supra* note 13 at p. 261

⁵³ See *supra* note 20 at p. 2

⁵⁴ See *supra* note 19 at p. 2

⁵⁵ Law of the Sea,. (2009). In *Encyclopædia Britannica*. Retrieved February 20, 2009, from Encyclopædia Britannica Online: <http://search.eb.com/eb/article-9066428>

⁵⁶ Center for International Climate and Environmental Research–Oslo, Jorunn Gran, “Law and Order in the Arctic,” 11th September 2006 (accessed 5th February 2009) http://www.cicero.uio.no/fulltext/index_e.aspx?id=4271

⁵⁷ See *supra* note 19 at p. 2

environmental protection and scientific research. Navigation still remained a high sea freedom. The coastal nations do not have a full sovereignty over the area, rather certain rights over the resources. Other nations have no rights to conduct scientific researches or gather resources.⁵⁸

The general rule is that the rights of coastal nations to set and enforce rules on various activities within their EEZ diminish in accordance with the distance from the coastline. Rules are more extensive in the fields of scientific research and with the management of resources than with navigation. States can however set limitations on shipping within 12 nautical miles from land.⁵⁹

States have exclusive rights over their continental shelf and all resources that can be found there, with the exemption of copper and cobalt which are defined in the treaty as a common heritage of mankind and are controlled by a special regime.⁶⁰

There are special rules that apply to spatial areas with some special socio-economic or physical characteristic such as enclosed or semi-enclosed seas, found in articles 122-123, straits that are used by international shipping traffic and ice-covered areas, found in article 234.⁶¹

Canada's concern for foreign shipping traffic brought article 234 of the UNCLOS to existence. It allows coastal states to pass and enforce rules on pollution.⁶² *The Law of the Sea Convention* encourages states to set rules and standards to conservations and usage of marine species and rules on pollution from land based sources or sea-bed activities under national jurisdiction.⁶³ In some areas *the Law of the Sea Convention* limits the applicability of regional actions. This is done by setting the bar for minimum requirements and then maximum requirements. An Important example of this rule are the provisions concerning dumping of any sorts. Paragraph 6 of article 210⁶⁴ "*Pollution by dumping*" says that nations cannot make rules that are less effective in preventing, reducing and controlling such pollution than the global rules and standards such as those set forward in the 1972 London Convention.⁶⁵ This however does not mean that states can apply stricter rules within their EEZ which has been done before such as the banning of dumping radioactive material in the Baltic Sea in 1974.⁶⁶

⁵⁸ Gunnar G. Schram, Hafréttur, 1st ed. (Reykjavík: Háskólaútgáfan, 2001) at p. 166

⁵⁹ See *supra* note 19 at p. 3

⁶⁰ *Ibid* at p. 3

⁶¹ *Ibid* at p. 3

⁶² *Ibid* at p. 3

⁶³ *Ibid* at p. 3

⁶⁴ The United Nations Convention on the Law of the Sea, 10 Dec 1982, 263 U.N.T.S. 48, 33 ILM 1309 (1994)

⁶⁵ See *supra* note 19 at p. 3

⁶⁶ *Ibid* at p. 4

The convention came into force in 1994 after being agreed upon by 60 countries, now there are about 150 countries that have signed the convention.⁶⁷ The Arctic received little attention in the negotiation process of the third conference on the Law of the Sea. The tension between the United States and the Soviet Union made negotiation about military activities in the region impossible. The result was that little material concerning the Arctic directly got into the treaty.⁶⁸

Only one article had a direct influence in the Arctic and that was article 234. It provided guidelines on future development on ship traffic in the region. The article gives coastal states the power to enforce laws on maritime pollution in ice-covered areas within their exclusive economic zones. Despite the power given by article 234 there has been little development in environmental legislation since UNCLOS was signed.⁶⁹ The exception was *the Polar Code*, launched by Canada in the 1990's to address the issue of increased shipping in the Arctic. The cornerstone of *the Polar Code* is article 234.⁷⁰

The UNCLOS not only protected coastal states rights in their EEZ it also had guidelines for the protection for marine environment. Provisions concerning marine protection can be found in part XII of the convention. The general theme is set forth in article 192 which states that “*States have the obligation to protect and preserve the marine environment.*”⁷¹ Article 194 then further explains how nations can achieve those goals by cooperation and how to form their policies according to the treaty.⁷²

Section two of part XII is called Global and Regional Cooperation and includes articles 197-201. Those Articles set the guideline of how states should cooperate. Article 197 states the following:

*States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.*⁷³

⁶⁷ *Ibid* at p.2

⁶⁸ *See supra* note 2 at p. 21

⁶⁹ *Ibid* at p.21

⁷⁰ *Ibid* at .21

⁷¹ The United Nations Convention on the Law of the Sea, 10 Dec 1982, 263 U.N.T.S. 48, 33 ILM 1309 (1994)

⁷² *See supra* note 13 at p. 295

⁷³ *See supra* note 70

Other Articles important to mention are article 207 on pollution from land-based sources, article 211 on vessel-source pollution, articles 208 and 209 on seabed activities and article 212 on atmospheric pollution.⁷⁴

Although those articles provide only a set of guidelines for governments they are important groundwork for further cooperation and they are the first principles developed under international law on environmental protection to be codified since the 1950s.⁷⁵

The most influential article in the UNCLOS is article 234. It is the only article of the UNCLOS that directly affected the Arctic. Article 234 states:

*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.*⁷⁶

Article 234 is often referred to as the Canadian Clause. The article is the cornerstone of Russian legal regime in the Arctic.⁷⁷ Originally its purpose was to provide Canadian government with international support to protect its Northern waters.⁷⁸ Article 234 gives coastal states the power to enforce laws on maritime pollution in ice-covered areas within their exclusive economic zone. Rules based on article 234 must be non-discriminatory and although it gives certain rights to coastal states they cannot implement extensive marine pollution provisions for all polar waters because of navigation rights.⁷⁹

Article 234 talks about ice-covered areas. It does however not clarify what constitutes as an ice-covered area. In both polar regions ice is a big issue. It is important to define the

⁷⁴ See *supra* note 13 at p. 294

⁷⁵ *Ibid* at p. 294

⁷⁶ See *supra* note 70

⁷⁷ R. Douglas Brubaker, "The Russian Arctic Straits, vol. 14". (Boston: Martinus Nijhoff Publishers, 2005). At p. 79

⁷⁸ Rob Huebert. "Article 234 and Marine Pollution Jurisdiction in the Arctic". in Alex G. Oude Elferink & Donald R. Rothwell, eds. *The Law of the Sea and the Polar Maritime Delimitation and Jurisdiction*, 1st ed. (Hague: Kluwer Law International, 2001) at p.249

⁷⁹ See *supra* note 13 at p. 298

status of ice, whether or not it constitutes as land for the matter of setting baselines.⁸⁰ A definition of ice in the Antarctic has not been agreed on because it has yet to be decided whether article 234 can be applied in the Antarctic.⁸¹

One way of approaching this problem is to look at ice as a special area or *sui generis* that it is neither land nor sea. However there are many varieties of ice so that it is more practical to view the legal status of it depending on its location. Land based ice or glacial ice has the same equivalent to terra firma and should not be treated any different as the land it sits on.⁸²

It has been argued that the legal status of shelf ice is the same as land because it is several hundred feet thick, immobile and impenetrable by ships and has a considerable mass, it should not be described as a high seas area but rather considered as a natural boundary between land and shelf. Therefore the shelf should be considered by international law as land not water.⁸³

In the matter of fast ice there is another story. Fast ice should be classified as something in between water and shelf ice. It is formed by sea water and both Polar Regions have some amount of permanent fast ice. This is especially a big issue in both Russia and Canada because of indigenous population on ice covered areas. In respect of the nature of fast ice it should have the same characteristic in international law as the ice shelf and therefore be treated as land.⁸⁴ The matter of fast ice is of importance especially for the economy of indigenous people. Because of its semi permanent nature it can be subject to a claim where it exceeds further than the land.⁸⁵ It has been argued that the Inuit have a historical claim to the sea ice or the areas they float in and therefore it can be concluded that fast ice can be subject to some sort of historical sovereign claim.⁸⁶

⁸⁰ Bjørn Geirr Harsson, Chris Carleton, Ron Macnab & Olav Orheim, *Unclos and Ice Edge Base Line Problems, Third Biennial Conference of Ablos – Addressing Difficult Issues in the Law of the Sea*, Monaco October 28th - 30th 2003 at p. 1

⁸¹ *See supra note 13 at p. 301*

⁸² *Ibid at p. 262*

⁸³ *Ibid at p. 262*

⁸⁴ *ibid at p. 263*

⁸⁵ *Ibid at p. 266*

⁸⁶ *Ibid at p. 267*

Is there a need for a comprehensive legal regime for the Arctic?

There are multiple problems facing the Arctic environment, such as industrial and military activities. As it has been shown in the previous chapters there are regulations and rules concerning many aspects of Arctic environment. However the main problem is might be that they aren't comprehensive, meaning problems are dealt with one at a time. It needs a management framework to make it more efficient.⁸⁷

The scholars Clive Schofield and Tavis Potts stated in their lecture for the *Advisory Board on the Law of the Sea on Difficulties in Implementing the Provisions of UNCLOS* that there are three possibilities for the future of Arctic legal regime. The first being the status quo, states are unlikely to give away their sovereignty so that *the Arctic Council* will keep on being the main instrument for cooperation and *the Law of the Sea Convention* will lay the foundation. The second is a more flexible approach where the issues are dealt with one issue at a time, here international commitments and obligations play a bigger role but sovereignty stays intact. The third option is a comprehensive binding legal regime. That option might be hard to reach since because of political interests, coastal states are unlikely to give their rights away.⁸⁸

A comprehensive legal regime similar to the one in the Antarctic seems like a viable option for the Arctic. A comprehensive framework would take into consideration the whole ecosystem of the Arctic instead of this one problem at a time approach. It would in a more efficient way conserve the region's unique living resources. The framework would manage all human activities in the area with conservation as its main goal. This management would include all human activities that can have critical impact on the environment such as commercial fisheries, increased shipping, and mining activities of all sorts that are likely to have systematic impact.⁸⁹

There is a need for a concrete foundation and an efficient way of approaching environmental issues. For this to be possible there is a need for a legal regime that would supply legal order and policies.⁹⁰ Hans Corell has stated that there is already a binding legal

⁸⁷ See *supra* note 2 at p. 24

⁸⁸ The Australian National Centre for, Maritime Claims, Shipping and Governance in the Arctic: Emerging Challenges in a Warming North Ocean Resources & Security, Clive Schofield and Tavis Potts, 2008 (accessed 15th march 2009) <http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session2-Presentation2-Potts.pdf>

⁸⁹ See *supra* note 2 at p. 24

⁹⁰ Alliance of liberals and democrats for Europe, Jonas Gahr Støre, ALDE, 2008 (accessed 20th march 2009) http://www.alde.eu/fileadmin/images/Photo_Library/2008/080507_Arctic_governance/NorwegianMinisterJGS-ArcticGovernanceManuscript-070508.pdf

regime for the Arctic.⁹¹ *The Law of the Sea Convention* is recognized by all Arctic states except the United States.⁹²

The Arctic environmental protection has come a long way but there are still gaps in the international and regional agreements to protect the Arctic environment. Although the environmental protection has been taken to a higher level in the last decades with the foundation of *the Arctic Council* and various other international cooperation forums the environment in the Arctic is still not as protected as the Antarctica.⁹³ There are various gaps in the regime that still have not been addressed. There are no agreements on waste dump, marine resource management or military activities just to mention few of the gaps. Take mining for example, a polluting industry that can have severe impact on the fragile Arctic environment has not yet been regulated on an international level because the legal regime of the Arctic lacks adequate legal resources to control of environmental impacts of mining. This is the major dilemma of the current regime. It is unenforceable, lacking in specific a common goal to strive for, targets and timetables for action, and it suffers from under-funding.⁹⁴

These issues have been taken care of in the Antarctica but have yet to be closed in the Arctic. When Arctic legal regime is compared with the precise legal regime of the Antarctic it appears to be inferior or incomplete.⁹⁵ When the two poles are compared the question whether soft law system is sufficient to protect the Arctic arises and whether a comprehensive hard law legal regime would serve this purpose better.

In previous chapters it has been answered what is the current legal regime for the Arctic. *How is the current legal regime protecting the environment* is the first question that has to be addressed when deciding whether or not there is a need for a hard law legal regime. The current legal regime is based on soft law that means that it is not binding upon the Arctic nations but rather a guide to what they should aim for in environmental protection. This means that the effectiveness of the legal regime is up to the Arctic nations.⁹⁶

Although the legal regime of the Arctic is not perfect and has patched all the holes, it has tackled the problem of pollution much better than biodiversity. This might be because of many global agreements and by *the Arctic Council*. The Council has had many successful working groups focusing on pollution. *The Arctic Council* has produced a comprehensive plan to eliminate all sources of pollution and the regional program of action to reduce land-

⁹¹ *see supra* note 20 at p. 10

⁹² *see supra* note 20 at p. 2

⁹³ *See supra* note 7 at p. 55

⁹⁴ *Ibid* at p. 55

⁹⁵ *Ibid* at p. 55

⁹⁶ *Ibid* at p. 56

based sources of marine pollution.⁹⁷ The council has also made numerous guidelines such as the Arctic guide for emergency prevention and the Arctic offshore oil and gas guidelines just to mention a few. The council and its working groups have also gone on campaigns, such as the highly successful campaign to eliminate PCB in the Russian Arctic. But there are still holes in the regime as previously stated.⁹⁸

The council has been less successful when it comes to the protection of animals and biodiversity in the area. The legal framework for biodiversity is not as developed as the pollution regime. *The Convention on Biological Diversity* sets the framework for biodiversity but it is too general and does not go as far as it could in setting guidelines for member states. *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) is more to the point convention and adds more to the protection of species in risk.⁹⁹

Can the Antarctic Treaty work as a model for legal regime in the Arctic?

Original members of the Antarctic Treaty were twelve, today there are 45. The fact that those members include the most influential nations in international relations including all five permanent members of the UN Security Council gives the treaty a certain standard and empowers it.¹⁰⁰

At the time when the Antarctic Treaty was signed in 1958, environmental issues were not as high on the priority list as they are now. Article 5 of the treaty does prohibit the instalment and traffic of nuclear weapons and therefore acknowledges some environmental issues. Since 1958 there have been significant changes in environmental awareness. The Antarctica is one of the best protected areas in the world.¹⁰¹

The Antarctic Treaty System or the ATS manages the whole affairs of the Antarctic and its regions. An interesting thing about ATS is that it was not originally designed to protect the environment but it developed into the best environmental protection treaty to date. Its development started in 1961 when the Antarctic Treaty was signed. There are four major agreements that developed the environmental legal regime.¹⁰²

⁹⁷ *Ibid* at p. 56

⁹⁸ *Ibid* at p.56

⁹⁹ *Ibid* at p. 57

¹⁰⁰ *Ibid* at p. 58

¹⁰¹ *Ibid* at p. 58

¹⁰² National Science Foundation, "The Antarctic Treaty," 10th July 2008 (accessed 17th March 2009) <http://www.nsf.gov/od/opp/antarct/anttrty.jsp>

The Antarctic treaty provided the foundation for the treaty system and a sophisticated legal regime on environmental protection.¹⁰³ Its main objective was to settle disputes on sovereign rights and ensure scientific research rights. The treaty gave parties to the treaty right to inspect activities. This right for unannounced inspections set an important precedent in international law. The treaty also froze all territorial claims in article 4 and prohibited new claims.¹⁰⁴

The Convention for the Conservation of Antarctic Seals or the CCAS entered into force in 1978. Later the importance of the treaty becomes less because of the lack of interest in hunting the seal.¹⁰⁵

The Convention on the Conservation of Antarctic Marine Living Resources or the CCAMLR was adopted in 1980.¹⁰⁶ The treaty was to prevent overexploitation of living marine resources in the region. Its goal was to manage the sustained conservation of the Antarctic marine living resources with the ecosystem and precautionary approaches. This meant that they had to take into consideration all aspects of the ecosystem and how species are interdependent. It was one of the first multinational conventions to adopt this method. This convention was criticized that although it stated that it protected the marine life it did not work in real life because illegal fishing did still continue.¹⁰⁷

The Protocol on Environmental Protection for the Antarctic treaty also known as the Madrid protocol was signed in 1991 and came into force in 1998. With this treaty the legal regime of the Antarctic was completed. The treaties' purpose is set out in article 2: "*The parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.*"¹⁰⁸

When compared, *the Antarctic Treaty System* and the Arctic legal regime, the latter seems to be relatively undeveloped. The first distinction noticed when looking into the polar regions is that the Antarctic has land but the Arctic polar region is ocean and subsequently there is more emphasis on land in the Antarctic treaty rather than ocean.¹⁰⁹ An important

¹⁰³ See *supra* note 7 at p. 42

¹⁰⁴ *Ibid* at p. 43

¹⁰⁵ *Ibid* at p. 44

¹⁰⁶ Commission for the Conservation of Antarctic Marine Living Resources, General Introduction, 2006 (accessed 15th March 2009) <http://www.ccamlr.org/pu/e/gen-intro.htm>

¹⁰⁷ See *supra* note 7 at p. 45

¹⁰⁸ British Antarctic Survey, "Protocol on Environmental Protection to the Antarctic Treaty (1991)," Natural Environmental Research Council, 2007 (accessed 24th January 2009) http://www.Antarctica.ac.uk/about_Antarctica/geopolitical/treaty/update_1991.php

¹⁰⁹ See *supra* note 7 at p. 48

difference between the Polar Regions is the human activity in the area. There are no indigenous people in the Antarctic and there are no normal human activities in the Antarctic other than those of the scientists living there temporarily and about 15.000 visitors each year while there are about 3.8 million inhabitants in the Arctic. An important difference for this thesis is that the industrial activities in the Antarctic are minimal but in the Arctic industrial activities are increasing and causing ever growing environmental impacts.¹¹⁰

But the two regions also have one thing in common that is the harsh environment that makes them vulnerable to outside activities. They are isolated and hard to access which makes environmental accidents such as oil spills extremely hard to clean up.¹¹¹

The Antarctica can be governed easily by a single system treaty system with a comprehensive environmental regime. That is because the Antarctic is a single continent that has no permanent human inhabitants, no industrial or commercial activities.¹¹²

The dominant legal discussion in the Antarctic was the resolution of sovereignty over the Antarctic land mass and its offshore areas. This has been resolved by its treaty system. The oldest territorial claim was set forward by the United Kingdom. The area is controlled by the Foreign and Commonwealth Office as an Overseas Dependent Territory. Like in other parts of the Antarctic there are no permanent human inhabitants. The only inhabitants are scientists living in three stations and the Royal Navy maintains an ice patrol.¹¹³

Article 4 does not recognize any territorial claims old or new while the treaty is in force. It states the following: *"This article does not recognize, dispute, or establish territorial claims and no new claims shall be asserted while the treaty is in force."*¹¹⁴ There is an agreement to freeze all claims. This means that the Antarctic is open for all to use in a peaceful manner such as for scientific researches.¹¹⁵

This would not be easy to implement in the Arctic. The Arctic nations do have full sovereign rights over their exclusive economic zones up to 200 nautical miles.¹¹⁶ There is no one document for the current Arctic legal regime for environmental protection but that is not to say that the area is not protected. The legal regime is based upon the domestic

¹¹⁰ *Ibid* at p. 48

¹¹¹ *Ibid* at p. 49

¹¹² *Ibid* at p. 49

¹¹³ British Antarctic Survey, "Framework for Environmental Protection in the Antarctic Treaty System" Natural Environmental Research Council, 2007 (accessed 23rd January 2009)

http://www.Antarctica.ac.uk/about_Antarctica/geopolitical/environmental_issues/framework.php

¹¹⁴ British Antarctic Survey, "The Antarctic Treaty (1959)," Natural Environmental research council, 2007 (accessed 19th January 2009) http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/update_1959.php

¹¹⁵ *ibid*

¹¹⁶ See *supra* note 20 at p. 2

environmental laws of the nations, many of whom base it on article 234 of *the Law of the Sea Convention*. In the Arctic, the UNCLOS has played an important role along with bilateral and other regional initiatives to deal with common problems along with *the Arctic Council* and its soft-law regime.¹¹⁷ This can be described as patchwork, filling up the gaps with patches. This system is advanced and all of the Arctic nations are involved in the development by keeping domestic laws open for improvements in environmental protection.¹¹⁸

The Antarctic Treaty System provides a comprehensive environmental protection for the Antarctic. It makes specific requirements whereas the Arctic relies on voluntary agreements but those voluntary agreements or soft law can change into hard law.¹¹⁹ The difference between the hard law system of the Antarctica and the soft law governing the Arctic environmental legal regime is best looked into by comparing how the two system deal with similar issues. *The Antarctic Treaty System* treats prevention of marine pollution differently than the *Arctic Environmental Protection Strategy* or AEPS. The AEPS uses *the Law of the Sea Convention* and its principles to protect the marine environment. There is no mention of the UNCLOS in the Madrid protocol.¹²⁰ The marine protection principles are found in the Madrid protocol specifically in Annex IV there it is stated that its protocol comes from *the International Convention for the Prevention of Pollution from Ships (MARPOL)*. The MARPOL convention is not mentioned in AEPS.¹²¹

Annex I of the MARPOL deals with the prevention of pollution by oil. The Annex sets limits to the discharge of oil in designated areas. The concept of special areas is important because it bans all discharge of oil in areas vulnerable to pollution.¹²² However the Arctic has not yet been recognized as a special area and therefore MARPOL does not apply. The UNCLOS has little authority to put constraints on states exploitation of their shelf resources. Coastal states are allowed to set strict standards for oil exploitation but because the oil's its financial value states are reluctant to put constraints on it.¹²³

Mining activities in the polar regions have always been controversial. After the Madrid protocol came into force, mining has been forbidden in the Antarctic but that is up for

¹¹⁷ See *supra* note 19 at p. 21

¹¹⁸ See *supra* note 7 at p. 50

¹¹⁹ *Ibid* at p. 50

¹²⁰ *Ibid* at p. 50

¹²¹ *Ibid* at p. 50

¹²² International Maritime Organization, "Annex I: Prevention of Pollution by Oil" International Maritime Organization, 2002 (accessed 17th March 2009)

http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#7

¹²³ See *supra* note 19 at p. 6

review in 2041.¹²⁴ The status in the Arctic however is not as developed. There are no laws that prohibit mining operations. Laws governing mining operations are the domestic law of the Arctic nations. There is a working group in *the Arctic Council* that is developing guidelines of how to secure mines in the Arctic coastal areas.¹²⁵

The Antarctic is a military and nuclear free zone as stated in article 5 of the Antarctica Treaty.¹²⁶ In the Arctic it is a different story. *The Arctic Council* has no means to intervene in military activities. There are large amount of nuclear waste present in the Arctic especially in Russian harbours where numerous nuclear submarines are rotting away.¹²⁷

Waste disposal is dealt with in annex II of the Madrid protocol and the *Basel Convention* in the Antarctica. In this area there is a big difference between the two legal regimes because while the Antarctica is well protected while the Arctic relies on minimum requirements set forward by *the Law of the Sea Convention* and that has not been implemented.¹²⁸

Biodiversity protection and sustainability in the Arctic is incomplete. There is no overall regime but rather each species is managed separately. In the Antarctic there is a framework for protecting biodiversity that is found in Annex II of the Madrid Protocol. *The Arctic Council* has a working group working on a plan but it has not created significant results.¹²⁹

Sustainability of marine species is a big issue in the Arctic. The United States oppose the idea of restriction. It is the opinion of the other Arctic nations that restrictions on marine species are vital in sustainable development. This debate shows the clear difference in the legal environment of the two Polar Regions. In the Antarctica there is a rule set out in Article 3.1 of the Madrid Protocol that prohibits any hunting or gathering of marine species without a permit. In the Arctic the rules about hunting are up to the laws of the Arctic nations.¹³⁰

The Madrid Protocol states that the whole continent of the Antarctica shall be a natural reserve. The continent is divided into special areas and each area is managed separately based on its requirement for example is it a scientific research area or are there some species living there. In the Arctic it is up to Arctic states to designate an area and

¹²⁴ Cool Antarctica, "Human Impacts on Antarctica and Threats to the Environment- Mining and Oil" Paul Ward, 2001 (accessed 11th march 2009)
http://www.coolAntarctica.com/Antarctica%20fact%20file/science/threats_mining_oil.htm

¹²⁵ *see supra* note 7 at p.51

¹²⁶ *See supra* note 106

¹²⁷ *See supra* note 7 at p. 51

¹²⁸ *Ibid* at p. 52

¹²⁹ *Ibid* at p. 53

¹³⁰ *Ibid* at p. 53

protect it. *The Arctic Council's* workgroup CAFF has gathered the information about those areas and has set goals for the Arctic nations and urges them to follow those goals but with limited effect.¹³¹

Conclusion

The Antarctica Treaty in its current form was not formed over night. It developed out of necessity to resolve question about sovereign claims in the area, and the need to preserve scientific freedom to research. What helped to develop the systems were the resource management and environmental protection treaties.¹³²

The question is whether or not the Antarctic legal regime could be applied in the Arctic. The political and legal status of the Arctic is quite different from the one in the Antarctic. Antarctica is governed by a hard law system while the Arctic is governed by soft law and *the Law of the Sea Convention*.¹³³

Then there is the question whether or not there is already a legal regime available in the Arctic or at least whether there is a framework for a legal regime available in the Arctic. A significant difference between the poles is that the Antarctic is a continent surrounded by sea while the Arctic is an ocean surrounded by sovereign states. *The Law of the Sea Convention* gives certain rights to those coastal states to govern their waters inside the exclusive economic zone. It is unlikely that the states would give those rights away and give other states power to make decisions.¹³⁴ In 2008 five Arctic coastal states, the United States, Canada, Denmark (Greenland), Russia and Norway held a discussion. At that meeting they adopted a declaration called *Ilulissat Declaration*. The declaration states that *the Law of the Sea Convention* provides enough rights and obligation to serve as a framework for a responsible management of the Arctic and it is not necessary to implement a new legal regime. This Declaration puts the United States in a difficult position. They have not ratified the UNCLOS but still they adopt the *Ilulissat Declaration*.¹³⁵

Hans Correl comes to the conclusion that although the Antarctic treaty has been a great success, “it could hardly serve as a model for organising a comprehensive legal regime for the Arctic.”¹³⁶

¹³¹ *Ibid* at p. 54

¹³² *See supra* note 27 at p. 8

¹³³ *See supra* note 7 at p. 50

¹³⁴ *See supra* note 20 at p. 5

¹³⁵ Arctic Council, “Ilulissat-declaration,” May 28th 2008 (accessed 29th April 2009) <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>

¹³⁶ *See supra* note 20 at p. 6

There are good reasons to believe that the Arctic legal regime might evolve in a similar direction as the Antarctic treaty although it is hard to say if there will ever be a binding legal regime for all the Arctic area as such. But in the environmental legal field there is a common good for all the nations to in the direction to an agreement. *The Arctic Council* has made a significant contribution to the development of Arctic environmental legal regime that started with the formation of *the Arctic Environmental Protection Strategy* in 1991.¹³⁷

Hans Correl talks about the possibilities of forming a legal regime based on *the Law of the Sea Convention* articles 122 and 123 on cooperation of states bordering enclosed or semi-enclosed seas and article 234 on ice-covered areas. If this would be possible then the 1991 Madrid Protocol could be learned from.¹³⁸

The professor Timo Koivurova also mentions this possibility. Because of the constitutional nature of the UNCLOS it should be applied to the Arctic as a semi-enclosed sea as defined in article 122. If that were to be, coastal states would have greater obligation to cooperate in regard to environmental protection.¹³⁹

Closing argument

Because of the extreme cold weather in the Arctic, the ecosystem of the area is fragile and is difficult to sustain. This ecosystem makes the Arctic especially fragile against outside influence such as pollution and increased air temperature caused by global warming. In the light of those issues the need for organized environmental protection becomes apparent. It has been suggested that *the Antarctic Treaty System* could serve as a framework for future legal development in the Arctic.¹⁴⁰ However the situations of those two Polar Regions are not the same. Opposite to the Arctic which consists of frozen ice, the Antarctic is a continent covered almost entirely with ice, which no nations can have any sovereign claim over. In the Arctic there are eight nations Iceland, Greenland, the United States, Canada, Norway, Russia, Sweden and Finland, who govern their exclusive economic zone, beyond that the high seas is governed by article 86 of *the Law of the Sea Convention*.¹⁴¹ It is highly unlikely that those nations are willing to give away their sovereign rights over the region.

The Law of the Sea Convention came into force on November 16th 1994 in accordance with its article 308 after 60 nations had ratified it. It has been signed by more than 150 states

¹³⁷ See *supra* note 7 at p. 55

¹³⁸ See *supra* note 20 at p. 66

¹³⁹ Timo Koivurova, "Alternatives for an Arctic Treaty–Evaluation and a New Proposal" *Review of European Community & International Environmental Law*, (2008), 17:1, at pp 19-20

¹⁴⁰ See *supra* note 7 at p. 40

¹⁴¹ See *supra* note 13 at p. 285

although not all of the articles have been ratified.¹⁴² All Arctic states except for the United States have ratified the Convention¹⁴³ that soon became the framework for the development of international cooperation in the Arctic. It included rules about pollution but like in the case of dumping of waste it only set guidelines and a minimum standard, therefore imposing some constraints on governments.¹⁴⁴

One of the problems with *the Law of the Sea Convention* is that its existing rules have not all been implemented or in a limited way. There are articles regulating ice-covered water but that rule has only been implemented in a limited extent. The convention contained rules to promote scientific researches, environmental protection and other relevant measures but those rules also have only been implemented in a limited way. This might be because there is a lack of international unity of understanding its goal.¹⁴⁵

An important cooperation forum was the Arctic Environmental Protection Strategy (AEPS). One of the main focuses of the AEPS was to establish working groups that would assess various issues and try to solve them. The most successful accomplishments of the AEPS were to prove that it was possible for the eight Arctic nations to sit down and discuss the issues facing the Arctic and try to solve problems there. The AEPS also showed that it was possible to begin an international assessment on environmental problems. The AEPS proved its importance as a forum for discussion on Arctic issues but it lacked the political support it desperately needed.¹⁴⁶

In 1991 *the Arctic Council* evolved from the AEPS because of the need for a high level forum for consulting and discussing issues of the Arctic. Both *the Arctic Council* and the AEPS have made an important contribution on the development of international cooperation in the Arctic and have strengthened environmental governance in the region by preparing practical guidance on how to reduce risks associated with various activities, by improving knowledge, by highlighting the issues and dangers and by supporting Arctic states to implement commitments.¹⁴⁷ Both *the Arctic Council* and the AEPS are only discussion

¹⁴² The United Nations, “Overview and full text,” April 8th 2009 (accessed 27th April 2009)

http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

¹⁴³ Wikipedia. “United Nations Convention on the Law of the Sea”(accessed 19th April 2009)

http://en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea

¹⁴⁴ See *supra* note 19 at p. 10

¹⁴⁵ Alliance of liberals and democrats for Europe, Jonas Gahr Støre, ALDE, 2008 (accessed 20th march 2009)

http://www.alde.eu/fileadmin/images/Photo_Library/2008/080507_Arctic_governance/NorwegianMinisterJGS-ArcticGovernanceManuscript-070508.pdf

¹⁴⁶ See *supra* note 2 at p. 19

¹⁴⁷ See *supra* note 19 at p. 10

forums, they identify problems and form guidelines but have neither capacity nor authority to set binding rules and enforce them.¹⁴⁸

Ambassador Hans Correl, former Under-secretary-General for legal affairs and legal counsel of the United Nations has stated that *the Law of the Sea Convention* has status of a legal regime in the arctic and therefore there is no need to form a new one. Instead of trying to form a new legal regime he says that it would be better to focus on the resources that are currently available and try to strengthen them.¹⁴⁹

One way of strengthening the legal regime would be to strengthen *the Arctic Council*. It must be kept in mind that the Council is limited by its role as a discussion forums, it primarily points out problems, discusses them and considers a solution and also promotes cooperation on issues of common concerns. Under those limitations the Council could of course undertake further activities such as its PAME working group is working on assessment of shipping issues. *The Arctic Council* could make more use of that information to make a comprehensive approach to environmental issues posed by the increased shipping traffic which would strengthen *the Polar Code*. This could be a model of how to further develop the Council. There are many other ways of strengthening the regime, working group on fishery issues under the *2001 U.N. Fish Stocks Agreement* has also been suggested.¹⁵⁰

Olav Schram Stokke came to similar conclusion in his paper “A legal regime for the Arctic? Interplay with the Law of the Sea Convention.” There he states after examining the current legal regime that a legally binding Arctic environmental regime would not serve to enhance the function of those mechanisms that forms the current regime.¹⁵¹ Olav Schram Stokke then suggests that because of the political complications of forming a legal regime in the region “*the best answer would seem to be a flexible approach to norm-building that seeks productive interplay with existing institutions.*”¹⁵²

Hans Correl and Olav Schram Stokke both share a similar view. That *the Law of the Sea Convention* is the binding legal regime for the Arctic. As have been pointed out the convention does not focus on the special circumstances of the Arctic, which is obvious because only one article affected the Arctic directly, article 234. The Convention has its shortcomings in many areas of environmental protection such as oil drilling, shipping traffic and military activities. Here *the Arctic Council* along with many other international

¹⁴⁸ See *supra* note 2 at p. 21

¹⁴⁹ See *supra* note 20 at p. 8

¹⁵⁰ See *supra* note 2 at p. 25

¹⁵¹ See *supra* note 19 at p. 10

¹⁵² *Ibid* at p. 10

cooperation forums comes in. What *the Law of the Sea Convention* lacks in specific areas of environmental protection could be resolved by the Arctic nations with soft law agreements and treaties.

My conclusion is that a Legal regime based on soft law agreements would be more flexible than a comprehensive binding treaty. A flexible regime that uses *the Law of the Sea Convention* as a framework is likely to be more useful to deal with the environmental issues that develop quickly because of rapidly growing human activity in the region. Waiting for the world of nations to adapt a new legal regime would most certainly take many years to create and there would be no guarantees that it would work better. The *Ilulissat declaration* that was adapted by five arctic coastal states, states that *the Law of the Sea Convention* is the legal regime for the Arctic. The fact that the United States has not ratified the convention brings uncertainty and undermines the existing framework so it is of utmost importance that they ratify the convention.

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