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Legal credence of the United Nations Convention on the Law of the Sea in the changing Arctic

Bachelor's Thesis

Programme HAJB08/17 - Law, specialisation European Union and International Law

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Tallinn 2020

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The document length is 11199 words from the introduction to the end of conclusion.

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ABSTRACT

The vague and rather ambiguous contents of the United Nations Convention on the Law of the Sea (UNCLOS) have for a past decade or two promulgated disputing voices in the context of the Arctic region. Due to the warming climate and the effects thereof, the “legal epicentre” of polarized perspectives of the interpretation of the body of UNCLOS has been under development. Increased attention to the Polar regions has made many to question the effectiveness of the Convention of Law of the Sea, coping with the current challenges faced in the north. Thus, primacy in legal dialogue should lay on the future-oriented assessment of the Conventions ability to counter the potential risk factors. The paper aims to channel the state of the art to a comprehensive evaluative environment in order to indicate the overlaying irreplaceability of the Law of the Sea Convention.

Through qualitative research methods, following the line of the requirements for Bachelor Thesis at Tallinn University of Technology School of Business and Governance research, attempting to find answers and solutions to the topical question will be conducted by relying on primary and secondary sources.

Keywords: The United Nations Convention on the Law of the Seas (UNCLOS), Extended Continental Shelf (ECS), Littoral States, Arctic Council, North West Passage (NSW)

LIST OF ABBREVIATIONS

| | |
|---------|---|
| UNCLOS | The United Nations Convention on the Law of the Sea |
| ECS | Extended Continental Shelf |
| EEZ | Exclusive Economic Zone |
| bePOMAR | Best Practices in Ecosystem-based Oceans Management |
| NSR | Northern Sea Route |
| NWP | North West Passage |
| WWF | World Wildlife Fund |
| IMO | International Maritime Organization |

INTRODUCTION

Since the ratification of the United Nations Convention on the Law of the Sea, the instrument has in many ways entrenched its position as one the leading pioneers of international law with the sole purpose to establish a balance in the sphere of maritime governance while also fostering the universal realization of environmental protection and resource control. The past decades have brought along the concrete signs of climate change, which has ignited a discussion going beyond the academic circle. The environmental changes occurring in the Arctic Ocean and its surroundings have thus fermented questions concerning the adaptability of UNCLOS during the shift in circumstances.

The fundamental nature of the Law of the Sea convention has been described to represent an instrumental embodiment of a living unit.¹ Conceptualizing this vague term would serve no relevant purpose in practice but the ethos it places around the possession of regulative nexus that reflects characteristics bespoke to the Convention. Flexible gestalt obtained from the very day of implementation has been the structural pathway to thriving existence. Without the adoption of moderate ambiguity in its contents, the prosperous continuance of its application would have with high probability gained only a marginal success. The Arctic occurrence events have however come to illuminate its midst strengths in negative light. The lack of open, state-level opposition, is not merely a sign of the lack of ingredients for an extensive wave of authority-based criticism. Moreover, the lack of legitimate motive in topical context kept, for a number of years the discussion as a legal minority. Taking into consideration the current state of regional development, ignorance is no longer a viable option. It is crucial to notice that the involvement of economic factors has played the role of the leading accelerator regarding arctic legal

¹ Barnes, R. (2016). The Continuing Vitality of UNCLOS, *The United Nations Convention on the Law of the Sea: A Living Instrument*, 459-489.

discussion. The role of UNCLOS as the principal framework provider should undergo an evaluation of the obstacles it faces and whether it can remain interchangeable.

In order to answer this question, the research will geographically concentrate on the arctic regime, with additional reference to areas outside the primary scope for comparative purposes. It seizes to attain an overlaying picture of the arctic area inside the legal spectrum weighing the relevant indicators and placing them in the right context, further linking it to the evaluative prospects of the future success of the Convention. In short, the problem arises from the ambiguous nature of the Law of the Sea Convention that has due to accelerated climate led to a polarization of disputes in the interpretational determination of maritime boundaries and legal rights and responsibilities of the States with geographical connection to the region.² By using qualitative research methods, relying on the sources that represent a combination of the most prominent base works supported by the most recent academic publications, the goal is to concentrate on these issues.

The research question, of whether the Convention has the normative capacity continue to function as the leading body of legal framework in the region, will be evaluated through recognition of the most substantial issues in the arctic area. This is further followed by a presentation of viable future options thereof. The paper begins with contextualizing the topic to the subject in a practical manner first, considering its geographical context in order to gain an overlaying understanding of the matter in question. Namely, this contains a regional description with an illustration of the division of the area to elaborate in reaching the needed perception. The first main chapter also provides a brief description of the Convention's historical steps and crucial developmental turning points ending the initial chapter by linking it all to the relevant arctic context. The second main chapter will draw attention to the core of the problems themselves. It will focus on examining and evaluating the substantial obstacles that the Law of the Sea Convention faces in the current progressive cycle including continental shelf disputes, ocean boundary disputes, the aspects of environmental protection, and in the end taking into account the arising issues in the field of navigation and shipping. The last main chapter will seek to process and examine the evolution curve of the legal movements in the area with additional emphasis on the vertical and horizontal reforms that attain a level of probability. These primarily

² Law of the Sea: A Policy Primer, *The Fletcher School TUFTS University*. (2020). Retrieved from: <https://sites.tufts.edu/lawofthesea/>, 5 March 2020.

include inspections of the Arctic Council and its role in the future and evaluation of the establishment of a new multilateral “Arctic Treaty”.

1. ARCTIC REGION UNDER THE LAW OF THE SEA

For the purposes of the topic, the geographical definition of the Arctic is to be considered. According to generally recognized outlines the polar region lies north from the 66°33' N latitude.³ The area situated inside this artificial barrier, thus constitutes the territory which is a combination of adjacent seas, the Arctic Ocean itself, and numerous land areas under different jurisdictions. The fundamental characteristic that separates it from its southern counterpart is that majority of the area is dominated by water, these water masses that used to exist in solid form around the year have for past decades have started to experience melting phenomenon, molding the characteristics of the area in a way never experienced before. Despite its remote nature and predominance of high seas multiple States have legal rights to control and claim actions in the region. The distinction between the broad definition of the Arctic States and States that can be considered relevant under the Law of the Seas and the maritime zones is crucial since only United States, Canada, Norway, Denmark, and Russia have legal rights in the context of UNCLOS, despite of the fact that also Finland, Sweden, and Iceland hold the status of official Arctic nations.

1.1 Division of the Arctic area

As mentioned before, the USA, Canada, Norway, Denmark, and Russia all have their outer national borders determined in a way that places them in a relatively sovereign position in relation to legal and political power in the northern realm. Each of these States has under their jurisdiction a multi-level legal power to control the Arctic waters in a manner specifically

³ National Snow & Ice Centre: What is the Arctic? (2019) Retrieved from: <https://nsidc.org/cryosphere/arctic-meteorology/arctic.html>, 30 January 2020.

determined in the United Convention of the Law of the Sea. The source for the risk of confusion between the borders of each nation and the outer limits of their maritime jurisdiction is primarily dictated by the limits of State-specific continental shelves. In order to receive a coherent picture of the existing state of the division of the area the attached figure illustrates comprehensively the principal boundaries of each state's jurisdiction based on submitted continental shelf claims with the addition of USA's hypothetical continental shelf claim. For clarification, the map also depicts internal waters, territorial seas, and exclusive economic zones for each of the Arctic coastal states, special areas within exclusive economic zones with the inclusion of a highly disputed area of Beaufort Sea.⁴ As it is evident from the map illustration, there are still existing areas beyond the reach of national jurisdictions, which have been under the spectrum in the form of extended continental shelf claims. This subject will be examined in a more thorough manner later but in short, these claims would significantly amend the existing boundaries.

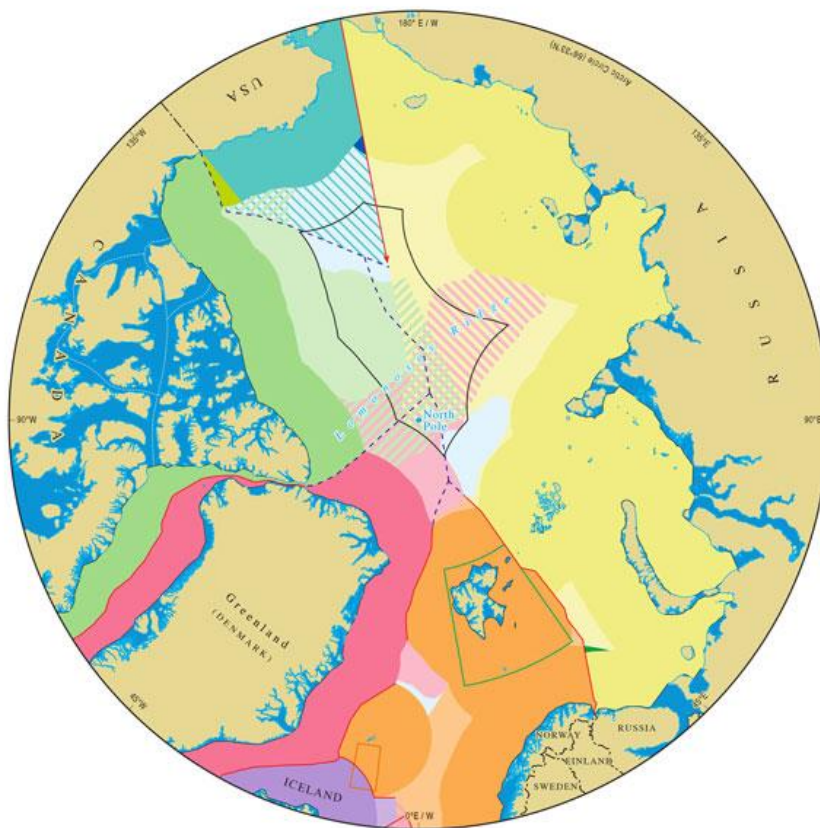


Figure 1. Map of maritime jurisdiction and boundaries in the Arctic region and accompanying briefing notes Source: Durham University: Arctic Maps

⁴ Durham University, *IBRU: Centre for Borders Research: Arctic maps*, Retrieved from: <https://www.dur.ac.uk/ibru/resources/arctic/>, 30 January 2020.

1.2 Treaty formation

The international body of law today known as the International Law of the Sea constitutes one of the most significant bases for international legislation combining the core of the United Nations Convention of the Law of the Sea with various treaties, legal framework, and state practice.⁵ The concept that drove to the establishment of the United Nations Convention on the Law of the Seas (UNCLOS), was the desire to secure the realization of rightful distribution and control of the world's oceans regarding the whole spectrum of actions practiced in the maritime areas. It was to determine the limits of states and constitute guidelines for their powers to operate between the national and international waters.⁶ Since signing the Convention in 1982 and becoming to effect in 1994 the purpose of the convention has widened along with the changes around it. The UNCLOS can be in many ways perceived as an epitome of international law in action with its utmost task to form a safety net for both ends of the spectrum. Above all it balances the rights of states with universal interests, fostering this relationship is in a key position to ensure flourishing continuance of the Convention. What the Law of the Sea treaty may lack in fastidious approach methods on the content it compensates with its impact zone, this is the key feature that most visibly separates it from the domestic legal framework.

1.3 Arctic context

One of the arisen areas of interest relates to its impact on the polar region and more specifically in the Arctic Ocean and its surroundings. Relatively rapid changes in the north have accelerated the discussion concerning plausible actions to minimize legal hazards, which include a re-evaluation of UNCLOS as the main regulatory tool to encounter potential implications. The ice melting as a phenomenon cannot be synthetically limited in effect to singular, isolated obstacles, the consequences of warming climate create a domino effect that rather has its impacts on multiple levels. A More thorough assessment of the Convention has to be exercised with an

⁵ Rothwell, D. R., Stephens, T. (2016). *The International Law of the Sea* Oxford: Hart Publishing

⁶ Rothwell, Stephens (2016), *Ibid.*

approach that takes into account the relation of internal and external critical factors. In order to concretize the process, two aspects are pooled from the body of subjects. Perspective of shipping for example has to be considered from the angle of increased accessibility, this opening will pose unique challenges on the degree of freedom each state has in the context of exploitation of its benefits whether navigational or purely economic.⁷ The extent of power UNCLOS imposes to the regulation of environmental management and observance of legitimate fulfillment of conduct also constitutes one of the paramount dilemmas, it is under interpretation to establish the balance to the relationship between the rights of sovereign States to exploit their resources rightfully provided with the question of responsibility to respect the Convention's principles and regulations.⁸ The doubts of the convention's ability to cover necessary steps stable continuance of legal state in the Arctic has already seen numerous signs, such as the European Parliaments unofficial proposition of a new multilateral convention following the lines of the Antarctic Treaty ratified in 1959.⁹

Even though many argue that direct state against state competition for territory or resources in the Arctic, in reality, is inexistent, it does not remove the fact that thorough assessment on the effectiveness of the existing legal management could be removed out of the equation.¹⁰ The mere fact that cooperation between states presents itself as a viable solution it does not eliminate the problems. Public messages given, for example by China that is in the position of an "observer state", stating in its white paper that all activities to explore and utilize the Arctic should be conducted in compliance with international treaties and general international law should not be given too much attention.¹¹ Only in the future the level and methods of engagement by these "outer" as well as arctic states themselves will actualize in its proper form. The pressure that is placed on UNCLOS is an opportunity to field test its regulative stability, especially in the eyes of the key players. From the theoretical perspective it seems to be the case that fostering its application now and in the becoming decades should serve the "utilitarian" model. The rising interest of implementing a new body of codes whether with the goal to dismantle the Law of the Sea Convention from its throne or proceed with a new parallel instrument should not be ignored.

⁷ Rothwell (2013), INTERNATIONAL LAW AND ARCTIC SHIPPING, *Michigan State International Law Review*, Vol. 22, 67-99.

⁸ Henriksen, T. (2016). Arctic Governance - *The Arctic Ocean, Environmental Stewardship, and the Law of the Sea*. Vol. 6, Issue 1, UC Irvine Law Review: UC Irvine School of law, 61-82.

⁹ Byers, M., Baker, J. (2013). *International Law and the Arctic*. New York: Cambridge University Press

¹⁰ Byers, Baker (2013). *Ibid*, 5.

¹¹ Hong, N. (2018). China's New Arctic Policy – *Legal questions and Practical Challenges*. Retrieved from: <https://www.nbr.org/publication/chinas-new-arctic-policy-legal-questions-and-practical-challenges/>, 1 February 2020.

Even though the idea of “carte blanche” chaos with big states orchestrating the framework for such conventions in a biased manner may seem utopian, the danger of unbalanced execution still exists

2. THE LEGAL CHALLENGES OF THE LAW OF THE SEA CONVENTION IN THE ARCTIC

From the great mass of obstacles faced when dealing with the legal management in the polar area, few prominent ones rise above others. These are distinguishable from the rest due to whether their ongoing process that is under a dispute or despite of the absence of direct conflict with the arctic actors these question and subjects, resulting from the vague nature of the Convention are under the investigation to minimize the negative effects they might possess and which could potentially jeopardize the legal balance and harmony in the region. Thus, for the purpose of the research the emphasis is built around these various law-affiliated aspects that pose the most realistic probability on the realization of the situation where the theoretical propositions of replacing instruments could come under implementation. Such challenges include Ocean boundary disputes and extended continental shelf disputes, Determination of the jurisdictional status of the marine waters, Navigational issues relating especially to the transit passages and, environmental challenges. At the end of the chapter the state and essence of cooperation in the region and in the context of disputed fields will be briefly examined.

2.1 Extended continental shelf disputes

The current legal regime of the continental shelf was negotiated during the third UN conference on the law of the sea and set out in part IV of the 1982 UN Convention on the Law of the Sea, which in its contents entitled to exploit its subsoil and seabed up to 200 nautical miles from its territorial baseline.¹² Since then, under Article 76 UNCLOS states have obtained the right to

¹² Byers, Baker, (2013), *supra nota*, 6.

claim additional length to their continental shelves. The extent of the state-particular decisions of extended continental shelf claims could in theory predominantly act as the leading terminator of state sovereignty, thus every party involved tries to reach as beneficial end-result as it is possible under the Convention guidelines. This process has in the face of its interpretation proved to be a problematic task. The current state of relating affairs seems to have sustained a peaceful atmosphere between the claimant states. Despite of overlapping claims concerning the boundaries in the North Pole by Denmark, Canada, and Russia and in the Lomonosov ridge between Denmark and Russia there is no reason to suspect that these issues would lead to open conflicts.¹³ Moreover a sign of the will to cooperate in the decision by all three states desiring to claim the inclusion of the North Pole to file their respective submission “without prejudice”, handing the power to the Commission to formulate their opinion on the matter.¹⁴ Even though the Commission does not have the mandate to reach an ultimate resolution to the situation, it expedites the procedure that is further determined by relying on international law framework.¹⁵ Thus the emphasis situates in the evaluative means and methods implemented by a scientific basis in order to gather the essential data required to further proceed with actions that will determine the status of each state in the Arctic with their destined extended continental shelves.

Article 76 of UNCLOS in its essence provides broad guidelines for the definition of the continental shelf and its identifying, the application of its wording in the light of the extended shelf claims however suffers from the same detrimental effects that are quintessential for its interpretation in all relevant fields. The ambiguity of the Article becomes evident when conclusive identifying of boundaries of the continental shelves is required in order to proceed with the claims.¹⁶ As it has been recognized during multiple occasions, the conflict of terminologies that arises from the execution of a scientific approach in contrast with the more legal and political instrumental execution hampers the clarity of Article 76.¹⁷ The radical divergence of concepts, contains the risk of converting the perspectives in a manner that could in worst-case scenarios only lead to an infinite loop without an exit route. This concretizes for

¹³ Koivurova, T., Käpylä, J., Mikkola, H. Finnish Institute of International Affairs: *Continental Shelf Claims in the Arctic: Will Legal Procedure Survive the Growing Uncertainty?* (2015) Retrieved from: <https://css.ethz.ch/en/services/digital-library/articles/article.html/192957/pdf>, 6 February 2020.

¹⁴ Melody, S. Arctic Today: *Like Denmark and Russia, Canada says its extended continental shelf includes the North Pole* (2019). Retrieved from: <https://www.arctictoday.com/like-denmark-and-russia-canada-says-its-extended-continental-shelf-includes-the-north-pole/>, 6 February 2020.

¹⁵ Byers, Baker (2013), *supra nota* 2, 7.

¹⁶ Parker, C. (2008). - Implications of Global Warming on State Sovereignty and Arctic Resources Under the United Nations Convention on the Law of the Sea: How the Arctic is no Longer *Communis Omnium Naturali Jure*, *Richmond Journal of Global Law & Business*, Vol. 8. Issue 2. Richmond: University Richmond School of Law, 195-248.

¹⁷ Parker (2008), *Ibid*, 215.

example in situations where a term designates the features of a natural object based on scientific research and study that through the Convention formulation cycle has obtained a form that contradicts the original meaning, steering it away from the applicable reality. The seemingly compromised goals when framing the lines of the Convention have in the course of time started to turn against it. The terms currently applied in the Arctic Ocean to compose a coherent picture of the guidelines for the distinguishing of ECS borderlines suffers from the lack of literal connection with the international law. The law of the Sea Convention does not explicitly define certain natural features that fall under the submarine elevations such as plateaux, rises, caps, banks, and spurs, which all could be used in determining the limits of extended shelves.¹⁸ As it has been stated, the circumventing of the common heritage principle that presents the very fundamentals of The Law of the Sea Convention is plausible in the ECS claims.¹⁹ In case alternative methods to override the contentious deficiencies would prevail and outer limits of national jurisdictions imposed by UNCLOS are not absolute, it hardly seems logical to rely on the Convention to settle disputes.²⁰ Through relinquishment of the principal certainty to preserve the freedom of the seas in extended maritime zones, UNCLOS has made itself vulnerable to the subjective expression of a State's cartographic designs.²¹

Thus, the question remains what methods should be followed to fill the vacuum to reach a fully functional terminology and moreover who is the conceding initiative that enables us to make it a reality. Despite of the absence legal of disputes in a practical sense, recognizing the outer limits for the extensions plays a major role in a wider spectrum. Ongoing conflicts concerning differing legal views especially in the context of maritime boundaries and navigational issues has its link to the status of continental shelves, attaining a finality is, therefore, crucial for the legal development of other issues where actual disputes occur.

2.2 Ocean Boundary disputes

¹⁸ Byers, Baker (2013), *supra nota* 3, 97.

¹⁹ Parker (2008), *supra nota*, 221.

²⁰ Parker (2008), *ibid*, 221.

²¹ Parker (2008), *ibid* 2, 221.

In case we ignore the question concerning the Hans Island between Canada and Denmark, which in reality does not hold any value to either of the states being practically a formal squabble, purely territorial issues in the Arctic have ceased to exist. The focus has instead been aimed towards the maritime domain, where the diverging perspectives have raised conflicts on which international law seeks to answer.²² The main driver over the disputed maritime areas is the desire to gain control over economically important areas where access to various resources such as sea minerals and oil is located. Light at the end of the tunnel was provided in the form of a new agreement at the beginning of the decade when Norway and Russia concluded on agreeing on the Barents Sea maritime area.²³ Despite of the prevailing direction of cooperation, on several occasions finding the common ground that would respect the guidelines of the Law of the Sea convention and International law has proved to be a laborious path. Rushed conclusions should still be avoided since the characteristics of each of the boundary disputes vary in their political, legal, and geographical features. To attain a certain level of understanding concerning the general obstacles faced in these disputed areas the most prominent, the Beaufort Sea boundary area is briefly examined with the purpose to pool integrative factors under the scope in order to examine the tools required to cope with the core of the problem. It should also be distinguished why direct adaptations by relying on precedents have had no success in the current case.

2.3 The Beaufort Sea boundary dispute

As mentioned, the Beaufort Sea boundary dispute between the United States and Canada poses the most prominent and legally significant dispute in the Arctic region. It traces back to the interpretation of the terms of the treaty between the United Kingdom and Russia signed in 1825.²⁴ This conflict of views has created a decade-lasting disagreement between the U.S and Canada about the offshore boundary in the Beaufort. Canada claims it runs due North following the land border between Yukon and Alaska's North Slope, whereas The U.S. maintains the sea

²² Byers, Baker (2013), *supra nota* 4, 14.

²³ Orttung, R., Wenger, A. (2016) *Region: Explaining Cooperation and Conflict in Marine Boundary Disputes Involving Energy Deposits*, Vol. 5 No. 1. Slavica Publishers, 75-96.

²⁴ Huebert, R. (2014) *The Globe and Mail: Why Canada, U.S. must resolve their Arctic border disputes*. Retrieved from: <https://www.theglobeandmail.com/opinion/why-canada-us-must-resolve-their-arctic-border-disputes/article21189764/>, 9 February 2020.

border should go out at a 90-degree angle from the land.²⁵ New data collected in pursuit of establishing the limits of the extended continental shelf in the region has re-ignited the conversation including a possibility of seabed resource rights stretching far beyond the 200-nautical-mile limit of the exclusive economic zone.²⁶ Significantly, at approximately 200 nautical miles from shore, the U.S.-claimed equidistance line crosses the line claimed by Canada, which follows the 141° W meridian, resulting in a situation where the legal positions of the two states if simply extended beyond the EEZ would appear to favor the other party.²⁷

The Barents Sea boundary Treaty Between Russia and Norway in 2010 inevitably put pressure on the shoulders of disputing parties at the Beaufort Sea, despite of surrounding progress it has turned out to be a difficult job to find a middle path between the two perspectives in a way that would satisfy both. In numerous sea boundary disputes after the establishment of the Convention general line of respect towards international principles has prevailed. In the current case, the treaty established in 1825 has its effects on the possible outcome and legal character of the procedures since the international law of maritime boundary delimitation will be relevant only if the US position concerning the inapplicability of the old treaty prevails, or alternatively if that interpretation comes up as a factor during negotiation. Dichotomy between the lines of the Law of the Sea convention compared to the treaty established in the nineteenth century exacerbates the legally functional absorption of these two bodies with each other.²⁸ The wording in Article 83 (1) UNCLOS states that in case there is a delimitation of a continental shelf between States with opposite or adjacent coasts any actions conducted to reach an agreement should be done according to the basis of international law.²⁹

Theoretical guidance derived from precedents dealing with aligning disputes could be applied with a critical mindset. The salience given for the geographical features when concluding the maritime boundary lines has raised trepidation concerning the negative effects this ignorance could cause in the context of boundary distinction.³⁰ The “exclusivity” given to such factors for example at the expense of economic and security-based aspects has been a topic of discussion. In

²⁵ Windeyer, C. (2016) CBS News: *Proposed U.S. Beaufort Sea drilling leases infringe on Canada's sovereignty, says Yukon*. Retrieved from: <https://www.cbc.ca/news/canada/north/proposed-beaufort-licences-infringe-arctic-sovereignty-1.3498469>, 9 February 2020.

²⁶ Baker, J.S, Byers, M (2012) *Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute - Ocean Development and International Law*, Vol. 43. Issue 1, 70-95.

²⁷ Baker, Byers (2012), *ibid*.

²⁸ Byers, Baker (2013), *supra nota* 5, 68.

²⁹ United Nations Convention on the Law of the Sea Article 83 *Delimitation of the continental shelf between States with opposite or adjacent coasts* 16.10.1994.

³⁰ Byers, Baker (2013), *supra nota* 6, 69.

the Gulf of Maine case the International Court of Justice stated that unless disregarding the security and economy in the particular context would have catastrophic consequences, provisional lines should not be adjusted.³¹ The court perspective was later re-affirmed in the Black Sea case solved in 2009 where the court gave the structural emphasis on the evaluation of relevant circumstances, which in practice have stabilized as geological and geomorphological factors.³² This, in reality, gives a little value to the Beaufort case, since the question lies beyond the limits of the EEZ, thus the case law and state practice with respect to the delimitation of extended continental shelves provide only a minimal legal aid on constructing an applicable approach on how submarine elevations that extend off a common continental margin beyond the state land border resulting in an overlap in bounded areas should be considered by an international court or tribunal charged with delineating a maritime boundary.³³

Since a strictly applicable approach methods relying on case law and customary state practices seem a distant tool to functionally exploit in the Beaufort Sea boundary dispute, new direction on relative grounds could provide the needed results in a manner that benefits both countries. This could realize in a form of bilateral agreement between the relevant states or a common ground with compromise solution giving rights and freedoms to the both sides of the boundary could pose an equitable solution, these various directions will be later discussed more thoroughly.

2.4 Law of the Sea convention role in the Arctic environmental protection

2.4.1 Predominant directions of development

Along with the rapid rise of attention received by the Arctic Ocean and Polar region, in general, has brought with it a range of potential obstacles that in the past would not have been propelled state-based initiative actions. Friction arises especially in circumstances where the question

³¹ International Court of Justice, Judgement No.67 12.10.1984

³² Byers, Baker (2013), *supra nota* 7, 69.

³³ Byers, Baker (2013), *ibid*, 74.

about the legitimate and efficient governance of the area is discussed in intergovernmental level, traditionally the established Arctic actors primarily the Arctic Council's eight member states are defending the status quo and the view that the Arctic Ocean can be governed best by the Council, the law of the sea, UNCLOS in particular and related multilateral environmental agreements.³⁴ A concrete example of a major area of concern that closely relates to the legal questions of the legitimate and effective establishment of governance are the potentially harmful by-products that can be caused by shipping activities in especially in ice-filled waters or land-based activities that in spite of all have negative effects in the arctic waters..³⁵

The methodology of the approach adopted by the Arctic Council seems to fail to address the inevitable change in the region that will cause unavoidable balance shifts in relevant fields. This transformation covers the "third party" involvement by non-arctic states, which have already expressed their interest to become a part of the area politically or economically. Many of these states already hold observer status in the Arctic Council, still, it seems that the Council desires to attain core governance in the hands of the actual arctic states including all the permanent members of the council. From the perspective of Best Practices in Ecosystem-based Oceans Management in the Arctic (bePOMAR) project report the goals pursued are best achieved by concentrated cooperation between the Council members focusing on flexible application, integrated and science-based decision-making, commitment to ecosystem-based oceans management. Area-based approaches and transboundary perspectives, stakeholder participation, and adaptive management.³⁶ Thus it is questionable whether it is the ideal direction for future regional development, especially when the global context of marine management is comprehensively and practically disregarded.³⁷

It should be asked whether the approach of the Arctic Council follows the lines of UNCLOS by guaranteeing the principal protection of the Ocean Environment in the most effective manner. Does the safeguarding of the Arctic Ocean require international governance at its fullest potential or is a regional approach method extensive enough to provide environmental protection and fulfillment of guidelines of the Law of the Sea Convention. Practicing too stringent conduct with

³⁴ Koivurova, T., Duyck, S. (2010), A new ocean to govern: Drawing on the lessons learned in marine management to govern the emerging Arctic Ocean - *The future of international environmental law*, Tokyo: United Nations University Press, 179-200.

³⁵ Dunbar, M., Barr, W., Ostenson, N.D., Bird, J.B., Dumond, D.E., Armstrong, T.E., Ingold, T., (2019), Arctic - NORTHERNMOST REGION OF THE EARTH – *Encyclopaedia Britannica*, Encyclopaedia Britannica inc. Retrieved from: <https://www.britannica.com/place/Arctic>, Debruary 13 2020.

³⁶ Best Practices in Ecosystem-based Oceans Management in the Arctic (The Norwegian Polar Institute...2009, 1-116)

³⁷ Koivurova, Duyck (2010), *supra nota*, 192.

the exclusion of global element undoubtedly predisposes the region to environmental hazards, since the legal monitoring of fulfillment of legal principles will increase in the level of effort required. The whole issue polarizes when ice melting extends to high seas, in principle, every state with their fishing and commercial fleets can make use of many parts of the Arctic Ocean, in particular the large high seas area at the center of the Ocean.³⁸ Crucial for the coastal states should be the consideration of the types of solutions that might be available to engage other countries in Arctic Ocean governance in the future. As it is further analyzed, UNCLOS's structural weaknesses may contain a practical risk of covering the necessary normative steps to enclose the environmental protection in the northern marine region. In addition, the International Convention for the Prevention of Pollution from Ships known as the MARPOL has shown signs of success in the international maritime field.³⁹ Inclusion of field-specific Conventions as a permanent part of UNCLOS practical application, will elaborate the process to standardize the prevention of marine-pollution in a more comprehensive manner.

2.4.2 Practical obstacles

The probabilities of the Law of the Sea to cope successfully with the transformations should be evaluated with emphasis on the evaluation of realistic power that Convention guidelines may or may not possess. Compliance with relevant rules governing marine environmental protection and the potential weakness of rules regulating land and vessel-based marine pollution at the global level pose prominent dangers and should be taken into closer inspection.

Foundational form of the Convention already lacks specific articulation, the Article 192 establishes the core for the environmental framework in the treaty only stipulates States to have the obligation to protect and preserve the marine environment without further differentiation of categories of actions.⁴⁰ The lack of distinction cannot be compensated even with the comprehensive specification of the sources of pollution in Article 194 1-5, which covers source related factors as part of protection.⁴¹ Even with the "all-source" wording, the instrument guidelines alone remain too general in nature to provide plausible security for the fulfillment of

³⁸ Koivurova, Duyck (2010), *ibid*, 200.

³⁹ Bimie, P., Boyle, A., Redgewell, C. (2009). *INTERNATIONAL LAW AND THE ENVIRONMENT*. 3rd ed. New York: Oxford University Press.

⁴⁰ United Nations Convention on the Law of the Sea Article 192 *General obligation* 16.10.1994.

⁴¹ United Nations Convention on the Law of the Sea Article 194 *Measures to prevent, reduce and control pollution of the marine environment* 16.10.1994.

effective realization of environmental protection.⁴² Overall the Convention seems to reflect a paradigm shift in the international law of the marine environment from the freedom to pollute to an obligation to prevent pollution. Under the Convention, the primary focus is not on obligations of responsibility for damage, but on general and comprehensive regulation to prevent marine pollution. In this sense, it may be said that the cardinal principle of the legal regime for the protection of the marine environment changed from the discretion of States to the duty of protection by States.⁴³

The lack of prohibitable stipulation of specific actions certainly forms a void for the credibility of the Law of the Sea Convention, its concrete impact to the state-source conduct cannot be predicted but it is clear that temptation to perform avoiding actions is more effortlessly made possible by the vague wording of UNCLOS Articles.

2.5 Transit of passage of sea routes and navigational issues

Accelerated melting of ice enables a unique prospect for economic exploitation of the area beyond local operations, that purely focus on the collection of natural resources. The decrease in the dependence on seasonal marine traffic in the Arctic Ocean presents an opportunity for states to use these newly open routes resulting in faster and shorter sea voyages, which will be in benefit especially for commercial shipping. The international regulation of maritime shipping is primarily undertaken by global bodies and instruments of global application, with an attempt to guarantee an existing international community with globally uniform international regulation.⁴⁴ The law of the Sea convention obtains the fundamental task to safeguard this interest by only allowing unilateral coastal State prescription in a few situations.⁴⁵ The convention stands in the position to identify the dangers that are prone to rise alongside the increased operations in the arctic waters. This task is however compromised, since internationally binding instrument for the standards of shipping related requirements and operational conditions lacks the credibility of

⁴² Yoshifumi, T. (2012). *The International Law of the Sea*. Cambridge: Cambridge University Press

⁴³ Yoshifumi, (2012), *ibid*, 307

⁴⁴ European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010. Framework Service Contract, No. FISH/2006/09 – LOT2. Summary Report submitted to: DG Maritime Affairs & Fisheries

⁴⁵ European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010, *ibid*.

“hard law” in the eyes of states.⁴⁶ Most prominent of the faced challenges will be discussed below which namely include the passage related issues and challenges in the sphere of navigation and shipping that contain questions such as the geographical scope of applications, the types of vessels covered, and the strength of regulatory measures.⁴⁷ The goal is to characterize the core arguments that could be used against UNCLOS as the main “arctic operative”.

2.5.1 Northern Sea Route

The Northern Sea Route is a shipping lane between the Atlantic Ocean and the Pacific Ocean along the coast of Russia going across the Arctic Seas.⁴⁸ Even though attention has mainly been steered towards upon dispute rising in the Northwest Passage between the US and Canada, the legal status of the strait dictated by Russia has created friction especially between the West and Russia on legal questions.

The perspective animosities that Russia with its rightful claims for the passage that trace back centuries are likely to increasingly polarize with proponents of navigational freedoms provided primarily by International Law of the Sea Convention.⁴⁹ As receding ice makes Arctic seaborne logistics viable and pressure from non-arctic such as Germany and China has experienced drastic shifts in actions towards the polar regime, the collision between the Russian view in contrast to the “international” perspective supported by states with the ambition to benefit from the accessibility to these waters will most likely pose challenges.⁵⁰ In 2012 Russian federation revised it’s “arctic legislation” as the newly promulgated Federal Law on the NSR, on July 28th was established.⁵¹ It the built basis for further specific regulatory acts to have an effect on commercial navigation on the waters of the route with an ultimate goal to discuss the processes

⁴⁶ Ostreng, W., Eger, K., Fløistad, B., Jørgensen-Dahl, A., Lothe, L., Mejlænder-Larsen, M., Wergeland, T. (2013). *SHIPPING IN ARCTIC WAYERS: A Comparison of the Northeast, Northwest and Trans Polar Passages*. Berlin: Springer-Verlag.

⁴⁷ Loukacheva, N. (2010). *Polar Law Textbook*. Copenhagen: Norden

⁴⁸ *Arctic Bulk: NORTHERN SEA ROUTE - the shortcut between Asia and Europe*, retrieved from: http://www.arcticbulk.com/article/186/NORTHERN_SEA_ROUTE, 19 February 2020.tje6

⁴⁹ Lincoln, E.F, (2013). Climate Change and Security: Navigating an Ice-Free Arctic - Russia's Policy on the Northern Sea Route in an Era of Climate Change. *The RUSI journal*, Vol. 158, Issue 3, 44-52.

⁵⁰ Blunden, M. (2012). Geopolitics and the Northern Sea Route, *Oxford Academic: International Affairs*, Vol. 88, Issue 1, 115-129.

⁵¹ Solski, J.J. (2013). New Developments in Russian Regulation of Navigation on the Northern Sea Route, *Arctic Review on Law and Politics*, 90-119.

leading up to the decision made and direction is taken, as well as to illustrate the implications of the new legislation for navigation on the NSR.⁵² According to the contents of the adopted rule it applies to the entire maritime area. Seas with inland character and the territorial sea remain under State sovereignty with an additional provision of the right of innocent passage of foreign ships applying to the territorial sea.⁵³ The rule states that the contiguous zone and Russia's exclusive economic zone (EEZ) are included in the NSR waters where Russia has certain sovereign rights and limited jurisdiction but not full sovereignty and where navigational freedom is applied.⁵⁴ The view taken by the Russian Federation collides UNCLOS since the Convention permits the authorization-based procedure for navigation to be extended to include territorial sea and the EEZ regardless of the right of innocent passage and the freedom of navigation.⁵⁵ Russia invokes the articles 21 and 234 UNCLOS in order to grant justification of its authoritative and legislative position.⁵⁶ Article 21 stipulates that coastal state obtains the right to pass laws and regulations in the area of the territorial sea if these actions serve the purpose to guarantee the safety of navigation, preserving the environment and resources.⁵⁷ In consideration of the EEZ they have justified their view by citing the "arctic" Article 234, which states laws and regulations in these vulnerable areas as a part of EEZ, where ice cover occurs most of the year to be appropriate in order to prevent and secure safe navigation and realization of environmental hazards.⁵⁸

The loudest voice of the opposition during the last decade has emanated from the US, the main argument against the state of the NSR is the status of various straits along the route, and their connection with International law guaranteed right to the transit passage.⁵⁹ Their concern of the navigational freedom conceptualizes around the provided reality of Russia's views that have made no exceptions for vessels enjoying immunity such as warships, naval auxiliaries, and other ships owned or operated by a state and used only for government non-commercial services.⁶⁰ The new amendment was introduced in 2018 with the utmost goal to clarify the legal nature of the "contested" areas and navigational rights therein, with statements that seem to layout an

⁵² Solski, (2013), *ibid*, 1.

⁵³ Todorov, A. (2019). *Russian International Affairs Council (RIAC): Where does the Northern Sea Route Lead to*, retrieved from: <https://russiancouncil.ru/en/analytics-and-comments/analytics/where-does-the-northern-sea-route-lead-to/>, 19 February 2020.

⁵⁴ Todorov, (2019) *ibid*.

⁵⁵ United Nations Convention on the Law of the Sea, 16.10.1994.

⁵⁶ Todorov, (2019) *supra nota*.

⁵⁷ United Nations Convention on the Law of the Sea, Article 21 *Laws and regulations of the coastal State relating to innocent passage*, 16.10.1994

⁵⁸ United Nations Convention of the Law of the Sea, Article 234 *Ice-covered areas*, 16.10.1994.

⁵⁹ Todorov, (2019) *supra nota 2*.

⁶⁰ Todorov, (2019) *ibid*.

officially exhaustive attitude on the right of warships beyond the territorial sea in the NSR area.⁶¹ The support attained from UNCLOS Articles 236 and its arctic counterpart 234 in the case of internal and territorial waters for non-naval vessels cannot be used as a legitimate rationale for regulative restrictions in the EEZ for state- sourced warships.⁶²

It should be pointed out that despite the ultimate alignment on the views of the status of the warships and their navigational and operational limitations sources for disputes so not disappear all along. Sign of further continuance of tension is the plan by Russia to introduce a requirement for notification only in the NSR's territorial sea, which could culminate on the braking test of the Law of the Sea instruments when states take tentative steps to find the limits of tolerance and loyalty to the Convention.⁶³ As it becomes evident from the recent events NSR problematic atmosphere thrives principally on collisions regarding on navigational matter, this does not remove the reality of sphere of obstacles outside of the subject but for example, the issue of the right to natural resources along the NSR will not be settled conclusively until a decision on Russian claims to extended continental shelf filed under UNCLOS will reach their final form.⁶⁴

2.5.2 The Northwest Passage

In the past decades, Canada's sovereign control of the Northwest Passage has been the subject of government protests from such facets as the United States and the European Union with academic criticism giving their respected support to the opposition with one of the most compelling arguments being that Canada has broken faith with its own commitment to multilateralism.⁶⁵ At the core of the altercation is the "interpretational" state of facts that currently is held by the Canadian Authorities. Canada perceives that all waters that together combine the straits called the Northwest Passage are internal waters and thus fully belonging

⁶¹ Todorov, (2019) *ibid* 2.

⁶² Todorov, (2019) *ibid* 3.

⁶³ Todorov, (2019) *ibid* 4.

⁶⁴ Górski, J. (2018). Northern Sea Route: International Law Perspectives, Erokhin, V., Gao, T., Zhang, X., *Handbook of Research on International Collaboration, Economic Development, and Sustainability in the Arctic*, 282-313. Hong Kong: IGI Global.

⁶⁵ Conde, E., Sánchez, S. I. (2016). *Global Challenges in the Arctic Region: Sovereignty, environment and geopolitical balance*. 11st. ed. London: Routledge

under the national jurisdiction.⁶⁶ This will automatically grant the state the power to restrict access to these waters by foreign ships. Without the transit passage right, exploitation of the route as a more viable option for the Suez and Panama canals by rendering shorter naval journeys in time and distance cannot be commenced.

The first and foremost claim made by the Canadian government to secure their role in the waters of NWP is the indication based on historical right over the maritime space under International law. Historic title may be obtained if it has for a considerable length of time, effectively exercised its exclusive authority over the maritime area in question with an additional requirement of acquiesced practiced by those who are affected by it in a direct manner.⁶⁷

In order to determine the status of the Northwest Passage as an eligible part of the international strait through which a right of navigation exists, evaluation based on the International law should be conducted with an additional emphasis on the test of the NWP on the functional criterion of international straits.⁶⁸ The aspect that should also be taken into consideration is the fact that the current baselines of the Canadian waters overlap with the lawful baselines going to the territory of high seas. Even if established to legitimately include these sections of the sea the international community would still enjoy the right of innocent passage through those waters, UNCLOS provides that where the establishment of straight baselines has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage still exists in those waters.⁶⁹ The vague output of the Convention brings its own contradictory to the table, in theory, the Article 234 particularly intended to secure the northern environment could be used by Canada to gain credibility behind their arguments. According to the wording of Article 234 the coastal state may take measures within the limits of its EEZ, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create potentially dangerous situations.⁷⁰ Bartenstein has accentuated in his text that words “where” and “limits” may contain unintended interpretative lacunas concerning the territorial scope of the article and especially the indication of the operational limits on the EEZ.⁷¹ It seems that the

⁶⁶ Byers, Baker (2013), *supra nota* 8, 131.

⁶⁷ Lalonde, S. (2018). The Debate Over the Legal Status of the Northwest Passage, *Explanatory Notes by Dr. Suzanne Lalonde, Faculty of Law, Université de Montréal*.

⁶⁸ Todorov, a. (2017). The Russia-USA legal dispute over the straits of the Northern Sea Route and similar case of the Northwest Passage, *Arctic and North*, 62-75.

⁶⁹ Kraska, J. (2007), *The Law of the Sea Convention and the Northwest Passage, THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW, Vol. 22, No 2*.

⁷⁰ United Nations Convention of the Law of the Sea, Article 234 *Ice-covered areas*, 16.10.1994

⁷¹ Bartenstein, K. (2011). The “Arctic Exception” in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?. *Ocean Development & International Law*, Vol. 42, Issue 1-2, 22-52.

decision of the ultimate approach method depends on the case-by-case adoption of the powers that the Convention Article 234 provides for the coastal states.⁷² This originates from the unique aspects of the Arctic regime, where prevailing circumstances differentiate themselves from the general target areas that UNCLOS serves to protect. Volatile nature of the north combined with instrumental obscurity for example visible in the notion “most of the year” in the Article 234 meaning the characterization of the arctic leaves room for adaptations.

Article 234 finds a further connection to the straits and navigational rights through Article 233. The latter establishes the link as a part of areal protection that mandates coastal states to safeguard its fulfillment by navigation in accordance with the Convention guidelines.⁷³ In relevant context the mutual coherence between the Articles is evident and neither of the Articles does exclude or hinder the realization of the purposes of their respective goals, thus they can be seen as one from the navigational perspective.⁷⁴ To legally argument justified status of internal waters in the NWP appears to find some support from the International law.

There is little dispute around the fact that the Northwest Passage technically connects two bodies of waters together, which is the fundamental requirement to obtain the status of an international strait. Despite the common recognition, reliance on the particular Article 37 by the US and other opposers is not conclusive.⁷⁵ In practice the applicable approach sources its roots to the Corfu Channel case, which established an additional requirement for the distinction of a body of water to be considered as straits in international perspective.⁷⁶ The functional criteria alongside the geographic criteria have provided for Canada an opening to argue that the Northwest Passage does not qualify as an international strait.⁷⁷ The of volume of commercial traffic transiting through these waters is on such a minor level that in practice it does not constitute an importance for international shipping. However, the contradiction between the Corfu precedence case and UNCLOS wording cannot be disregarded. The Convention does not contain requirements for additional tests for recognition of a maritime area as an international strait, thus there is no authority to pose an idea that a strait is only a strait if it meets a certain minimum threshold of

⁷² Bartenstein, (2011), *ibid*, 9.

⁷³ United Nations Convention of the Law of the Sea, Article 233 *Safeguards with respect to straits used for international navigation*, 16.10.1994.

⁷⁴ Bartenstein, (2011), *supra nota*.

⁷⁵ Kennair, J. (2012). AN INCONSISTENT TRUTH: CANADIAN FOREIGN POLICY AND THE NORTHWEST PASSAGE, *Vermont Law Review*, Vol. 34, No. 15, 16-34.

⁷⁶ Kennair, (2012). *Ibid*, 25-26.

⁷⁷ Burke, D., C. (2018), *Oxford Research Group – Breaking the cycle of violence*, The Northwest Passage Dispute, retrieved from: <https://www.oxfordresearchgroup.org.uk/blog/the-northwest-passage-dispute>, 20 February 2020.

shipping traffic, a specific number of transits or any other actions with relatable nature.⁷⁸

Whether Canada should argue that the Northwest Passage is part of Canada's internal waters before an international tribunal remains officially undetermined, reaching towards disclosure for the issue in the possible expense of receiving negative outcomes obstructs the realization of actions.⁷⁹

The endowment of leeway that UNCLOS gives for the states in relation to the interpretation of the respective Articles can be seen above all a convention-based phenomenon. The issues that develop are fundamentally in majority of the situations enabled to evolve due to the degree of interpretative freedom. The general conclusion suggests that the current international legal framework lacks functional character by steering the restrictiveness in the wrong direction and that it needs to be more flexible concerning sui generis areas such as the Arctic.⁸⁰ That it may be concluded that the ambiguous nature of the Convention hinders the process of finding viable solutions to the challenges and disputes on the polar region. In the case of the NWP, this is a clearly visible, UNCLOS provides for Canada a tempting opportunity to secure their position in the arctic by referring on the Articles that are vague enough in their contents to sustain the state of dispute. This might however turn out to be detrimental to the legal and political development in the area where cooperation is crucially required. The future will, most likely expose this problem to its core when ever-growing attention in the Arctic area increases along with the warming temperatures.

2.5.3 UNCLOS as a part of arctic shipping regulations

Before proceeding further, narrowed inspection purely around regulative steps that suffer from ambiguities surrounding the shipping policies should be mentioned. Maritime shipping under the UNCLOS framework in the Arctic Ocean has shown signs of de-alignment, which

⁷⁸ Kraska, (2007), *supra nota*, 274.

⁷⁹ Kennair, (2012), *supra nota*, 28.

⁸⁰ Rowe, R. (2019). *The United Kingdom Mutual Steam Ship Assurance Association*, Legal Article: The Northwest Passage - What is its status under the international law of the sea?. Retrieved from: <https://www.ukpandi.com/knowledge-publications/article/legal-article-the-northwest-passage-what-is-its-status-under-the-international-law-of-the-sea-147500/>, 22 February 2020.

predominantly is a consequence of the international nature that the Convention obtains. The arctic suffers from the absence of area-specific rules that has led to various challenges. Vessel-source pollution, regulated by UNCLOS prevails as the most pronounced issue. From UNCLOS perspective, the responsibilities of vessel-source pollution are predominantly directed to flag States and coastal States.⁸¹ However, Article 236 of the Convention regarding the protection and preservation of the marine environment releases warships and other vessels on government non-commercial service from this liability.⁸² Moreover, the general rule only by its wording includes pollution caused by vessels, the definition of which is not broad enough to include anchoring or discharges of ballast water.⁸³ The conclusion that can be derived is that there exists a lack of legally binding standards within the full range of substantive IMO standards, aside from Article 234 of UNCLOS and the additional non-binding Arctic Shipping Guidelines and the Polar Shipping Guidelines.⁸⁴ Thus, concern rises of the extent of application that the standards and rules currently set out in international maritime law conventions obtain.⁸⁵ To fill the void of inconsistency there exists a need for greater coherency, instead of implementing a new treaty, efforts should be focused on the multiple levels of governance to maintain a healthy connection on responding to the regulatory needs that the increased international navigation and shipping bring along.⁸⁶

⁸¹ European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010, *supra nota*.

⁸² European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010, *ibid*.

⁸³ European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010, *ibid* 2.

⁸⁴ European Commission LEGAL ASPECTS OF ARCTIC SHIPPING February 2010, *ibid* 3.

⁸⁵ Chircop, A. (2012). Regulatory Challenges for International Arctic Navigation and Shipping in an Evolving Governance Environment, *Annual Meeting of the Comité Maritime International*. 1-24.

⁸⁶ Chircop (2012). *Ibid.*.

3. PROSPECTS FOR THE LEGAL DEVELOPMENT IN THE ARCTIC REGION

The future role of the Convention of the Law of the Sea as the driving force in the polar regime has been under mutable discussion. The direction of development has gained arguments before and against, some claiming that the Convention should remain immutable while others have expressed a will to proceed towards molding the existing instrument. Proposals of going for even greater lengths beyond UNCLOS to form a new legal body has gained endorsement for a certain extent. Before any considerations could be initiated in reality, the whole spectrum of issues would have to be regarded. The convention cannot be isolated from the practice relying on teleological interpretation. Many have suggested that implementation of already-existing legal instruments at the domestic level is a key factor to find equitable solutions.⁸⁷ The cooperative bodies such as the Arctic Council also holds a responsibility to further approximate the goals between the stakeholders, thereby enhancing the grounds for increased international cooperation.⁸⁸ For the past few decades, only minor shifts in the region has occurred, this is not solely an indication of irreplaceable position of UNCLOS, it is a reflection that should feed proactivity to ignite concrete action plan to secure the legal balance in the Arctic. State perspective should gain the priority, as it has been stated, each nation is likely to measure its position towards its obligations deriving from the law of the sea against the alternatives, which often carry a considerable element of legal uncertainty in it.⁸⁹

⁸⁷ Hoel, A., H. (2009). Do We Need a New Legal Regime for the Arctic Ocean?, *The International Journal of Maritime and Coastal Law*, Vol. 24, Issue 2, 443-456.

⁸⁸ Hoel, (2009), *ibid*.

⁸⁹ Proless, A., Müller, T. (2008). The Legal Regime of the Arctic Ocean, *Heidelberg Journal of International Law*, 653-687.

3.1 The role of Arctic council

On February 23, 2015 in Washington D.C panel of specialists concluded about the broad lines for actions and regional development in the Arctic.⁹⁰ The future role of Arctic Council alongside with UNCLOS as a leading mechanism of the polar governance was affirmed.⁹¹ As expressed in the Ottawa Declaration on the establishment of the Arctic Council, the formal character of the Arctic Council all though officially established cannot erase the “soft law” stigma that prevails under the council.⁹² The lack of legal initiative power raises the question of the danger of displacement.⁹³ Even though the Arctic council presents the closest tangible achievement of organizational cooperation, the concept of “umbrella organization” that would obtain the ability to enable legally binding harmonization actions deviates too radically from the current reality.⁹⁴ Signs that the prevailing cooperation driven atmosphere will in the becoming decades experience an inflation still remains as an uncertainty. Regardless, the risk that economic factors overthrow the Council, making it a governing “outcast”, in the Arctic policy should be taken seriously.

Flexibility that comes along with the non-organizational status also has its failings in promoting concrete legal actions. Arguments on behalf of the renovation of the Council with granting of the role of legal person have stated that these steps would enable implementing power with greater probabilities of success.⁹⁵ This shift of legal status would however indicate an end to the decision-making capabilities of the Permanent Participants as obligational collision between the international law and the newly established organization would realize.⁹⁶ Since the UNCLOS already provides an extensive principal framework for international operations in the Arctic regime, there is no desperate need for such organization. It should also be noted that the non-

⁹⁰ Collins, J., Sfraga, M., Virginia, R.A., Yalowitz, K.S. (2015). *Carnegie endowment for international peace: Arctic Council Initiatives to Sustain Arctic Cooperation*. Retrieved from: <https://carnegieendowment.org/2015/04/20/arctic-council-initiatives-to-sustain-arctic-cooperation-pub-59839>, February 24 2020.

⁹¹ Collins, Sfraga, Virginia, Yalowitz, (2015). *ibid*.

⁹² Ottawa Declaration on the establishment of the Arctic Council, 19.9. 1996.

⁹³ Kankaanpää, P., Young, O. R. (2012). The effectiveness of the Arctic Council – *Polar Research*, Vol. 31. Norwegian Polar Institute, 1-14.

⁹⁴ Plášilová, D. (2011). *Current Problems of the Legal Regime of The Arctic*. (Master's Thesis) MASARYK UNIVERSITY FACULTY OF LAW, Department of International and European Law, Brno.

⁹⁵ Exner-Pirot, H., Ackrén, M., Loukacheva, N., Nicol, H., Nilsson, A.E., Spence, J. (2019). THE ARCTIC INSTITUTE: *Form and Function: The Future of the Arctic Council*. Retrieved from: <https://www.thearcticinstitute.org/form-function-future-arctic-council/?cn-reloaded=1>, 26 February 2020.

⁹⁶ Exner-Pirot, Ackrén, Loukacheva, Nicol, Nilsson, Spence, (2019). *ibid*.

organizational position could in many ways be seen as the appropriate approach, without structural restrictions and legal functions the free flow of cooperative actions between states can be arranged with more accessible measures.

3.2 Arctic Treaty

The formation of an “Arctic Treaty”, separated from the existing international framework namely UNCLOS has been under the discussion in relation to the future governance of the polar area. Noticeable changes in climate have ever more accelerated the conversation around the concept of a new Treaty. The idea has merely reached the surface, but it seems to face obstacles right from the start. WWF has expressed its will for legal reforms by stating that the legal instruments relevant to protecting the Arctic marine environment are in measures incoherent and incomplete and cannot secure the utmost goal of environmental protection.⁹⁷ In contrast the Arctic shipping has already taken steps towards legally binding form following the IMO Guidelines.⁹⁸ Thus contradictory perspectives that source from field variety and the international legislation such as UNCLOS may act against themselves. The Guidelines for ships operating in Arctic ice-covered waters is an example of concrete legislative results that are achievable, however, to support the vague content in the Articles the will to carry out measures with tangible legal effects requires interest from the outside. The Arctic Treaty concept thus, may only create an unbalance where resources required to enforce the instrument are overcome by the achievable advantages. Moreover many seem to lean towards a more narrowly-tailored agreement that would address the host of Arctic issues more directly and efficiently.⁹⁹ States and corporations operating in the arctic obtain the ultimate power to initiate procedures to strengthen the position of UNCLOS, the necessity to displace or transform the convention is not the primary requirement, instead of through activity by relevant actors harmonized and binding legal implementations may be established.

⁹⁷ Fløistad, B., Lothe, L. (2010), *The Possibility of an Arctic Treaty*. Retrieved from: <http://www.arctisearch.com/The+Possibility+of+an+Arctic+Treaty>, 26 February 2020.

⁹⁸ Fløistad, Lothe, (2010). *ibid.*

⁹⁹ Parker (2008) *supra nota* 2, 221.

Additionally, in resolving the overlaying status of territorial claims and shut the “regulative leak” article 298 of UNCLOS must be amended to require all arctic-related territorial disputes to be resolved by the fashion of binding arbitration before an international court.¹⁰⁰ In order to achieve this, member states are required to delete the opt-out exception that is stipulated in the article 298 and be willing to mandate a binding that has its basis one of the four options provided in article 297 of UNCLOS.¹⁰¹ Following the procedure mentioned above respective to the fair and equitable exploitation of Arctic territory, the most efficient and pragmatic way to accomplish this is to delete the exception in article 298 that permits member nations to opt-out of binding arbitration of territorial claims. By limiting the effects of the leverage that is under UNCLOS Article 298 provided for the states, the question remains, whether the structural integrity of the Arctic international legislation is able to reach a position that forms effectual legal framework.

3.3 The Antarctic Treaty System and the faulty nature of bipolar view

Already in 1992, an article that exhibited an idea of an Arctic treaty that would find its inspiration from the 1959 Antarctic treaty was proposed.¹⁰² While acknowledging the disparities that fundamentally separate these polar areas from each other, to some extent in case of multilateral treaty formation would become relevant the Antarctic Treaty could provide valuable insight. Since the Antarctic is already regulated in commercial shipping, resource exploitation and tourism-related matters, the experience in building these instruments is an opportunity not to be overlooked entirely.¹⁰³ Thus, as long as the difference of structure of governing the area and geographical contentions are included in the discussion, patterns useful to reorganizing the existing or implementing a new legal framework are possible to be derived out of its polar counterpart.

¹⁰⁰ Wilder, M.P. (2010). Who Gets the Oil?: Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea, *Houston Journal of International Law*. Vol. 32, No. 2, 505-544.

¹⁰¹ Wilder (2010). *Ibid*, 531.

¹⁰² Lalonde, S., McDorman, T. L. (Eds.) (2015). *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand*. Leiden: Brill – Nijhoff.

¹⁰³ Lalonde, McDorman (2015). *ibid*, 88.

3.4 Future direction

The crucial position obtained by the Arctic Council exponentially increases if the predominant legal structure is kept interchangeable. This is the very reason why the Council should be given appropriate visibility, since it stands alone as the only prominent platform for creating a dialogue between the State actors in the north.¹⁰⁴ The Council is also the key actor to prevent isolative policy making, since it is the sole provider for “outsider” States to an access in the arctic decision-making table. Such an opportunity should be a clear indication of the willingness of the arctic states to execute cooperative actions to resolve legal disputes or rather legal obstacles that derive from instrumental ambiguities. The inclusion of observer status holders as a part of the core structure of the Council should, despite the criticism, serve the purpose ultimately seek through the work of the Council. By including the EU in the Arctic governance the whole international community benefits from the better prospects that the Union brings alongside it to sensitize its policies and discourses to the Arctic realities and for other Arctic actors to understand how to gain legally attainable results.¹⁰⁵ The wider perspective that the EU offers is in a crucial position regarding future prospects especially in the field of commercial shipping. Asian economic superpowers such as China have already received the observer status in the Council, thus the general shift into the direction that serves global agenda should also consolidate the legal status of UNCLOS in the region.¹⁰⁶ As it has been earlier mentioned the observer states from Asia have expressed their reverence towards the International law framework applied in the regional legal operation. It would be hard to claim a convincing pool of factors acting against the continuance of UNCLOS and the question remains, whether an establishment of a new soft law convention would gain a more favorable position. UNCLOS has the advantage of being a widely respected and established instrumental body that gains its efficiency primarily from the status it enjoys.

Conclusively the matters that fall outside of the limitless “international scope”, in a sense that they mainly are a composition of bilateral terms and should be dealt in a theoretically separated manner. In many of the cases with such character that has been previously mentioned, there

¹⁰⁴ Yermakova, Y. (2017), *Future Governance of the Arctic: Press, Policy and the Arctic Council*. (Master’s Thesis) Cornell University Institute for Public Affairs, New York.

¹⁰⁵ Koivurova, T., Kokko, K., Selheim, N. (2012). The present and future competence of the European Union in the Arctic, *Cambridge Core*, 361-371.

¹⁰⁶ Lunde, L., Yang, O., Iselin, S. (eds.) (2015). *Asian Countries And The Arctic Future*, Singapore: World Scientific Publishing Company.

exists a dual-edged problem source, thus in order to attain a profitable solution both ends of the arising conflict should be eliminated. This is where the necessity to execute conventional reforms may become topical, but it still would require the investment of States to respect the newly established legal framework. Initiation of such reforms is however a timely process and the evaluation of its indispensability should be carefully assessed, taking account the future relevance. Many of the disputes are limited in legal and geographical scope inside the “party parameter” without direct international connection, thus the emphasis should be given to the factors that may propose valuable outcomes to prevent legal obstacles yet to be foreseen.

CONCLUSION

There hardly exists any disagreement around the idea of guaranteeing a stable legal atmosphere in the Arctic regime. Beneficial for all actors whether private or state-based is legal certainty that simultaneously provides freedom and security. Unifying relevance for freedom should be viewed universally separated from the arctic context itself, States outside of the geographical connection to the area should be in a position that fosters respect to the prevailing legal framework. For it to realize, countries that possess a level of arctic sovereignty should themselves be in the position that enables them to willingly dispense their power for less restricted operation, without need to worry of threats to their legal status. Even though it would be fallacious to attempt to derive a single scapegoat for the law-based uncertainty the primary inflictor seems to have its core in the vague contents of UNCLOS the Arctic applicable Articles. The common goal is distorted by the differing views particularly on the practical level. The means and methods through which the operational “middle ground” could be reached suffers from the unwillingness of the parties to cede their sovereign position. The general concern closely relates to the fact that many Arctic and non-Arctic actors obtain incredulous stance when the question of UNCLOS’s ability to effectively cover arctic legal field is brought into the light.

The establishment of a new treaty can be seen to promote an escape plan rather than directly confronting the faced challenges. The necessity to channel time and resources for the creation of treaty formation does not impose a profitable solution, in the sense that the basis for multilateral legal framework already exists in UNCLOS platform. The support expressed for a more tailored approach method constituting an agreement that addresses the host of Arctic issues is an option to be considered. Taking this proposal to even further, plausible development direction could contain an introduction of a series of legally binding agreements respective to the areas of a particular concern agreed between the relevant parties. The meaning of “relevant” may extend to the inclusion of a great number of state actors in various areas of interest, which despite opposition especially by Arctic Council permanent members could be a vital step forward. The

fundamental shortage of practically effective instruments of law and the absence of binding legal initiative craves of structural reform. The motive of these steps is by no means to supersede the principal role of UNCLOS rather the establishment of sub-level instruments could act as a gap filler for content-sourced incoherency.

Disarray evermore increases when the effects of the overlapping claims for extended continental shelf claims are taken into consideration. This distortion will lengthen the overall procedure of generating a coherent action plan to find a pathway that legally satisfies all the nations affected. As stated earlier it is challenging to predict the outcomes of the filed claims and as the fact stands only Norway and Denmark have successfully to the date concluded their extended continental shelf status. These decisions are not absolute in their nature, since the effects of colliding claims from remaining States hinder the pace of development. The underlying uncertainty around the continental shelf claims should be the priority in the list of solving the overlaying legal knots existing in the region. It is not more than a prolongation of facts that the littoral states will not engage with full attention and resources before in a manner that is required to take steps forward, before they have attained just proclamation to their individual rights of the marine areas.

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