

Climate Change and Maritime Delimitation in the Arctic: The United Nations as a Beacon

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I. The Arctic, Climate Change and the Legal Implications

In the context of climate change and the Arctic Ocean, a catalogue of problems has been revolving in public discourse. The melting ice in the Arctic region is seen by many as a symbol of climate change.¹ Depending on the effects of climate change, the extent of Arctic sea ice may recede permanently.² A recession of Arctic sea ice threatens the existing economy and ecology of the region.³ At the same time, however, it may open up new possibilities. Among them are navigation and the facilitation of drilling for oil and gas in the seabed.⁴

With regard to navigation, an ice-free Arctic could dramatically change the pattern of global trade routes.⁵ While the ice melts down, a new era of navigation may arise.⁶ The status of these newly navigable waters will need to be clarified.

In terms of resources, the expected reserves of oil and gas are currently the most prominent ones.⁷ But the region may be awash with additional marine treasures.⁸ With these prospects in mind, States will demand the allocation of maritime jurisdiction.

¹ Center for Stabilization and Reconstruction Studies, *On Thin Ice: Addressing the Scientific, Economic, Environmental, Cultural, and Security Implications of Climate Change in the Arctic Region*, December 2008, available at <http://www.csrns-nps.org>.

² The Arctic has lost over 40% of its year-round ice since 1985 (The Economist, “The curse of carbon”, 30 December, 2008, available at <http://www.economist.com>). Estimates expect an ice free North Pole within decades (The Economist, “The icy road to Bali”, 1 November 2007, [*ibid.*]; The Economist, “Comrade Climate Change”, 18 December 2006, [*ibid.*]). When sea ice melts, the newly exposed dark water absorbs radiation rather than reflecting it, as snow or ice would. That may raise the temperature of the Arctic sea, making the ice melt even faster (The Economist, “Of ice and men”, 29 August 2008, [*ibid.*]).

³ Ilulissat Declaration, Adopted at the Arctic Conference, Ilulissat, Greenland, 28 May 2008, available at <http://www.cop15.dk>, at para. 2.

⁴ The Economist, “Lines in the Ice”, 21 August 2007, [*supra*, note 2].

⁵ Borgerson, p. 63. A newly navigable Arctic Ocean would cut thousands of miles off the journey between the Atlantic and the Pacific (The Economist, “Comrade climate change”, 18 December 2006, [*supra*, note 2]), shortening *e.g.* the journey from Rotterdam to Yokohama by 4,700 miles, or 42% (The Economist, “The curse of carbon”, 30 December, 2008, [*ibid.*]).

⁶ The partial loss of pack ice has already extended the seasonal navigability of the Arctic Ocean (The Economist, “Not a barren country”, 18 July 2009, [*ibid.*]).

⁷ The region may contain 25% of the world’s undiscovered oil and gas reserves (The Economist, “The curse of carbon”, 30 December, 2008, [*ibid.*]) Note that this figure is generally attributed to the United States Geological Survey – a study which did not provide concrete numbers (The Economist, “Drawing lines in melting ice”, 16 August 2007, [*ibid.*]).

⁸ Among them are methane hydrates, manganese nodules and an unknown number of little known fauna and flora, not to mention the North Pole’s symbolically value to potentially any Arctic State (The Economist, “Scramble for the seabed”, 30 December 2008, [*ibid.*]).

In the meantime, conflicts may be looming in a region that is removed from enforceable coastal State jurisdiction.⁹

None of the above-mentioned problems is entirely new to the law of the sea. In fact, most questions have in similar shapes been subject to an ever expanding body of case law.¹⁰ It is submitted that the problems surrounding the legal uncertainty in the Arctic Ocean may largely stem from the absence of clarity over coastal State jurisdiction. The aim of the UN should thus be to introduce maritime delimitation to the problems surfacing in the Arctic.¹¹ The existing case law on maritime delimitation can provide guidance even in a region undergoing deep changes. In this sense, the Arctic is surely no “special case”.¹² Despite the uncertainties surrounding climate change, a legal solution should be sought now that a human concern has emerged.¹³

While proposing maritime delimitation as the solution to the newly encountered problems in the Arctic, a closer look must be paid to the role of the United Nations (UN), its institutions and bodies of law.

II. Maritime Delimitation and the United Nations

A. What Role for the United Nations?

“I don’t think that the UN plays a big role so far in the Arctic” said the executive director of Greenpeace International, Gerd Liepold, in a recent television interview suggesting further that the issue of the Arctic should be discussed at the United Nations Climate Change Conference in Copenhagen in December 2009.¹⁴

⁹ Borgerson, p. 71

¹⁰ See for the issue of navigation, e.g. *Corfu Channel Case*, pp. 28-29; *Eritrea/Yemen*, para. 155; *Qatar/Bahrain*, para. 93 (concerning archipelagic baselines and thus, potentially, navigation).

¹¹ That is not to say that the common heritage of mankind would thus be reduced, since the limits of each maritime zone have been agreed upon in UNCLOS Articles 3 for the territorial sea, Article 57 for the Exclusive Economic Zone (EEZ), Article 76(1) for the continental shelf and Article 76(4-6) for the outer continental shelf.

¹² Borgerson, p. 72. It will also be tried to show that in a maritime delimitation case, a “cacophony of arguments” shall not result (The Economist, “Drawing lines in melting ice”, 16 August 2007, [*supra*, note 2]). There might thus not be a “coming anarchy” (Borgerson, p. 71).

¹³ “It is a task of legal scholarship to aid societal adaptation to global climate change by identifying and addressing [the] legal feedbacks” (Caron, p. 17).

¹⁴ “Battle for the Arctic”, available at <http://english.aljazeera.net>.

In this respect it is important to recall that the five Arctic States declared at their meeting in Ilulissat in 2008 that “[they] see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean”.¹⁵ The UN’s role would therefore not lie in the drafting of a new special regime for the Arctic Ocean. Rather, the existing “framework provides a solid foundation for responsible management by the five coastal States and other users of [the Arctic] Ocean”.¹⁶

Nevertheless, does the UN play a key role in the governance of the world’s oceans, including the Arctic Ocean. Indeed, the UN’s role is a vital one within the existing legal framework governing the oceans. In a continued effort, the UN enabled the core of that framework, the United Nations Convention on the Law of the Sea (UNCLOS)¹⁷, which draws heavily from the 1958 Geneva Conventions as well as from State practice.¹⁸ Since the entering into force of UNCLOS in 1994, the UN has promoted this constitution for the oceans through the various institutions it provides and mandates, most prominently in the realm of maritime delimitation. The International Court of Justice (ICJ) as a principle organ of the United Nations established under the UN Charter’s Article 7, as well as various Tribunals, are all mandated by UNCLOS Article 287 to solve maritime delimitation disputes and have continuously and successfully done so since their establishment.

In the delimitation of the outer continental shelf, another UN institution, the Commission on the Outer Limits of the Continental Shelf (CLCS), as set up under UNCLOS Annex II, may also play a role.

¹⁵ Ilulissat Declaration, Adopted at the Arctic Conference, Ilulissat, Greenland, 28 May 2008, available at <http://www.cop15.dk>, at para. 4.

¹⁶ *Ibid.*

¹⁷ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 United Nations Treaty Series 397, reprinted in 21 International Legal Materials (1982), p. 1261, (entered into force on 16 November 1994), (See <http://www.un.org/Depts/los>);

¹⁸ Including the theory of natural prolongation as triggered by the Truman Proclamation (Truman Proclamation of 18 September 1945).

B. A Testing Case for Maritime Delimitation

The UN should not, and the present writer is confident that it will not, leave the path of enabling and maintaining the peaceful coexistence of States as required by the preamble of the UN Charter. In this venture, the most secure path is that of maritime delimitation. The experience of maritime delimitation has led to a predictable and stable legal outcome in contentious cases.¹⁹ Both the ICJ and Tribunals have in the elaboration of their decisions relied upon the law as developed in a decades-long effort to seek equitable solutions for the partition of ocean areas.²⁰

It is the present task to show that the UN can promote legal stability in the Arctic environment, and the Oceans in general, by encouraging States to pursue the avenue of maritime delimitation. Successful maritime delimitation can be achieved through either the negotiation of delimitation agreements or dispute settlement. The case law has helped to promote the constitution of the oceans by clarifying norms and lending them

¹⁹ Articles 74(1) and 83(1) UNCLOS provide that the delimitation of the continental shelf and the EEZ between States with opposite or adjacent coasts “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the ICJ Statute, in order to achieve an equitable solution”. Emphasis is placed in both of these Articles on the equitable solution, meaning that the course of the *final* delimitation line should result in an equitable solution (*Tunisia/Libya*, para. 150; *Guyana/Suriname*, para. 331; *Romania/Ukraine*, para. 120). Accordingly, the principles and rules applicable to the process of delimitation are those which bring about an equitable result (*Cf. Tunisia/Libya*, para. 50). It must however be stressed that delimiting with a concern to achieve an equitable result is not the same as delimiting in equity (*Cameroon/Nigeria*, para. 294). In other words, “equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation” (*Cameroon/Nigeria*, para. 294). The delimitation exercise proceeds in well defined steps (*Romania/Ukraine*, para. 115). The case law of the last two decades as well as State practice have come to embrace a clear role for equidistance as the first step of the delimitation exercise (*Guyana/Suriname*, para. 335, 342). In the first step, the court or tribunal establishes a provisional equidistance line, which in the second step may be adjusted in the light of relevant circumstances in order to achieve an equitable result (*Guyana/Suriname*, paras. 335, 342; *Barbados/Trinidad and Tobago*, para. 242; *Cameroon/Nigeria*, para. 288; *Qatar/Bahrain*, para. 230). “Certainty is thus combined with the need for an equitable result.” (*Barbados/Trinidad and Tobago*, para. 242). The legal validity of the two-step approach was reconfirmed in the most recent maritime delimitation Award of *Guyana/Suriname* (2007) as well as in the newest ICJ judgement on maritime delimitation in *Romania/Ukraine* (2009) (*Cf. Tanaka, Yoshifumi, The Guyana/Suriname Arbitration: A Commentary*, in: *Hague Justice Journal*, Vol. 2, No. 3 (2007), pp. 28, at p. 32). In the search for an equitable solution a court or tribunal would accordingly exercise its judicial discretion within the constraints imposed by law – all the while concerned for a stable legal outcome. *Cf. Barbados/Trinidad and Tobago*, para. 244 “Certainty, equity, and stability are thus integral parts of the process of delimitation.” (*Barbados/Trinidad and Tobago*, para. 244).

²⁰ Such an equitable solution is today requested by Articles 74 and 83 UNCLOS for the delimitation of the EEZ and continental shelf. The same method and indeed an equitable outcome is however equally requested in the delimitation of the territorial sea in accordance with Article 15 UNCLOS (*Qatar/Bahrain*, para 231; *Cameroon/Nigeria*, para. 288; *Cf. also Barbados/Trinidad and Tobago*, para. 305).

an additional degree of authority. But the promotion of international law is a long-term task and does not end there.

No case study is at the present time better suited to illustrate the predictable workings of the UN judicial system than the case of the Arctic, precisely because the Arctic is such an uncertain environment. It should be made the task of maritime delimitation in this region to point the way for international law towards an equitable solution. What better place to pursue this exercise than at the top of the world?

C. The Benefits for International Law and the United Nations

The aim is to promote the existing legal *acquis* of maritime delimitation as a valuable role model for other issues of resource distribution.

The existing law on maritime delimitation can ensure that unilateralism is prevented.²¹ The UN can strengthen its role by encouraging States' trust into the existing law and the institution of tribunals and the ICJ. The stability and predictability that the law of maritime delimitation has achieved may prove the UN's valuable role well beyond the present subject matter. The legitimacy and necessity of the UN in maintaining the peaceful coexistence of States would thus be reinforced.

To show that only minor obstacles lie in the path of the maritime delimitation exercise in the Arctic, an examination of jurisdictional issues and the existing agreements in the region will be made.

²¹ The binding effect of a delimitation decision would end unilateralism in the drawing of baselines or the declaration of archipelagic status – an important issue in the determination of navigation regimes and extents of maritime zones, especially in the Arctic Ocean (*Cf. Qatar/Bahrain*, para. 183).

III. Jurisdictional Issues

A. Jurisdiction and its Scope

1. ICJ Statute²²

Jurisdiction may be conferred on the ICJ, in accordance with Article 36(1) of its Statute by a special agreement or through a jurisdictional clause in a treaty or convention in force between the parties.²³ Additionally, compulsory jurisdiction, based on reciprocity, may be conferred on the Court by means of the “optional clause” in Article 36 (2) of the ICJ Statute.

2. UNCLOS Part XV

Article 287 UNCLOS provides for disputes to be submitted to the ICJ or a tribunal constituted under Annex VI, VII or VIII UNCLOS. A court or tribunal referred to in Article 287 UNCLOS exercises jurisdiction over any dispute concerning the interpretation or application of UNCLOS (Art. 288(1)); as well as any dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS, which is submitted to it in accordance with the agreement (Art. 288(2) UNCLOS). Maritime delimitation disputes may be exempted by Article 298(1)(a)(i) UNCLOS from application of the compulsory dispute settlement procedures provided for in Part XV, section 2 UNCLOS, but may still be submitted to such procedures if the relevant party so agrees or withdraws its prior declaration of exemption (Art. 298(2) UNCLOS).

Both UNCLOS Part XV and the ICJ Statute request the settlement of disputes by peaceful means.²⁴

²² Statute of the International Court of Justice [*hereinafter* ICJ Statute], 26 June 1945, 59 Stat. 1031, T.S. No. 993, 1 U.N.T.S. (See <http://www.icj-cij.org>).

²³ Since additional problems could surface in the Arctic, it may be pointed out that the ICJ has no limited competence *ratione materiae* (Art. 36(1) ICJ Statute).

²⁴ Article 293 UNCLOS and Articles 1, 2(3) and 33(1) of the UN Charter, to which the ICJ Statute is annexed (See <http://www.icj-cij.org>).

3. The Case Law

Since the entering into force of UNCLOS on 16 November 1994, two Awards have been rendered by Annex VII Tribunals in accordance with Part XV UNCLOS.²⁵ In the same period, one Award was rendered pursuant to an arbitration agreement between Yemen and Eritrea, the latter State not being party to UNCLOS.²⁶ Also during the same period, four maritime delimitation cases have been decided by the ICJ. Of those, one was contentiously instituted by Cameroon relying on the declarations made by Nigeria and itself under Article 36(2) of the ICJ Statute.²⁷ One dispute was submitted under Article 36(1) ICJ Statute by one party, Romania, and uncontested by the other, Ukraine, in terms of jurisdiction in general.²⁸ Nicaragua filed application instituting proceedings against Honduras under both provisions.²⁹ Qatar's filing of an application instituting proceedings against Bahrain under Article 36(1) ICJ Statute had been contested by the latter.³⁰

4. The Arctic States

Of the five States bordering the Arctic Ocean, only Norway and Denmark accept the ICJ's compulsory jurisdiction by virtue of Article 36(2) ICJ Statute.³¹

Four of the Arctic States are parties to UNCLOS, excluding the United States (U.S.).³² Of those four, all have made some use of the opt-out clause of Article 298(1)(a)(i) UNCLOS with regard to the compulsory settlement of maritime delimitation disputes under UNCLOS Part XV. While Norway and Denmark allow no tribunals but only the

²⁵ *Barbados/Trinidad and Tobago* (2006) and *Guyana/Suriname* (2007).

²⁶ *Eritrea/Yemen* (1999).

²⁷ *Cameroon/Nigeria*, paras. 1 and 9.

²⁸ But not its scope (*Romania/Ukraine*, paras. 1 and 22).

²⁹ *Nicaragua/Honduras*, para. 1.

³⁰ *Qatar/Bahrain*, paras. 1 and 3.

³¹ See the ICJ's website for the declarations of the parties, at <http://www.icj-cij.org>.

³² However, joining the Convention may today be seen as favourable, in order "to protect and advance U.S. interests, including with respect to the Arctic" (National Security Presidential Directive 66/Homeland Security Presidential Directive 25, 9 January 2009, available at <http://www.uscg.mil>). The issue of UNCLOS ratification is nevertheless still hotly debated in the public sphere (See David J. Bedermann, *The Old Isolationism and the New Law of the Sea: Reflections on Advice and Consent for UNCLOS*, in: *Harvard International Law Journal Online*, Volume 49 (2008), at p. 1.

ICJ to adjudicate upon maritime delimitation disputes, pursuant to Part XV UNCLOS, Russia and Canada exempt these disputes from any kind of compulsory settlement.³³

Accordingly, no compulsory jurisdiction of any sorts applies between the U.S., Canada or Russia and any other party. Nevertheless, they may still agree to some form of dispute settlement in case of conflict. In this respect it should not be overlooked that a comprehensive delimitation agreement in the region was successfully negotiated between Russia and the U.S.³⁴

The most recent case law also speaks in favour of future submissions for adjudication of even the most vital disputes in the Arctic. In the last maritime delimitation case decided by the ICJ, jurisdiction was in principle uncontested despite the considerable resources at stake for the parties.³⁵ Likewise, the most recent arbitration Award was rendered in a delimitation dispute concerning oil exploration activities and extending even into a threat of the use of force.³⁶ Although the expected reserves in the Arctic are larger than both those in the Black Sea and offshore from Guyana and Suriname, the latter ones must have been of a high relative importance to the disputing States.

5. Jurisdiction to Delimit the Outer Continental Shelf in Particular

a) Science or Law

While the CLCS works according to scientific criteria (Article 76(3-8) and Article 4 Annex II UNCLOS), an adjudicating body entrusted with maritime delimitation decides according to the law. It is submitted that, at least at the present time, only the latter option of a legal enquiry provides the predictability and stability inherent to the law of maritime delimitation as developed in an effort by the international community with the UN institutions as its most prominent embodiment.

³³ See United Nations, *The Law of the Sea: Declarations and statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, (UN Sales No. E.97.V.3).

³⁴ See *infra.*, chapter IV.

³⁵ *Romania/Ukraine*, para. 22; See <http://news.bbc.co.uk/2/hi/europe/7867683.stm>, last visited 23 August 2009.

³⁶ *Guyana/Suriname*, paras. 432-38 and para. 445. Interestingly, the Tribunal in this maritime delimitation dispute accepted jurisdiction to adjudicate also violations of the UN Charter and customary public international law (at paras. 403-406).

b) The Question of Scope

The outer continental shelf was the principal jurisdictional issue before the UNCLOS Annex VII Tribunal in *Barbados/Trinidad and Tobago*.³⁷ The Tribunal found that – as a matter of principle – the outer continental shelf was contained in the scope of its jurisdiction.³⁸ It reasoned that this shelf formed part of, or was sufficiently closely linked to, the dispute that was submitted to arbitration, as further evidenced by the record of the preceding negotiations between the parties.³⁹ Additionally, the Tribunal held that “in any event there is in law only a single “continental shelf” rather than an inner continental shelf and a separate extended or outer continental shelf”.⁴⁰

It is worth noting that both under UNCLOS Part XV and under the ICJ Statute, a court or tribunal decides autonomously upon the scope of its jurisdiction (Art. 288(4) UNCLOS or Art. 36(6)ICJ Statute). While the UNCLOS Annex VII Tribunal in *Barbados/Trinidad and Tobago* had to decide upon matters concerning the interpretation or application of UNCLOS in accordance with its Article 288, the same “pioneering” conclusion with respect to outer continental shelf jurisdiction should also be available to the ICJ or possibly any other arbitral tribunal in a dispute between States not parties to UNCLOS.⁴¹

c) The Question of Competition to the CLCS

If a State party to UNCLOS wants to establish the limit of its outer continental shelf, it has to submit the relevant geological information to the CLCS (Arts. 76(4-6) and (8) UNCLOS).

The Tribunal in *Barbados/Trinidad and Tobago* was convinced that its jurisdiction over delimitation of the outer continental shelf would not interfere with the core function of the CLCS, whose practice must, in turn, in accordance with Article 76(10) and Article 9

³⁷ Rosenne, p. 1003.

³⁸ *Barbados/Trinidad and Tobago*, paras. 217(ii), 384(ii). The finding was a matter of principle, because the single boundary line as construed did not involve overlapping continental shelf claims extending beyond 200 nm (See paras. 297, 368).

³⁹ *Barbados/Trinidad and Tobago*, para. 213.

⁴⁰ *Barbados/Trinidad and Tobago*, para. 213.

⁴¹ Kwiatkowska, p. 941; This may also be rewarded by the fact that the very concept of natural prolongation of the continental shelf as it exists in Article 76(4-6) UNCLOS today, derives from a Proclamation by then American President Harry S. Truman (Truman Proclamation of 18 September 1945 [*hereinafter* Truman Proclamation]).

Annex II UNCLOS, remain without prejudice to the question of delimiting these areas between the States concerned.⁴²

Of the four Arctic States which are party to UNCLOS, only Russia and Norway have submitted their claims to the CLCS under Article 76(8) UNCLOS.⁴³ Interestingly, the CLCS recommended pursuant to Norway's submission, that a delimitation agreement should be sought with Russia in the region of the Barents Sea – the so-called “Loophole” – where the countries' outer continental shelves overlap.⁴⁴

6. Jurisdiction with Regard to the Threat or Use of Force in Particular

Even if a maritime delimitation disputes should escalate into a threat or use of force, an adjudicating body may still be called upon to draw a boundary. Such was the case in *Guyana/Suriname*.⁴⁵ Future courts or tribunals may thus pay tribute to the maintenance of peace as the cornerstone of the UN Charter even within a maritime delimitation case.

The Tribunal in *Guyana/Suriname* was faced with the so-called CGX incident, which included a possible threat of force by Suriname against Guyana.

With reference to UNCLOS Article 293 and the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS), the Tribunal accepted jurisdiction to

⁴² Cf. *Barbados/Trinidad and Tobago*, paras. 80-87 and paras. 217 (ii), 384(ii); Kwiatkowska, pp. 940-941. In this respect the Award contrasts with the reluctance originally displayed in the 1992 *St. Pierre et Miquelon* Award (at paras. 75-82), where – prior to UNCLOS and the establishment of the CLCS – the Tribunal declared itself to be incompetent to carry out a delimitation which affected the rights of the international community represented by organs entrusted with the administration and protection of the international sea bed area. Conversely, it may be assumed today that, in view of the “final and binding” nature of maritime delimitation judgements and awards (*Barbados/Trinidad and Tobago*, para. 385(ii)), the CLCS would not make any recommendations on a continental shelf under delimitation, notwithstanding whether such outer continental shelf will or will not border on the International Seabed Area (Kwiatkowska, p. 942).

⁴³ Russia's submission dates from 2001, Norway's from 2006. Canada, who joined UNCLOS in 2003, does not have to submit until 2013, Denmark has until 2014 – both in accordance with Annex II Article 4 UNCLOS. See the Commission's website for all submissions, recommendations and third states' reactions, at: http://www.un.org/Depts/los/clcs_new/clcs_home.htm.

⁴⁴ Summary of Recommendations, p. 9, available at the Commission's website (*ibid.*). Cf. also the Commission's earlier recommendation pursuant to the Russian submission (Report of the Secretary-General to the Fifty-seventh session of the General Assembly under the agenda item Oceans and the Law of the Sea (A/57/57/Add.1), at para. 39. Russia's submission also raised questions with Denmark and with Canada, concerning potential delimitation issues in the Arctic Ocean (Colson/Smith, p. 3401.)

⁴⁵ *Guyana/Suriname*, paras. 263-270.

adjudicate alleged violations of the UN Charter and customary public international law to settle disputes by peaceful means.⁴⁶

With reference to the testimony of witnesses to the CGX incident, the Tribunal held that the conduct of the Surinamese naval vessels amounted to a threat of the use of force in contravention of UNCLOS, the UN Charter, and general international law.⁴⁷

Finally, the Tribunal noted that the use of force by Suriname was not a substitute for pursuing peaceful means of dispute settlement and “if bilateral negotiations failed to resolve the issue, a remedy is set out in the options for peaceful settlement envisaged by Part XV and Annex VII of the Convention”.⁴⁸ In this respect, the Tribunal held that Suriname’s threat of the use of force in a disputed area threatened international peace and security and jeopardised the reaching of a final delimitation agreement.⁴⁹

B. Applicable Law

If both parties to a dispute have ratified UNCLOS, no difference results in applicable law or procedure from choosing the ICJ over an UNCLOS Part XV Tribunal or vice versa (Art. 38(1)(a) ICJ Statute or Art. 293(1) UNCLOS).⁵⁰ This is stated explicitly for the delimitation of the EEZ and continental shelf in Articles 74 and 83 UNCLOS which refer to Article 38 of the ICJ Statute. The ICJ applies customary international law in the absence of any valid convention or agreement between the parties (Art. 38(1)(b) ICJ Statute). Needless to say, in voluntary third-party arbitration proceedings, UNCLOS may be the choice of law even if one or more of the parties to the dispute is no party to the Convention.⁵¹

It is worth noting that the U.S., as the only Arctic State which has not ratified UNCLOS, regards most provisions of the Convention as customary law.⁵² The case law

⁴⁶ Award, paras. 403-406.

⁴⁷ Id., paras. 432-38, para. 445.

⁴⁸ Id., para. 482.

⁴⁹ Id., para. 484.

⁵⁰ “They are likely to follow substantially the same legal approaches to delimitation disputes” (Rao, p. 896).

⁵¹ See e.g. *Eritrea/Yemen*, para. 6.

⁵² See generally, U.S. Commentary.

has crystallized into a clear cut procedure, which applies to maritime delimitation cases even if UNCLOS is not applicable between the parties.⁵³

Contrary to the procedure of the CLCS – science is no criteria for the delimitation of the outer continental shelf according both to Article 83 UNCLOS and the case law as developed since the Truman Proclamation.

C. Conclusion

From the above it seems not unlikely that future disputes between the Arctic States will be submitted to the ICJ or a tribunal. Even the U.S. as the last non-member State may soon ratify UNCLOS. The existing work of the CLCS remained without prejudice to the future drawing of a boundary line between Norway and Russia but even encouraged it. Finally, States may still agree on a boundary, based upon customary or treaty law without the need for adjudication. In this respect, the existing agreements in the region request some attention.

IV. Existing Agreements

A comprehensive maritime boundary up to 200 nm was agreed by the U.S. and the former Soviet Union in the Bering and Chukchi Seas in 1990.⁵⁴

In the Barents Sea, a small portion of maritime boundary was agreed between Russia and Norway in the region of the Varangerfjord in 1957.⁵⁵ The remaining boundary in the Barents Sea remains subject to negotiations.⁵⁶

⁵³ See e.g. *Qatar/Bahrain*, which was decided in accordance with customary international law (at para. 167).

⁵⁴ Maritime Boundary Agreement Between the United States of America and the Union of Soviet Socialist Republics, signed 1 June 1990; reprinted in: Charney/Alexander, p. 448. The U.S. and Russia honour the boundary which is being applied provisionally, pending its formal entry into force upon exchange of instruments of ratification (Colson/Smith, p. 3403).

⁵⁵ 1957 Agreement between the Royal Norwegian Government and the Government of the Union of the Soviet Socialist Republics concerning the Sea Frontier between Norway and the USSR in the Varangerfjord, 312 U.N.T.S. 322.

⁵⁶ See Rothwell, p. 178.

Climate change may facilitate the exploration of the major hydrocarbon resources at stake, notably in the Beaufort and Barents Seas.⁵⁷ Today there may thus be a desire to achieve certainty in the question of jurisdiction over these areas, either by negotiation or, hence, adjudication.⁵⁸

V. Conclusion

There is no need for a special regime in the Arctic Ocean apart from the existing legal framework governing maritime delimitation. The UN should encourage States to seek the opinion of the World Court or a tribunal if the solution of their maritime boundary disputes seems unattainable. The case law has reached an impressive degree of predictability and stability in legal outcome. This achievement is somewhat rare in international law and should not be jeopardized by the introduction of new substantive law. In this respect, the CLCS will hopefully choose to continue to recommend maritime delimitation in contested parts of the Arctic, rather than rely on scientific assumptions about the little explored geology of a hitherto ice-covered submarine region.

The attention which the Arctic has received with the perception of climate change is a unique chance for the UN and its institutions to showcase how international law works at its best.

⁵⁷ The Economist, “Not a barren country”, 18 July 2009, [*supra*, note 2].

⁵⁸ This assumption may not have been valid yet in 1996 (*Cf.* Rothwell, pp. 176, 178).