

CMI Colloquium at Buenos Aires - October 26, 2010

## A comparison of legal regimes in the Arctic and Antarctic

### The Arctic

#### Introduction

I. My friend Holger Martinsen is the deputy legal adviser in the Argentine Ministry of Foreign Affairs. We are very fortunate to have him here today to speak on the Antarctic. I have allocated more time to him as I suspect there will be more interest amongst delegates for what is going on in the Antarctic, as the Arctic has been the subject of many conferences in recent years.

As you know, I am the Secretary General of the CMI and I am from Canada. I put this topic on the programme as there is a growing interest in the Polar regions, largely due to climate change and new technologies. The Executive Council has authorized the establishment of a small working group on the Arctic/Antarctic to identify issues for study by a larger international working group in the future. The working group will initially study the applicability of existing private maritime law conventions and other laws on the Arctic and Antarctic.

I will be speaking on the legal regime in the Arctic and recent developments in that vast area.

I have put up two charts - one of the Arctic from a Canadian perspective. The other looking down on the North Pole showing the five Arctic coastal states – Canada, Denmark, Norway, the Russian Federation and the United States of America.

II. You will hear from Mr. Martinsen that the legal framework in the Antarctic is comprehensive. On the other hand, there is no systemic legal framework in the Arctic. Also, unlike the Antarctic, sovereignty is a major issue in the Arctic, spurred on by the discovery of new oil and gas fields that may contain as much as 30% of the World's undiscovered gas and 13% of the World's undiscovered oil. It is also believed to be rich in gold, silver and diamonds.

I will now set forth the current major sovereignty issues:

#### i) Beaufort Sea.

This is a dispute between the US and Canada and concerns an oil and gas field to the east of Alaska and to the north of the Canadian Northwest Territories. The problem is that the two countries use different methods to calculate the Canada-US boundary in the Beaufort Sea. The two countries recently agreed to attempt a settlement. Canada relies on an interpretation of an 1825 treaty between Great Britain and Russia (which owned it at the time) that established the

Yukon-Alaska border and claims that the maritime boundary follows the same line “as far as the frozen ocean.” The US draws the boundary differently with a more modern approach to drawing water boundaries. Canada says that the 1825 treaty meant up to and across the frozen sea, which nearly 2 centuries later is increasingly unfrozen.

ii) Hans Island/Lincoln Sea

This is a dispute between Canada and Denmark. The problem is a tiny island off the west coast of Greenland that falls within both countries’ territorial claims, plus a small stretch of the Lincoln Sea that is in dispute. The two countries are presently posturing with politicians, troops and tourists visiting what is essentially a large rock sticking out of the water.

iii) Continental Shelf

This is a dispute between the Russian Federation and Canada, and possibly Denmark. According to the United Nations Convention on the Law of the Sea, countries can claim the seabed far beyond their land borders based on any geographic extension of their continental shelf. Russia is laying claim to everything up to and including the North Pole. Canada disagrees. The Russians have already filed their claim with the United Nations Commission on the Limits of the Continental shelf. They have been required to file more evidence in support of their claims. Canada has until 2013 to submit its claim, after which the UN will make recommendations that the countries can accept or ignore.

The central issue is the Lomonosov Ridge (which apparently contains large amounts of minerals and oil) the exact limits of which is not yet known. Generally, it runs for 1,800 kilometers between Canada’s Ellesmere Island and Russia’s New Siberian Islands. To both countries it is an extension of their sovereign territory. As we all know, international law defines territorial waters as 12 nautical miles out from the coast and sovereign rights exist over the Exclusive Economic Zone (“EEZ”) 200 nautical miles beyond that, or even beyond 200 nautical miles if its continental shelf extends outwards. It may take 10 or 20 years before the Commission rules.

iv) Northwest Passage. The status of these waters is unresolved between Canada and most of the world. Ownership of the islands in the Canadian Arctic archipelago is not in issue. However, the passage of ships through the Arctic archipelago is argued to be within Canada’s 200 nautical mile EEZ. The problem is whether it is actually Canadian territory. Canada says that they are internal waters. The United States and most other countries say they are international waters, and that ships are entitled to “innocent passage” through it, like the Straits of Gibraltar and the Hormuz Straits. There is no easy solution. With a large amount of goodwill (and perhaps other considerations), the United States might agree to accept Canadian authority over the Passage to deter environmental disasters and security threats.

v) Barents Sea. There has been a dispute for 40 years between Norway and Russia over a large area of the Arctic Ocean adjacent to those two countries which is thought to contain 40 billion barrels of oil. Last month they signed the Barents Sea Pact to resolve their differences and share the resources.

### III. Administration / Territorial jurisdiction

- The five Coastal States all govern their territories with National law, including territorial waters and, where they can, over their EEZ. For example, Canada proclaimed the Arctic Waters Pollution Prevention Act in 1970 which regulates protection of the environment in what Canada perceives to be its territory. Ships entering that territory and particularly the Northwest Passage are required to have certificates of financial responsibility in case of oil spills. So far, all ships comply. Canada governs its territory in Nunavut, the Yukon and North West Territories and in the islands to the far North.

- The Arctic Council, comprising the five Coastal States, meets regularly to oversee and coordinate the 1991 Arctic Environmental Protection Strategy - a non binding agreement to protect and preserve the Arctic environment, with the involvement of the indigenous peoples, and other common issues. Finland, Iceland and Sweden have joined the Arctic Council. China, the European Union and others have applied to join the Arctic Council as observers.

- The European Union has issued reports and regulations concerning the Arctic environment, energy, security and governance.

- The IMO has issued reports and regulations dealing with sea lanes, pollution from ships, tourism (particularly guidelines for cruise ships operating in the Arctic), unsafe routings in the North West Passage and the North East Passage over the top of Russia, and guidelines for ships operating in ice-covered waters.

### IV. United Nations Convention on the Law of the Sea.

It is now in effect and applies in part to the Arctic. The USA has not ratified it, though it is widely expected that they will do so.

Articles relevant to the Arctic include Articles 1, 2(1), 5, 87, 197 and 234. The latter article, you will be interested to know, refers to "Coastal States" so quare whether it applies to the Antarctic where there are no "Coastal States", as defined. I look forward to hearing from Mr Martinsen on this.

### V. Protection of the Environment

- Canada's Arctic Waters Pollution Prevention Act .

- UNCLOS Article 234 applies to vessels in ice covered waters within the Coastal State's EEZ but gives no protection for the frozen high seas in the Arctic Ocean ( which are now rapidly melting).

-Ilulissal Declaration of 2008 by the 5 Coastal State countries to safeguard the Arctic.

-Arctic Environmental Protection Strategy, 1991.

- Barents European Arctic Council ( EU, Iceland, Norway and Russia) deals with environmental issues and resources

- EU environmental regulations

- IMO mandatory Polar Code and guidelines

## VI. Shipping Routes

- Northwest Passage from Southwest of Greenland to the north and east of Alaska. There have been a number of transits over the years, most with Canada's consent. It is to be noted that the great Norwegian explorer, Mr Amundsen, who first transited the Northwest Passage over a century ago did not seek consent ! It is submitted that Canada and the US should agree to disagree over its legal status and work closely over environmental and security concerns. Canada presently keeps track of Arctic shipping and its Northern Strategy plans a regulated Arctic traffic zone with mandatory ship reporting. All are agreed that an oil spill in the fragile Arctic would be a disaster. Ships taking the Northwest passage enjoy a 2200 nautical mile shorter voyage from Rotterdam to Kobe, than proceeding through the Panama Canal.

- Northeast Passage ( also known as the Northern Sea Route) along the top of the Russian Federation. Russia has a ship reporting mechanism in place and there is a distinct possibility that passage fees will be charged in the near future. Use of this passage trims 2400 nautical miles off a voyage from Shanghai to Hamburg.

- Arctic Ocean As the frozen sea melts, it opens up many possibilities for ship routings through the Arctic Ocean, including into Canada's Hudson's Bay.

- Beaufort Sea. This runs south of the Northwest passage to the west, and up the east coast of Alaska and westwards into the Bering Sea and the North Pacific. Canadian and US oil industry vessels and ships departing the Canadian Mackenzie River Delta use this routing.

## VII. Impact of Climate Change

- The large increase in shipping in recent years, both commercial and tourist, gives rise to the need for better charts. There were three groundings a few months ago - the passenger vessel Clipper Adventurer, the Tanker Challenger and the Tanker Nanny. Thankfully, there were no oil spills. From 1906 to 2006 there were 80 voyages in Arctic waters . In 2009 alone, there were 24 ! The Government of Canada has just announced that the 5 Coastal States have established the Arctic Regional Hydrographic Commission with more accurate charts as the end result. Canada has recently embarked on an ambitious mapping programme through the use of robotic technology. A company in British Columbia, International Submarine Engineering Ltd. ("ISE"), a world leader in small commercial submarine construction, manned and unmanned, has built an autonomous underwater vehicle ("AUV") with robotic manipulator systems and unique computer software. It was used for the first time a few months ago in the high Arctic, north of Borden Island, which operated under the ice down to great depths and was able to give accurate descriptions and depths of the seabed. This has set the stage for a more extensive survey in 2011 with the Canadian Hydrographic Service and the Department of Natural Resources. These Power Point slides illustrate the start of an ambitious programme to have more accurate charts and to better support Canada's claims.

- there is a need for a commercial shipping infrastructure with repair facilities, spill clean up stations, improved aids to navigation, and more icebreakers etc.

- there is, in particular, a need for better search and rescue facilities.

VIII. Time does not permit much on this, but the private sector has long been involved in the North. The insurance industry has kept statistics of ice experience by ships over the years. Mining ventures and oilfields are being served by private carriers. Canada has privatized the annual seaborne re-supply of Arctic island settlements, with Coast Guard icebreakers servicing only the most inaccessible settlements. The Government of Nunavut contractually controls terms of carriage to suit northern needs. There are ice clauses and safe Port warranties in charterparties. There are No Trading zones. There are defined navigation limits. More favourable ice conditions permit northern extension of fisheries.

#### IX. Conclusion

The frantic rush to stake claims in the Arctic (Professor Donald Rothwell of the Australian National University College of Law has described it as “the last great land grab !”) now includes China which in recent years has taken an active interest in Arctic international waters and their seabed. With its considerable cash reserves, it is open to China to partner with other countries that have territorial claims but insufficient money to extract the resources. The complicated legal claims to territory argue for a resolution of legal differences, rather than litigating them for decades in the Law of the Sea International Court of Justice in Hamburg. One could also argue for a new international regime to control the Arctic. The thawing of Arctic ice opens up opportunities for more ship operators to use the Arctic and a taming of the wild North may be called for.

I now have pleasure in handing over to Mr Martinsen who will likely describe a much more orderly legal regime in the Antarctic.

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