

Governance and Legal Issues Regarding the Polar Regions

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As it is well known to everyone the planet has two poles of the world, the region around the North Pole, called Arctica and the region around the South Pole, called Antarctica. The legal regulation of these two poles, however, is rather different, as is their governance structure.

In the following paper the attempt will be made to simply describe the legal structure of both regions and draw some conclusions from that with regard to the solution on upcoming problems.¹

I. The Arctic

The Arctic, currently populated by approx. 1 million inhabitants (150.000 Inuits, 40.000 Neuzies, 330.000 Jacuties, 70.000 Samii and 35.000 Evankuai) is the northern circumpolar region of the Earth which covers the northern parts of the continents North-America, Europe and Asia, moreover the north polar sea which is mostly covered by ice. The word stems from ancient Greek *arktos* = bear, referring to the star of „Great Bear“. Opposed to the icy continent Antarctica the North Polar region consists of a great sea, limited by the aforementioned continents. Parts of the Arctic are all year long covered by ice, whereas others melt off during the summer season.

Around 40-50 million years ago in the Arctic there were subtropical temperatures with mammut trees and lots of vegetation. The Earth cooled down approx. 33 million years ago and the poles started to develop. This reached Antarctica 25 million years ago and Greenland 6 million years ago.

Since 50 years one can observe a considerable increase of the temperatures in the Arctic, probably due to global warming. Alone in 2007 the Arctic ice melted down on approximately 1 million square kilometer. Subsequently in 2030, the Arctic could be ice-free, and the North East and the North West passage could be opened for commercial shipping as early as 2019.

1 For further information, see Rüdiger Wolfrum, “The Arctic in the Context of International Law”, *ZaöRV* 2009, 533, available at <<http://beck-online.beck.de/?vpath=bibdata/zeits/zaoerv/2009/cont/zaoerv.2009.533.1.htm&pos=3&hlwords=arctic%C3%90council%C3%90+arctic%2ccouncil+%C3%90+arctic+%C3%90+council+%C3%90+arcticcouncil+#xhlhit>>.

Currently the changes become obvious e.g. in Greenland where there are considerable less reindeers and considerably more geese.

Parts of Russia, the USA (Alaska), Canada, Greenland (administered by Denmark) and Svalbard (Norway) as well as the Lapland region (Norway, Finland, Sweden) belong to the Arctic region.

Despite the lack of an overarching political agreement consensus was reached among the neighbouring states to an application of the so called sectorial principle. According to this principle states can claim certain sectors of the Arctic region.

There is a strong probability for the existence of rich resources in the Arctic such as oil and gas which already by now are being exploited. These possibilities have already been given rise to conflict among the neighbouring states.² E.g. in 2007 Russia has pronounced its claim on parts of the Arctic by putting its flag via submarines exactly on the geographic North Pole.

The governing organ for the Arctic is called the Arctic Council³, established in 1996. Its members are the claiming neighbouring states Denmark (Greenland), Finland, Norway, Sweden, Iceland, as well as Russia, the USA and Canada. Moreover indigenous populations like the Aleut International Association, the Inuit Circumpolar Conference, the Russian Association of Indigenous Peoples of the North, and the Saami Council, Gwich'in Council International and the Arctic Athabaskan Council are members and six states Germany, France, the Netherlands, the UK, Poland and Spain enjoy observer status. The Arctic Council is no international organisation (as the USA did not wish it to have any significant international legal status) – it is rather a cooperation *sui generis* (comparable to the CSCE in the ninetenseventies and -eighties).

The most important area of cooperation so far was the problem of environmental protection – there is *inter alia* a working group on sustainable development. Agreements with an impact on the Arctic are: the Treaty of Spitzbergen of 1920⁴ and the Agreement on the Conservation of the Polar Bears of 1973⁵. But, due to the fact that the region is in principle based on water, certainly the overarching international agreement which however does not specifically deal with the Arctic, is certainly the Law of the Sea Convention (LOSC) of 1982⁶.

2 Marc Benitah, "Russia's claim in the Arctic and the Vexing issues of Ridges in UNCLOS", ASIL INSIGHTS (American Society of International Law, Washington, D.C.), Vol. 11, Issue 27, 8 November 2007, available at <www.asil.org/insights071108.cfm>.

3 The Arctic Council was based on the "Declaration of the Establishment of the Arctic Council", so called "Ottawa Declaration", 19 September 1996. Available at <<http://library.arcticportal.org/id/eprint/1270>>.

4 Spitzbergen Treaty, also called **Svalbard Treaty** (concluded 9 February 1920, entered into force 14 August 1925) LOV-1920-02-09.

5 Agreement on Conservation of Polar Bears (concluded 15 November 1973, entered into force 26 May 1976) 27 UST 3918; 13 ILM 13 (1974).

6 United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

Currently the most contested use with regard to the Arctic are the following two:

- claims of certain states to a so called outer continental shelf, and
- the legal regime of the so called North West passage.

Those claims will be briefly addressed in the following.

Already in 2001 Russia has made a claim to the Continental Shelf Commission, an organ of the LOSC with the demand to enlarge its continental shelf – followed by protest from Japan, Denmark, Canada, the USA and Norway – Denmark even considered this claim in contrast to own claims to the Arctic region.

This procedure is still going on. The Commission has asked Russia to present a new application based on new geological and geophysical data.

The core of the Russian as well as of the other claims is how one should interpret article 76 para. 3 of the LOSC⁷ which also favours an extension of the continental shelf under the condition that there is an „under sea prolongation of the land mass of the coastal state“ (corresponding to the jurisprudence of the ICJ in *Tunisia vs. Libya*⁸ and *Libya vs. Malta*⁹). Russia as well as Denmark and Canada must thus demonstrate that the claimed territory is an underwater prolongation of their part of the continent. This is for various geomorphological reasons very difficult to prove.

The other problem is the one of the legal status of the North West passage¹⁰ which links the Northern Atlantic with the Northern Pacific Ocean, and was first used by Amudsen during 1903-1906. For the USA and the European Union the North West passage is an international strait according to Article 34 et seq. of the LOS Convention 1982. This opinion is opposed to the one of Canada who sees it as its own internal waters.

Both these problems which are based on different interpretations of the LOS Convention can be made subject to the jurisdiction of either the International Tribunal of the Law of the Sea in Hamburg or to the International Court of Justice in The Hague provided that the parties to these disputes submit the issue to the jurisdiction of these courts.

7 Anna Cavnar in “Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor”, NYU, IILJ Emerging Scholars Paper 15 (2009), available at <www.iilj.org/publications/documents/CavnarESP15-09.pdf>.

8 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18.

9 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13.

10 Alexander Proelss / Till Müller in: “The Legal Regime of the Arctic Ocean”, ZaöRV 68 (2008), 651-687 (655 ff.).

II. Antarctica

Unpopulated Antarctica, right opposite to the Arctic, covers land and sea areas around the South Pole, i.e. basically the continent Antarctica and the South polar sea. It has been researched since 1820. The legal status is laid down in an international agreement, the Antarctic Treaty of 1 December 1959¹¹. Most of the 52 million square kilometers are water. The Antarctic continent with its 13,2 million square kilometers is approximately 2,7 million square kilometers bigger than Europe.

Antarctica is covered by a large zone of ice which covers one of the richest eco systems of the world (especially crill). Inhabitants are pinguins, robbes, some plants, rare fish species, all at the ocean subsoil.

The legal regime is to a large extent determined by the aforementioned Antarctic Treaty of 1959 (as a consequence of the International Geophysical Year 1957/58) which entered into force on 23 June 1961. After the expiry of its first duration period of 30 years in 1991 it was prolonged for another 50 years until the year 2041.

The most important regulation of the Antarctic Treaty next to the total demilitarization of the continent is the freezing of existing territorial claims of 6 states to sectors of Antarctica „in the deep ice“ of its article IV.

Attempts to open Antarctica for commercial uses led to the draft of a Convention on the Regulation of Antarctic Mineral Resources (CRAMRA) in 1988¹². Under this Convention the attempt was made to allow Antarctic mineral activities under very severe legal conditions of a system of strict liability of the operators (article 8 CRAMRA). But this Convention never entered into force since France and Australia did not ratify it.

Rather in 1991 a “Protocol on the Protection of the Antarctic Environment”¹³ was adopted and later entered into force. According to the Protocol no com-

11 Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

12 Convention on the Regulation of the Antarctic Mineral Resources (adopted 2 June 1988 in Wellington). As it has not been ratified, the CRAMRA did not enter into force and had been replaced by the “Protocol on the Protection of the Antarctic Environment”, 1991. The convention was signed by 19 states, but no states have ratified it. Subsequently, the Convention has not entered into force and has been replaced by the 1998 Protocol on Environmental Protection on the Antarctic Treaty. Draft available at <<http://sedac.ciesin.columbia.edu/entri/texts/acrc/cramra.txt.html>>; Uwe Jenisch, in „Renaissance des Meeresbodens“, Zeitschrift für öffentliches Recht in Norddeutschland – NordÖR- 2010, 373- 383 (379), available at <<http://beck-online.beck.de/Default.aspx?vpath=bibdata/zeits/nordoer/2010/cont/nordoer.2010.373.1.htm&pos=0&clasthit=true&hlwords=CRAMRA%C3%90+cramra+#xhlhit>>.

13 Protocol on the Protection of the Antarctic Environment (adopted on 3 October 1991 in Madrid - Spain, and entered into force in 1998). Available at <www.unep.ch/regionalseas/legal/antarc.htm>.

mercial activity besides a limited form of tourism is allowed in the Antarctic region.

In total the Antarctic Treaty system consists of:

- the Antarctic Treaty of 1959¹⁴
- the Convention on the Conservation of Antarctic Seals of 1972¹⁵,
- The Convention on the Conservation of Antarctic Marine Living Resources of 1980¹⁶, and
- the Protocol on Environmental Protection to the Antarctic Treaty of 1991¹⁷.

The governing body of Antarctica are the Antarctic Treaty Consultative Parties¹⁸, the so called Antarctic Club. This club consists of those countries which have made claims to sectors of Antarctica and others. It consists of

- the 12 states which have negotiated and ratified the original Antarctic Treaty like Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom, which are all claimant states, plus Belgium, Japan, Russia, South Africa and the USA.
- Since 1961 another 33 states have ratified the Treaty of which 16 later became states with consultative status because of the magnitude of their contributions to Antarctic research and development such as Poland, Germany, Brazil, China, Uruguay, Italy, Sweden, Spain, Finland, Peru, South Korea, Canada, the Netherlands, Bulgaria, Ukraine. Moreover, other Treaty partners without consultative status are the Czech and the Slovak Republics, Denmark, Romania, Papua New Guinea, Hungary, Cuba, North Korea, Austria, Canada, Columbia, Switzerland, Guatemala, Turkey, Malaysia and Pakistan.

In short the steering of affairs important to the Antarctic development is done in the so called Antarctic Treaty Consultative Meetings (ATCM), which take place every two years since June 1991. 28 of the 45 Treaty partners have consultative status and are thus allowed to participate in these meetings.

14 Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 12 UST 794; 402 UNTS 71; 19 ILM 860 (1980).

15 Convention for the Conservation of Antarctic Seals (signed 1 June 1972, entered into force 11 March 1978) 29 UST 441; 11 ILM 251 (1972).

16 Convention on the Conservation of Antarctic Marine Living Resources (signed 20 May 1980, entered into force 7 April 1982) 33 UST 3476; 1329 UNTS 48; 19 ILM 841 (1980).

17 Protocol on Environmental Protection to the Antarctic Treaty (signed 4 September 1991, entered into force 14 January 1998) 30 ILM 1455 (1991).

18 Antarctic treaty consultative parties, further information available at <www.scar.org>.

III. Summary

Whereas the legal regime of the Arctic region lacks any overarching structure apart from the Law of the Sea Convention 1982 which is not a specific regulation for the Arctic, there is a specific Treaty for Antarctica since 1959.

This significant difference has led, on the one hand, to the establishment of a governing body for Antarctica, the ATCM, whereas the Arctic Council, on the other hand, is more an informal body rather than having international legal personality.

The solution of legal issues with regard to Antarctica is either postponed (such is the case for the territorial claims until 2041), or even more or less solved at least until 2021 with regard to environmental protection.

For the Arctic region, however, everything is in flux and due to the immense and controversial interests at stake with regard to the recovery of Arctic resources like oil and gas as well as with regard to commercial shipping, there is no high likelihood of reaching an agreement in the foreseeable future.