THE UN LAW OF THE SEA: A TOOL FOR ARCTIC GOVERNANCE?

I. Introduction

The United Nations plays a central role in the essential rule-making of international society\textsuperscript{1} first of all through the Security Council and the General Assembly, and associated world conferences, but also through conventions and other mechanisms. Some treaties and conventions are made outside the UN system, and regional organizations also make rules. According to Weiss various international and regional regimes often involving parts of the UN system, provide multiple forms of\textit{ global governance}. Global governance can be defined as the capability of governments to find international answers and solutions to challenges and benefits of increased globalization\textsuperscript{2}. In this paper we will have a closer look on which role the UN Law of the Sea (UNCLOS) can play in order to ensure global governance in the Arctic. In this paper global governance will be called\textbf{ Arctic governance}. Due to the restrictions of this paper I will choose the case of maritime shipping in the Arctic to analyze how the UN Law of the Sea can contribute to Arctic governance. First this paper therefore will look into the UN Law of the Sea (III) and the process around its establishment between 1973 and 1982. Secondly there will be a short summary of definitions and terms related to the Northern Sea Route and maritime shipping, before the paper closes with giving an answer on whether the UN Law of the Sea can contribute to regulate the transport and trade on the Northern Sea Route and hence be a tool for governance in the Arctic.

\textsuperscript{1} Weiss, T. G. et al., 2010
\textsuperscript{2} Ibid.
II. **UN Convention of the Law of the Sea (UNCLOS)**

*a) Background*

Between 1945 and 1960, starting with the United States, states started to extend national claims of the natural resources like fish and minerals on their continental shelves. States started to extend their rights to a distance between 12 and 200 nautical miles to cover their fishing grounds. Despite the United Nations Conference of the Law of the Sea I (UNCLOS I:1956-1958) and II (UNCLOS II:1960) there was by 1967 still no clear custom with regards to the size of continental shelves: Both a three-mile, 12-mile and a 200-mile territorial limit were still used by states to define their continental shelves.

*b) The third UN Conference of the Law of the Sea (1973-1982)*

The third UN Conference of the Law of the Sea (UNCLOS III) took place between 1973 and 1982 and concluded with a variety of regulations and definitions for amongst others continental shelves, territorial waters and economic zones. The UNCLOS III was convened in New York in 1973. In an attempt to reduce the possibility of groups of nation-states dominating the negotiations, the conference used a consensus process rather than majority vote. The convention (UNCLOS III) has been ratified by 164\(^3\) states and came into force on November 16, 1994.

*c) Provision in the UNCLOS relevant for shipping along the Northern Sea Route*

UNCLOS III introduced a number of provisions. The most significant issues were setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones (EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes.

\(^3\) UNa, 2012
Since shipping in the Northern Sea Route is the subject for this analysis this paper will focus on the following definitions and regulation in UNCLOS III:

1. **Baseline**
   A normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. International lawyers appear to favor the notion that where ice persists for many years and is fixed to land, it may be able to generate territorial sea baselines.\(^4\)

2. **Internal Waters**
   A nation's internal waters cover all water and waterways on the landward side of the baseline from which a nation's territorial waters is defined. It includes waterways such as rivers and canals. According to the UNCLOS the coastal nation is free to set laws, regulate any use, and use any resource. Foreign vessels have no right of passage within internal waters, and this lack of right to innocent passage is the key difference between internal waters and territorial waters.

3. **Territorial waters (sea)**
   Out to 12 nautical miles from the baseline (internal waters), the coastal state is free to set laws, regulate use, and use any resource. Vessels have the right of innocent passage through any territorial waters. Nations can however temporarily suspend innocent passage in specific areas of their territorial seas, if doing so is essential for the protection of its security.

4. **Innocent Passage**
   Innocent passage is a concept which allows for a vessel to pass through the territorial waters of another state just subject to certain restrictions. The UNCLOS concludes that all States enjoy the right of innocent passage through territorial sea\(^5\) and defines innocent passage as:

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\(^4\) Kaye, S.

\(^5\) UNCLOS III: Section 3. Innocent Passage in the Territorial Sea: Article 17
Article 18: Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
   a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
   b) proceeding to or from internal waters or a call at such roadstead or port facility

Article 19: Meaning of innocent passage

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.\(^6\)

5. Archipelagic Waters

A baseline is drawn between the outermost points of the outermost islands, subject to these points being sufficiently close to one another. All waters inside this baseline are designated Archipelagic Waters. The state has full sovereignty over these waters (like internal waters), but foreign vessels have right of innocent passage through archipelagic waters (like territorial waters).

6. Sea lanes in the territorial waters

According to the UNCLOS III\(^7\) the state may require foreign ships exercising the right of innocent passage through its territorial sea to use sea lanes it prescribes for the regulation of the passage of ships.

7. Contiguous Zone

The contiguous zone is a band of water extending from the outer edge of the territorial sea to up to 24 nautical miles from the baseline, within which a state can exert limited control for the purpose of preventing or punishing "infringement of its customs, fiscal, ...

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\(^6\) UNCLOS III: Section 3. Innocent Passage in the Territorial Sea: Article 18/19

\(^7\) UNCLOS III: Section 3. Innocent Passage in the Territorial Sea: Article 22
immigration or sanitary laws and regulations within its territory or territorial sea. This will typically be 12 nautical miles wide, but could be more or less, if it would otherwise overlap another state's contiguous zone. However, beyond the 12 nautical mile limit there was a further 12 nautical miles or 24 nautical miles from the territorial sea baselines limit, the contiguous zone, in which a state could continue to enforce laws in four specific areas: pollution, taxation, customs, and immigration.

8. Article 234: Ice-covered areas

UNCLOS contains few provisions regarding ice, as during its negotiation, in an effort to reach a consensus, discussion of Arctic was avoided. However the Article 234 authorizes coastal states to develop special regulations dealing with human activities in ice-covered waters. This grant of authority supports regulatory activities by the states. Article 234 seeks to upgrade coastal state authority, without abolishing the rights of others to innocent passage. According to the article:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone [...] Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

It is however worth noting that the UNCLOS is silent on whether the regime of transit passage prevail over the regime of article 234.

9. Continental Shelf and Exclusive Economic Zones

The two definitions are central for the exploitations of natural resources, however not for their shipping. The two notions are fundamental in the UNCLOS. The legal continental

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8 UNCLOS III: Section 4. Contiguous Zone Article 33
9 Stuart B. Kaye
10 UNCLOS III: Section 8: Article 234
11 Moe, A, 2010
shelf\textsuperscript{12} comprises the seabed and subsoil of the submarine areas beyond the territorial waters of the coastal state to at least 200 nautical miles from the baselines. The only exemption is when the continental margin\textsuperscript{13} extends to 200 nautical miles. EEZs extend from the edge of the territorial waters out to 200 nautical miles from the baseline. The EEZs were introduced to stop the increasingly heated clashes and debates over fishing and petroleum rights. The EEZs give the coastal state the sole right to exploit the natural resources in its zone.

III. The Northern Sea Route: Drivers and Uncertainties

\textit{a) The Northern Sea Route}

The Northeast Passage (NEP) is a term for the transit route north of Russia linking the Northern Atlantic and Northern Pacific Oceans. It is an abstract term without strictly defined borders. The Northern Sea Route (NSR) on the other hand is a term used by Russia. NSR is defined as the sea area from the Novaya Zemlya islands in the west to the Bering Strait in the east.\textsuperscript{14} The 1990 Regulations\textsuperscript{15} define the NSR as follows:

\begin{quote}
[T]he essential national transportational line of the USSR that is situated within its inland seas, territorial sea (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast and includes seaways suitable for leading ships in ice, the extreme points of which are limited in the west by the Western entrances to the Novaya Zemlya Straits and the meridian running north through Mys Zhelaniya, and in the east (in the Bering Strait) by the parallel 66° N and the meridian 168°58’37” W (Art. 1 (2)).
\end{quote}

The NSR is due to the highly variable and difficult ice-conditions not a clearly defined linear route. Vessels will sometimes have to choose routes close to the mainland, other times routes through the many archipelagos, and sometimes routes north of them.\textsuperscript{16}

\textsuperscript{12} UNCLOS III: Article 76
\textsuperscript{13} The intersection between the continent and the deep ocean is called the continental margin
\textsuperscript{14} Moe A., Jensen Ø., 2010
\textsuperscript{15} Translated and quoted in: Franckx, E., 1991
\textsuperscript{16} Ragner 2000
September 2010 was the first time in modern history that the NSR was totally ice-free\textsuperscript{17}. So far 2010 has the record for the warmest year in the Arctic\textsuperscript{18}

\textbf{Figur 1:} August 22, 2007 sea ice concentration showing the Northeast Passage (The Northern Sea Route) (green)\textsuperscript{19}

\textit{b) Defining “transit marine shipping”}

In this paper transit marine shipping refers to transportation of goods and merchandise between Europe and Asia via the Northern Sea Route. As ice conditions diminish in the future, transportation of merchandise between Europe and Asia along the Northern Sea Route by liner shipping services may be expected.

\textsuperscript{17} Barentsobserver: December 17, 2010
\textsuperscript{18} The Guardian: September 11, 2011/Barents Observer January, 2012
\textsuperscript{19} NASA's Earth Observatory/Weather Underground: \url{http://www.wunderground.com/climate/NorthernPassages.asp}
c) **Transit marine shipping on the Northern Sea Route**

In 2009, the first two international commercial cargo vessels traveled north of Russia between Europe and Asia\(^{20}\). In 2011, 18 ships have made the now mostly ice-free crossing\(^{21}\). The most important users of the route are the Russian companies Norilsk Nickel, Gazprom, Lukoil, Rosneft and Rosshelf.\(^{22}\)

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d) **Drivers**

The reduction in sailing distances that can be obtained from using the NSR is considerable. Travel along NSR takes only one third of the distance needed to go through the Suez Canal, without as high a risk of pirates\(^ {23}\). The gains from shipping operations on an ice-free NSR appear to be reduced number of days at sea and more than doubling of the vessel fuel efficiency if shipping from Northern European to Northern Pacific ports. The argument is thus economically founded on the reduction of shipping time; employment and fuel costs. The development of petroleum and mineral production in the Arctic region is getting increasingly important for an Asian continent with appetite and need for energy and minerals.

![Map of the Northern Sea Route](image)

Figure 2: Wikipedia: A graphical comparison between the NSR (blue) and an alternative route through Suez Canal (red)

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\(^{21}\) *New York Times*, 17.10.2011  
\(^{22}\) *Barentsobserver: December 17, 2010*  
\(^{23}\) Ibid./ DNV, 2010
e) **Uncertainties**

**Climatic conditions**

Ships operating in the Arctic environment are exposed to a number of unique risks besides the sea and glacial ice concentrations which pose a structural risk to ships. Poor weather conditions and lack of up-to-date charts, communications systems and navigation aids are special risks for shipping in the region\(^{24}\). The remoteness of the areas makes rescue or pollution clean-up operations difficult. The availability and cost of marine insurance\(^{25}\) is another major restraint.

**Operational conditions**

Heavy investment is needed to make NSR a viable transport route that would give enough income to finance running costs. Despite serious Russian state investment the operational conditions may continue to decline despite improved ice conditions. However, the commercial conditions remain uncertain and necessary investments in ice-breakers and infrastructure are missing. The lack of well equipped ports in Arctic prepared for the Northern Sea Route is one of the biggest challenges meeting companies that are planning Arctic marine shipping. However Norway and Russia are preparing themselves: Kirkenes in Norway, Murmansk and Petropavlovsk at Kamchatka in Russia have admissions to become Northern Sea Route hubs. The companies will have to use ice-strengthened vessels all the time and will need icebreaker backup most of the year. All this amounts to serious cost factors. Punctuality is another challenge: Due to changing conditions it will be difficult to guarantee delivery on time. The fees collected by Russian authorities for shipping along the NSR are supposed to cover infrastructure costs, including maintenance of the icebreaker fleet. The high fees are however making shipping in the NSR unattractive to many.

\(^{24}\) Østreng, 1999

\(^{25}\) VanderZwaag, D.L., et al., 2008
IV. Governance of Shipping in the NSR

The five Arctic Ocean coastal states (Denmark, Canada, Norway, Russia, the United States) confirm in the Ilulissat Declaration\(^\text{26}\) that the current International Law of the Sea applies to all seas including the Arctic. The states therefore see no need to develop a new (Arctic/Polar) convention or treaty. However it is worth noting that the Ilulissat Declaration refers to the “law of the sea” but not explicitly to the UNCLOS Convention. This is due to the fact that the United States is not a party to the Convention. The Ilulissat Declaration and the Arctic Council is an example of global governance outside of the UN system. At the same time it confirms and shows the importance of the UN treaties The United Nations plays a central role in the essential rule-making of global governance\(^\text{27}\) and in this case Arctic governance.

Free passage

Generally the UNCLOS most important achievement regarding the Arctic is the right to free innocent passage. This is not only for the Arctic, but is an important principle for shipping along the Northern Sea Route.

Regulatory activities by the Russian state

The UNCLOS authorizes coastal states to develop special regulations dealing with human activities in ice-covered waters. This grant of authority supports regulatory activities by the states to protect the nature from pollution and install the needed savage/rescue measures. Russia claims formal jurisdiction over the NSR, based on Article 234 of the UNCLOS\(^\text{28}\). As seen above this article gives coastal states the right to unilaterally adopt and enforce non-discriminatory laws and environmental regulations in their EEZ. In the case of NSR this has become a challenge for non-Russian companies: It is possible to claim\(^\text{29}\) that the Russians interpret the article 234 to their own economic interests in a traditional Soviet way of sector concept and not for the best of the environment. On the basis of article 234 Russia prescribes standards which are more rigid

\(^{26}\) Ilulissat Declaration, 2008
\(^{27}\) Weiss, T. G. et al., 2010
\(^{28}\) Bunik, 2011
\(^{29}\) Ragner, 2008/Bunik, 2011
than those generally permitted under international law applied in other maritime zones\textsuperscript{30}:
The Russian regulations set out that all vessels wishing to enter the NSR and the Russian EEZ should give notifications to the Russian authorities in advance. The vessels must submit an application for guiding, as well as pay an “ice-breaker fee” to use the NSR. The mandatory ice-breaker fees are high, and are not directly linked to services. For example, during summer, an ice-strengthened vessel may be able to transit the NSR unescorted, but will still have to pay a full fee. Another challenge for a foreign vessel in Russian Arctic waters is that it is impossible to enter/exit the Russian EEZ or international sea without navigate through Russian territorial waters subject to Russian sovereignty and regulation. This means that independent of the interpretation of the Article 234 of the UNCLOS, Russia will based on the Article 21 of the UNCLOS be able to regulate the entry/exit to/from and define fees for passage along the NSR\textsuperscript{31}.

**Russian claims for straits between Arctic archipelagos**

Russia claims the straits within and between the Russian Arctic archipelagos and the mainland as part of its internal waters. Most countries, except for the US, have more or less accepted Russia’s *de facto* control of these waters\textsuperscript{32}. If the Russian claims are accepted these straits will only be open to transit passage if Russia allows it. This could be a further possibility for Russia to claim fees related to shipping along the NSR.

**V. Conclusion**

The UNCLOS establishes the over-arching legal framework for Arctic governance of transit marine shipping. The Convention balances the power of states and gives the right to innocent passage and shipping in the Arctic. The extent of Arctic coastal states to control foreign shipping in the Arctic has been bolstered by Article 234 of UNCLOS. However the jurisdictional status of some Arctic waters remains controversial. It can be claimed that the Russian interpretation of the article 234 of the UNCLOS is interpreted in accordance with the Soviet sector concept, which is not to the best of transit marine shipping in the NSR. The

\textsuperscript{30} Moe, A, 2010
\textsuperscript{31} Bunik, 2011
\textsuperscript{32} Bunik, 2011
Russian interpretation leads to higher cost and more uncertainty for the shipping companies and therefore to less trade and commerce along the NSR. In my opinion thorough international dialogue and more specific regulations are hence needed.

With regards to the question whether The UNCLOS is a tool for increased cooperation on and governance of transit marine shipping along the NSR, the answer is yes when it comes to the overall Arctic governance. However the regulative measures taken by Russia on the basis of the UNCLOS is not always beneficial for international cooperation on transit maritime shipping along the NSR. UNCLOS is therefore not sufficient for international cooperation for increased trade along the NSR. Further international dialogue on the management of the NSR will be needed in the future.

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**Illustrations:**

**Figure 1:** Weather Underground/NASA Earth Observatory:
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**Figure 2:** Wikipedia:
http://en.wikipedia.org/wiki/File:Northern_Sea_Route_vs_Southern_Sea_Route.svg