Draft Presentation

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Is There a Need for New Legal Regime in the Arctic?

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The climatic changes affecting the Arctic have lead to visions of new possibilities, new challenges, and new ways of thinking about an area often neglected in the past. This conference has been a great vehicle for this. One of the things that is sometimes said is that the challenges we face mean that there is a need for a new legal regime for the Arctic. That is what the European Parliament said in 2008. It called on the Commission to pursue the opening of negotiations on: "the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty". Recognizing that there might be some peoples and nations in the area already who might have an interest in the matter, it went on to qualify the first part of its resolution by saying "as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean."

The European Parliament's resolution like many statements about what should be done in the Arctic is based on certain assumptions – assumptions that are not always in accord with reality or at least with the legal reality. What I would like to do this afternoon is explore this call for a new legal regime, for a new international treaty for the Arctic that the EP is calling for. In doing this, I am not trying to focus on the EP in particular. Others have called for a new regime as well.

The need for a new legal regime means either that there is a vacuum there already or that the existing regime is somehow broken and is not working – hence it needs to be replaced. I will explore both of these possibilities.

The Existing Legal Regime in the Arctic Ocean

Unlike the Antarctic, there is no distinct legal regime for the Arctic as such. And, of course, the Arctic and Antarctic are different. The Antarctic is an area of land covered by ice, and surrounded by ocean. Some states have territorial claims to portions of that land although no such claims have been formally accepted, and there is a multilateral agreement, the Antarctic Treaty, under which uses of Antarctica are reserved for peaceful, scientific purposes and territorial claims have been placed in abeyance. This apparently is the regime that the EP is advocating for the Arctic notwithstanding the fundamental differences between the Arctic and the Antarctic.

The Arctic, by contrast with the Antarctic, is an area of ocean surrounded by land. And all of that land is within the undisputed sovereignty of the Arctic basin states. There are two qualifications to this. First, there is a tiny island between Greenland and Canada, Hans Island, which is disputed between the two countries. Second, the Treaty of Paris grants certain rights to signatory states in respect of Svalbard, which is subject to the sovereignty of Norway, and from time to time questions have arisen about the extent of those rights.

Thus, the issues relating to the Arctic are not about sovereignty over land. Rather they relate to the management of an area of ocean including the seabed and concern the extent to which the Arctic basin states can extend their maritime jurisdiction out into that Ocean. The question of the maritime jurisdiction of states was well settled in part in customary international law and confirmed in the 1982 UNCLOS, so to a certain extent the basic principles are settled and well-known.

The basic core is that every state has a territorial sea extending 12 nm from its land. Waters behind the baseline from which the territorial sea is measures are

internal waters. Baselines can be in dispute, and this is something that Prof de Mestral will deal with in the context of the NWP.

More importantly is the extent to which states can claim jurisdiction over the resources of the seabed and water column beyond the territorial sea, because that is in part what is at stake in discussions over the Arctic.

(a) Exclusive Economic Zone (EEZ)

Under Article 56 of the 1982 Convention, every state has the right to an EEZ extending 200 nm from its coast in which it has exclusive rights to explore and exploit the resources of the water column and of the continental shelf or seabed. Essentially the coastal state has exclusive rights over the fishery and over hydrocarbon or other mineral resources of the continental shelf. Each of the Arctic coastal states thus has a 200 EEZ. But because of the configuration of the Arctic coasts it is only Canada, Denmark (Greenland), Norway, Russia and the US that have EEZs extending into the Arctic Ocean. **Slide**

The rights of states within their EEZs are the same around the world. So, the rights that Arctic coastal states have in respect of their 200nm EEZs are just the same as the rights states have in the waters off their coasts elsewhere in the world. The existence of these EEZs means that there is a the need to draw boundary lines between their respective zones. Canada and Denmark have done this in part in relation to Greenland, and the United States and Russia have done so as well, although the agreement still has to be ratified. Equally, Norway and Denmark have resolved their boundaries by agreement and through a decision of the International Court of Justice and more recently Norway and Russia have delimited their maritime boundary in the Barents Sea.

The most significant of the boundaries yet to be resolved is that between Canada and the United States in respect of the Beaufort Sea, where the two states have fairly divergent views on where the boundary should run. According to Canada the boundary should be the extension of the land boundary running along the 141st meridian. According to the United States, the boundary should be an equidistance line. **Slide**

There is, therefore, nothing in contention over the 200nm EEZs of the Arctic coastal states. No other state is claiming an EEZ in the Arctic and apart from delimiting boundaries, there is nothing in dispute between the Arctic states in respect of the resources of the EEZs.

(b) Extended Continental Shelf

The jurisdiction of states is not, however, limited to 200nm; if the continental shelf extends beyond 200nm the coastal state can claim the right to explore and exploit the resources of that extended continental shelf. The basis for jurisdiction is that the continental shelf in question is just a continuation of the continental shelf that extends 200nm from the coast, or to put it another way, the extension of the landmass under the sea. But, this raises one of the more difficult questions relating to the Arctic. How far do the continental shelves of the Arctic coastal states extend?

Now let me make the point clear. The question is not whether Arctic states can lay a claim to an area of continental shelf beyond 200 miles. If they have a shelf that goes beyond 200 nm then it is theirs – they do not need to claim it. And although in theory I suppose they could renounce it, even if the coastal state claims no interest in its extended continental shelf – no other state can claim it. In law the sovereign rights of the continental shelf belong to the coastal state – they

are not *terra nullius* open to claim by anyone as land territory was treated as being in the 19th century (in wilful disregard of the rights of indigenous peoples). If a state were to renounce its extended continental shelf, then the area would become part of the international seabed, which in turn cannot be appropriated by any state.

Thus the only issues relating to the extended continental shelves in the Arctic are the outer limit of each state's shelf and if the shelves overlap then there is a need for delimitation between them. So it is quite misleading to speak of a "land-grab" in the Arctic in the 19th century sense of what one state gets another loses. It is not a zero-sum game in that sense. The rights have always been there, what is different now is that states are having to define their outer limits in part because of time pressure under the provisions of UNCLOS. I shall back to that point in a minute.

The issue of the outer limit of the extended continental shelf is complicated both legally and scientifically. Article 76 of the 1982 Convention sets a formula for determining the outer limit of the continental shelf. This formula requires first the determination of the foot of the continental slope and then a measurement from the foot of the slope, either 60nm or to a point where the sediment thickness is no less than 1% of the distance to the foot of the slope. Just stating the formula indicates the complexity of it. Further, there are maximum distance limits as well: 350 nm or 100 nm beyond the 2500 metre isobath.

Of course, states will want to ensure that they establish a limit that reflects fully all that there are entitled to. So, they will want to apply the option within the Article 76 formula that gives them the greatest amount of continental shelf. But whatever approach is taken, scientific uncertainty is confronted. How can the foot of the continental slope be determined with precision in an area that is many metres below a surface of the ocean that is often covered in ice? Thus, a major

challenge for the Arctic states is to gather the scientific information necessary to establish the foot of the slope and to determine the 1% sediment thickness point. **Slide**

But, if this were not complicated enough, there is a further problem in the Arctic. There are two major submarine ridges extending from the Russian side of the Arctic Ocean to the Canada/Greenland side. They are the Lomonosov ridge and the Alpha-Mendeleev ridge. The question, then, is whether these ridges are part of the continental shelf or whether they are part of the deep ocean floor not subject to the jurisdiction of coastal states. **Slide**

Article 76(5) of the Law of the Sea Convention permits states to include submarine ridges within their continental shelves provided that they are continental in nature that is they are geologically part of the shelf rather than part of the seabed. And if there is some geological discontinuity between the shelf and the ridge then the ridge is not part of the shelf.[1]

And that is precisely the challenge in respect of the Lomonosov and Alpha-Mendeleev ridges. If Russia, Canada and Denmark/Greenland want to include the Lomonosov ridge as part of their continental shelves, they have to demonstrate that there is a geological continuity between their shelves and the ridge. In fact all states are engaged in the scientific research that is necessary to establish the outer limits of their shelves including whether the there is a geological connection with the Lomonsov Ridge. It was this research that Russia was undertaking when its research vessel dropped a flag at the North Pole. It was a great publicity stunt and

[1] Article 76 (5) provides: Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

apparently an impressive technological feat. But it was not intended as, nor could it be, an attempt to claim any kind of sovereignty over the North Pole.

The North Pole lies alongside the Lomonosov Ridge and so if that submarine feature is a continental extension of Russia at one end and Canada and Denmark/Greenland on the other end, then boundaries between Canada and Russia, Canada and Denmark/Greenland and between Russia and Denmark/Greenland on the Lomonosov ridge will have to be drawn. This would result in the area of the North Pole being within the continental shelf jurisdiction of one of the states, unless there is some agreement to avoid including that area within the continental shelf.

But, as one can see from this, the likelihood for disputes between Arctic states is less over the definition of the continental shelf and more over the delimitation of boundaries between them if their shelves over lap. And delimitation is a zero sum game.

Moreover, under the terms of the 1982 Law of the Sea Convention, after identifying the outer limits of their extended continental shelves (continental shelves beyond 200 nm), states must deposit those limits with the Commission on the Limits of the Continental Shelf (CLCS). The Commission can provide comments to a state if it feels that there is inadequate or non-compelling proof of the claim. In fact, when Russia first submitted its limits to the Commission, it was told that its proof relating to the Lomonosov Ridge was inadequate, and that is the reason for the continuing scientific work by Russia seeking to establish continuity between the geology of the continental shelf of Russia and the Lomonosov Ridge.

If the Arctic coastal states were to be successful in getting acceptance of the maximum outer limits that they could have in respect of the continental shelves in

the Arctic, most of the seabed of the Arctic Ocean would be within the continental shelf of an Arctic state. **Slide** The areas not included within the continental shelf of an Arctic coastal state would be part of the deep seabed with resource exploitation being administered by the International Seabed Authority (ISBA). What this means is that much of the seabed of the Arctic Ocean would be within the extended continental shelf of an Arctic coastal state and only a small portion would be international seabed, although payments would have to be made to ISBA in respect of production by a state within its extended continental shelf beyond 200 nm.

(c) Navigation

The other major question concerning the Arctic is that of navigation in Arctic waters. Beyond the EEZs of the Arctic coastal states the waters of the Arctic Ocean are high seas. There is thus freedom of navigation in those waters just as there is in the other oceans of the world. However, access to the waters of the Arctic Ocean involves of necessity transit through the exclusive economic zone of an Arctic coastal state, or through the Northwest Passage or the so-called Northern Sea Route to the north of Russia.

The EEZ is an area where states have the right to explore and exploit living and mineral resources; it is not an area over which the coastal state has full sovereignty. In respect of navigation within the EEZ Article 58 of the Law of the Sea Convention makes clear that the freedom of navigation principles applicable to the high seas are equally applicable to the waters of the EEZ. Also when regulating navigation within the EEZ to ensure environmental protection in that area, states are limited to applying "generally accepted international rules and standards".

There is, however, one important qualification to this. The Law of the Sea Convention contains a specific provision for "ice covered areas" – Article 234, which Professor de Mestral will speak about. That provision was negotiated largely by Canada, the US and Russia in response in particular to Canada's concerns with respect to the Northwest Passage, but it applies to all of the EEZs of the Arctic coastal states.

This provision grants a fairly broad right to Arctic coastal states to establish their own regulations for shipping in their EEZ, without being limited to applying generally accepted international rules and standards. There are, however, three important qualifications. First, Article 234 does not apply to all areas of the EEZ; just those areas where "particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance". Second, Article 234 does not grant a mandate for excluding navigation in these waters, because it requires that "due regard" be had to navigation. Third, Article 234 does not apply to government vessels, and is thus applicable only to commercial navigation.

The qualification relating to "presence of ice" covering the area for most of the year assumes greater importance in a period of climate change with Arctic ice receding. Questions have been raised from time to time whether with receding ice the ability of Arctic coastal states to regulate their EEZs in the Arctic will diminish.

Is the Legal Regime Broken?

What then are the problems that the LOS regime as it exists cannot deal with?

Delimitation. But there is a body of law on delimitation that can resolve these issues. The ICJ and international arbitral tribunals have been resolving maritime boundary disputes since 1969 in ways that seems quite acceptable to states. There is no gap here that needs a new regime. Dividing the Arctic Ocean – the challenges **Slides**

CLCS process. Can only make recommendations to states. Art 76.8 Some ambiguity about the effect of these recommendations. If a state establishes its outer limit of the continental shelf on the basis of the recommendations of the CLCS, then those limits are said by the Convention to be final and binding? But what if it ignores the CLCS and publishes limits on its own? Not clear that these limits are invalid. It would be up for each state to challenge them and the outcome of that challenge might determine the legality of the line. But challenges may be limited to neighbouring states, because only a neighbour could show an interest in the matter. Perhaps the Deep Seabed Authority might challenge, but difficult to find a legal forum in which such a challenge could occur.

So the possibility exists that if CLCS rejects Russia's submission again, Russia will simply publish its own limits and wait for a challenge. And it may not be in the interests of Arctic neighbouring coastal states to challenge this. On the Lomonosov Ridge, what is good for Russia may also be good for Canada.

But in any event, the CLCS process is hopelessly bogged down with the number of submissions filed and it will take 25 to 30 years for submissions filed now to be considered. On some estimates it will not be until the year 2043 before Canada's outer limits are confirmed by the CLCS. So thinking of the outer limits problem as an issue of great urgency is missing this essential point.

Shipping in the Arctic Ocean. As high seas the Arctic Ocean is subject to the regime of freedom of navigation, thus any regulation of shipping in the waters of the Arctic Ocean beyond the EEZ of the Arctic coastal states is governed by any relevant international standards. These standards are formulated within the framework of IMO.

This is the body in which a Polar Code has been developed although on a voluntary basis so far.

Fisheries. Within the EEZ of each Arctic coastal state, the state has exclusive rights over the fishery and effectively does not have to grant access to foreign fishers. The possibility of high seas fishing remains, however, and this is subject again to a regime of freedom of fishing. A particular problem as we know in Canada is the problem of straddling stocks – those that are found both within the EEZ and the high seas. In the rest of the world, high seas fisheries are now managed through RFMOs, established by coastal and DWFN. These bodies, provision for which is made in UNCLOS have both management and conservation functions. Clearly there is a need to create such a body for Arctic fisheries if in fact major fisheries continue to develop in the Arctic Ocean. The models for such a body are numerous

Environment. UNCLOS provides a framework for the protection of the marine environment, but it that framework needs elaboration. And here of course is a problem, which is not limited to the Arctic. Effective environmental regulation cannot segment high seas, EEZ, territorial sea and land territory. It needs a more embracing approach, but the types of authority the coastal state can exercise in each of these areas is different. Howevre, any international regime for the environment in the Arctic will require implementation largely by the coastal states – although may require non-Arctic states to control their pollution as well.

What I am suggesting is that UNCLOS provides a legal framework, as was said in the Ilulissat Declaration, a legal regime for all of the issues that have to be dealt with in the maritime Arctic. And, unless UNCLOS is amended there can be no legal regime put in place that is inconsistent with it. But the chances of amending UNCLOS are almost non-existent. Amendment of a multilateral Convention of that kind opens up the opportunity for many provisions to be called into question, and this is a major inhibitor for any such revision.

Does it matter that the US is not a party? In the early stages, maybe, but as time goes on it is of less importance. The key provisions of UNCLOS are regarded (including by the US) as customary international law and thus governing state behaviour, again including that of the US, independently of US ratification. Fund the Deep Seabed Authority.

There is therefore a legal regime in place for the Arctic, one that gives rights to the coastal states, and gives limited rights to non-coastal states. Those rights cannot be taken away by any new legal regime, and the extent of the rights of non-coastal states are those set out in UNCLOS and cannot be abrogated short of a new treaty in which they agree to give up those rights. Many may think that this is a pity, because the Arctic was not a high priority for most states that negotiated the 1982 Convention, and in fact Article 234 stands out as an indication that the Canadian negotiators saw it as different and were opposed to applying the standard rules to it.

And there are problems with the 1982 Convention from the perspective of Arctic issues. It entrenched the flag state principle, a major problem in seeking to regulate many aspects of oceans use, including in the Arctic. Moreover, UNCLOS was negotiated in ignorance of or wilful blindness to the fact that Arctic areas, including ocean areas have been occupied by indigenous people for thousands of years. Not even Arctic 234 – the special provision in UNCLOS for the Arctic – acknowledges this.

However, contrary to what politicians or press reports say from time to time, no state is challenging the rights of other states in the Arctic in respect of the resources of the continental shelf or land territory for that matter (Hans Island excepted). And there is no legal basis for any such claims either from Arctic or non-Arctic states. No one's sovereignty is under threat. Rights are well-defined and are not being challenged. Non-Arctic coastal states have navigation and overflight rights in the EEZ and high seas, just as they do elsewhere in the world. Indeed, a common mistake is to think that there is something different or unique about the Arctic in terms of a legal regime.

I say it is a mistake, but it is a commonly held view. Franklyn Griffiths has written about the myths that Canadians hold about the Arctic, but I think that it is not limited to Canadians. The Arctic is a fabled area in the minds of many, particularly in northern countries, and that makes it difficult to think of it as if it were just the territory and maritime jurisdiction of the Arctic coastal states. Thus, we find some countries suggesting that the Arctic should be seen as the "common heritage of humanity". Well, that may be true of the (probably very small) deep seabed of the Arctic Ocean, but not of elsewhere under the existing legal regime.

Having said that there is an existing legal regime for the Arctic and little possibility of any new legal regime being negotiated to replace UNCLOS, there is however scope within the existing regime for multiple cooperative regimes to be negotiated. UNEP's regional seas program for the Mediterranean shows how states can cooperate in respect of sea areas where they have a common interest and where they have recognized jurisdiction over the waters and the seabed.

There is an opportunity for such regimes to be developed based on existing rights and commitments and developed in full cooperation with indigenous peoples. But this raises a further and difficult question of forum. Should such regimes be developed bythe Article coastal states, states operating within the Arctic Council, or the broader international community?

This raises the question, that I have no time to deal with, whether the Arctic Ocean is a closed or semi-enclosed sea, with greater rights to the coastal states.

Although some have argued it is, the problem is with the definition of an enclosed or semi-enclosed sea

> Gulf, basin or sea, surrounded by two or more States and connected to another sea or ocean through a narrow outlet consisting of primarily the territorial seas and exclusive economic zones of two or more coastal states.

It seems difficult to fit the Arctic Ocean within this.