CHAPTER 8

The “New” Arctic Passages and the “Old” Law of the Sea

Erik Franckx

Introduction

With respect to the Arctic, the negotiations leading up to the adoption of the United Nations Convention on the Law of the Sea\textsuperscript{1} were characterized by the drive of the Canadian government to try to obtain international recognition for a unilateral measure adopted in 1970, i.e. the Arctic Waters Pollution Prevention Act.\textsuperscript{2} Enacted in the wake of the Manhattan crisis of 1969, when the largest American oil tanker in operation had been strengthened with an ice bow and sent through the Canadian archipelago in order to test the feasibility of oil tanker navigation through the Northwest Passage, this avant garde piece of legislation tried to enhance coastal state powers with respect to this fragile environment by enhancing coastal state competence in these ice-covered waters. The fact that Canada adjusted its declaration recognizing the

\* Research professor, President of the Department of International and European Law, and Vice-dean for Internationalization, Faculty of Law and Criminology, Vrije Universiteit Brussel (V.U.B.). He holds teaching assignments at Vesalius College (V.U.B.); Université Libre de Bruxelles; Brussels School of International Studies (University of Kent); Institute of European Studies (V.U.B.); Université Paris-Sorbonne Abou Dhabi, United Arab Emirates; and University of Akureyri, Iceland. He is appointed by Belgium as expert in maritime boundary delimitation to the International Hydrographic Organization (2005–); member of the Permanent Court of Arbitration (2006–); arbitrator under the United Nations Convention on the Law of the Sea (2014–); and member of the national Belgian Commission for the Reform of Private and Public Maritime Law (2012–).

The status iuris of this contribution is June 2014. The strong devaluation of the Russian ruble at the end of 2014 and the adoption in November 2014 of the International Code for Ships Operating in Polar Waters, the so-called Polar Code, by the International Maritime Organization, have consequently not been taken into consideration.


\textsuperscript{2} Arctic Waters Pollution Prevention Act 1970, as reprinted in (1970) 9 International Legal Materials 543–552. Hereinafter AWPPA.
jurisdiction of the International Court of Justice as compulsory at the same
time in order to prevent others from challenging the international legal valid-
ity of this new kind of coastal state jurisdiction over offshore waters,\(^3\) indicates
that at that time this country itself had some doubts on whether the AWPPA
formed part and parcel of international law as it existed in the late 1960s, early
1970s. This was confirmed by the good number of diplomatic notes Canada
received in the aftermath of its enactment, all protesting the legal valid-
ity of the AWPPA. Direct negotiations between the three protagonists at that
time, namely Canada, the Soviet Union and the United States,\(^4\) enabled the
introduction in a document, which was later to become the Constitution for
the Oceans, of an article that allowed the coastal state in ice-covered areas
to exercise enhanced competence over navigation.\(^5\) The inclusion of this so-
called “Arctic” article in UNCLOS “notwithstanding its geographical scope—
limited in reality to the ice-covered polar regions, principally of the Northern

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\(^3\) Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court
of Justice, as reprinted in (1970) 9 International Legal Materials 598–599. Excluded by virtue
of point 2 (b) were: “disputes arising out of or concerning jurisdiction or rights claimed or
exercised by Canada in respect of . . . the prevention or control of pollution or contamination
of the marine environment in marine areas adjacent to the coast of Canada”. The present
Canadian declaration no longer contains such a clause (available at <http://www.icj-cij.org/

1982 Virginia Commentary. The fact that the three protagonists directly negotiated this article
between themselves has been confirmed by American and Canadian authors forming part
of their respective official delegations to the Third United Nations Conference on the Law of
the Sea (hereinafter UNCLOS III) and writing either at the time of the negotiations, or shortly
thereafter. See for example: B.H. Oxman From Cooperation to Conflict: The Soviet Union and the
United States at the Third U.N. Conference on the Law of the Sea (Donald L. McKernan Lectures
in Marine Affairs, 15 May 1984) (Institute of Marine Studies, University of Washington, Seattle:
1985) 14–15 [treating this issue under the heading “The Arctic”], and A.L.C. de Mestral and
L.H.J. Legault, “Multilateral negotiation—Canada and the law of the Sea Conference” (1979)
35 International Journal 47, 67 [calling the issue the “Arctic exception”], respectively.

\(^5\) UNCLOS, article 234, which reads: “Coastal States have the right to adopt and enforce non-
discriminatory laws and regulations for the prevention, reduction and control of marine pol-
lution from vessels in ice-covered areas within the limits of the exclusive economic zone,
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. 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.”