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# PROTECTION OF THE ENVIRONMENT IN THE ARCTIC: THE FUTURE IN UNILATERALISM?

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## ABSTRACT

*The respect for the rule of law is fundamental to the effective protection of the security of law. But what if it does not work on international level, because there is no effective international legal instrument for a problem? Can States handle the problem by themselves and adopt unilateral acts to ensure the protection of fundamental interests as clear environment. In the following essay the special territory of the Arctic will be presented as a field of challenge for environmental questions as well and the unilateral solutions of its coastal States whether these are valid on international level.*

*Keywords: Arctic, unilateralism, environment, self-protection, sea*

## THE SPECIFICITY OF THE ARCTIC

All human activities leave an environmental footprint in the Arctic which is challenged by the cycle of the effects of global warming and pollution.

As ice melts, contaminants conserved in the ice for long decades are getting into the water again and get far away with the movement of currents. Owing to the reduction of ice new shipping routes opens, fishing facilities widen out and the exploitation of resources hidden in the continental plate is increasing in the foreseeable future. [Theologitis, 2008] Spill probabilities will also increase with a greater number of vessels and volume hazardous substances transported and the main problem is that ice-covered area is against degradation process and no special regulation delays with this problem.

However, it is the coastal State is touched by the effects of sea pollution in the first place, and it has to deal with it first.

## ENVIRONMENTAL OBLIGATIONS OF STATES

However, traditional debate on sovereignty has conceived of human rights and environmental law as limitations on the State's freedom and independence, a more contemporary approach recognizes that protecting both human rights and the environment does not limit the State's sovereignty, but rather provides an expression of it (Reisman, 1990) As the State is bound to ensure the protection of environment, as it is liable for the victims of pollution and other environmental damages, it has to be kept in mind, that States are responsible not only towards other States and the international community as a whole under the generally accepted principle of *sic utere*, but also toward their own citizens, who have the right to healthy environment. (Stockholm Declaration, 1972) (Lake Lanoux Arbitration) On the other hand it has the right to protect it from external impacts, as for pollution of those who do not stand under the jurisdiction of the State. Can a State unilaterally, by national legislations impose obligations on others to protect its own territory from pollutions?

## UNILATERALISM AS A SOLUTION?

The LOS has been seen as the product of the voluntary subscription of States to rules of law namely to treaties and to customary law, (McDougal, 1962) as generally accepted sources of international obligations and the elements of rule of law concerning the sea. However, LOS is described as "not a static body of absolute rules, but rather a living, growing, customary law, grounded in the claims, practices, and sanctioning expectations of nation-states..." (Chazournes, 2000). Technological changes of the time and the disturbances that have resulted in environmental and social matters require change in the existing law. It is not a matter of recording old rules, but one of making new ones, and there are no other ways of doing this than by agreement or unilateral action, and when agreement is not forthcoming, then by unilateral action alone. (O'Connell, 1982)

Much of the doctrine concludes that they do not constitute a source of law,[10; 32.] but it does not mean that a States cannot create international law through unilateral acts, especially because they have a significant role in the formation of customary law, especially in the formation of LOS: it is continuous process of interaction in which States unilaterally put other States accept or reject them. [70]

International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they satisfied with the statement, that such acts are a source of international obligations if they fulfil the requirements established in the *Nuclear Tests cases* in 1974 in order to guarantee legal security, as an element of rule of law. [43; 43.]

## THE FIRST UNILATERAL STEP: ARCTIC WATERS POLLUTION PREVENTION ACT

By 1970 off-shore exploitation of crude oil has begun in Prudhoe Bay which increased the ship transport in the area. The incident of the S.S. Manhattan in 1969 highlighted the fragile ecosystem and the vulnerability of the region and dangers laid down in oil exploitation and its transportation so as the lack of international legal instrument to protect it, thus Canada as a modern crusader neglected the LOS - the principle of *mare liberum* - and unilaterally settled the question of pollution while restricting the freedom of the seas doctrine. Prime Minister Trudeau emphasized that this regulation was only in force as long as international law provides for a satisfactory protection for the region, and this Act was considered as the first step to development which serves the protection of environment for the humanity as a whole.(Pharand, 1972)

## INTERNATIONAL REGULATION TO PROTECT THE ARCTIC

International conventions and UNCLOS contain several dispositions on sea pollution, but Article 234 is the only one which is elaborated especially to Arctic conditions. The common lack of other provisions is that they authorise coastal States to take preventive measures on foreign vessels only in the newly created territory of exclusive economic zone [EEZ] and only under the conditions of Article 234, thus as soon as they are not satisfied, the special regulation shall be derogated.

Apart from this, coastal State is only free to adopt any preventive measure only for the territorial sea. (UNCLOS, 1982)

## UNILATERALISM OF THE USSR

As the former USSR dispose a coast of 10.000. km it is seriously affected by vessel pollutions, not to mention the future exploitations in its huge continental shelf. The USSR after ratification of UNCLOS but long before its Soviet entry into force elaborated its legislation including rules for

ice-covered areas where pollution could cause major harm to the ecological balance or disturb it irreversibly. (Franckx, 1986)

Soviet legislation exceeds UNCLOS rules, as it unilaterally establishes strict regulations concerning design, construction, manning or equipment of vessels transporting in the EEZ, however, no international guideline support this kind of restriction without the authorisation of IMO, not to mention rules of Article 234 which serves as legal basis for such regulation only in those periods of year when ice makes transport extremely hazardous.

The international legal literature considers the Soviet legislation as a central element in the evaluation of customary norms of the LOS commenced by Canada. Although formation of customary law requires general practice and not just the municipal legislation of one single State, special circumstances are present in this case. In the Arctic only 8 States are concerned as a community to form a general practice not to mention the fact that in practice, great powers have more influence on the formation of customary rules, and as the USSR was a major naval power and extend on a significant size of territory in the Arctic, (Franckx, 1986) not to mention, that 2 other Arctic – The USA and Denmark – States has followed this practice.

### LEGAL JUSTIFICATION OF UNILATERAL ACT OF

Several States have objected to unilateral regulations as they contradict to every aspect of the principle of *mare liberum* and the flag State doctrine. (Henkin, 1971) It has already declared that if a national act of State affects other States, the Act shall be examined under the title of legal security whether it may be regarded as binding on other States. (Fisheries case, 1951) Moreover, the practice of national jurisdiction in international context shall be considered as legal if there is no rule of international law which prohibits it. (Lotus case, 1927) However, in this case the freedom of the high seas may be regarded as a prohibitive rule, although it has never been applied in absolute terms: coastal States may exercise jurisdiction over foreign vessels on the high seas in order to prevent injury to their territory and to defend their security and well being. In Canadian view a serious threat to the environment of a State represents a threat to its security. The right of environmental integrity, as a matter of fact, is the same as right to territorial integrity so the principle of *self defense* enable the State to take reasonable preventive protective measures. (Beesley, 1972) In addition, it is more reasonable to prevent than to apply the principle of *in integrum restitution*. Moreover, it would be a distortion of the freedom of the high seas to consider it as a licence to pollute marine environment and the shores of other States, and to argue that State is barred from taking preventive protection against it. It would also be a negation of the fundamental principle of international law that every state is obliged not to knowingly allow its territory to be used for acts contrary to the rights of other States. (Corfu Channel Case, 1949) Even the category of contiguous zone serves the aim of protection of State interests, but this additional 12 miles is not sufficient for the protection against pollutions. (Sutton, 1972) Concerning environmental damages and their prevention – as it is learned from previous cases – the urgent need to for unilateral action is not merely being asserted as necessary to safeguard a particular essential interest of a State from a grave and imminent peril of irreversible pollution, but rather those of the international community as a whole as it was stated by the ICJ in 1998. (Fisheries Jurisdiction, 1998)

### THE FUTURE IN UNILATERALISM?

Pollution is a danger increasing with melting of ice, as huge unexplored hydrocarbon stores become accessible with sea routes to transport, too and coastal States need to assure the protection

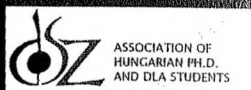
of their territory to ensure the ideal conditions of environment to their citizens as well, not to mention the interest of State not to be polluted by foreigners. On the other hand it is a duty of State to take all possible steps to prevent pollution of the seas by substances that are hazardous to human health and take effective actions for the protection and enhancement of the environment in accordance with their respective capacities and responsibilities. In addition, considering the development in the LOS and extending coastal State jurisdiction through the last decades, it is not sure that this expansion has come to the end and would not continue. As long as international law does not elaborate better solution, coastal States have the right to enforce these kinds of measures to protect themselves.

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