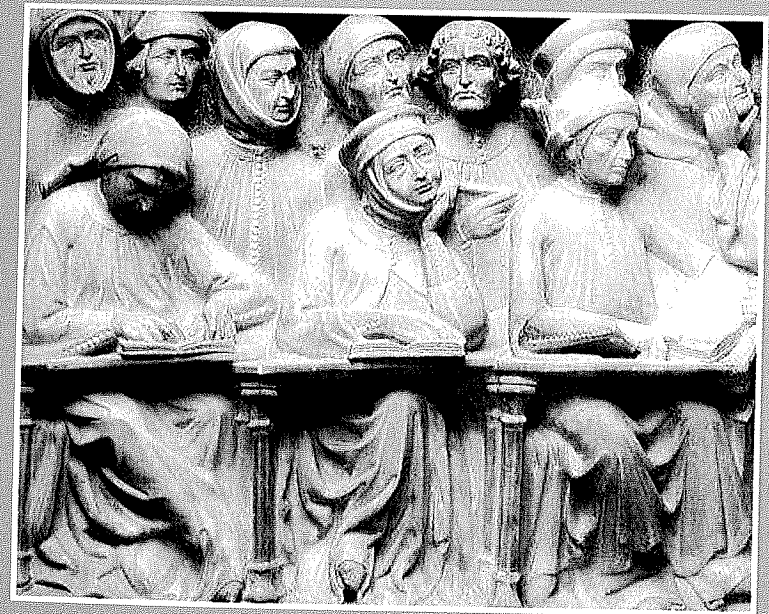




PROFECTUS IN LITTERIS II.

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PROFECTUS
IN
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The Control of Pollution from Vessels in the Arctic: formation of a customary law or breaching of international law?

Introduction: environmental problems and international law in the Arctic

The Arctic region is an ocean surrounded by land around the North Pole. The mainly ice-covered sea surface has already started to melt drastically in the past few years, as the impacts of global warming cause the increase of annual average temperatures more than twice as fast as in the rest of the world.¹

Owing to the reduction of ice, new shipping routes open, fishing facilities widen so as the possibilities of exploitation of resources hidden in the continental plate.² For sea routes this means more vessel traffic over a longer navigational season, moreover, Arctic conditions, such as dynamic ice cover, low temperatures, reduced visibility or complete darkness, high winds, and extreme storms add to the probability of an accident or error that might cause a spill to occur.³

The potential consequences of an oil spill are also impacted by the effectiveness of the spill response and cleanup. Above all, ice-covered area as a matter of fact is against all degradation process.⁴ At average circumstances, 50% of the oil is getting degrade in the first week, but here this degradation

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¹ *Impacts of a Warming Arctic: Arctic Climate Impact Assessment*. p. 3. <http://amap.no/acia/> (2009. december 14-i letöltés)

² According to forecasts, 40% of global oil and gas will be produced offshore by 2015, and this rate will increase with the reducing of icesheet. THEOLOGITIS, Dimitrios (Head of Unit, Maritime Transport, DG TREN, EU Commission), *The EU Perspective for Energy and Maritime Transport*. Speech at Conference „Common Concern for the Arctic” Ilulissat, Greenland, 9 September 2008. 113. http://www.norden.org/sv/publikationer/publikationer/2008-750/at_download/publicationfile (2009. december 2-i letöltés)

³ *Oil Spill Response Challenges in Arctic Waters*. WWF International Arctic Programme, Oslo, Norway, 2007. 7.; JOLICOEUR, Thomas, *Arctic unprepared for another oil spill*. WWF <http://www.canada.com/news/Arctic+unprepared+another+spill/1419878/story.html> (2009. május 22-i letöltés)

⁴ *Arctic Oil Activity Seen Up, Eco-Risks Loom*. Report. <http://www.planetark.com/dailynews-story.cfm/newsid/46546/story.htm> (2009. május 25-i letöltés)

period can be delayed for even 50 years,⁵ as it is seen at the catastrophe of the *Exxon Valdez*: the remains of its oil cargo could even be noticed at Alaska in 2005.⁶ Although climate change is a global problem, and it is impossible to fight against it by unilateral achievements only, but in the case of pollution, it is possible at least to fight for the interest of the coastal State being the first and mostly affected victim of the consequences of pollution.

As there is no effective international legal instrument to respond to this problem, the Arctic coastal States has elaborated and enforced their unilateral acts as a solution. Is it a breach of international law or the naissance of a new customary law?

Environmental Problems and the State: obligations and rights

The Arctic is home to almost four million people who are directly affected by sea pollution as they depend on subsistence hunting and fishing thus they are likely to be affected not only in the health, but through dietary, social and cultural elements, thus their human rights relating to existence are violated.

As the environmental issue has long before entered into the domain of human rights,⁷ this phenomenon creates obligation on States to ensure the protection of environment, as it is the *sine qua non* of the enjoy of other human rights.

Human rights law and environmental law have an important element in common: they are both seen as a challenge to, or limitation on sovereignty but a contemporary approach recognizes that protecting both human rights and the environment does not limit the sovereignty of a State, but rather provides an expression of it.⁸ The State is bound to ensure the protection of the environment, as it is liable for the victims of pollution and other environmental damages,⁹ so States are responsible not only towards other States and the

⁵ SCHACTER, Oscar – SERNIER, Marine, *Pollution and Remedies*. 65 American Journal of International Law 84, 1971. 89.

⁶ *Oil Spill Response Challenges in Arctic*. 7-8. http://www.crrc.unh.edu/workshops/arctic_spill_summit/nuka_oil_spill_response_report_final_jan_08.pdf (2009. május 27-i letöltés)

⁷ SACHS, Wolfgang, *Environment and Human Rights*, Wuppertal Institute for Climate, Environment, Energy, Döppersberg, 2003, 32-35. *Problems of the Human Environment*. UN GA Resolution 2398 (XXII) 3 December 1968.

⁸ PIERREZ, Franz Xaver, *Cooperative Sovereignty From Independence To Interdependence In The Structure Of International Environmental Law* 46-64 (2000), REISMAN, Michael W, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866 (1990), 331-343.

⁹ *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972. [Stockholm Declaration] Principle 22.

international community as a whole under the generally accepted principle of *sic utere*,¹⁰ but also toward their own citizens, who have the right to healthy environment. On the other hand the State has the right to protect itself from external impacts, but can the State unilaterally, by national legislation impose obligations on those who do not stand under its jurisdiction according to general rules of international law to protect its own territory from pollutions?

Unilateralism as a solution?

By 1970 off-shore exploitation of crude oil has begun in Prudhoe Bay which increased the ship transport in the area. This fact and the incident of the *S.S. Manbattan* in 1969 highlighted the fragile ecosystem and the vulnerability of the region and dangers laid down in oil exploitation and its transportation. Economic development is inevitable, but it does not have to be followed by the degradation of environment, thus Canada neglected the existing law of the sea rules with the principle of *mare liberum*¹¹ and unilaterally settled the problem.¹²

Unilateral acts and the sources of international law

Technological changes of the time 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 – whose future is still depend on ratification – , then by unilateral action alone.¹³

A State can, in accordance with international law, assume engagements and acquire legal obligations at international level through the expression of its will. However, much of the doctrine concludes that the unilateral act of States does not constitute a source of law,¹⁴ but it does not mean that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law.¹⁵

¹⁰ *Trail smelter case* (United States, Canada), 16 April 1938 and 11 March 1941, U.N.R.I.A.A. Volume III. 1905-1982, Principle 21 of Stockholm Declaration.

¹¹ At the time, the category of exclusive economic zone has not yet existed.

¹² BEESLEY, J. Alan, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, Journal of Maritime Law and Commerce Vol. 3. No. 1. 1971-1972, 6.

¹³ O'CONNELL, D. P., *The International Law of the Sea*, Vol. 1. Clarendon Press Oxford, 1982, 31.

¹⁴ BRUNET, René, *Droit international et droit interne*, Paris-Oxford, 1920, 32.

¹⁵ A/CN.4/486. 81.

International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they are just satisfied with the statement expressed in the *Nuclear Tests case*¹⁶, that such acts *can be the sources of international obligations*.

The first protective step: the Canadian Arctic Waters Pollution Prevention Act (AWPPA)

The Act of 1970 aimed to preclude the passage of ships threatening pollution of the environment thus commercially-owned ships intending to enter waters of the Canadian Arctic. In a shipping safety zone of 100 miles offshore¹⁷ ships are required to meet Canadian design, construction and navigational safety standards. Prime Minister *Trudeau* emphasized that this regulation is temporarily and is in force as long as international law provides for a satisfactory protection for the region,¹⁸ and this Act shall be considered as the first step to development which serves the protection of environment for the humanity as a whole.¹⁹

Legal judgement of AWPPA as a unilateral act of State creating obligation as an international norm

At first sight it is contrary to international law and to every aspect of the principle of *mare liberum*²⁰ and the flag State doctrine to establish sovereign authority over high sea territories as the AWPPA does.²¹

The *Anglo-Norwegian Fisheries* judgement has already declared that if a national act of State affects other States, the Act shall be examined whether it may be regarded as binding on other States.²² Before, in the occasion of case of

¹⁶ *Nuclear Tests case* (Australia v. France), (Judgment of 20 December 1974), I.C.J. Reports 1974, 253, 43.

¹⁷ Arctic Waters Pollution Prevention Act 1970, 3(1) <http://laws.justice.gc.ca/PDF/Statute/A/A-12.pdf> (2009.december 18-i letöltés)

¹⁸ BIESLEY, J. Alan, *The Arctic Pollution Prevention Act: Canada's Perspective*, International Law Journal of Syracuse Vol. 1. 226.

¹⁹ PHARAND, Donat, *Oil Pollution Control in the Canadian Arctic*, Texas International Law Journal, Vol. 7:1. 1971-1972, 62.

²⁰ According to Canadian arguments, this region is considered terra firma by indigenous people as it is frozen water used as a land, transported by land vehicles and not sea. This explication fails at the point, that because of warming, the icesheet does not last for all year and even the Northwest Passage can be used for shipping. PHARAND *ibid.* 64.

²¹ HENKIN, Louis, *Arctic Anti Pollution: Does Canada Make or Break International Law?*, 65 American Journal Of International Law, 1971, 131

²² *Fisheries case* (United Kingdom v. Norway) [1951] I. C. J. Rep. 116. 20.

the *S. S. Lotus* it was also stated that practice of national jurisdiction in international context shall be considered as legal if there is no rule of international law which prohibits it.²³ However, in this case the freedom of the high seas may be regarded as a prohibitive rule, but it has never been applied in absolute terms: the practice of major maritime powers conclusively establishes that States may and do exercise authority 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 as the right to environmental integrity, as a matter of fact, is the same as right to territorial integrity so the principle of self defence enable the State to take reasonable preventive protective measures.²⁴ Since the impact of pollution is usually upon coastal residents, the coastal State has an understandable interest in preventing it.²⁵ 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 polluting activity. It would also violate the fundamental principle of *sic utere*.²⁶ The same is declared in the *Corfu Channel Case* which states that every state is obliged not to knowingly allow its territory to be used for acts contrary to the rights of other States.²⁷ The U.S. Act against alcohol smuggling in 1935 which expanded U.S. jurisdiction 50 more nautical miles beyond territorial sea was also based on this judgment,²⁸ so as the category of contiguous zone later.²⁹ Summarizing the facts above, there is no legal burden for expanding national jurisdiction to prevent pollution under the principle of self-protection.

As for more, the Canadian legislation can be explained under the protection of humanity, as preserving Arctic environment is a common interest

²³ *The Case of the S.S. Lotus*, (September 7th 1927) (Series A) No. 10. 13-15.

²⁴ One of the primary justifications for President Truman's unilateral assertion of US jurisdiction over the resources of the continental shelf was also the principle of self-protection which enables the coastal states to keep an eye on activities off its shores. BIESLEY *ibid.* 35.

²⁵ MCDUGAL, Myres S. – BURKE, William T., *The Public Order of the Oceans*, New Haven and London, 1962, 566.

²⁶ *Ld, Trail Smelter case.*

²⁷ *Corfu Channel case* (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgement of April 9) I.C.J. Reports 1949. 22.

²⁸ *Church v. Hubbard*, 6 U.S. 2 Cranch 187 (1804) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=6&invol=187> (2009. június 5-i letöltés); JESSUP, Philip C., *The Anti-Smuggling Act of 1935*, American Journal of International Law, 1937, 104-105.

²⁹ SUTTON, Gary, *Pollution Prevention in the Arctic – National and Multinational Approach Compared*, Ottawa Law Review, 1971-1972, 45.

of all the States and someone shall preserve it as long as international law is not able to do it.³⁰

International regulation to protect the Arctic

As a legalisation of AWPPA and as a response to the need of international protection of the Arctic area, the 1982 U.N. Convention of the Law of the Sea contains special rules for ice covered areas. The Convention contains several dispositions on sea pollution,³¹ but *Article 234* is the only one which is elaborated especially to Arctic-conditions.

The general rules only give authorisation to coastal States to take preventive measures against only those foreign ships which enter to the exclusive economic zone [hereinafter: EEZ] with the aim of entry into the ports or internal waters or for a call at off-shore terminals of the coastal State.³² Moreover, these measures shall go through the authorisation procedure of the competent international organization or general diplomatic conference before its entry into force, and after, such act shall be re-examined from time to time as necessary.³³

As for the special article 234, it entails the coastal State to take preventive measures only in the EEZ and only in the case if 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.³⁴ The problem is if ice melts, and it does not cause the above mentioned hazards to navigation, the special measures have to be deregulated, and only general rules can be applied in order to protection.

³⁰ Press Conference of April 8 1970. of Prime Minister Trudeau. International Legal Materials 1970. p. 601.

³¹ United Nations Convention on the Law of the Sea Montego Bay, 10 December 1982, [16 November 1994] 1833 U.N.T.S. 3. [hereinafter: UNCLOS] Art. 211.

³² UNCLOS Part V. Art. 211. 3

³³ UNCLOS Art. 211 (1). Although UNCLOS does not expressly refers to the IMO, the travaux préparatoires leave no doubt about this intention. LAMPE, W. H., *The „New“ International Maritime Organisation and its Place in the Development of International Maritime Law*, (1983) 14 Journal of Marine Law and Commerce 305, 329.

³⁴ UNCLOS Art. 234.

Unilateral development by the USSR

The former is also seriously affected by offshore pollutions with its shores of 10.000.km and the greatest extent of continental shelf in the world with many resources to exploit. The USSR, after ratification of UNCLOS but long before its Soviet entry into force,³⁵ elaborated an edict and several decrees on the protection and preservation on the soviet EEZ.³⁶

Its legislation applied word for word Article 234 of UNCLOS but neglected some key points like derogation in the case if there is no more ice threat in the region. As for the general rule, the USSR legislation did not go through the authorisation process of the competent international forum either. In addition, it accepted regulations to design, manning or equipment of vessels transporting in the EEZ.

The international legal literature considers the Soviet measures as a central element in the evaluation of customary norms strictly similar to the Canadian achievements.³⁷ Although the 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 special case of the Arctic only the Arctic States are concerned as a community to form a general practice not to mention the fact that in practice, grate powers have more influence than others on the formation of customary rules, and as the former USSR, Russia is a major naval power and extend on a significant size of territory in the Arctic, so as the 1970 unilateral Act of Canada was also welcomed, the relevance and developing character of the Soviet legislation is undeniable, especially because the other States in the North also followed this practice and considered their acts as authorised by customary law.³⁸

³⁵ 10 December 1982 and 12 March 1997. http://www.un.org/Depts/los/reference_files/status2010.pdf (2010. június 1-i letöltés)

³⁶ Unofficial English translation extracts by FRANCKX, Erik, *The New USSR Legislation on the Pollution Prevention in the Exclusive Economic Zone*, 1 International Journal of Estuarine and Coastal Law (1986) 172-183.

³⁷ FRANCKX, *op. cit.*, 158.

³⁸ Oil Pollution Act (33. USC 40.) 1990. <http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&TITLE=33USCC40> (2009. június 10-i letöltés); Alaska Oil and Hazardous Substances Pollution Control Act <http://touchngo.com/lglcntr/akstats/STATUTES/Title46/Chapter04.htm> (2009. június 10-i letöltés); Water, Air, Energy and Environmental Conservation Act <http://touchngo.com/lglcntr/akstats/STATUTES/Title46.htm> (2009. június 10-i letöltés); JENSEN, Oystein, *The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters*, Fridtjof Nansens Institutt Report 2/2007. 8.; MOLINAAR, Erik Jaap, *Coastal State Jurisdiction Over Vessel-Source Pollution*, Kluwer Law International, 1998, 424.

The future in unilateralism?

The pollution of the vulnerable Arctic is a danger increasing with melting of ice and coastal States need to assure the protection of their territory and the human rights of their citizens,³⁹ and take effective actions for the protection and enhancement of the environment in accordance with their respective capacities and responsibilities.⁴⁰ On behalf of the principle of self-protection and regarding the generally acknowledged Canadian and Russian practice, the polar States have the right to establish unilaterally regulation to respect by all who enter into their EEZ especially when international legal instruments do not serve the protection of this fragile ecosystem. Considering the development in the law of the sea and extending coastal State jurisdiction through the last decades, a new customary law is born to substitute for the lack of international legal instruments, so as long as international law does not elaborate a better solution, coastal States have the right to enforce these kinds of measures as unilateralism is a lot easier to perform than to achieve a multilateral solution, and it is not in all circumstances a sin.⁴¹

³⁹ Stockholm Declaration, Principle 7.

⁴⁰ Declaration on International Economic Cooperation adopted by the General Assembly in May 1990. A/RES/S-18/3.

⁴¹ HOMES, John, *The New Agenda for Canadian Internationalism*, In: STROMBERG, Rhiannon, *Unilateralism in Canadian Foreign Policy: an Examination of Three Cases*, Ph.D. Thesis, Saskatoon 2006, 1.

„Multifunkcionális” diplomácia: A diplomáciai eszközök alkalmazási körének változása az ezredforduló nemzetközi folyamatainak tükrében

A nemzetközi jog – s ezen belül a diplomácia – intézménye *csaknem*¹ egyidős a joggal és az állammal. Az államok közti kapcsolatokat – az első birodalmak megjelenésétől kezdve – kizárólag ma is ismert és alkalmazott diplomáciai eszközök – pl. tárgyalás, szerződés-kötés – alkalmazásával szabályozták, így – kis túlzással – azt mondhatjuk, hogy a diplomácia és a „nemzetközi jog” kategóriája – főként kezdetben – egybeesett, s eme sajátosság hosszú időn át meghatározta a nemzetközi jog karakterét, alkalmazásának módját, és fejlődési irányát egyaránt. A fenti megállapítást jól tükrözi azon tény, hogy az évszázadok során bekövetkezett – lényegesnek tekinthető – változások² ellenére még a – hazánkban az 1980-as évek végéig uralkodó – marxista jogfelfogás szerint is a külpolitika és a diplomácia domináns jellege elengedhetetlen a nemzetközi jog eredményes működése szempontjából.³ A második világháború

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¹ A mai, tudományos értelemben vett nemzetközi jog csupán a középkor és újkor közti átmeneti időszak kezdetétől jelent meg, azt megelőzően – főként az ókorban – inkább csak az államok közti kapcsolatok kiépítésére, fenntartására szolgáló, (szokás) jogi normák rendszeréről beszélhetünk.

² Ide tartozott például az emberi jogok deklarálása, a polgári és politikai jogok egyezménybe foglalása, a kisebbségvédelem nemzetközi jogi megteremtése, a hadijog, a világűrjog, a humanitárius jog, a környezetvédelemmel kapcsolatos kérdések nemzetközi jogi keretbe történő illesztése, s természetesen a diplomáciai és konzuli jog szabályainak kodifikálása is.

³ Hargitai József szerint a diplomácia és a külpolitika ma is *aránytalanul nagy* jelentőséggel bír a nemzetközi jogon belül, elméleti és gyakorlati szinten egyaránt. A megállapításról részletesen ld.: HARGITAI József, *Nemzetközi jog a gyakorlatban*, Magyar Közlöny Lap és Könyvkiadó, Budapest, 2008, 13. Véleményem szerint azonban Hargitai ezen megállapítását szükséges *némileg* árnyalni, hisz korunk nemzetközi viszonyainak tükrében kijelenthetjük, hogy világunknak számos különféle természetű kihívást, problémát kell leküzdenie a béke, a biztonság, és a jólét megvalósulása érdekében. Ide tartoznak például a humanitárius tevékenységek, a különféle konfliktusok megelőzése és kezelése, vagy éppen a környezetvédelem. Közös jellemzőjük, hogy mindegyik kérdéskör rendezéséhez *szükség van bizonyos mértékben*, a felek közti – nemzetközi szintű – tárgyalásra is, mely, mint tudjuk, a diplomaták hatáskörébe tartozik, akik bi-, és multilaterális tárgyalásokat egyaránt folytathatnak, s mivel sok esetben eltérő természetű kérdéseket kell tárgyalás útján rendezniük, kis túlzással azt is mondhatjuk, a diplomácia a nemzetközi jog minden más részterületére hatást gyakorol(hat). Mivel a külpolitika tulajdonképpen az