

# The Future of the Central Arctic Ocean: Protection Through International Law<sup>1</sup>

*Stefan Kirchner*

## Structured Abstract

Article Type: Commentary Essay

*Purpose*—This essay examines the implications of the lack of ice coverage in the Arctic Ocean.

*Design, Methodology, Approach*—The essay raises a fundamental question: should the international community treat the Arctic Ocean like all other seas, or should there be a special legal regime for the High Arctic, similar to that for Antarctica, a kind of global commons, shared by all mankind? Is the Arctic a part of the world like any other, with the Arctic Ocean soon an ocean like the others, with all the international legal standards applying elsewhere also applying here? Or is the Arctic special enough to warrant the creation of a specialized international legal regime beyond the existing law of the sea?

*Findings*—The idea of an Arctic Ocean Treaty has a certain appeal but is very unlikely to be realized in the near future and might soon no longer be necessary if existing norms of international law are applied consistently.

*Practical Implications*—It is necessary to use the international legal frameworks, treaties, and norms which already exist today in order to get results quickly and protect this rapidly changing environment.

Keywords: Arctic, Arctic Ocean, climate change, Law of the Sea, shipping

In many ways, the Arctic Ocean is on the way to becoming an ocean like all the others. New record, or at least near-record, lows of ice coverage are reported with

*University Researcher for Arctic Law, Arctic Centre, University of Lapland,  
P. O. Box 122, 96101, Rovaniemi, Finland; tel: +358 40 48 44 001; email:  
stefan.kirchner@ulapland.fi*



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alarming frequency. From the perspective of shipping, this is an opportunity because the distance from East Asia to Europe along the Northern Sea Route, along Russia's Arctic coastline, or through the North-West Passage, provides a shorter, faster, cheaper, and in some ways even a safer alternative to traveling for example through the Suez Canal, let alone around all of Africa. While there are only a few dozens ships making the journey every year, compared to thousands on classical routes, one can see a trend—especially because other marine activities in the Arctic Ocean are increasing, from drilling for oil and gas to tourism and fishing. Tourism is a particularly important source of income for many Arctic and sub-Arctic communities, especially in Europe. Fishing will become more relevant further north, not least due to the pole-ward migration of fish stocks as a result of global warming. No part of the planet is affected by climate change as much as the Arctic, yet, unlike Antarctica, the Arctic has been home to many peoples for thousands of years. While the Central part of the Arctic Ocean is still covered by ice, the idea of an almost ice-free Central Arctic Ocean, at least during the summer months, is no longer unthinkable. In the last years the predictions when this will happen have changed a lot, but it appears highly likely that there will be a future without (permanent) ice. Indeed, there has already been research on how to get the ice back, once it will be gone.<sup>2</sup>

At some point in the future also central parts of the Arctic Ocean will become accessible. This raises a fundamental question: should the international community treat the Arctic Ocean like all other seas, or should there be a special legal regime for the High Arctic, similar to that for Antarctica, a kind of global commons, shared by all mankind? Is the Arctic a part of the world like any other, with the Arctic Ocean soon an ocean like the others, with all the international legal standards applying elsewhere also applying here? Or is the Arctic special enough to warrant the creation of an international legal regime?

Among lawyers, this has long been discussed and I will not repeat all arguments here—instead, I want to show that current international law can already be used to protect the Arctic more effectively, specifically, the central part of the Arctic Ocean which would not be part of the Territorial Seas (up to 12 nautical miles<sup>3</sup>) nor of the Exclusive Economic Zones (up to 200 nautical miles<sup>4</sup>) of the coastal states. For the purposes of this presentation we will only look at the water, not at subsoil natural resources, such as oil or gas, on the continental shelf, which adds a number of other issues. In other words, at this stage, we are just looking at the surface.

Of course the idea of an Arctic Ocean Treaty has a certain appeal<sup>5</sup>—it would be highly symbolic, the world coming together to save the polar bears. The problem is of course, that the negotiations for such a major international treaty would be time consuming and that success would hardly be guaranteed, especially given the significant economic interests of the Arctic nations (but also non-Arctic countries, such as China<sup>6</sup> and India,<sup>7</sup> which have expressed greater interest in the Arctic in recent years) not only in the Territorial Seas and Exclusive Economic Zones but the nearby High Seas parts of the Arctic Ocean as well.

The Central Arctic Ocean is important for mankind as a whole but, from a legal and economic perspective, it is literally too close to home for many in the Arctic in

order to allow it to become Global Commons in a legal sense. For the purposes of my research, which is still at a very early stage, global commons are goods, in the widest sense of the term, the protection or use of which are meant to benefit everybody, such as Antarctic or the Deep Sea Bed. While the “use” of Antarctica is limited, the Deep Sea Bed-Regime in the Law of the Sea Convention foresees that “[a]ctivities in the [Deep Sea Bed] Area shall be [...] carried out [...] on behalf of mankind as a whole.”<sup>8</sup>

The High Seas are different in that there is freedom for everybody. While there are some limitations which can be understood as benefiting the international community at large, these limitations are based on international treaties, such as MARPOL, concerning the protection of the marine environment. For centuries, the freedom of the High Seas has been a key role of international law. This freedom includes navigation,<sup>9</sup> overflight,<sup>10</sup> fishing,<sup>11</sup> laying cables and pipelines,<sup>12</sup> the construction of artificial islands<sup>13</sup> and scientific research,<sup>14</sup> all of which has to be done peacefully<sup>15</sup> and without the possibility of a state to claim sovereignty<sup>16</sup> but with a duty of flag states to protect living natural resources<sup>17</sup> and to cooperate to protect the marine environment.<sup>18</sup>

In this sense, the High Seas are not global commons in the same way Antarctica is, because the point of departure is the exact opposite: on the High Seas, the freedom to use the sea is limited by protective rules, in Antarctica the protective principle<sup>19</sup> allows for exceptions, such as scientific research<sup>20</sup> (interestingly, the Antarctic Treaty does not affect the use of the High Seas in the geographical area<sup>21</sup> concerned<sup>22</sup>). on the Deep Sea Bed, the global benefits principle of profit sharing<sup>23</sup> is designed in a way to make early investments profitable, too.<sup>24</sup>

The idea of an Arctic Ocean Treaty would be a great solution, not least due to publicity associated with it and potential enforcement structures, but is not realistic in the near future. Therefore it is necessary to use the international legal norms which already exist today in order to get results quickly. (In international law-making, “quick” can be a relative term. The International Code for Ships Operating in Polar Waters which entered into force on the 1st of January of this year had been negotiated for half a dozen years, is based on voluntary guidelines which date back to 2002 and still is criticized by many as not going far enough.) Fortunately there are already ways for more effective law-making: the ability of the International Maritime Organization (IMO) is recognized in the Law of the Sea Convention<sup>25</sup> and it does so in the framework of existing international treaties. The Polar Code for example is binding under both MARPOL and SOLAS. A state which has ratified either MARPOL or SOLAS has to implement the Polar Code for all ships flying its flag. The same approach can be used to protect the Central Arctic Ocean. The Law of the Sea Convention deals with ice-covered areas only with regard to Exclusive Economic Zones<sup>26</sup> but MARPOL allows for the designation also of High Seas as Special Areas,<sup>27</sup> and as Particularly Sensitive Sea Areas (PSSAs).<sup>28</sup> The same approach can be used for the Central Arctic Ocean. This would require negotiations but it could happen within the existing treaty framework of MARPOL. There are already IMO Guidelines for the declaration of PSSAs,<sup>29</sup> which regulate both the process and the conditions. Current PSSAs include small areas such as Malepo Island in Colombia, but also

larger regions such as the Great Barrier Reef, the Wadden Sea, the Baltic Sea, the Western European Waters, which includes the Western coasts of the United Kingdom, Ireland, Belgium, France, Spain and Portugal, from the Shetland Islands to Cabo de São Vicente, plus the English Channel and parts of the North Sea, and the Papahānaumokuākea Marine National Monument in Hawaii, to name just a few.<sup>30</sup>

The same approach can, and should, be used for the Central Arctic Ocean beyond national jurisdiction. At the end of the day, protecting the Arctic marine environment also beyond.

## Notes

1. This text is based on a presentation with the title “The Future Legal Status of the Central Arctic Ocean: Global Commons vs. Current Law” which was given by the author during an interdisciplinary workshop entitled “The Future of Polar Governance: Knowledge, Laws, Regimes, and Resources,” hosted by the British Antarctic Survey, in cooperation with the University of Leeds and Royal Holloway, University of London, in Cambridge, on March 27, 2017. In order to ensure readability of the text, the presentation style was maintained for this publication.

2. Julia Rosen, “Arctic 2.0: What Happens After All the Ice Goes?,” *Nature*, 8 February 2017, <http://www.nature.com/news/arctic-2-0-what-happens-after-all-the-ice-goes-1.21431>, accessed May 16, 2017.

3. Article 3 Law of the Sea Convention.

4. Article 57 Law of the Sea Convention.

5. See, e.g., Stefan Kirchner, “A Window of Opportunity for an International Treaty to Protect the Arctic Marine Environment,” *Current Developments in Arctic Law* 3 (2015), pp. 20–21.

6. Nengye Liu, “China’s Emerging Arctic Policy,” *The Diplomat*, December 14, 2016, <http://thediplomat.com/2016/12/chinas-emerging-arctic-policy/>, accessed May 16, 2017.

7. See, e.g., recently Xinhua, “Russia, India Mull Joint Fuel Exploitation in Arctic,” *New China*, March 8, 2017, [http://news.xinhuanet.com/english/2017-03/09/c\\_136113734.htm](http://news.xinhuanet.com/english/2017-03/09/c_136113734.htm), accessed May 16, 2017.

8. Article 153 (1) Law of the Sea Convention.

9. Articles 87 (1) (a) and 90 Law of the Sea Convention.

10. Article 87 (1) (b) Law of the Sea Convention.

11. Articles 87 (1) (e) and 116 Law of the Sea Convention.

12. Article 87 (1) (c) Law of the Sea Convention.

13. Article 87 (1) (d) Law of the Sea Convention.

14. Article 87 (1) (f) Law of the Sea Convention.

15. Article 88 Law of the Sea Convention.

16. Article 89 Law of the Sea Convention.

17. Article 117 Law of the Sea Convention.

18. Articles 118, 119, 120 and 65 Law of the Sea Convention.

19. Article I Antarctic Treaty.

20. Article II Antarctic Treaty.

21. South of 60° S, Article VI Antarctic Treaty.

22. Article VI Antarctic Treaty.

23. Article 140 (2) Law of the Sea Convention.

24. Part of the income of the Deep Sea Bed Authority consists of payments made by the companies and states engaged in Deep Sea Bed Mining, therefore allowing both economically meaningful mining activities by states and corporations as well as profit sharing with all states, see Rüdiger Wolfrum, “Hohe See und Tiefseeboden (Gebiet),” in *Handbuch des Seerechts*, 1st ed., Wolfgang Graf Vizthum (ed.) (Munich: C.H. Beck, 2006), pp. 287–345, at p. 339.

25. See, e.g., Article 94 Law of the Sea Convention concerning safety and Article 211 Law of the Sea Convention concerning pollution from vessels; for a complete overview see International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for

the International Maritime Organization, Study by the Secretariat of the International Maritime Organization (IMO), January 30, 2014, IMO Doc. LEG/MISC.8, <http://www.imo.org/en/OurWork/Legal/Documents/LEG%20MISC%208.pdf>, accessed May 16, 2017.

26. Article 234 Law of the Sea Convention,

27. See, e.g., IMO Doc. A.927 (22).

28. On open questions concerning the legal relationship between the Law of the Sea Convention, MARPOL, MARPOL Special Areas and Particularly Sensitive Sea Areas see Haryo Budi Nugroho, "The Particularly Sensitive Sea Area (PSSA): History and Development," in *The Law of the Sea Convention—U.S. Accession and Globalization*, 1st ed., Myron H. Nordquist, John Norton Moore, Alfred A. H. Soons and Hak-So Kim (eds.) (Leiden: Martinus Nijhoff Publishers/Koninklijke Brill, 2012), pp. 529–550, at pp. 547 *et seq.*

29. IMO Doc. A 24/Res.982.

30. For an overview, see <http://pssa.imo.org>, accessed May 16, 2017.

## Biographical Statement

Stefan Kirchner, MJI, is University Researcher for Arctic Law at the Arctic Centre of the University of Lapland in Rovaniemi, Finland, and an adjunct professor for Fundamental and Human Rights at the same university. Earlier he was an associate professor for the Law of the Sea at the Faculty of Law of Vytautas Magnus University in Kaunas, Lithuania. He is admitted to the bar (*Rechtsanwalt*) in Frankfurt am Main, Germany. He serves as co-chair of the Law of the Sea Interest Group of the American Society of International Law (ASIL), based in Washington, D.C., and as a visiting professor for Transitional Justice at the University of Torino, Italy. This text only reflects the author's private opinion and is not attributable to any of the institutions or organizations with which the author is, or has been, affiliated.