

CHAPTER ONE

THE REGIONAL IMPLEMENTATION OF THE LAW OF THE SEA AND THE POLAR REGIONS

Alex G. Oude Elferink, Erik J. Molenaar and Donald R. Rothwell

INTRODUCTION

The polar regions are facing rapid change. Climate change and new and intensified human activities require a critical assessment of the sufficiency of existing regulatory frameworks and may require the development of new approaches and regimes. Although national implementation will always be critical to build effective regimes, global and regional cooperation will also be essential in this respect. No state is in a position to effectively manage its entire national ocean space by its own if it cannot address transboundary activities and processes.

The political and physical geography of the oceans differ radically and the polar regions are no exception. Certain natural processes, such as the Global ocean conveyor belt, span the globe.¹ Marine species often migrate over large distances and the range of some migratory species covers thousands of kilometers and, as chapter 8 of this book observes, may cover both polar regions. Pollutants may travel similar distances. For instance, much of the pollution in the Arctic region originates from industrial activities in North America, Europe and Asia.²

¹ The Global ocean conveyor belt, also known as the great ocean conveyor, is a system of surface and deep ocean currents. It spans all oceans except for the Arctic Ocean. See *e.g.* the entry "Ocean Current" in the Encyclopedia Britannica (available at <www.britannica.com/EBchecked/topic/424354/ocean-current>) or the item "The Global Conveyor Belt" on the website of the National Oceanic and Atmospheric Administration (available at <oceanservice.noaa.gov/education/kits/currents/06conveyor.html>).

² For a discussion of pathways of pollution into the Arctic see for example Arctic Monitoring and Assessment Programme (AMAP) *Arctic Pollution 2009*; J.W. Bottenheim et al. "Long Range Transport of Air Pollution to the Arctic" in *The Handbook Of Environmental Chemistry* (Springer Verlag, Berlin: 2004), Volume 4G, 13–39.

The political geography of the oceans remains dominated by an international system centered on states. First of all, there currently are 152 coastal states,³ and almost all marine regions are characterized by the presence of multiple coastal states with a wide variety of interests. A further layer of complexity is added by the fact that coastal states have varying rights and jurisdiction in their maritime zones. Sovereignty in the territorial sea, but only specified rights and jurisdiction beyond. Other states have rights of communication in the maritime zones of coastal states. This state of affairs restricts the possibilities of coastal states to comprehensively manage their maritime zones on their own. Transboundary impacts are also to a large extent beyond the regulatory reach of the coastal state. In addition, most oceans have extensive areas beyond national jurisdiction, that is the high seas and the Area. All states have equal access to those areas and regulatory standard-setting and enforcement almost entirely remain the primacy of the flag state. This has given rise to continued difficulties in managing these areas.

The recognition that the jurisdictional fragmentation of the oceans requires international cooperation and standard setting, is deeply entrenched in the law of the sea. Some global and regional regimes have their origins in the nineteenth and first half of the twentieth centuries. For instance, the first global convention related to whaling, much of which at the time took place in the Southern Ocean, was concluded in 1931.⁴ Institutionalized cooperation in respect of Antarctica took off in the 1950s⁵ and this was followed a couple of decades later by the first regional agreement in relation to the Arctic in the form of the ACPB.⁶ At present both polar oceans are covered by a host of global and regional instruments.

The present introductory chapter first of all briefly sketches a number of general considerations in relation to international cooperation. Subsequently, it explains why the polar regions have been selected as a case study on the interactions between global and regional regimes in implementing the law of the sea. This is followed by a brief consideration of the political geography of the polar oceans and the various definitions that have been provided of the Southern Ocean and the Arctic Ocean. Both these issues shape regional cooperation. The definition of a region determines the area of application of the regional regime and impacts on the actors that will be involved in cooperation. The political geography of a region is important to defining the legal regime of specific maritime areas. For instance, the presence or absence of high seas areas will be an important determinant in shaping regional cooperation in relation to fisheries.

³ Based on the data contained in "Table recapitulating the status of the Convention and of the related Agreements, as at 30 January 2013" (available at <www.un.org/Depts/los/reference_files/status2010.pdf>).

⁴ International Convention for the Regulation of Whaling of 24 September 1931 (165 LNTS 349).

⁵ This occurred through the Antarctic Treaty of 1 December 1959 (402 UNTS 71).

⁶ Agreement on the Conservation of Polar Bears of 15 November 1973 (13 ILM 13).

GENERAL CONSIDERATIONS IN RELATION TO INTERNATIONAL COOPERATION

Most of the general obligations in respect of global and regional cooperation in relation to the oceans are set out in the LOS Convention.⁷ A reading of these obligations points out that states have a large margin of appreciation in determining how to give shape to their cooperation. In this respect, two aspects can be distinguished: the question what constitutes the appropriate framework for cooperation and the content of the rules of a specific regulatory regime.

As regards the first question, the LOS Convention in some cases only provides for a general duty to cooperate, but in other cases refers to cooperation at respectively the global, regional or subregional level. For instance, in the case of illicit traffic in narcotic drugs and unauthorized broadcasting from the high seas, the Convention simply provides that “[a]ll States shall cooperate” in the suppression of the activities concerned.⁸ The Convention also contains such a general obligation to cooperate in relation to fisheries on the high seas, but adds that this cooperation is concerned with “areas of the high seas” and in cases in which states are exploiting resources in the same area “they shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned”. States are also required to cooperate, as appropriate “to establish subregional or regional fisheries organizations to this end”.⁹ The general obligation on cooperation in respect of the protection and preservation of the marine environment also offers states a broad range of options. They are required to cooperate “on a global and, as appropriate, on a regional basis”. This can be done “directly or through competent international organizations”. Finally, these obligations have to be implemented “taking into account characteristic regional features”.¹⁰

These qualifications in relation to international cooperation of the LOS Convention point to a number of considerations that are relevant in determining the appropriate framework for cooperation. First, this concerns the subject matter that is the object of regulation. Certain issues can only be effectively regulated with the participation of the whole international community and regulation at the regional level is not sufficient. However, where an issue can be regulated effectively at the regional level, this offers itself as a logical option. In general, it will be easier to agree on measures between a limited number of states and this may also allow more detailed and effective measures to be negotiated. As is witnessed by some of the provisions of the LOS Convention on international cooperation, regional cooperation in some cases is the preferred mode of cooperation, but in other cases the Convention prioritizes cooperation at the global level.

⁷ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 396).

⁸ *Ibid.*, arts. 108 and 109.

⁹ *Ibid.*, art. 118.

¹⁰ *Ibid.*, art. 197.

The availability of existing organizations may also contribute to shaping the form international cooperation will take. Tapping into the experience of an existing organization and avoiding the need to develop new cooperative mechanisms can be attractive. At the same time, there may be various reasons why states might not want to make use of an existing organization. For instance, states in a specific region may consider that an existing global body is unlikely to come up with a regulatory regime that is in accordance with their preferred outcomes. In such a case they may opt to develop a new regulatory regime on a regional basis. Similarly, in the case of the existence of a number of potentially competent bodies, states may have different preferences. The existence of these different options raises questions concerning the exclusiveness/inclusiveness of international cooperation. To a certain extent this is a matter that is governed by international law. The LOS Convention provides certain indications as to the nature of cooperation in respect of specific subject matters. For instance, in the case of fisheries there is a clear emphasis on (sub)regional cooperation. Perhaps equally, if not more, important, the LOS Convention limits the options of states to agree *inter se* on specific measures. In agreeing on measures, states have to respect the rights the LOS Convention and international law generally accord to third states in respect of maritime zones. At the same time, it should be realized that these limits are not set in stone. For one thing, many of the general rules of the LOS Convention allow for different options to provide them with more specific content. Who has control over the process of implementing these general rules can have a significant impact on shaping a regime, whether this is done at the global or the regional level.

At this point, it is necessary to look in a little more detail at what the concept of regional cooperation entails. First of all, it does not necessarily imply cooperation between the states of a specific region. For instance, it is clear from the LOS Convention's provisions on high seas fisheries that cooperation has to involve all the states whose nationals exploit the resources of a given area, whether they come from the region or the other side of the globe.¹¹ Article 123 of the LOS Convention on cooperation of states bordering enclosed or semi-enclosed seas envisages that the coastal states shall endeavor "to invite, as appropriate" other interested states to cooperate with them. The latter provision does indicate that the initiative lies with the coastal states of the region and leaves them a measure of discretion. An unresolved issue is whether article 123 applies to the Arctic Ocean. Given the LOS Convention does not specify which seas the provision applies to, there is the potential for differing views between and amongst Arctic and non-Arctic states on this issue. This example illustrates the difficulty of some of the LOS Convention's provisions for the polar regions. How article 123 is interpreted in the

¹¹ *Ibid.*, art. 118.

context of developing and future Arctic cooperation may have an impact on the interactions between Arctic states and states from beyond the region.

The LOS Convention does not contain a definition of the term 'region'. Use of the term in other contexts indicates that it might in principle refer to areas of widely differing size. At one end of the spectrum the term 'region' may cover entire oceans or span different continents, such as is for example the case for the Indian Ocean region or the Asia-Pacific region. At the other end of the spectrum the term 'region' may be used to refer to much smaller areas, such as the Baltic Sea or the Barents Sea. Although the LOS Convention does not define the term 'region', certain provisions provide guidance about the content of the term in specific contexts. For fisheries, the range of the stocks that require regulation will be an important, if not the most important, consideration. In deciding on the appropriate level of cooperation in respect of the protection and preservation of the marine environment, states are required to take into account "characteristic regional features".¹² Such features might include coastal geography, the physical characteristics of an ocean area, the distribution of specific species or valuable ecosystems and the pathways along which marine pollutants spread. Political geography may also contribute to determining the extent of a region. The interest, or absence thereof, in participation in a regime may lead to an area of application of a specific regime that does not necessarily sit well with the other characteristics mentioned above. In certain cases there may not be one obvious limit to define the area of application of a regime and a limit may therefore be set at a line of longitude or latitude.

The LOS Convention mainly takes a sectoral approach to regulating activities in the marine environment. It only addresses their interactions, including their cumulative impact on the marine environment, in general terms. This same approach is evident in most regulatory regimes. To give a few examples, cooperation on fisheries takes place mainly in regional fisheries management organizations (RFMOs) and the regulation of international shipping is the primary responsibility of the International Maritime Organization (IMO). The exploitation of mineral resources is within the remit of the International Seabed Authority (ISA) in relation to the Area and cooperation in relation to these activities within national jurisdiction may take place in regional seas arrangements principally aimed at the protection and preservation of the marine environment.

After the adoption of the LOS Convention in 1982, there has been a wider recognition that to effectively manage the marine environment it is necessary to not only regulate individual activities but also to address their cumulative ecosystem impacts including the interaction that exists between those activities. Chapter 17 of Agenda 21 adopted at the Rio Earth Summit in 1992 called for "new approaches

¹² Ibid., art. 197.

to marine and coastal area management and development [...] that are integrated in content and are precautionary and anticipatory in ambit”.¹³ This implicit call for an ecosystem approach to oceans management has been taken up at the global and the regional level. The Conference of the Parties to the CBD,¹⁴ another output of the 1992 Earth Summit, has recognized the ecosystem approach as “the primary framework of action to be taken under [that] Convention”.¹⁵ Sectoral regulatory bodies have recognized that an overall ecosystem approach to oceans management requires them to pursue sector-based ecosystem approaches.¹⁶

An ecosystem approach to management obviously requires that decision-making is tailored to the geographical scope of ecosystems. For the marine environment, large marine ecosystems (LMEs) are considered to provide an appropriate regulatory unit in this respect.¹⁷ The boundaries of LMEs are defined by four ecologically linked criteria: 1) bathymetry; 2) hydrography; 3) productivity; and 4) trophic relationships. Political and economic criteria are not taken into account in this connection.¹⁸ On the basis of these four ecological criteria, 64 LMEs have been identified and been considered in a UNEP Report on LMEs.¹⁹ The Southern Ocean is identified as one LME spanning the circumference of Antarctica. As regards the Arctic, in 2006 the Arctic Council’s Protection of the Arctic Marine Environment (PAME) working group adopted a ‘working map’ with 17 Arctic LMEs, covering the entire Arctic Ocean and adjacent seas, which is currently being refined.²⁰

¹³ Agenda 21, para. 17.1.

¹⁴ Convention on Biological Diversity of 5 June 1992 (1760 UNTS 79).

¹⁵ COP Decision V/6 Ecosystem Approach, Section C.5.12. The Decision defines the ecosystem approach as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way” (ibid., Section A.1).

¹⁶ See e.g. FAO Technical Guidelines for Responsible Fisheries. No. 4, Suppl. 2. “The Ecosystem Approach to Management”, 14 (available at <ftp.fao.org/docrep/fao/005/y4470e/y4470e00.pdf>); Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 7 November 1996 (36 ILM 1), preamble.

¹⁷ See K. Sherman and G. Hempel (eds.) *The UNEP Large Marine Ecosystems Report; A Perspective on Changing Conditions in LMEs of the World’s Regional Seas* (UNEP Regional Seas Report and Studies No. 182, United Nations Environment Programme, Nairobi: 2009) 5–6.

¹⁸ Ibid., 3.

¹⁹ It should be noted that these LMEs in general are limited to areas within national jurisdiction and in some instances their seaward limit falls short of the 200-nautical-mile limit.

²⁰ See info at <www.pame.is/arctic-large-marine-ecosystems-lme-s>.

WHY THE POLAR REGIONS AS A CASE STUDY?

International cooperation to effectively manage the marine environment is in no way unique to the polar regions. Instruments and institutions at the global level are in principle applicable to all ocean areas. Most regions are covered by regional conventions for the protection and preservation of the marine environment, although these conventions in most cases only apply to areas within national jurisdiction. Regional cooperation on fisheries commonly has a wider geographical coverage. Most high seas areas are covered by RFMOs, although some gaps remain in that respect, including in a part of the Arctic Ocean.

So, why a project on the interaction between global and regional regimes in the law of the sea focusing on the polar regions? Two of the editors of the present volume had edited a book on the law of the sea and the polar regions in 2001.²¹ In view of our continued interest in this topic, we asked ourselves whether we might want to revisit the subjects that were covered in 2001. We concluded that we should not simply aim for an update of the 2001 book. That book's focus was on maritime delimitation and jurisdiction and in respect of some of these issues there have not been any significant developments since then. Instead we decided to focus on the implementation of the law of the sea in the polar regions. The choice for this topic is explained by the fact that deficiencies in the implementation of existing obligations constitute one of the major bottlenecks in arriving at an effective regime for the oceans. The focus on the interaction between global and regional regimes was adopted because the parallel existence of numerous regimes at both levels is a given and will continue to be so in the future. Regional cooperation cannot be effective if it does not take into account the interactions between these regimes in order to arrive at an ecosystem approach.

The above explains our focus on the interaction between global and regional regimes in the implementation of the law of the sea, but apart from practical considerations, still does not explain our choice for the polar regions as a case study. So, again, why the polar regions? The polar regions share climatologic and ecological characteristics that are not present in other marine regions. As a consequence of these conditions, regulatory responses could be similar in both cases and could be developed in tandem or, alternatively, experiences in one region might be relevant to the other region. The development of rules in relation to shipping, discussed in chapter 9, is one case in point. The polar regions are also of interest as a case study on the interaction between global and regional regimes because the changes that are currently taking place, in particular in the Arctic, are resulting in a rapid development of regional cooperation. In this connection,

²¹ A.G. Oude Elferink and D.R. Rothwell (eds.) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, The Hague: 2001).

the Arctic states are also grappling with how to develop the regional regime in the light of the growing interest of states from outside the region in the Arctic Ocean and its legal and governance regime. Dealing with this issue to a large extent is a political issue, but it also has a legal dimension. International law defines the rights and obligations of the Arctic coastal states and other states in the Arctic Ocean and sets limits in selecting pathways for international cooperation. A final reason that justifies the choice for the polar regions is that they offer two idiosyncratic examples of regional cooperation.

In the Southern Ocean, cooperation is built on the Antarctic Treaty and its agreement to disagree on the issue of sovereignty over the Antarctic continent and adjacent islands south of 60° S.²² As is discussed in chapter 2, this arrangement, which, at least in practical terms, implies the absence of coastal state jurisdiction, has required a continuous consideration of the relationship between the international law of the sea and global regimes developed in its framework on the one hand and instruments developed in the framework of the Antarctic Treaty System (ATS) on the other hand. To the contrary, the political geography of the Arctic is no different from other regions: there are coastal states with the full suite of maritime zones. The trajectory of regional cooperation in the Arctic nonetheless is interesting for various reasons. As is set out in detail in chapter 3, the appropriate format for regional cooperation is an issue of much debate. In addition, the role of states and entities outside of the Arctic has attracted more attention than in most other regions. The only region with a larger involvement of extra-regional states, albeit for different reasons, is Antarctica. Finally, regional cooperation in the Arctic is unique because of the role it attributes to the indigenous populations of the region. We feel that these particularities of regional cooperation in respect of the polar regions offer food for thought for those who are looking at the implementation of the law of the sea in other regions.

THE DEFINITION OF THE POLAR OCEANS AND THEIR POLITICAL GEOGRAPHY

Both Antarctica and the Arctic have been defined by reference to different criteria, leading to quite different limits.²³ There is no agreed definition of either polar region or the polar oceans. In Antarctica, the Antarctic Treaty defines its area of application as the area south of 60° S.²⁴ During the later negotiation of the CAMLR Convention²⁵ it was concluded that the Antarctic Treaty limit did

²² Antarctic Treaty, art. IV.

²³ For a brief overview see D.R. Rothwell and C.C. Joyner "The Polar Oceans and the Law of the Sea" in Oude Elferink and Rothwell, note 21, 1–22 at 3–6.

²⁴ Antarctic Treaty, art. VI.

²⁵ Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (1329 UNTS 47).

not constitute an appropriate northern boundary because the Antarctic marine ecosystem extends further north up to the northern limit of the Antarctic Convergence.²⁶ The CAMLR Convention defines its area of application by reference to the Antarctic Convergence.²⁷ Interestingly, the Madrid Protocol,²⁸ like the Antarctic Treaty itself, only applies to the area south of 60° S, thus excluding the part of the Antarctic marine ecosystem between the parallel of 60° S and the Antarctic Convergence. Nevertheless, the Madrid Protocol seeks to provide for the protection of the “Antarctic environment and dependent and associated ecosystems”,²⁹ which potentially allows for its impact to extend north of 60° S even though it only seeks to regulate activities within the Treaty area. Beyond the framework of the ATS, the Southern Ocean has been defined for purpose of the ICRW³⁰ under which a ‘Southern Ocean Sanctuary’ has been declared, within which commercial whaling is prohibited. The boundary of the Sanctuary encompasses all of the Southern Ocean up to the Antarctic Treaty limit of 60° S, but in many places extends well to the north of that boundary.³¹ In that respect the ICRW definition of the Southern Ocean, albeit for the purposes of whale conservation, is much more extensive than that adopted under the ATS even including the CAMLR Convention boundary limits.³²

Definitions of the marine Arctic vary widely. The main differences in definitions of the marine Arctic concern the question whether the sea areas connecting the Arctic Ocean to the Atlantic and Pacific Oceans are part of the Arctic Ocean or not. For instance, the five Arctic Ocean coastal states—Canada, Denmark/Greenland, Norway, the Russian Federation and the United States—adopted the

²⁶ The Antarctic Convergence is the area where colder Antarctic waters meet and mix with relatively warmer subantarctic waters.

²⁷ CAMLR Convention, art. I. However, whereas the northern limit of the Antarctic Convergence is mobile, the CAMLR Convention defines the Convergence by a number of points joined by lines following parallels of latitude and meridians on longitude. The Antarctic Convergence (sometimes referred to as the ‘Antarctic Polar Front’) is also considered to be susceptible to the impacts of global warming (see generally J.K. Moore, M.R. Abbott, and J.G. Richman “Location and dynamics of the Antarctic Polar Front from satellite sea surface temperature data” (1999) 104 *Journal of Geophysical Research* 3059–3073).

²⁸ Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991 (30 ILM 1455).

²⁹ Madrid Protocol, arts. 2 and 3(1).

³⁰ International Convention for the Regulation of Whaling of 2 December 1946 (161 UNTS 72), Schedule (as amended), cl. 7(b).

³¹ See *ibid.*

³² However, note that the Schedule to the ICRW also makes clear that “Nothing in this sub-paragraph is intended to prejudice the special legal and political status of Antarctica” (*ibid.*).

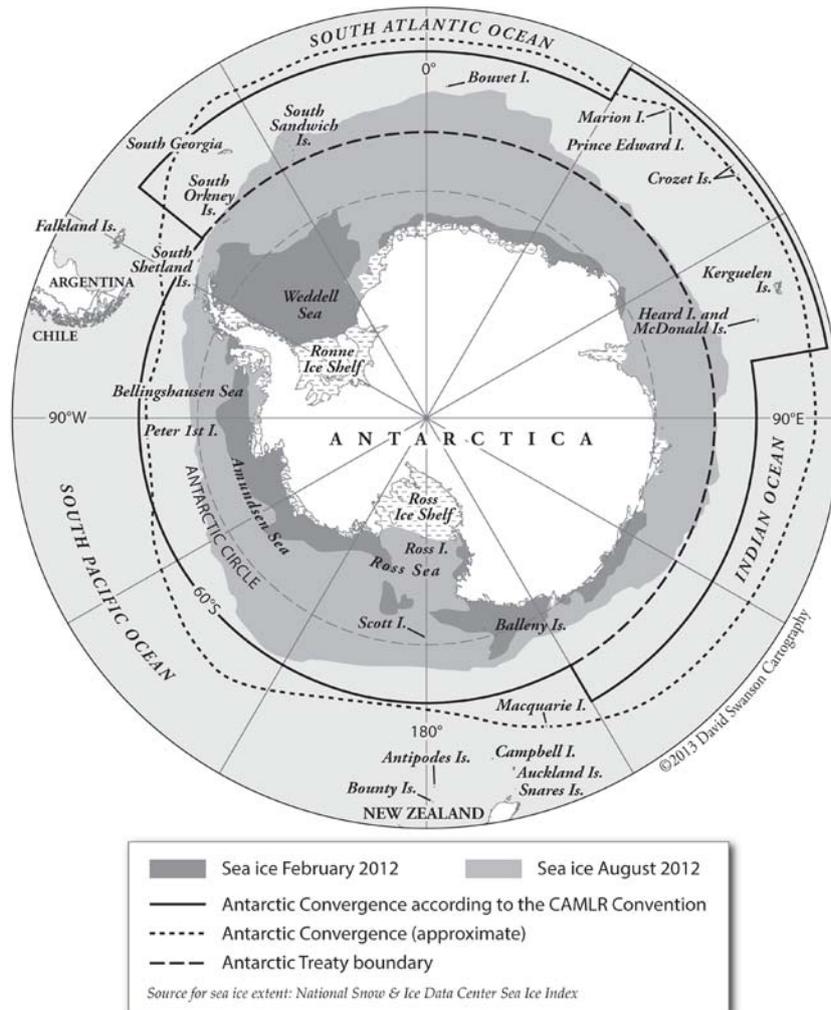


Figure 1.1 The Antarctic Region—General Overview

Ilulissat Declaration,³³ in which they set out their views on the relevant legal framework for the Arctic Ocean's management. Iceland did not participate in the meeting at which the Declaration was adopted. At the same time, a significant part of Iceland's maritime zones are located north of the Arctic Circle (66° N) in the Norwegian Sea, which links the Arctic and Atlantic Oceans. Working groups of the Arctic Council have developed definitions of the marine Arctic that include the Norwegian Sea. For instance, the Conservation of Arctic Flora and Fauna (CAFF) working group in 2001 adopted a definition on the basis of the convergence of "the relatively warm, salty water from the Atlantic and Pacific Oceans and the colder, less salty waters of the Arctic Ocean".³⁴ Under this definition, the Arctic Ocean includes most of the Bering Sea, the Davis Strait and Baffin Bay between Canada and Greenland and the part of the Greenland Sea and Norwegian Sea north of the Arctic Circle.³⁵ As was mentioned previously, PAME has so far identified 17 Arctic LMEs. These cover the Bering Sea and areas to its south, the Sea of Okhotsk, the Norwegian Sea, the Greenland Sea, the Denmark Strait, the Davis Strait and Baffin Bay. On the other hand, PAME's *Arctic Marine Shipping Assessment 2009 Report* puts the limit between the Arctic and Pacific Oceans in the Bering Strait, to the north of the Bering Sea and refers to the Davis Strait, Baffin Bay, Norwegian Sea and the Denmark Strait between Greenland and Iceland as passages between the Arctic and Atlantic Oceans. It was further considered that the Arctic was bounded by Svalbard (Norway) and the Russian islands of Franz Joseph Land, Novaya Zemlya, Severnaya Zemlya and the New Siberian Islands.³⁶ The IMO Polar Shipping Guidelines³⁷ employ yet a different definition of their area of application. They generally define Arctic waters by reference to the parallel of 60° N, but the limit of the area of application is significantly to the north of the parallel of 60° N in the Denmark Strait, the Norwegian Sea and the Barents Sea.³⁸

Having reviewed these various definitions, it is clear that while there is no general agreement on the exact limit of the Arctic Ocean in relation to other ocean areas and different definitions are employed in specific instruments and

³³ Ilulissat Declaration of 28 May 2008 (available at <www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf>).

³⁴ CAFF "Arctic Flora and Fauna: Status and Conservation" (2001) (available at <arcticportal.org/uploads/eX/e6/eXe6XNMebXN263nFyvx_Rg/AFF-Status-and-Trends.pdf>) 13.

³⁵ Subsequently this boundary was adapted to include the entire Bering Sea and waters between the Faroe Islands and the Arctic Circle (see e.g. CAFF 2006 *Circumpolar Biodiversity Monitoring Program 2006 Annual Report* (CAFF, Akureyri, Iceland: 2006), title page).

³⁶ Arctic Council *Arctic Marine Shipping Assessment 2009 Report* (Arctic Council: 2009), 18.

³⁷ Guidelines for ships operating in polar waters, IMO Assembly Resolution A.1024(26) of 2 December 2009 (A 26/Res.1024 of 18 January 2010).

³⁸ See Polar Shipping Guidelines, s. G-3.3. The limit is depicted in *ibid.*, 9.

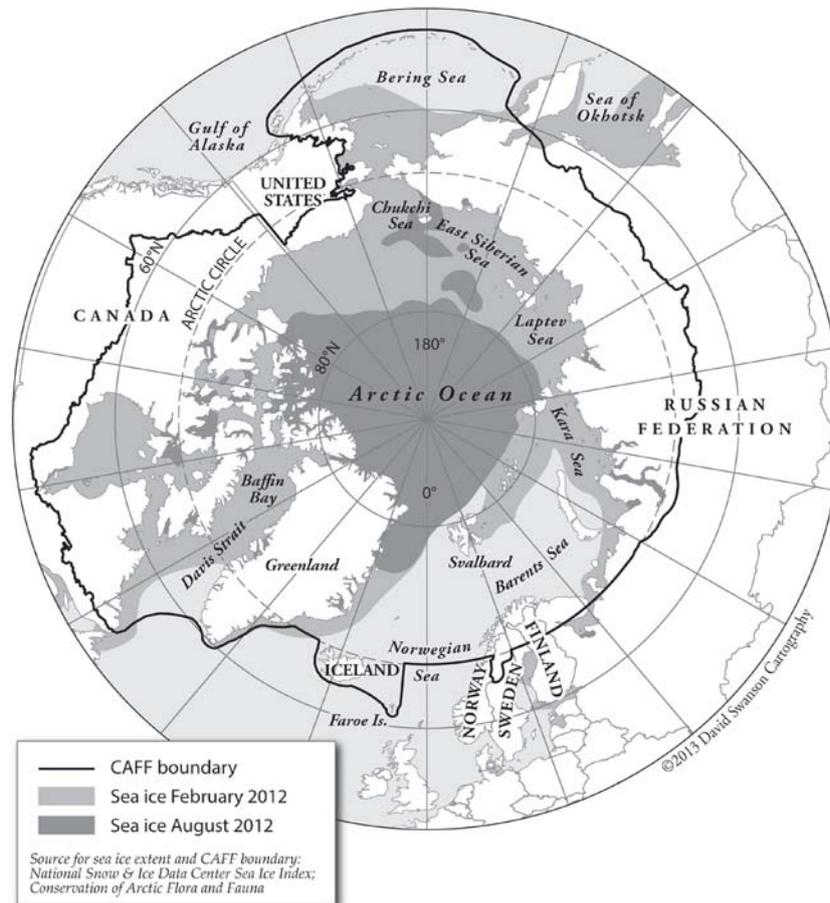


Figure 1.2 The Arctic Region—General Overview

documents, the definition of the marine Antarctic has been set at 60° S and the Antarctic Convergence in treaty instruments. In the present project we consequently have opted to not adopt one specific definition of the marine Arctic/Arctic Ocean and the marine Antarctic/Southern Ocean but left it to individual authors to deal with this matter in the light of the subject matter they are addressing. In the concluding chapter we, however, intend to pick up this definitional issue and how it may impact on the interaction between different regimes that are applicable to the polar oceans/marine polar regions.

Apart from these limits defining the extent of the polar oceans, the political geography of these regions is important for understanding the setting in which international cooperation takes place. In Antarctica, the political geography is defined by two fundamental oppositions that have their basis in the Antarctic

Treaty. First, as was already mentioned, the Antarctic Treaty is premised on the agreement to disagree on the issue of sovereignty over the Antarctic continent and adjacent islands. On the one hand, there are the seven claimant states—Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom—that consider to have a legal title to parts of the Antarctic continent and adjacent islands. In formulating their Antarctic policies these states, which in their view have coastal state entitlements to maritime zones, have to take into consideration how to deal with the development of coastal state jurisdiction in the law of the sea in the light of their obligations under the Antarctic Treaty. The other parties to the Antarctic Treaty are faced with a similar challenge. How should they react to developments in the law of the sea and the policies of the claimant states in this respect to safeguard their rights and interests in Antarctica? As was mentioned, the territorial arrangement contained in the Antarctic Treaty implies, at least in practical terms, the absence of coastal state jurisdiction.³⁹ As a consequence, regulation of activities in the Southern Ocean has to rely heavily on flag state jurisdiction.

A second opposition concerns the Antarctic Treaty parties on the one hand and the international community at large. The parties to the Antarctic Treaty have assumed the responsibility to manage Antarctica. Originally, the Antarctic Treaty was negotiated by 12 states and entered into force with 13 parties. Especially in the 1980s, the legitimacy of the regime set up by the Antarctic Treaty was challenged by non-parties in the United Nations. In part as a response to this challenge, the Antarctic Treaty Consultative Parties (ATCPs) have sought to broaden participation in the regime. At present the Antarctic Treaty has 50 parties, including some of the most vocal opponents of the ATS in the 1980s, such as Malaysia. Still, there remains a risk that decision-making in the context of the ATS will be viewed as being exclusive and benefitting insiders. In that connection it should also be realized that only 28 of the 50 parties to the Antarctic Treaty have consultative status. Only the ATCPs have decision-making power in Antarctic Treaty Consultative Meetings (ATCMs). As regards the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) set up under the CAMLR Convention, decision-making rests with its 25 members, two of which, the European Union and Namibia, are not parties to the Antarctic Treaty.

A final complexity of the political geography of Antarctica is caused by the existence of a number of subantarctic islands north of 60° S. The provisions on territory contained in the Antarctic Treaty are not applicable to these islands. The 200-nautical-mile zones of these islands—Bouvet (Norway), the Crozet Islands and the Kerguelen (France), Heard Island and the McDonald Islands (Australia), the Prince Edward Islands (South Africa) and South Georgia and the South Sandwich Islands (under the authority of the United Kingdom; sovereignty is

³⁹ See, however, below for the status of the subantarctic islands north of 60° S.

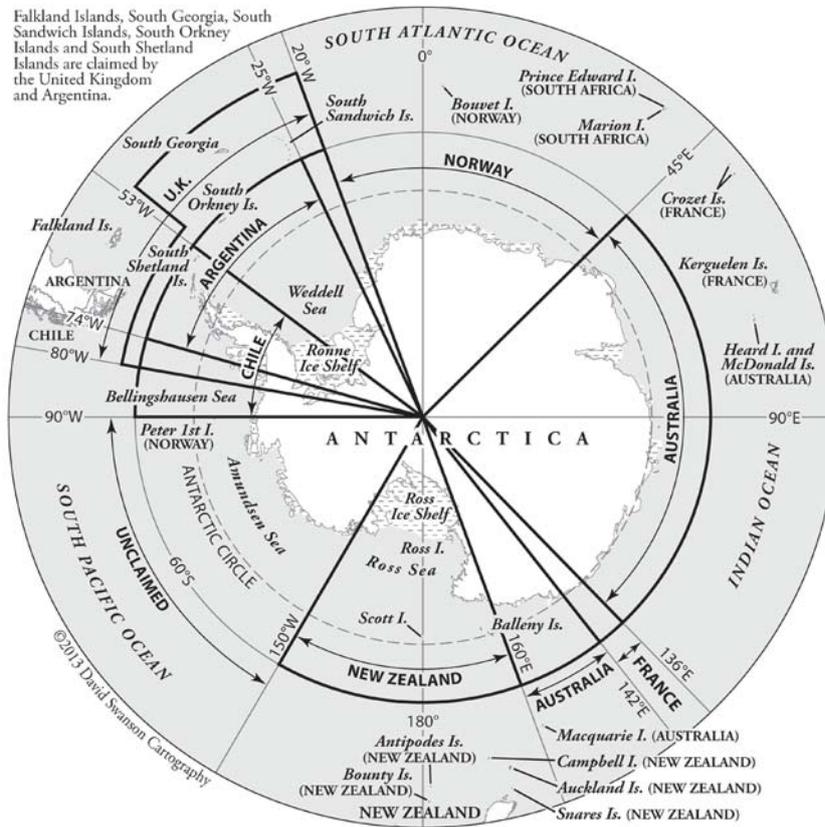


Figure 1.3 The Antarctic Region—Political Geography

also claimed by Argentina)—overlaps with the area of application of the CAMLR Convention and the continental shelf beyond 200-nautical-miles of a number of these islands extends into the Antarctic Treaty area and in some instances overlaps with the continental shelf of the Antarctic continent. In addition, there are some subantarctic islands that fall beyond the limits of the CAMLR Convention, whose sovereignty is not contested, and where the relevant coastal state is able to exercise all of its entitlements without any of the limitations imposed by the ATS.⁴⁰

The marine Arctic, like all other parts of the globe apart from Antarctica, is bordered by coastal states. Depending on one’s definition of the marine Arctic,

⁴⁰ Those islands include Gough Island (South Africa), the five New Zealand subantarctic islands of Antipodes, (Auckland, Bounty, Campbell, and Snares), and Macquarie Island (Australia).

the number of coastal states differs. As was mentioned above, the Ilulissat Declaration of 2008 on the Arctic Ocean was adopted by Canada, Denmark/Greenland, Norway, the Russian Federation and the United States. On the other hand, the Arctic Council also has Iceland as a member and apart from the Danish autonomous area of Greenland, the Arctic Council's work area also extends to the Faroe Islands, the other autonomous Danish territory. The Faroe Islands are located in the southern part of the Norwegian Sea and the northernmost point on the coast of the Faroe Islands is some 470 kilometers south of the Arctic Circle. The Faroese continental shelf beyond 200 nautical miles does straddle the Arctic Circle.

Due to the size of the Arctic Ocean and adjacent seas, most of the marine Arctic, whether defined broadly or narrowly, is covered by the 200-nautical-mile zones of coastal states. The largest area of high seas is located in the central Arctic Ocean. The geographical North Pole is over 170 nautical miles from the nearest 200-nautical-mile limit and certain high seas areas are more than 300 nautical miles from the 200-nautical-mile limit. Smaller areas of high seas are located in the Barents Sea and the Norwegian Sea, respectively called the Loophole and the Banana Hole. As the practice in relation to Arctic fisheries management discussed in chapter 11 indicates, these areas are significant to regulating specific activities. Beyond the 200-nautical-mile limit, the coastal states in the marine Arctic have extensive areas of continental shelf. As is discussed in chapter 4, the exact extent of this continental shelf is still uncertain, but it is likely that a large part of the central Arctic Ocean and most or all of the high seas pockets in the Barents Sea and the Norwegian Sea will be within the outer limits of the continental shelf to be established in accordance with the law of the sea.

The political geography of the marine Arctic has important implications for international shipping. Currently, the two main trans-Arctic routes pass through the Canadian coastal archipelago and between the Russian mainland and several groups of coastal islands. The legal regime applicable to navigation in these areas has been subject to much discussion. The opening up of the Arctic as a result of changing ice conditions and the possibility of a significant increase in maritime traffic is likely to lead to continued debate. On the other hand, significant loss of sea-ice may open up the central Arctic Ocean as an alternative route, diminishing the significance of the two coastal routes and facilitating the development of trans-Arctic navigation. In that case the Bering Strait between Alaska and the Asian continent would remain a major choke point.⁴¹

CONCLUDING REMARKS

As this chapter already foreshadows, the implementation of the law of the sea in the polar regions involves a broad variety of regimes at the global and regional

⁴¹ See also chapter 16 in this volume.

level. In both cases there is a regional body with cross-sectoral competence: the ATCM in the case of Antarctica and the Arctic Council in the Arctic, and a number of sectoral regimes in relation to such issues as fisheries and navigation. These two examples also illustrate the difference in focus of specific regimes. Regulation of fisheries to a large extent takes place at the regional level through RFMOs. In the case of navigation there is strong involvement of the IMO. Two other important points emerge from this chapter. First, the political geography of the polar regions is a key factor in shaping regulatory regimes. On the one hand, regulation in Antarctica is based on the agreement to disagree about sovereignty over the Antarctic continent contained in the Antarctic Treaty. On the other hand, coastal states border the Arctic Ocean and adjacent seas and most of these areas fall under coastal state jurisdiction. Secondly, the definition of a region depends on various factors and specific regimes in the marine Arctic and Antarctica have different areas of application. These issues will be further explored in the following chapters and the concluding chapter will draw the findings in this respect together.