Arctic Legal Issues

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(Graphic from Roach, Singapore 2011)
Overview

- Legal Status of the Arctic
- Ownership of Resources and Claims
- The Regulation of Shipping – Marine Safety
- Marine Pollution Issues
- Liability Convention(s)
- Governance Gaps & Analysis
Arctic Legal Status

- The Arctic is legally different than other geographically remote areas

- There is no overarching legal treaty which governs activities…contrast:
    - An international body licenses activities
  - **Outer Space** (O/S) – Outer Space Convention 1967
    - General legal obligation to use peacefully and not affect other users.
    - A ’72 Liability Convention makes states responsible for their activities in O/S
  - **Antarctica** – The Antarctic Treaty of 1961
    - Rejects all territorial claims…or military activities
    - A 1982 Protocol establishes a UN entity to regulate harvesting of marine resources – especially Krill
    - Extractive activities now banned.

- The LOS has one specific Article - for the most part, the general LOS Rules & legislation of individual state(s) apply.

- Direct comparisons difficult because much of the Arctic is under the sovereign jurisdiction of individual states and there is some development/population centers.
The Arctic & The LOS

Art 234 of the LOS Convention:

- Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution 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 ........

- 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.
The Arctic Council

- An intergovernmental forum for Arctic governments and peoples …to discuss matters of mutual interest and

  - Established via a ‘96 Ottawa “Declaration” to “oversee, coordinate” and promote programs concerned with protection of the Arctic environment. (vs. military or security matters).
    - No power is given to the Council to take actions on behalf of the member states or give it legal personality (as is the case with the EU).
    - The Council has been charged with developing programs to promote sustainable development which are implemented by the individual states.

  - Contrast: The ASEAN treaty - - does have legally binding agreements (especially in the areas of trade) which devolve from the political structure. EU even stronger.

- No regulatory power over the activities in arctic waters.
Boundary Disputes & Extraction Rights
Legal Boundaries of the Oceans and Airspace

- National Airspace
  - Territorial Sea (12 nm)
  - Contiguous Zone (24 nm)
- International Airspace
  - Exclusive Economic Zone (200 nm)
  - High Seas
  - Continental Shelf
  - The deep sea bed

Outer Space
Boundaries & Resource Claims

• Arctic States have agreed on many but not all maritime boundaries
  – All the countries except the US have drawn straight baselines.....many are likely excessive.

• A few maritime boundary situations exist in Arctic Ocean where adjacent or opposite States have overlapping maritime claims to Exclusive Economic Zone (EEZ) or Continental Shelf (CS):
  – Canada –Denmark (Greenland)
    • Sovereignty over Hans Island
    • EEZ (south of Alert), EEZ and continental shelf (north of Alert)
  – Canada –U.S.
    • Territorial Sea, EEZ, and ECS in Beaufort Sea/Arctic Ocean

• Potential for Extended CS overlap US/Russia/Canada.
US-Russia Agreement: TS, EEZ and CS

- Agreement between US & USSR
- Signed: June 1990
- U.S. ratified: Sept 1991
- Provisionally applied: June 1990

Longest maritime boundary in the world
First boundary to include the extended continental shelf “…the maritime boundary extends north…into the Arctic Ocean as far as permitted under international law”

Graphic: Roach, 2011, Singapore
Norway-Russia Boundary

- Signed on Sept 13, 2010
- Another amicably resolved territorial sea boundary dispute. Note that the line extends to the Arctic Circle.
- Still some disagreement over the breadth of each's EEZ.
US v. Canada Beaufort Sea

- Disputed area likely has hydrocarbons

- This type of dispute commonplace among adjacent coastal states.
Norway- Russia Dispute: EEZ

Graphic from Roach, Singapore Presentation 2011.
Canada – Denmark

• Sovereignty dispute over Hans Island (far north) and associated EEZ and CS.
  – The “Island” is totally barren and uninhabited.

• 1450NM CS/EEZ agreement extant since 1974.
  – The boundary to the North and South of the Island is established in the Treaty.

• Unlike the SCS island disputes, the Han Island dispute has been the subject of “google wars” between Denmark and Canada.
Extended CS Claims: Potential Overlap

- Art 76: LOS
  - Canada Submission planned for 2013
  - Denmark Submission planned for 2012
  - Norway Submission approved 2009 by Continental Shelf Commission (CLCS)
    - If the submission is approved by the CLCS, then the boundary is final.
  - Russia 2001 submission under revision
  - United States Data being collected but cannot Submit
- **Myanmar v. Bangladesh:** (ITLOS 2012) usual delimitation rules apply
Boundary Issues: Conclusions

• Most Hydrocarbon Activities are Occurring inside of Established EEZs of 5 littoral countries

• The Boundary Disputes are Minor in Comparison to those elsewhere: SCS and ECS
  – Should not be difficult to resolve.

• Outer Continental Shelf Claims still not adjudicated….. questionable whether these areas can ever be exploited?
Vessel Transit and Presence Issues
Potential Routes For Int’l Navigation

• Bering Strait
• Northwest Passage (Canada)
• Northern Sea Route (Russia)
• Arctic Ocean (“over the top”)
• Some of these routes may traverse internal waters – some pass through recognized straits

Source: Arctic Marine Workshop, 20-30 Sep 2004- ARC Council
Transit and Presence Risks

• Transit Risks
  – Vessel source pollution due to incidental discharges or accident
  – Vessel stranding : ice or uncharted obstruction – need rescue
  – Whale strikes

• Oil and Gas Extraction Risks
  – Vessel stranding
  – Vessel source pollution
  – Oil Rig, Pipeline, floating production/storage/offloading units or Transfer Vessel Risk(s)
  – Fisheries/wildlife damage & cleanup costs

• Tourism Risks
  – Vessel stranding ice or uncharted rock
  – Vessel source pollution due to incidental discharges or accident
  – Pax. Evacuation.
  – Whale strike

Graphic from AMSA Rept, 2009
Navigational Safety Aids Not Uniformly Available

• Less than 10% of Arctic waters charted to modern standards...although 5 littoral countries have formed a regional hydrographic commission
  – Lack of charts increases probability of mishaps.
  – Lack of good charts affects full insurability of shipping

• Navigation Aids: Fixed and floating systems) still under development, sea ice and weather broadcasts and electronic charts have gaps.

• Arctic SAR collaboration between the 5 littorals plus Finland, Iceland, and Sweden have improved the situation ....but large areas to cover with small number of response platforms.

• Financing is an issue - - 5 states shouldn’t shoulder burden for entire maritime community.

Primary Source: 2009 Arctic Marine Assessment, ARC Council
Applicable LOS Provisions Governing Ship Operations

- **LOS & Principle of Flag State Control**
  - Most rights vested in the flag state
  - The Flag state responsible for enforcing vessels standards w/some exceptions

- **Enforcement rights of Coastal States:**
  - In EEZs-
    - Boarding & stoppage if a “substantial discharge”
  - Territorial Sea - Innocent Passage
    - Enforce Traffic measures if IMO Approved (TSS/VTS/MSR/ROUTEING)
  - Internal Waters & Ports
    - Can Inspect and Require Conformity with Its Domestic Laws
    - No legal limits but normal enforcement is done via Port State control inspections.
    - Need to be judicious
    - Russian Northern Route good exemplar: mandatory pilot, advance vessel planning
Coastal State Regs: Canada

- **Mandatory Ship Reporting in NORDREG (unilateral)**
  - SOLAS – Requires IMO Approval

- **Canadian Shipping Act of 2001**
  - Broad authority to conduct inspections of hulls, equipment, charts, etc.
  - Must have appropriate charts on board.
  - Large fines for non-compliance.

- **Arctic Waters Pollution Prevention Act of 1970, as extended…applies to shaded area 60N**
  - Zero discharge limits
  - Absolute liability for discharges
  - Right to deny passage/seize vessels

*linked to NW passage

Source: Transport Canada Press
Release 2010 (Roach)
International Regulations

• Soft law:
  – Arctic Council Guidelines on Arctic Oil and Gas (2009)
  – IMO
    • 2009 Guidelines for Ships Operating IN Polar Waters
    • “IMO Encourages Governments to take appropriate Steps to Give Effect to the Guidelines”

• IMO Regulations: SOLAS, MARPOL, COLREGS, LONDON Conv, SAR, Liability Conventions
  – SOLAS/COLREGS allows for traffic routeing measures, mandatory reporting systems, or traffic separation schemes WITH IMO approval.
    • Areas to be Avoided (ATBAs), Particularly Sensitive Sea Areas (PSSAs) and MARPOL Special Areas also possible for LOCALIZED areas.

• Enforcement of current IMO regulations:
  – Flag state has primary responsibility for compliance - - especially crewing, training, design, construction.
  – No unrestricted authority to stop and arrest a ship to verify compliance.
  – Cannot prevent flag vessels from states which are not party to all the IMO regulations from entering their EEZ or TS (innocent passage).
Future IMO Measures:

- Make Polar Code Mandatory?
  - Adopt IACS’ “Polar Class Ship” Standard & make mandatory $$$

- Enhance training and certifications for Polar Operations (Int’l Safety Management (ISM) Code)

- Strengthen Maritime Safety Information Broadcast system

- Establish Routening or VTS regime.
  - Must be done via IMO
  - Mandatory pilotage?

- Designate certain areas as Particularly Sensitive Sea Areas (PSSAs) or a MARPOL Special Area.
  - Controversial.
Assessment the IMO/Coastal State Approach
Given the Rapid Rate of Change

• IMO Approach
  – IMO measures, such as the Polar Code, and traffic control measures will take considerable time to pass & phase in w/relevant flag states
  – IMO largely works on the basis of consensus so it could take a very long time to enact things like a PSSA
  – IMO Enforcement primarily done via the FLAG STATE
    • Some “Open Registry” states can either not adopt or not enforce .....creating a regulatory gap that ship owners can exploit to avoid cost.
    • IMO standards are normally enforced via the Port State Control system....many ports/inspectors in the Arctic areas.

• Coastal State Approach
  – An area of policy sensitivity for US and other major maritime powers. Ship design, construction, operation a sovereign matter.
  – Canadian legislation may be sensible but not necessarily compliant with the LOS Convention
Oil Pollution & Marine Environment Issues

• Shell’s drill ship Noble Discoverer bores an exploratory well in the Chukchi Sea north of Alaska above the Arctic Circle. Photo: Jennifer A. Dlouhy, Houston Chronicle / SF (Nov 2012)
Specific Duties of States to Protect the Arctic Marine Environment

• LOS Convention, Art 234
  – Focus is only upon protection of the marine environment in “ice covered areas” against VESSEL Source pollution vs. Oil Rigs.

• Arctic Council “mandates” are not legally binding in the same sense, as say, the Antarctic Treaty.
  – So, Canada or the Council has no power to tell Russia or the US what to do in their Arctic EEZ.

• Consequently, most obligations come from General LOS Principles
Regulation of Exploration and Extractive Activities in National Waters

- LOS Convention gives coastal states the exclusive right to regulate all exploration in their EEZ and on the continental shelf (Articles 56, 60 and 81).

- States have a duty to protect the marine environment from pollution from oil rigs and offshore installations (Arts 194 and 208).
  - States have a duty, under Art 194, to prevent pollution damage to other states; cooperate internationally; and monitor. (Arts 204 and 205).

- Duty to prevent incidents, monitor and cooperate ≠ Duty to Pay Damages to Everyone Harmed
  - It is envisioned that states will discharge their LOS duties via their national legislation (US) or by joining IMO regulatory schemes (others)
    - Liability schemes/compensation funds mapped to the situs of an incident.
  - Suits vs. states may be blocked because of sovereign immunity although "state on state" litigation is not absolutely precluded by the LOS Convention.
  - Some regional organizations, e.g., EU have legislation which have resulted in higher standards of operation but this legislative system not comprehensive.
COMPENSATION FOR POLLUTION DAMAGE

Possible polluters:
- Tankers (large vs. small)
- Transfer Vessels, Pipeline Operators, floating Production storage/offloading units or Transfer Vessels
- Oil Rig Operators
- Licensors

Financial Responsibility
- Most of the entities have their liability capped by statute/treaty
- Fault is normally presumed – especially in the US system.
- That liability is secured by insurance
- Liability caps can be avoided for really bad actors.
- Getting a judgment does not mean you will ever get paid!
  - Consequently, compensation funds are critically important.
General Liability of Shipowners

- NA to tankers….could apply to rigs.
- US: Under traditional Admiralty Rule, owner liable up to the value of the hull (after the accident) plus the pending freight.
  - 1851 LIMITATIONS ON LIABILITY ACT, TITLE 46 USC
    - May limit Transocean’s liability (Marshall Island Flag/Swiss LLC) to $27 Million but USCG seeking to avoid those limits (fines/Clean Water Act). Collectable?

- IMO Liability Convention:
  - States can opt to follow domestic law or the IMO liability Convention:
  - The IMO Convention on Limitation of Liability for Maritime Claims has caps for “loss of life/injury” and “property claims.” Assume a 50,000 ton cruise liner or ore carrier.
    - Cap: PI= $30 million; Prop = $15 million
Oil Tankers: IMO Conventions

- Pollution damage caused by spills from oil tankers is governed by a 1992 Civil Liability Convention and the Fund Convention of 1996. Wide accession. NA to Rigs.
  - The 1992 Civil Liability Convention applies to oil pollution damage resulting from spills of persistent* oil from tankers. Canada, Russia, Denmark, and Norway are parties.
  - The US has a parallel system.

- The owner has strict liability for pollution caused by an incident unless caused by a war or natural disaster, sabotage, or “the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.”
  - An owner’s liability is based on tonnage. Max liability $138 million – if the result of ordinary negligence.
  - Owners must carry compulsory insurance to cover his liability.
  - If the owner’s payoff inadequate, the IMO administered fund is available as a backstop. The Fund provides an additional $200 million of total coverage.

- Suit in the national courts of the TS or EEZ where the spill occurs.
  - The flag State of the tanker and the nationality of the ship owner are irrelevant (a variation from the flag state control principle to ensure a “financially responsible” defendant)
  - What happens if a spill in Russian waters which drifts into the US.
Liability - Domestic Laws (US)

- The US Oil Pollution Act of 1990.
  - OPA '90 ....any owner who causes oil to discharged, or which poses a substantial threat of discharge, into US waters is strictly liable for removal costs and damages - - except for Acts of God/Acts of War.
  - For tank vessels over 3,000 gross tons, it is the greater of US$ 1,200 per gross ton or US$10 million for single hull tank vessels and US$ 1,900 per gross ton or US$ 16 million for double hull tank vessels.
    - Limits lost if gross negligence, willful misconduct, violation of applicable federal safety regs
  - For offshore facilities, the holder of the permit is the responsible party (BP). Liability for such permit holders is capped at $75 million, plus removal costs.

- Oil Spill Liability Trust Fund: provides backup funding when individual payments not sufficient. The maximum amount of compensation available from the Trust Fund is $1 billion per incident. It derives its money from a per barrel tax on imported and domestically produced oil….quid pro quo for liability caps.

- Foreign Claimants (Incl. Gov'ts) 33 USC 2707 – can make a claim under OPA if the claimant’s country allows for reciprocal treatment, & the claim arose from an incident in US waters
Pollution Control Measures: Gaps and Costs

• Questionable whether convention(s) apply in all cases (especially rigs) if loss occurs due to force majeur. IMO Convention weak.

• Regime does not cover losses created by warships or ships involved in non-commercial services...state owned oil rig?

• IMO Liability regime does not apply to oil rigs accidents
  – Would have to sue the owners of the rigs and the oil company drilling on the Rig.

• All Liability schemes inadequate.
  – Deepwater Horizon – The Deeply capitalized BP has either paid/set aside $37.2B. More possible in massive civil suits now ongoing.
  – Exxon Valdez – about $5-7Billion. Recurring bills.

• If outside the scheme, the affected coastal state/claimants must sue the ship owner. Good luck!!!
  – Owners many not have insurance above the statutory caps and the owners are usually LLCs - - piecing the corporate veil will be tough assuming there are assets worth seizing.
Issue Summary

• Maritime Disputes are relatively minor when contrasted to the SCS and ESC where sovereignty over rocks and islands at issue.
  – All Arctic States have large undisputed areas where they can fish and extract hydrocarbons.

• Oil and Gas Extraction activities are regulated by the individual coastal states. No cross boundary regulation and/or indemnification scheme because of the high probability of transboundary incidents in the Arctic
  – Oil rigs outside the IMO liability schemes - - that means no liability caps but good luck in having assets to seize to pay the cleanup costs.

• Tanker liability scheme mature…. phase out of single hulled tankers should help. Spill liability determined by site of accident. Main issue with tankers is the low liability limits.

• Individual states can regulate some shipping movements in ice covered areas but no comprehensive scheme ……routeing, pilotage and other requirements brokered by the IMO.
  – IMO action to enact routeing and other traffic control measures – MSR, ATBAs, reasonably accomplished in IMO setting.
  – NA to public vessels/warships

• Coastal states can generally not regulate vessel design, construction or manning
  – Push for mandatory compliance with the Polar Code & Polar Ship Class Designation appropriate.
  – Unilateral legislation works to a point - - - as ice recedes then ships can pass further from coastal areas to avoid “internal waters” regulations.
  – Bad policy to regulate ship design/construction/operations issues outside of internal waters.

• Free Ridership.
  – Arctic Code, More NAVAIDs, SAR Coverage, etc., will help but not mitigate the risk. But, some need for a legally binding and contributory system to finance the costs of charting and appropriate spill response…..
  – Response and Adaptation Activities (like NAVIDADS) are Increasing but costly….unfair that coastal states bear all these costs.
Questions

Graphic from AMSA Report, 2009
Extended CS of the US (outlined in red) and the US EEZ (in blue)
Vessel Transit and Presence Issues

• The authoritative analysis of the various issues pertaining to maritime access to the Arctic.

• Examined oil and gas exploration, transit and “eco” tourism issues issues.
  – Fisheries/living marine resource issues given modest treatment

• Report contained modest recommendations to follow the IMO path, upgrade infrastructure, and for states to update their laws.

• This briefing is less modest.
National Legislation Regulating Transits

- Russia – ’98 legislation for ships using the Northern Sea Route.
  - Russia maintains these are all internal waters.
- Mandatory pilot and equipment standards.
- Pollution standards tougher than MARPOL
- Must proffer an advance application
- Fee system (to underwrite costs of icebreaker infrastructure).
  - Modified in 2012 law.
- Russia passed a 2012 law establishing a Northern Sea Route “Administration” to administer their law, coordinate SAR, install NAVAIDS,