

INTRODUCTION TO THE SPECIAL ISSUE ON “ARCTIC AND ANTARCTIC REGIONS: NEW CHALLENGES FOR OCEAN GOVERNANCE”

BY

Erik FRANCKX*

AND

Philippe GAUTIER**

This special issue of the Belgian Review of International Law reproduces the papers presented at the conference “Arctic and Antarctic Regions: New Challenges for Ocean Governance”, which was held on 3 September 2018 at the Egmont Palace in Brussels, Belgium. This conference was the first colloquium organized further to the decision adopted by the Belgian Society of International Law during its General Assembly held on 6 October 2017, to support, on an annual basis, the joint organization by a Flemish and a French speaking university of an international conference under its auspices. In accordance with this new policy, the first event was the result of a cooperation between the *Université catholique de Louvain* and the *Vrije Universiteit Brussel*.

The topic selected for this conference concerns legal issues related to recent developments in the Arctic and the Antarctic. As regards the Arctic, these developments refer to the Polar Code, a new international shipping regulation that entered into force on 1st January 2017, as well as to a draft convention on high seas fisheries in the Arctic that was “successfully concluded”

* Full-time research professor, President of Center for International Law, Faculty of Law and Criminology, *Vrije Universiteit Brussel* (V.U.B.). He serves at present as the President of the Belgian Society of International Law (2017 -). He holds moreover teaching assignments at the *Université libre de Bruxelles*; Brussels School of International Studies (University of Kent); Institute of European Studies (V.U.B.); *Université Paris-Sorbonne Abu Dhabi*, United Arab Emirates, and the University of Akureyri, Iceland.

** Registrar of International Tribunal for the Law of the Sea (ITLOS) since 2001. Deputy Registrar of ITLOS from 1997 to 2001. Professor at the *Université catholique de Louvain*. From 1984 to 1997, he worked for the Belgian Ministry of Foreign Affairs (1984-1997), where he was Head of the Treaties Division (1995-1997) and Head of the Law of the Sea/Antarctica Office (1991-1995). He is Doctor of Law (1992) and holds a Master in Philosophy (1983). He is also lecturing at IMLI (International Maritime Law Institute, Malta (2011- present)), *Vrije Universiteit Brussel* (2006- present) and Wuhan University, China (2016- present).

at the time of the conference, although it was neither adopted nor authenticated, to use the concepts of the 1969 Vienna Convention on the Law of Treaties, (1) at that very moment.

A number of prominent speakers, mostly from abroad, were invited to participate in the event, as well as panel chairs, mostly academics from Belgium. Although some of the international guests could not attend the conference, due to reasons beyond their control, the organizers are proud to note that all the invited speakers submitted their papers for inclusion in the present proceedings.

The conference was opened by a representative of the Federal Public Service Foreign Affairs, one of the co-sponsors of the event. The Deputy Director General of Legal Affairs, William Roelants de Stappers, stressed the long-time interest of Belgium for the ocean and the leading role that Belgium has played in this domain. He referred to the ongoing negotiations relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, as well as to the adoption of Agenda 2030, where Belgium has strongly argued in favour of a specific sustainable development goal for the ocean. He concluded his remarks by remembering the participants of the specific historical interest of Belgium for Antarctic matters, as it was the *Belgica*, a Belgian flagged vessel under the command of Baron Adrien de Gerlache, that was the first ship ever to overwinter in the Antarctic.

The conference was divided in three separated panels, each of them dealing with a specific topic, which was examined from the point of views of both the Arctic and the Antarctic. The first panel, chaired by Prof. em. Eduard Somers of the *Universiteit Gent*, related to navigational issues; the second one focused on fisheries and was presided by Friedrich Wieland, retired Head of Unit, Directorate-General for maritime Affairs and Fisheries of the Commission of the European Union. The third one related to tourism and scientific research, and was headed by Prof. Louis le Hardÿ de Beaulieu, Professor at the *Université catholique de Louvain*. Each panel will be addressed in turn.

I. — NAVIGATION

All contributions in the first panel focused on the International Code for Ships Operating in Polar Waters, the so-called Polar Code. (2)

(1) Convention on the Law of Treaties. Multilateral convention, 22 May 1969, 1155 *United Nations Treaty Series (UNTS)*, 1987, pp. 331, 332-353. This convention entered into force on 27 January 1980, Articles 9-10, as available at https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf (consulted on 1 September 2018).

(2) A consolidated version of the Polar Code is available at <http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf> (consulted on 1 September 2018).

In a first presentation, Masamichi Hasebe, Senior Legal Counsel of The Japan Association of Marine Safety, gave a general introduction to the Polar Code. He explained that the adoption of the Polar code took place in the context of a global increase of temperature in the Arctic. He underlined that the International Maritime Organization (IMO) had successfully developed and adopted these safety and environmental regulations for polar navigation before the start of commercial shipping activities. He also stressed that the effective implementation of the Polar Code is a new challenge that the IMO will have to face.

After this introduction, Prof. Keyuan Zou of the University of Central Lancashire, United Kingdom, considered the application of the Polar Code in Antarctic waters. As the Polar Code, contrary to some of the earlier, non-legally binding documents on which it is today based, has also been declared applicable to the Antarctic, this results in some complex problems as regards the coexistence of this document, developed by the IMO, with the Antarctic Treaty System.⁽³⁾ The contribution also examined in particular the implications of the Polar Code on fisheries, marine protected areas and tourist activities.

The two remaining contributions focused on the Arctic, where climate change has the effect of improving the navigational prospects of the region. First, Prof. Aldo Chircop of Dalhousie University, Canada, presented the Canadian perspective. After discussing the Canadian expectations during the elaboration of the Polar Code and their reflection in the final product, he came to the conclusion that this country has reached a high degree of harmonization between that document and its domestic regulation on Arctic shipping. At the same time, he did not deny that tensions remain between approaches based on unilateralism and multilateralism.

The Russian perspective was then addressed in the joint contribution of Yulia Bobrova, Anatoly Kapustin, Senior Researcher and Scientific Director respectively of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, Moscow, and Vladimir Vasilyev, Deputy Director of the Central Marine Research and Design Institute, Saint Petersburg, Russian Federation. Starting from the national legal framework regulating shipping along the Northern Sea Route, these authors looked into the Russian participation in the development of the Polar Code and finally explained how the Russian Federation has adapted its national legal framework to comply with the Polar Code.

(3) The Antarctic Treaty System has at its core the Antarctic Treaty. Multilateral convention, 402, 1 December 1959, *UNTS*, 1962, pp. 71, 72-84. This treaty entered into force on 23 June 1961, as available at https://www.ats.aq/documents/ats/treaty_original.pdf (consulted on 1 September 2018).

II. — FISHERIES

Both co-authors of the present introduction participated in the panel on fisheries.

First, Prof. Philippe Gautier addressed the issue of fisheries from an Antarctic perspective. After a presentation of the main features of the Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention), (4) he focused on the new challenges which are facing the CAMLR Convention, with a specific emphasis on illegal, unreported, and unregulated (IUU) fishing activities, the creation of marine protected areas, the potential impact of climate change on fisheries, and the settlement of disputes.

Prof. Erik Franckx subsequently turned to the Arctic and clarified that two opposite trends have characterized the regulation of fisheries in the Arctic over the last couple of decades. He first referred to the total collapse of the pollock fisheries in the Donut Hole, located between the exclusive economic zones of the Russian Federation and the United States of America in the Bering Sea, during the late 1980s and early 1990s. This episode contrasts sharply with the regulation of fisheries in the Central Arctic Ocean, the central theme of his contribution. He concluded that the Central Arctic Ocean will most probably become the first ocean where unregulated commercial fisheries will be prohibited, pending the availability of scientific evidence showing that such activities can be undertaken in a sustainable manner.

In a final contribution, Prof. Fernando Villamizar Lamus of the *Universidad Bernardo O'Higgins*, Santiago, Chile, considered polar fisheries issues from the perspective of court cases, national as well as international. More particularly, he referred to the United States Court of Appeals for the Ninth Circuit case opposing the Institute of Cetacean Research and the Sea Shepherd organization. (5) This case centres on the constitutive elements of the international crime of piracy in general, and on the “private ends” requirement in particular. He came to the conclusion that the Court of Appeals in this case rendered a correct judgement even though it erred in its legal argumentation.

(4) Convention on the Conservation of Antarctic Marine Living Resources. Multilateral convention, 20 May 1980, 1329 *UNTS*, 1994, pp. 47, 48-59. This convention entered into force on 7 April 1982, as available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201329/v1329.pdf> (consulted on 1 September 2018).

(5) *Institute of Cetacean Research*, a Japanese research foundation; Kyodo Senpaku Kaisha, Ltd., a Japanese corporation; Tomoyuki Ogawa, an individual; Toshiyuki Miura, an individual, Plaintiffs-Appellants, *v. Sea Shepherd Conservation Society*, an Oregon nonprofit corporation; Paul Watson, an individual, Defendants-Appellees (*Institute of Cetacean Research v Sea Shepherd Conservation Society*), United States Court of Appeals, Ninth Circuit (No. 12-35266), 19 December 2014, as available at <http://caselaw.findlaw.com/us-9th-circuit/1687415.html> (consulted on 1 September 2018).

III. — TOURISM AND SCIENTIFIC RESEARCH

For this third panel devoted to the tourism, two contributions addressed issues relating to Arctic and the Antarctic, successively. A third contribution focused particularly on a specific legal issue relating to the status of the Belgian scientific station in the Antarctic. The members of the panel could also benefit from an additional written contribution prepared in advance of the conference. All four contributions are included in the present proceedings.

In a first contribution, Ambassador Holger Martinsen, from Argentina, underlined that, since its inception, the Antarctic Treaty System has regulated and controlled human activities in a satisfactory manner. He explained that an effective regulation of tourism in Antarctica could be based on the provisions of the so-called Madrid Protocol. (6) He also referred to legal issues relating to the application of rules developed by the Antarctic Treaty System to nationals of States non-parties to it.

Subsequently, Fiammetta Borgia of the University of Rome Tor Vergata, Italy, discussed the issue of tourism in the Arctic. She pleaded for a regional multi-sectoral approach in this respect and expressed the view that the Arctic Council should play a key role in the creation of a sustainable model for Arctic regional tourism. She also examined the manner in which the policy of the European Union has evolved over the time. She concluded that the efforts displayed by both the Arctic Council and the European Union with respect to the legal regulation of tourism still remain insufficient at present.

In his presentation, Prof. em. Eric David of the *Université libre de Bruxelles*, examined the legal status of the Belgian station in Antarctica, the Princess Elisabeth Station, in light of the agreement concluded in 2010 between Belgium and the International Polar Foundation with a view to transferring to Belgium the ownership of the station. He took the view that Belgian law is applicable to the Princess Elisabeth Station but that Belgian law only binds Belgian citizens and not the other nationals who remain subject to the law of their national State.

In her written contribution, drs. Alexia de Vaucleeroy examined the rules which govern the exercise of jurisdiction in Antarctica in the context of the implementation of the 1991 Madrid Protocol, as regards tourist activities. She also considered how Belgium, the United Kingdom and France have implemented the provisions of the Protocol in the field of tourism.

The organizers of the conference had then the privilege of benefitting from the experience of Prof. em. Yves Van der Mensbrugghe of the *Katholieke*

(6) Protocol on Environmental Protection to the Antarctic Treaty. Multilateral protocol, 4 October 1991, 2941 *United Nations Treaty Series*, 2019, pp. 3, 9-70. This protocol entered into force on 14 January 1998, as available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202941/v2941.pdf> (consulted on 1 September 2018).

Universiteit Leuven, to draw the conclusions of this one-day conference. As expected, he discharged this duty with brio, and a pinch of humour as well.

Before concluding, the organizers would also like to take this opportunity to express their sincere thanks to the speakers, chairs of panels, participants as well as — last but not least — the sponsors of this event, namely the Belgian Society of International Law, Caspian Tradition, the Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation of the Kingdom of Belgium, and the Nippon Foundation.