

Protecting the polar marine environment

LAW AND POLICY FOR
POLLUTION PREVENTION

Edited by
DAVOR VIDAS



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Contents

<i>List of figures</i>	xi
<i>List of tables</i>	xii
<i>Notes on the contributors</i>	xiii
<i>Preface and acknowledgements</i>	xv
<i>List of abbreviations</i>	xviii

INTRODUCTORY OVERVIEW

Protecting the polar marine environment: interplay of regulatory frameworks	3
<i>Davor Vidas</i>	
Areas dealt with in this book	4
The Arctic and Antarctic regions: similarities and contrasts	5
Structure of this book: interplay of regulatory frameworks	13

PART I: LEVELS OF REGULATION IN THE PROTECTION OF THE POLAR MARINE ENVIRONMENT

1 Globalism and regionalism in the protection of the marine environment	19
<i>Alan Boyle</i>	
Globalism and regionalism in the law of the sea	20
What is a 'region'?	26
Advantages and disadvantages of regionalism	30
Conclusions	33
2 United Nations Convention on the Law of the Sea and the polar marine environment	34
<i>Budislav Vukas</i>	
	vii

Applicability of the LOS Convention to the polar oceans	35
Navigation and the protection of the marine environment	38
Enclosed or semi-enclosed seas: Part IX	39
Protection and preservation of the marine environment:	
Part XII	42
Part XII and customary international law	45
Part XII and the polar oceans	51
Settlement of disputes: Part XV	53
Final remarks	54
3 Global environmental protection instruments and the polar marine environment	57
<i>Donald R. Rothwell</i>	
Marine pollution conventions and the polar oceans	58
International regulation of ship-sourced pollution	59
International regulation of dumping at sea	63
International regulation of land-based pollution	65
International regulation of maritime emergencies	67
Marine environmental protected areas	70
Other global environmental conventions and their impact on the polar marine environment	73
Interaction between global conventions and regional regimes for marine environmental protection	75
Conclusions	76
4 The polar marine environment in regional cooperation	78
<i>Davor Vidas</i>	
International cooperative processes for polar environmental protection: the decade of change	79
Approaches to polar marine environmental protection in regional cooperation	88
Conclusions: a paradox of similarities or a consequence of differences?	101
5 Protection of the Antarctic environment against marine pollution under the 1991 Protocol	104
<i>Christopher C. Joyner</i>	
Marine pollution in the Antarctic	105
Marine pollution law in the 1991 Environmental Protocol	107
The annexes	112
The balance sheet	122

6 Sub-regional cooperation and protection of the Arctic marine environment: the Barents Sea	124
<i>Olav Schram Stokke</i>	
Sub-regional collaboration in the Barents Region: effectiveness concerns	125
Threats to the Barents Sea marine environment	130
Managing the marine environment: sub-regional contributions	134
Conclusions: effectiveness of sub-regional cooperation in the Barents Sea	146
7 Domestic perspectives and regulations in protecting the polar marine environment: Australia, Canada and the United States	149
<i>Donald R. Rothwell and Christopher C. Joyner</i>	
Canada and the Arctic marine environment	150
The United States and the Arctic marine environment	156
Australia and the Antarctic marine environment	161
The United States and the Antarctic marine environment	166
Polar states and marine environmental protection: conclusions	170
PART II: CURRENT TRENDS AND ISSUES IN PROTECTING THE POLAR MARINE ENVIRONMENT	
8 Land-based marine pollution and the Arctic: polarities between principles and practice	175
<i>David VanderZwaag</i>	
Crises in Arctic seas	177
Global instruments addressing land-based marine pollution	180
Extra-regional efforts addressing land-based pollution	184
Regional sea agreements relevant to land-based pollution of the Arctic	187
Arctic regional initiatives addressing land-based pollution and activities	189
Challenges and future directions	195
9 Radioactive waste in the Barents and Kara Seas: Russian implementation of the global dumping regime	200
<i>Olav Schram Stokke</i>	
The problem of radioactive waste	201
The global dumping regime	203
Implementing the dumping regime: the Russian case	207
Conclusions	218

10 Regulation of navigation and vessel-source pollution in the Northern Sea Route: Article 234 and state practice	221
<i>R. Douglas Brubaker</i>	
The Northern Sea Route: legal controversy	223
Russian regulation: non-compliance with, or interpretation of, Article 234?	225
Practice of the USA and other states in Russian Arctic waters	239
Conclusions	242
11 The emerging International Polar Navigation Code: bi-polar relevance?	244
<i>Lawson W. Brigham</i>	
Navigating in polar waters	244
Historical perspectives	246
The harmonisation process and developments	248
Key elements of the Polar Code	250
Arctic issues	254
Antarctic issues	256
Assessing the potentials of the Polar Code	259
Conclusions and the future	261
<i>Index of international instruments and national legislation</i>	263
<i>Subject index</i>	268

List of figures

10.1	The Northern Sea Route	<i>page</i> 222
11.1	Extent of sea ice in the polar oceans	247

List of tables

11.1	Structure and components of the draft Polar Code as submitted to the IMO, March 1998	<i>page 252</i>
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1 Globalism and regionalism in the protection of the marine environment

ALAN BOYLE

This chapter is not concerned with what makes the polar regions different, or with the details of the legal and political regimes and institutions which govern them.¹ Our concern here is the relationship between regional regimes and the broader global context of the law of marine environmental protection. No study of the international law relating to protection of the marine environment can fail to note the interplay of global, regional, sub-regional and national rules and institutions, or the variety of interrelated and sometimes overlapping treaties which deal with the marine environment at these various levels.² This phenomenon has been likened to a 'Russian doll effect': as one layer of international regulation is peeled away, other layers appear beneath, until eventually the purely national layer is reached.³

This portrayal may oversimplify the position of the polar regions, and especially that of the Antarctic.⁴ Partly because of the contested legal status of the Antarctic, and partly because of the ambiguities of the 1959 Antarctic Treaty,⁵ the relationship between the Antarctic Treaty System and the law of the sea is a complex and uncertain one. Whether these two bodies of law conflict or co-exist is beyond the scope of this chapter, but the question is important to an understanding of the law relating to the protection of the marine environment in polar regions.⁶

¹ For discussion of these matters see in particular the Introductory overview and Chapters 4–6 in this book. For recent comprehensive studies see O. S. Stokke and D. Vidas (eds.), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, 1996); and D. R. Rothwell, *The Polar Regions and the Development of International Law* (Cambridge University Press, 1996).

² For a recent study see H. Ringbom (ed.), *Competing Norms in the Law of Marine Environmental Protection – Focus on Ship Safety and Pollution Prevention* (London: Kluwer Law International, 1997).

³ S. Sadowski, 'Protection of the Marine Environment of the North Sea: The "Russian Doll" Effect', in Ringbom (ed.), *Competing Norms*, p. 109.

⁴ See the discussion by Vidas, Chapter 4 in this book. ⁵ UNTS, Vol. 402, pp. 71ff.

⁶ See Vukas, Chapter 2 in this book. For comprehensive studies see F. Orrego Vicuña, 'The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction', in C. C. Joyner and S. K. Chopra (eds.), *The Antarctic Legal Regime* (Dordrecht: Martinus Nijhoff, 1988), pp. 97–127; C. C. Joyner, 'The Antarctic Treaty System and the Law of the Sea – Competing Regimes in the

Whether regional regimes are part of or separate from a global framework of regulation is but one aspect of the relationship between global, regional and sub-regional approaches to protection of the marine environment. More important for policy-makers is to have an understanding of the comparative advantages and disadvantages of global or regional approaches when deciding whether to regulate and how to do so. Both the Arctic and Antarctic illustrate well the sometimes difficult choices which may have to be made between these different levels of international protection. Decision-makers must deal not only with the question whether to initiate action at a regional or sub-regional level, rather than at a global level: they must also consider what constitutes a 'region' or 'sub-region'. The variety of answers to this basic question reflects both the diversity of state practice, and the complexity of international legal and political responses to the problems of protecting and preserving the marine environment. That is the theme which this chapter will address.

GLOBALISM AND REGIONALISM IN THE LAW OF THE SEA

Regionalism in the pre-UNCLOS III law of the sea

The law of the sea is inherently global. The International Law Commission assumed as much in its codification of the subject in the 1950s; and the words 'region' and 'regional' appear only twice in the four Geneva Conventions of 1958.⁷ Nor has there been any suggestion in the case law of the International Court of Justice that it is applying local or regional customary law when adjudicating law of the sea disputes. While the Court's decisions do take account of special circumstances, such as geography or dependence on fisheries,⁸ and naturally pay particular attention to the practice of the parties in dispute, the Court has always been careful to articulate its conclusions in terms of a general law of the sea applicable to all states. The Court's general approach suggests that, while there may be, for example, a Latin American perspective on the law of the sea, or Latin American

Footnote 6 (*cont.*)

Southern Ocean?', *International Journal of Marine and Coastal Law*, Vol. 10, 1995, pp. 301–31; D. Vidas, 'The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the Protocol', in Stokke and Vidas (eds.), *Governing the Antarctic*, pp. 61–90; and T. Scovazzi, 'The Antarctic Treaty System and the New Law of the Sea: Selected Questions', in F. Francioni and T. Scovazzi (eds.), *International Law for Antarctica*, 2nd edn (The Hague: Kluwer Law International, 1996), pp. 377–94.

⁷ See Art. 4(4) of the Convention on the Territorial Sea and the Contiguous Zone (straight baselines) and Art. 12(2) of the Convention on the High Seas (search and rescue); these conventions are published in UNTS, Vol. 516, pp. 205ff and UNTS, Vol. 450, pp. 82ff, respectively. See J. Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission', in *International Law on the Eve of the Twenty First Century: Views from the International Law Commission* (New York: United Nations, 1997), p. 99.

⁸ See, e.g., *Fisheries (United Kingdom v. Norway)*, ICJ Reports 1951, p. 116; *Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, ICJ Reports 1974, pp. 3 and 175; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p. 3.

practice contributing to the development of the law of the sea,⁹ there can be no Latin American law of the sea distinct from what prevails elsewhere.

Regionalism in the LOS Convention

The 1982 United Nations Convention on the Law of the Sea¹⁰ presents a more complex picture, however. On the one hand its explicit purpose is to articulate a comprehensive, uniform and global legal order for the world's oceans, and it seeks to sustain that legal order in several ways. Article 309 prohibits reservations and thus compels states to make an 'all or nothing' choice when deciding whether to become a party to the Convention. Article 311 gives the Convention pre-eminence over other agreements; it specifically limits the freedom of parties to create new agreements which are incompatible with the effective execution of the object and purpose of the Convention or which affect either the application of 'the basic principles embodied herein' or the rights and obligations of other parties. This article thus provides a significant constraint on the making of regional agreements by parties to the LOS Convention. At the same time, Article 237 specifically preserves the freedom of states to make further agreements relating to the protection and preservation of the marine environment, provided these are 'concluded in furtherance of the general principles and objectives of this Convention'. The same article also preserves obligations under existing agreements on the marine environment, but requires them to be 'carried out in a manner consistent with the general principles and objectives' of the LOS Convention.

Moreover, Part XV of the Convention subjects disputes concerning the interpretation or application of the Convention to compulsory, binding dispute settlement. Although there are certain exceptions to this principle, disputes concerning the Convention's articles on protection of the marine environment will generally fall within the requirement of compulsory settlement.¹¹ Regional agreements which derogate from the Convention in violation of Articles 237 or 311 would therefore be open to unilateral challenge by other states parties in one or other of the various fora on which the Convention confers jurisdiction.

The Convention is thus equipped with strong and sophisticated mechanisms intended to preserve its integrity and universality. On the other hand, while recognising that the problems of ocean space are 'closely interrelated' and 'need to

⁹ See F. C. Garcia-Amador, 'Latin America and the Law of the Sea', in L. M. Alexander (ed.), *The Law of the Sea: A New Geneva Conference. Proceedings of the 6th Annual Conference of the Law of the Sea Institute, Kingston, Rhode Island, 21-24 June 1971* (Kingston, RI: University of Rhode Island, Law of the Sea Institute, 1972); A. Szekeley, *Latin America and the Development of the Law of the Sea*, 2 vols. (Dobbs Ferry, NY: Oceana, 1976); F. Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective* (Boulder, CO: Westview Press, 1984).

¹⁰ Text reprinted in ILM, Vol. 21, 1982, pp. 1,261ff.

¹¹ See A. E. Boyle, 'UNCLOS, the Marine Environment and the Settlement of Disputes', in Ringbom (ed.), *Competing Norms*, pp. 241-56. Vukas, Chapter 2 in this book, takes a more cautious view of the extent to which environmental disputes fall within compulsory jurisdiction. On this question, as on others, Art. 297 of the LOS Convention is far from clear.

be considered as a whole',¹² the Convention is replete with references to regional rules, regional programmes, regional cooperation and so on. It makes specific provision for regional cooperation in the case of enclosed and semi-enclosed seas.¹³ Moreover, in the case of fisheries management, regional cooperation and regulation are required if the provisions of the Convention¹⁴ and the 1995 Implementing Agreement on Straddling and Highly Migratory Fish Stocks¹⁵ are to be implemented effectively. Part XII of the Convention, dealing with protection of the marine environment, also makes significant reference to regional rules and standards in various contexts.

It is clear therefore that a global law of the sea *can* accommodate regional approaches to certain problems, including protection of the marine environment. There will be no necessary incompatibility with the LOS Convention, provided any regional arrangements are consistent with the object and purpose of the Convention as set out in Articles 237 and 311, and provided they comply with the framework for regulation of the marine environment established by Part XII.

Regionalism in Part XII of the LOS Convention

The interplay between globalism and regionalism in the law of the sea is at its most evident and most complex in Part XII of the LOS Convention. There is no doubt that the fundamental elements of the law of the marine environment – both conventional and customary – are found in these articles of the Convention. They not only build on pre-existing law, including prior regional agreements such as the Baltic and Mediterranean Conventions of 1974 and 1976, respectively,¹⁶ but have provided the basis for subsequent developments, whether at global, regional or national level. There are important linkages between this part of the Convention and other, sectoral, treaties dealing with the marine environment, including the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London [Dumping] Convention) and its successor Protocol of 1996,¹⁷ as well as the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (MARPOL 73/78)¹⁸ and other IMO conventions. Part XII also provided the framework for Chapter 17 of Agenda 21 of the Report of the 1992 Rio Conference on Environment and Development, and is specifically referred to in that report as representing the international law on the subject.¹⁹ If that view is correct, then it is not merely regional arrangements

¹² See the Preamble to the LOS Convention.

¹³ Arts. 122–123 of the LOS Convention. See the further discussion by Vukas, Chapter 2 in this book.

¹⁴ Arts. 61–70 and 116–120. ¹⁵ Text reprinted in ILM, Vol. 34, 1995, pp. 1,547ff.

¹⁶ For those two conventions see below in this chapter.

¹⁷ ILM, Vol. 11, pp. 1,291ff (Convention); ILM, Vol. 36, 1997, pp. 7ff (Protocol).

¹⁸ ILM, Vol. 12, 1973, pp. 1,319ff (Convention); and ILM, Vol. 17, 1978, pp. 546ff (Protocol).

¹⁹ *Report of the UN Conference on Environment and Development*, Annex II, Agenda 21, Chapter 17, para. 1, UN doc. A/CONF.151/26/Rev.1, Vol. 1; see U. Beyerlin, 'New Developments in the Protection of the Marine Environment: Potential Effects of the Rio Process', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 55, 1995, p. 544; P. W. Birnie and A. E. Boyle,

between parties to the Convention which must comply with the constraints of Part XII: so must regional arrangements between non-parties, who will be bound as a matter of customary law.²⁰

While setting out a global framework of rules and principles governing marine pollution and the protection of marine ecosystems, Part XII also reflects a pragmatic acceptance that, in certain instances, regional approaches will be necessary or more appropriate even within a broadly uniform and comprehensive global legal order. It does, however, treat different sources of pollution differently in this respect. Within the global framework, two contrasting models of regionalism can be noted – one restrictive, the other more liberal.

The restrictive model of regionalism

This model is exemplified by the provisions of the LOS Convention on dumping at sea and pollution from ships.²¹ Here the function of regional rules or treaties is relatively limited: it is to reinforce enforcement and application of the global rules found in the LOS Convention itself and in the 1972 London Convention and MARPOL 73/78. These latter conventions are also global in scope; neither permits regional derogation or the separate adoption of lower regional standards. Their purpose is to provide international *minimum* standards, especially for flag states, and the LOS Convention articles largely serve to reinforce this objective.

At the same time, some elements of regionalism are permissible even here. Although dumping at sea is now globally almost entirely prohibited,²² regional treaties had for some time been more stringent than was required by the 1972 London Convention in its original form.²³ Neither the LOS Convention nor the London Convention in any way limits the freedom exercised by states to impose additional controls on dumping in response to the environmental circumstances of certain regional seas, including those, such as the Baltic, that are shallow and semi-enclosed.

The scope for regionalism with regard to pollution from ships is necessarily more limited. In the interests of freedom of navigation, MARPOL 73/78 is not merely a minimum standard for flag states, it is also a maximum standard for exclusive economic zone regulation by coastal states.²⁴ There is some room for

International Law and the Environment (Oxford: Clarendon Press, 1992), pp. 251–99; and A. Yankov, 'The Law of the Sea Convention and Agenda 21: Marine Environmental Implications', in A. E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Clarendon Press, 1999), pp. 271–96.

²⁰ *North Sea Continental Shelf*, p. 3. On Part XII of the LOS Convention and customary law see the discussion by Vukas, Chapter 2 in this book. ²¹ Arts. 210 and 211 of the LOS Convention.

²² See the 1996 Protocol to the 1972 London Convention.

²³ See the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (ILM, Vol. 11, 1972, pp. 262ff); the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (ILM, Vol. 13, 1974, pp. 546ff); the 1976 Barcelona Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Aircraft and Ships (ILM, Vol. 15, 1976, pp. 300ff); and the 1986 Noumea Protocol for the Prevention of Pollution by Dumping (ILM, Vol. 26, 1987, pp. 38ff). ²⁴ LOS Convention, Art. 211(5).

additional regional action, however. MARPOL 73/78 itself provides for stricter discharge rules in designated special areas,²⁵ while the LOS Convention does not prevent coastal states from exercising some control over navigation in environmentally sensitive areas,²⁶ or the exercise of port state control over compliance with international rules and standards.²⁷ Article 234 of the LOS Convention also permits additional measures to be taken nationally or regionally to control pollution from ships in ice-covered areas, while Article 211(6) allows for other special areas to be designated by IMO. Under this article IMO has a special responsibility for ensuring that regional or national action affecting navigation falls within the narrow boundaries of acceptability under the LOS Convention and its own conventions. It is really only under Article 234 that there is a significant autonomous discretion conferred on coastal states. The full implications of this article are further considered below, in several other chapters of this book.²⁸

The liberal model of regionalism

The more liberal approach is found in the LOS Convention's articles on land-based (including airborne) sources of pollution, and in the practice of states on these. Here, although the negotiation of global rules and standards is encouraged by its Articles 207 and 212, no attempt is made in the LOS Convention either to impose a uniform global standard comparable to that for ships, or even a minimum standard comparable to that for dumping at sea. Indeed, no such global standards exist for land-based or airborne pollution, nor are they likely to be agreed, given the great diversity of sources and the widely differing socio-economic priorities of states when asked to control pollution originating in industrial and agricultural activities. Instead, states are free to set their own standards of regulation, provided only that these meet the more general requirements of Article 194 of the LOS Convention. Briefly, this article requires states to take 'all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal'. These measures must minimise to the fullest extent the release of toxic, harmful or noxious substances. States are free to take such measures nationally or jointly, including regionally, as they deem appropriate.

In practice, international action to tackle these sources of pollution remains almost entirely regional. Prior to the 1992 Rio Conference, no agreement could be reached on a stronger global approach to land-based marine pollution.

²⁵ Annex I, Regulations 9 and 10.

²⁶ See generally *International Journal of Marine and Coastal Law*, Special Issue on Particularly Sensitive Sea Areas, Vol. 9, 1994.

²⁷ See LOS Convention, Art. 218, which provides for port state jurisdiction over pollution offences at sea. See also below in this chapter.

²⁸ See especially Vukas, Chapter 2; Rothwell and Joyner, Chapter 7; and Brubaker, Chapter 10 in this book.

Since Rio, there has been the adoption in 1995 of the non-binding Washington Declaration and the Global Plan of Action for the Protection of the Marine Environment from Land-Based Activities,²⁹ but this neither sets global standards of pollution control nor does it limit or preclude regional action.³⁰ Precisely because it does so little, it does not alter the liberal attitude of the LOS Convention towards regionalism in the control of these sources of pollution.

The limits of regionalism: conclusions

What we see when we look at the international law of the marine environment is that rules on pollution from ships are essentially uniform and international at the global level; rules on dumping at sea are given a minimum standard internationally, but have been supplemented and strengthened by a number of regional agreements or by national legislation; and rules on land-based and airborne sources of marine pollution are primarily regional, sub-regional or national in character, with little or no attempt to deal with this problem globally.

How far the LOS Convention constrains regional action thus depends principally on the source of the pollution, and in particular on whether freedom of navigation at sea will be affected. Regional action is least appropriate in this latter case. It is most appropriate in the case of industrial pollution affecting enclosed or semi-enclosed seas. This is where the states in question will share a common interest in taking measures to protect the marine environment, but they will also inevitably want a wide measure of autonomous discretion in deciding when and how far they should act. On other matters, such as pollution emergencies, environmental impact assessment (EIA) or environmental monitoring, the LOS Convention has very little to say beyond a general requirement for states to take action or cooperate.³¹ In these cases, regional cooperation is both sensible and permissible. Indeed, looking beyond the marine environment, it is evident that most international action on emergencies, environmental impact assessment and monitoring has been at a regional rather than a global level. There is, for example, no global treaty on EIA, but there is an important UN/ECE treaty covering potentially all of Europe and North America,³² as well as various other regional and sub-regional agreements.

The LOS Convention both encourages and constrains regionalism with regard to the marine environment. What it does not do is specify what a 'region' is, in any context.

²⁹ UNEP (OCA)/LBA/IG.2/L.4; reprinted in *Yearbook of International Environmental Law*, Vol. 6, 1995, pp. 883–6. See further T. A. Mensah, 'The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-Based Sources of Pollution', in Boyle and Freestone (eds.), *International Law and Sustainable Development*, pp. 297–324.

³⁰ For further discussion, see VanderZwaag, Chapter 8 in this book.

³¹ Arts. 199, 200, 204 and 206 of the LOS Convention.

³² The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context; text reprinted in ILM, Vol. 30, 1992, pp. 800ff.

WHAT IS A 'REGION'?

Attempts at definition

The terms 'region' or 'regional', both of which appear in the LOS Convention, are not defined by that convention nor by any other relevant instrument, including Agenda 21. This omission has not hindered reliance on the concept of regionalism, but it gives it an amorphous and open-textured character which makes any attempt at definition essentially descriptive rather than prescriptive.

Literature on the subject distinguishes two or possibly three senses in which the term 'region' has been used in a maritime context: the formal, the functional and the political.³³ A *formal* definition of a marine region would focus on its physical and geographical character, such as the fact that it is an enclosed or semi-enclosed sea. A *functional* definition would concentrate on patterns of use – resource exploitation, navigation, fisheries, defence and so on. A *political* region is essentially defined by little more than the decision of a group of states to cooperate, although some element of geographical propinquity may be implicit even here;³⁴ for example, an agreement among members of the British Commonwealth should probably not be described as 'regional' in any sense.

These descriptions are probably of more use in understanding *how* a particular region comes to be composed than in telling us what a region *is*. Not surprisingly, after considering use of the term 'regional' in the LOS Convention, one author concludes that 'any kind of co-operation developed by states in a given part of the ocean is regional'.³⁵ There is no reason to doubt the accuracy of this view. The records of the Third UN Conference on the Law of the Sea disclose no discussion of the term. There is some attempt to define one category of region – the enclosed or semi-enclosed sea – in Article 122.³⁶ This is presented as an essentially formal concept determined by reference to the geography of the surrounding landmass. On the other hand, such regions also require special treatment for functional reasons – i.e. because they are especially vulnerable to certain environmentally harmful uses.

³³ See also Stokke, Chapter 6 in this book. See generally L. M. Alexander, 'Regional Arrangements in the Oceans', *American Journal of International Law*, Vol. 71, 1977, p. 84; L. M. Alexander, 'New Trends in Marine Regionalism', *Ocean Yearbook*, Vol. 11, 1994, pp. 1–8; A. Vallega, 'The Regional Scale of Ocean Management and Marine Regional Building', *Ocean and Coastal Management*, Vol. 24, 1994, pp. 17–38; and B. A. Boczeck, 'Global and Regional Approaches to the Protection and Preservation of the Marine Environment', *Case Western Reserve Journal of International Law*, Vol. 16, 1984, p. 39.

³⁴ On cooperation within the Antarctic Treaty System characterised as being 'regional', see also Vidas, Chapter 4 in this book. ³⁵ Vallega, 'The Regional Scale of Ocean Management'.

³⁶ See further Vukas, Chapter 2 in this book. See also L. M. Alexander, 'Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas', *Ocean Development and International Law*, Vol. 2, 1974, p. 151; and Vallega, 'The Regional Scale of Ocean Management'.

UNEP established a 'regional seas' programme in the mid-1970s. Its first regional seas treaty was the 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution,³⁷ a sea which meets all the requirements of Article 122 of the LOS Convention. Subsequent UNEP Regional Seas have, however, been wholly eclectic in composition. Some are enclosed or semi-enclosed, such as the Mediterranean and Black Seas; some are oceanic, such as West and East Africa; some are based on island groupings, such as the Caribbean. Some involve ecosystem management or coastal zone management, whereas others do not. No consistent pattern or definition of what constitutes a region is apparent here, beyond a shifting mixture of formal, functional and political elements, whose balance varies from case to case.³⁸

Agenda 21 similarly lacks any definition of a marine region. It does, however introduce the idea of integrating the protection of the marine and coastal environment, requiring states to manage the marine environment and adjacent land areas as a single entity.³⁹ This approach is reflected in the 1995 revision of the Barcelona Mediterranean Convention,⁴⁰ and it is a significant innovation. It means that a state may be considered to be in a marine region even if it has no sea coast, provided its adjacent land area falls within the ambit of integrated coastal zone management. There are obvious implications here for the status of Finland and Sweden as 'Arctic' states, as these two countries have no coastline on the Arctic Ocean.

From all of this we can see not only that it is impossible and probably pointless to try to define a region in the law of the sea, but that it is also impossible to draw a clear dividing line between the marine environment and the land environment. This is scarcely surprising, given that the greatest impact on the marine environment comes not from the use of the sea but from the use of the land.

Defining a region thus resolves itself largely into a question of policy: what is the most sensible geographical and political area within which to address the interrelated problems of marine and terrestrial environmental protection? As one author correctly points out:

development of the basic regional concept has not been stimulated by scientific thought but by the decision-making context and practice of the UN system.⁴¹

³⁷ Text reprinted in ILM, Vol. 15, 1976, pp. 290ff.

³⁸ Vallega, 'The Regional Scale of Ocean Management'; P. M. Haas, 'Save the Seas: UNEP's Regional Seas Programme and the Coordination of Regional Pollution Control Efforts', *Ocean Yearbook*, Vol. 9, 1991, pp. 188–212.

³⁹ See Agenda 21, Chapter 17; see Alexander, 'Regionalism and the Law of the Sea', but contrast Vallega, 'The Regional Scale of Ocean Management'.

⁴⁰ On which see A. Vallega, 'Geographical Coverage and Effectiveness of the UNEP Convention on the Mediterranean', *Ocean and Coastal Management*, Vol. 31, 1996, pp. 199–218; and A. Vallega, 'Regional Level Implementation of Chapter 17: The UNEP Approach to the Mediterranean', *Ocean and Coastal Management*, Vol. 29, 1995, pp. 251–328.

⁴¹ Vallega, 'The Regional Scale of Ocean Management'.

From this perspective it does not matter how a 'region' is defined, so long as it works. What does seem to be important is that there should be close correspondence between the 'political' region and the 'geographical' region: and that is undoubtedly one of the central lessons of UNEP's regional seas programme.⁴²

The Antarctic as a marine region

In what sense is the Antarctic marine environment a region? As a polar continent, Antarctica itself is of course a unique region, for various physical, geographical and political reasons. Our concern, however, is to see how the legal regime which now governs the Antarctic defines its marine environment. That legal regime is constituted principally by three main treaties, all interlinked, which belong to the Antarctic Treaty System: the 1959 Antarctic Treaty, the 1980 Convention on the Conservation of Antarctic Marine Living Resources⁴³ (CCAMLR) and the 1991 Protocol to the Antarctic Treaty on Environmental Protection.⁴⁴

The Antarctic Treaty applies to the area south of 60° South latitude, including all ice shelves.⁴⁵ It thus covers both land and sea, including high seas,⁴⁶ within what is known as the Antarctic Treaty area. CCAMLR has a broader territorial scope, applying not only to the Antarctic Treaty area, but also to living resources within the 'Antarctic Convergence which form part of the Antarctic marine ecosystem'.⁴⁷ The Antarctic Convergence is a distinct mass of cold Antarctic water which constitutes a largely self-contained marine ecosystem with a seasonally fluctuating boundary.

Two points of special importance emerge from these definitions. First, the Antarctic Convergence appears to create the boundary of the biggest example of a 'large marine ecosystem' being adopted as a region for regulatory purposes. Large marine ecosystems have been defined by one author as:

relatively large regions of the world ocean . . . characterized by unique bathymetry, hydrography, and productivity within which marine populations have adapted reproductive, growth, and feeding strategies.⁴⁸

⁴² *Ibid.* ⁴³ Text reprinted in ILM, Vol. 19, 1980, pp. 837ff.

⁴⁴ Text of the Environmental Protocol reprinted in ILM, Vol. 30, 1991, pp. 1,416ff. In addition to the Antarctic Treaty, its Protocol and CCAMLR, there is the 1972 Convention for the Conservation of Antarctic Seals (CCAS; reprinted in ILM, Vol. 11, 1972, pp. 251ff). Art. 1(e) of the Protocol provides a legal definition of the ATS, by listing its main components. ⁴⁵ Art. VI of the Antarctic Treaty.

⁴⁶ The application of the Treaty to the high seas was a controversial question during the negotiations, and Art. VI is without prejudice to the rights of states under international law in the high seas area. On the drafting of Art. VI, see A. Van der Essen, 'The Application of the Law of the Sea to the Antarctic Continent', in F. Orrego Vicuña (ed.), *Antarctic Resources Policy: Scientific, Legal and Political Issues* (Cambridge University Press, 1983), pp. 232–3.

⁴⁷ Art. I(1) of CCAMLR. See C. Redgwell, 'Protection of Ecosystems under International Law: Lessons from Antarctica', in Boyle and Freestone (eds.), *International Law and Sustainable Development*, pp. 205–24.

⁴⁸ See K. Sherman, 'Biomass Yields of Large Marine Ecosystems', *Ocean Yearbook*, Vol. 8, 1989, p. 117 and the literature referred to therein. See also L. M. Alexander, 'Large Marine Ecosystems', *Marine Policy*, Vol. 17, 1993, p. 186.

The region within the Antarctic Convergence certainly fits this description, although scientists have identified some 50 large marine ecosystems in all. Some of these are shallow areas with vertical mixing of nutrients and high productivity; some are current-driven systems, such as the Gulf Stream; others are enclosed or semi-enclosed seas, including some of those now covered by UNEP's regional seas agreements. Unlike any of the UNEP treaties, the 1980 CCAMLR defines the Antarctic marine environment in these terms for the purposes of conservation of living resources only, rather than for protection of the environment as such. However, the 1991 Environmental Protocol also adopts a modified variant of this ecosystem approach. On the one hand, Articles 3, 6 and 8 regulate activities only in the narrower Antarctic Treaty area, rather than the Antarctic Convergence. On the other hand, Article 2 commits the parties to 'the comprehensive protection of the Antarctic environment and dependent and associated ecosystems', while Article 3(1) refers to the 'protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica' as 'fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area'. The Convergence is most probably for this purpose a 'dependent and associated ecosystem', which to that extent is covered by the Protocol.⁴⁹

Secondly, the Antarctic is one of the few examples of a region where protection of the terrestrial and marine environments has been significantly integrated in the manner called for by Chapter 17 of Agenda 21. The 1991 Protocol does include a specific annex on prevention of marine pollution, but otherwise its provisions on environmental protection, environmental monitoring and impact assessment, the ban on mineral activities and so on appear to apply equally to the whole land and sea area within the Antarctic Treaty area.⁵⁰ The Protocol is indeed the sole example of a single international environmental regime covering an entire continent and its surrounding ocean. Thus, it is probably inaccurate to speak of the Antarctic marine environment as a 'region' in itself: rather, it is simply part of a much larger 'macro-region' of land *and* sea to which the Antarctic Treaty System applies throughout. In this sense, it is once again unique.

The Arctic as a marine region

Although, unlike Antarctica, the Arctic has an indigenous population whose interests need to be accommodated, it is far from being integrated socially or economically. Indeed from this point of view the Antarctic would appear more

⁴⁹ See also the discussion by Vidas, Chapter 4 in this book.

⁵⁰ The accuracy of this proposition depends on the interpretation of Art. VI of the Antarctic Treaty. Views differ in particular on whether the ban on mining under the 1991 Protocol applies to the Antarctic deep seabed; compare J. I. Charney, 'The Antarctic System and Customary International Law' and L. Migliorino, 'The New Law of the Sea and the Deep Seabed of the Antarctic Region', in Francioni and Scovazzi (eds.), *International Law for Antarctica*, pp. 59–61 and 400–5, respectively. For a recent analysis see D. Vidas, 'Southern Ocean Seabed: Arena for Conflicting Regimes?', in D. Vidas and W. Østreng (eds.), *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999), pp. 291–314.

closely integrated than the Arctic. Nevertheless, the Arctic is arguably a marine region in several senses. First, it is geographically a large semi-enclosed sea mostly covered by ice.⁵¹

Secondly, it is functionally a distinct region with its own unique or special environmental characteristics and problems arising from the prevalence of ice and the extremes of climate. Navigation, protection of the environment, and resource management all present special problems, some of these similar to those in Antarctica.⁵² For all these reasons it merits coherent treatment as a marine region in its own right.

Thirdly, the Arctic Ocean can be seen as an ecosystem. Like the Antarctic, protection of the terrestrial and marine environments is intimately linked and requires integrated treatment. Unlike the Antarctic, however, it is far from clear what the boundaries of the Arctic ecosystem should be. The tree line? One of the temperature isotherms? Latitude? All are possibilities; none is uniquely compelling in the same way that the Antarctic Convergence represents an obvious ecosystem boundary. Where the Arctic begins and ends is more diffuse, and the answer may be that it should be defined differently for different purposes. Thus, the 1973 International Agreement on the Conservation of Polar Bears and Their Habitats,⁵³ Article 234 of the 1982 LOS Convention, and the 1991 Arctic Environmental Protection Strategy⁵⁴ (AEPS) all apply to different geographical areas, and none defines the Arctic in any definitive sense. Indeed, the AEPS leaves it to each Arctic state to define the geographical scope of the Arctic as a matter of national choice. At the same time, despite these uncertainties, the Arctic Ocean and surrounding landmass is certainly a political region, with evidence of long-standing patterns of cooperation even during the Cold War. This perhaps illustrates once more the essential eclecticism or relativity of the notion of a marine region. What ultimately makes a region cohere as a usable analytical tool is the political and institutional will to see that cooperation is effective within whatever boundaries are chosen.⁵⁵

ADVANTAGES AND DISADVANTAGES OF REGIONALISM

Political uses of regionalism

The growing importance of regional management of the marine environment is evident in various ways. Probably the most notable examples, and certainly the most extensive ones, are to be found in UNEP's regional seas programme. This

⁵¹ Whether the Arctic Ocean meets the criteria of a semi-enclosed sea as defined in Art. 122 of the LOS Convention is more questionable. See the discussion by Vukas, Chapter 2 in this book.

⁵² See the Introductory overview to this book. See also an overview in D. R. Rothwell, 'The Arctic Environmental Protection Strategy and International Environmental Cooperation in the Far North', *Yearbook of International Environmental Law*, Vol. 6, 1995, pp. 65–105. For detailed reviews see *AMAP Assessment Report: Arctic Pollution Issues* (Oslo: Arctic Monitoring and Assessment Programme, 1998); and *Arctic Pollution Issues: A State of the Arctic Environment Report* (Oslo: Arctic Monitoring and Assessment Programme, 1997).

⁵³ Text reprinted in ILM, Vol. 13, 1974, pp. 13ff. ⁵⁴ Text reprinted in ILM, Vol. 30, 1991, pp. 1,624ff.

⁵⁵ Vallega, 'The Regional Scale of Ocean Management'.

now comprises some twelve separate regions and involves some 160 countries, some in several regions.⁵⁶ A few regions have agreed only to adopt action plans (e.g., East and South Asian Seas) but the majority have evolved into a complex network of treaties, protocols and action plans. In most cases there are also institutional arrangements and trust funds, some of which have helped foster significant levels of political and technical cooperation. Of these, the Mediterranean and East Africa are generally thought to be the most successful; the Red Sea and the Gulf are probably the least effective, largely because they lack adequate political and institutional support.⁵⁷ The polar regions, the North Sea⁵⁸ and the Baltic⁵⁹ fall outside UNEP's programme, but here too we find evidence of effective and developed regional cooperation and regulation to protect the marine environment, as other chapters in this book will show.⁶⁰

Another important example of the uses of regionalism can be observed in the arrangements for port state control of shipping. The oldest scheme of this kind involves European states cooperating under the 1982 Paris Memorandum of Understanding on Port State Control⁶¹ to ensure that vessels entering and leaving European ports meet international standards of seaworthiness and pollution control. This particular scheme has undoubtedly helped to deter sub-standard vessels from using European ports, and has incidentally reduced some of the competitive advantages of lower standards enjoyed by some non-European flag of convenience vessels. Comparable regional schemes have thus far (as of 8 June 1999) been adopted in Latin America, Asia-Pacific, the Caribbean, the Mediterranean, the Indian Ocean and West and Central Africa.⁶²

Advantages of regionalism

The most important argument for a regional approach to protection of the marine environment is that in many cases it works better than a global

⁵⁶ Haas, 'Save the Seas'.

⁵⁷ *Ibid.*; P.A. Verlaan and A. S. Khan, 'Paying to Protect the Commons: Lessons from the Regional Seas Programme', *Ocean and Coastal Management*, Vol. 31, 1996, pp. 83–104.

⁵⁸ See the papers collected in *International Journal of Estuarine and Coastal Law*, Vol. 5, 1990; Sadowski, 'Protection of the Marine Environment'; S. Saetevik, *Environmental Co-operation between North Sea States* (London: Belhaven, 1988); T. IJlstra, 'Regional Co-operation in the North Sea: An Inquiry', *International Journal of Estuarine and Coastal Law*, Vol. 3, 1988, pp. 181–207; and M. Pallemmaerts, 'The North Sea Ministerial Declarations from Bremen to the Hague: Does the Process Generate any Substance?', *International Journal of Estuarine and Coastal Law*, Vol. 7, 1992, pp. 1–26.

⁵⁹ See M. Fitzmaurice, *International Legal Problems of the Environmental Protection of the Baltic Sea* (Dordrecht: Martinus Nijhoff, 1992).

⁶⁰ See Vidas, Chapter 4; Joyner, Chapter 5; and Stokke, Chapter 6 in this book.

⁶¹ Text reprinted in ILM, Vol. 21, 1982, pp. 1ff.

⁶² See G. C. Kasoulides, *Port State Control and Jurisdiction. Evolution of the Port State Regime* (Dordrecht: Martinus Nijhoff, 1993); R. W. J. Schiferli, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects', *Ocean Yearbook*, Vol. 11, 1994, pp. 202–17; D. Anderson, 'Port States and Environmental Protection', in Boyle and Freestone (eds.), *International Law and Sustainable Development*, pp. 325–44; and M. Valenzuela, 'Enforcing Rules against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction', in Vidas and Østreg (eds.), *Order for the Oceans*, pp. 496–501.

solution.⁶³ Regional approaches eliminate the disadvantages of unilateralism while enabling states to agree on commitments for common action that may be more feasible to implement than under a more broadly based global scheme. Regional schemes are more likely to respond to common interests in dealing with a common problem.⁶⁴ This point is true in many cases for fisheries, dumping of waste, port state control of shipping, pollution emergencies, and probably also for land-based sources of marine pollution. Within an overall global framework, largely provided by the LOS Convention, these problems all appear potentially better handled at the regional level.

Regional approaches also tend to produce institutions that have more cohesion and may be more effective for that. The South Pacific Forum and the Indian Ocean Marine Affairs Commission are perhaps good examples of this argument.⁶⁵ On the other hand, some regional institutions undoubtedly fail. Here the Red Sea and the Gulf again show that regionalism does not inevitably work.⁶⁶

A third argument is that regional cooperation may be easier to organise and may prove more effective on technical matters such as monitoring of pollution, environmental impact assessment, scientific research and the dissemination of information and expertise. Again, however, this is not an inevitable outcome.

A fourth benefit is that regional approaches may have an emerging role as a good way of giving effect to Chapter 17 of Agenda 21 and meeting the goals of sustainability and integrated ecosystem management.⁶⁷ This is certainly the aim of new treaties adopted under regional seas programmes in the Mediterranean and the Baltic. These do show something of a shift away from the older focus on pollution prevention in favour of ecosystem management and sustainable development.

Finally, regional agreements have been a significant means of implementing the framework provisions of Part XII of the LOS Convention, even before its entry into force in 1994. The state practice evident in these agreements is one reason why Part XII has so quickly come to be regarded as largely a codification of customary law. At the same time, by facilitating some flexibility in implementation, regional arrangements do help accommodate the special needs and varying circumstances of a range of seas with diverse oceanographic and ecological characteristics within a global international law of the sea. Much the same is true of regional regulation of fisheries.

Disadvantages of regionalism

Taken too far, regionalism may weaken the consensus on a genuinely global law of the sea. Fragmentation is an inherent risk in any system of law built

⁶³ R. W. Knecht, 'A Commentary on the Institutional and Political Aspects of Regional Ocean Governance', *Ocean and Coastal Management*, Vol. 24, 1994, pp. 39–50.

⁶⁴ Schiferli, 'Regional Concepts of Port State Control'.

⁶⁵ Alexander, 'New Trends in Marine Regionalism'. ⁶⁶ Haas, 'Save the Seas'.

⁶⁷ Alexander, 'New Trends in Marine Regionalism'.

on the consent of states; in a universal medium such as the oceans it carries special risks. There is, however, no real evidence that this has been the effect of regional environmental cooperation. On the contrary, as we have seen, it has arguably strengthened the LOS Convention.

A more significant objection to regional cooperation is that it may fragment the possibilities for, and the effectiveness of international supervision of compliance with environmental standards. The lack of any global oversight has been a real problem with regard to land-based sources of marine pollution. Not only have some of the regional bodies responsible for controlling this source of pollution failed to do an effective job, in some regions there simply are no such institutions.⁶⁸ Without an overarching global scheme comparable to the London Convention, there is in these cases no alternative supervisory mechanism and no accountability.⁶⁹ This is not *per se* an argument against regionalism, but it is a reminder of the need to integrate both regional and global approaches into an effective whole.

Finally, a problem which remains is that regional agreements dealing with common spaces may create conflict with third parties. This is a potential risk in Antarctica, where non-treaty parties are, in principle, not formally bound by the rules of the Antarctic Treaty System.⁷⁰ It is less of a problem in other maritime regions, where the overarching effect of the LOS Convention will give parties rights and dispute settlement options which they can use in the event of any regional-level interference with their rights.

CONCLUSIONS

First, there is no inherent reason why interested states should not or cannot cooperate to produce regional regimes for protection of the marine environment in either the Arctic or the Antarctic.

Secondly, there is nothing in the 1982 LOS Convention or in general international law to inhibit the making of such regional arrangements, provided they do not contravene the objectives of the LOS Convention or the rights of third states.

Thirdly, it is self-evidently essential to define the area of application of any new legal regime, but there can be different definitions for different purposes within the same basic region. Neither 'the Arctic' nor 'the Antarctic' needs to be given a single all-purpose definition – nor have states done so.

And, finally, the real test of regional arrangements is the existence of institutions with the political will and scientific input to make them work effectively. Rules alone cannot solve any of the problems.

⁶⁸ See Birnie and Boyle, *International Law and the Environment*, pp. 304–19.

⁶⁹ The 1995 Washington Declaration on Protection of the Marine Environment from Land-Based Activities does not create such an institution, but it does seek to strengthen institutional cooperation; see also VanderZwaag, Chapter 8 in this book.

⁷⁰ But see Art. X of the 1959 Antarctic Treaty. For the argument that the main principles of the ATS may have acquired customary status *vis-à-vis* non-parties, see Charney, 'The Antarctic System and Customary International Law'.

2 United Nations Convention on the Law of the Sea and the polar marine environment

BUDISLAV VUKAS

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) was conceived as a framework convention regulating the relations of states in respect of all ocean space: it had to regulate all the different legal regimes at sea and all human activities on the seas and oceans.¹ In addition to many other subjects, the Convention deals with the marine environment: it contains a system of rules on the protection and preservation of the marine environment. The application of those general rules to particular parts of the ocean space has often been examined. This chapter will scrutinise the environmental provisions of the LOS Convention with a view to their applicability to the polar oceans.

A very valid reason for such a study can be found in the Arctic Environmental Protection Strategy (AEPS), adopted at the First Ministerial Conference on the Protection of the Arctic Environment in Rovaniemi, Finland, on 14 June 1991, where eight Arctic countries expressed their opinion on the relevance of the LOS Convention also for the implementation of the Strategy, as the Convention reflects customary international law:

The implementation of the Strategy will be carried out through national legislation and in accordance with international law, including customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea.²

¹ The LOS Convention was negotiated through eleven sessions of the Third United Nations Conference on the Law of the Sea (UNCLOS III), in the period 1973–82. It was opened for signature on 10 December 1982, and entered into force on 16 November 1994. On 28 July 1994, the Agreement Relating to the Implementation of Part XI of the Convention was adopted by United Nations General Assembly Resolution 48/263 (the Agreement, which itself entered into force on 28 July 1996, is to be interpreted and applied together with Part XI as a single instrument). As of 8 June 1999, there were 130 parties to the Convention (i.e., 129 states and the European Community). Among them there are twenty-four of the total of twenty-seven Consultative Parties to the Antarctic Treaty; of the eight Arctic countries, Iceland, Finland, Norway, Russia and Sweden are parties to the LOS Convention. Texts of the Convention and the Agreement are reproduced in UN Pub. Sales No. E.97.V.10 (New York: United Nations, 1997).

² AEPS, Chapter 1; text reprinted in ILM, Vol. 30, 1991, pp. 1,624ff. On the AEPS see Vidas, Chapter 4 in this book.

As a consequence of a belief in the importance of the LOS Convention, the ministers of the Arctic countries concluded in the AEPS that the preventive measures they take will be 'consistent in particular with the 1982 United Nations Convention on the Law of the Sea',³ and they agreed to apply 'the principles concerning the protection and preservation of the Marine Environment as reflected in the 1982 United Nations Convention on the Law of the Sea'.⁴

It is interesting to note that in another instrument relevant to the polar oceans and adopted almost simultaneously with the AEPS – the 1991 Protocol on Environmental Protection to the Antarctic Treaty – no reference whatsoever is made to the LOS Convention.⁵ Neither the Protocol nor its Annex IV, dealing specifically with the prevention of marine pollution in the Antarctic Treaty area, contain any reference to the LOS Convention, which is supposed to regulate all ocean space.

The general, simplified statement that the LOS Convention reflected customary international law was not quite correct – even in respect of the environmental provisions – at the time of the adoption of the LOS Convention in 1982 or at the time of the adoption of the AEPS in 1991. Currently (as of 8 June 1999), with 130 parties to the Convention, and its solutions being applied to many other treaties as well as to national legislation, the conclusion concerning the customary character of the LOS Convention could be correct in respect of more provisions than at the end of UNCLOS III, or before the entry of the LOS Convention into force. Yet, any particular provision deserves scrutiny before being considered customary law.

The relation between the LOS Convention and customary law remains a subject of considerable interest. Notwithstanding 130 ratifications/accessions, a large number of states are not yet bound by the Convention. Among them are three Consultative Parties to the Antarctic Treaty (Ecuador, Peru and the USA) as well as some other important maritime states (including Canada, Denmark, Iran, Israel and Liberia). However, customary law is of great interest for all states in respect of its rules which have not been codified in the LOS Convention, for example the rules on internal waters. On the other hand, there are customary rules which are being developed independently of the solutions adopted in the LOS Convention. Naturally, while touching upon these complex issues within the context of its main theme, this chapter cannot deal with all those aspects of the relations between treaty and customary law of the sea.

APPLICABILITY OF THE LOS CONVENTION TO THE POLAR OCEANS

Due to the specific geographical, climatic, historical and political circumstances in the polar oceans, and the fact that the LOS Convention does not

³ *Ibid.*, Chapter 7. ⁴ *Ibid.*, Chapter 7(i).

⁵ Text of the Protocol with Annexes I–IV, adopted in Madrid, Spain, on 4 October 1991; reprinted in ILM, Vol. 30, 1991, pp. 1,461ff. For a discussion of marine pollution prevention under the Protocol, see Joyner, Chapter 5 in this book. See also Vidas, Chapter 4 in this book.

indicate any sea or ocean to which it is or is not applicable, it is often asked whether and to what extent the Convention applies to the polar oceans.

There is much to indicate that the states participating in UNCLOS III intended to draft a 'Charter of the Oceans' – a basic framework convention that would deal with all the major issues of the *entire* ocean space. This intention is revealed in the first preambular paragraph of the LOS Convention, where Conference participants stated that they were prompted 'by the desire to settle . . . all issues relating to the law of the sea'. Furthermore, they expressed their awareness 'that the problems of ocean space are closely interrelated and need to be considered as a whole' (third preambular paragraph). Following this philosophy, 'pollution of the marine environment' has been defined in general terms, in Article 1(1)(4) of the LOS Convention, as:

the introduction by man, directly or indirectly, of substances or energy into the marine environment . . . which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The general applicability of the LOS Convention is confirmed also by another characteristic of its contents: it takes into account the specific features of some categories of seas. A special Part is dedicated to enclosed or semi-enclosed seas (Part IX) and another to archipelagic states (Part IV).

At first glance it could seem that Article 234 of the Convention, which provides a specific provision concerning the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the exclusive economic zone, could be a major argument in favour of the global application of the LOS Convention. This provision belongs to Part XII of the Convention, which deals with the protection and preservation of the marine environment, and it aims at resolving the particular problems of some specific seas – the ice-covered areas. Taking into account the drafting history of Article 234, Nordquist, Rosenne and Yankov explain the value of Article 234 as follows:

The inclusion of article 234 in the Convention as Part XII, section 8, notwithstanding its geographical scope – limited in reality to ice-covered polar regions, *principally the Northern Hemisphere* – emphasises the global character of the whole convention, which applies to all the seas and oceans of the world.⁶

The above quotation discloses the hidden side of Article 234. It was negotiated at UNCLOS III between Canada, the Soviet Union and the United States, and is 'sometimes called the "Arctic" article'.⁷ Thus, in negotiating and adopting Article 234, states participating in UNCLOS III did *not* have in mind its application to

⁶ M. H. Nordquist (editor-in-chief) with S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982, A Commentary*, Vol. IV (Dordrecht: Martinus Nijhoff, 1991), p. 393 (emphasis added). ⁷ *Ibid.*

ice-covered sea areas of the Antarctic.⁸ This is in line with the dominant opinion at the Conference. Its President, Hamilton Shirley Amerasinghe (speaking as representative of Sri Lanka), formulated this opinion when he indicated in 1975 at the 30th Session of the UN General Assembly one limitation of the scope of UNCLOS III:

I should make it clear that the question of the status of Antarctica is in no way linked with the issues before the United Nations Conference on the Law of the Sea and, therefore, this question should not delay agreement on a new Convention on the Law of the Sea.⁹

However, this statement by the first President of UNCLOS III should not be understood as generally excluding the legal issues of the Southern Ocean from the scope of the Conference and the Convention it adopted. Amerasinghe only wanted to exclude any linkage of the problems discussed at UNCLOS III with the 'status of Antarctica'. Thus, all law of the *sea* issues, that do not impinge on the unresolved problem of the status of Antarctica (e.g., the regime of the high seas, the main principles on the protection of the marine environment, and the dispute settlement system relating to law of the sea issues) are beyond doubt applicable also to marine areas of the Southern Ocean.

It is not always easy to draw the line between law of the sea rules that do or do not concern the 'status of Antarctica'. However, it is clear that the application of Article 234 is contrary to the approach suggested by President Amerasinghe, namely that this provision is based on the existence of a 'coastal State' to which special rights are given to protect the ice-covered areas within the exclusive economic zone. It is a concept that should not be applied to the waters off Antarctica – where, according to the dominant opinion, there are no generally recognised coastal states and, consequently, there should be no exclusive economic zones.¹⁰

Notwithstanding the limited scope of this study, many provisions or Parts of the LOS Convention are indirectly linked and relevant to the topic of our concern. They include not only those dealing directly with marine pollution, but also rules on navigation, the establishment of artificial islands, and the exploration of non-living resources, etc. In the following, however, we will focus more closely on three Parts of the Convention that do have major relevance for our topic: Part IX (enclosed or semi-enclosed seas), Part XII (protection and preservation of the marine environment) and Part XV (settlement of disputes). We begin by indicating some of the provisions from other Parts of the Convention that deal directly with protection of the marine environment; most of these relate to navigation.

⁸ Alfred van der Essen is cautious: although he accepts its 'general nature', in his view 'Article 234 is principally applicable to the Arctic, where the coastal States are not disputed and the geographical complexity is exceptional'; the realities of the Antarctic 'do not make strict application of it very probable'. See A. van der Essen, 'The Arctic and Antarctic Regions', in R. J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol. 1 (Dordrecht: Martinus Nijhoff, 1991), pp. 527–8.

⁹ See *30th General Assembly Official Records*, 2380th meeting, 1975, para. 36.

¹⁰ See, however, Australian legislation on the EEZ, as discussed by Rothwell and Joyner, Chapter 7 in this book.

NAVIGATION AND THE PROTECTION OF THE MARINE ENVIRONMENT

According to Part II of the LOS Convention, passage of a foreign ship through the territorial sea 'shall be considered to be prejudicial to the peace, good order or security of the coastal State' if it engages in 'any act of wilful and serious pollution contrary to this Convention' (Article 19(2)(h)). The coastal state may adopt laws and regulations in conformity with the Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of 'the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof' (Article 21(1)(f)). When the coastal state designates or prescribes sea lanes and traffic separation schemes in its territorial sea, it may particularly require tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to confine their passage to such sea lanes (Article 22). Such ships, when exercising their right to innocent passage, are to 'carry documents and observe special precautionary measures established for such ships by international agreements' (Article 23).

All these rules on the protection of the marine environment in respect of ships enjoying the right of innocent passage are applicable also to straits used for international navigation (Article 45) and to archipelagic waters (Article 52) when the regime of innocent passage is applied in these areas.

Special rules on the marine environment are contained also in the new regime agreed upon at UNCLOS III for straits used for international navigation – the transit passage regime. Ships in transit passage are required to 'comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships' (Article 39(2)(b)). States bordering straits may adopt laws and regulations relating to transit passage through straits in respect of 'the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait' (Article 42(1)(b)).

In the specific legal regime of the exclusive economic zone, the coastal state has the jurisdiction as provided for in the relevant provisions of the Convention with regard to 'the protection and preservation of the marine environment', as will be further elaborated below in this chapter.

The following provisions, although contained in Part VII on the high seas, concern a general duty of the flag state. Every state shall take measures for ships flying its flag to ensure safety at sea with regard to 'the construction, equipment and seaworthiness of ships'; such measures shall include those necessary to ensure 'that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning . . . the prevention, reduction and control of marine pollution' (Article 94(3)(a) and (4)(c)).