

Reliability of access for Marine Scientific Research (MSR) to the Arctic Ocean and the possibility of a “MSR Code of Conduct”

Prepared Remarks for oral presentation
Betsy Baker, Vermont Law School

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Session I: “10-15 min presentation under Session I on the status of science relevant agreements (existing and emerging issues) within the context of the AOR Project.”

Summary of presentation:

A legally binding regime, Part XIII of the UN Convention on the Law of the Sea, already regulates the process for seeking and granting permission for access to the EEZ and continental shelf of Arctic Ocean coastal states for the purposes of Marine Scientific Research (MSR).¹ All five Arctic Ocean littoral states follow the convention processes, but scientists still face access reliability problems outlined elsewhere.²

A supplemental process, or non-binding agreement, might help the predictability problem. The science and diplomatic community could draft a politically acceptable non-binding document such as an MSR access “code of conduct” or “code of etiquette.” Participants could include the arctic coastal states that grant or deny permission for MSR, as well as other states, arctic and non-arctic. Such a code would not replace the existing regime under the Law of the Sea Convention. Instead, it would be a non-binding guide for states, drawing on principles to which they have already agreed, in existing binding bilateral agreements on matters such as Science and Technology Cooperation and in non-binding arrangements such as Memoranda of Understanding (MoU) on research related matters.

¹ “The AOR is not about departing from or trying to rewrite the fundamental international legal framework, but is about considering supplemental legal arrangements or processes that may enhance the management of activities and implementation of respective legal and regulatory frameworks.” Arctic Ocean Review Expert Workshop: Context and Guidance for Presenters, unpublished, undated AOR document, August 2010, 3.

² See, e.g., Winfried Dallmann and Alf Håkon Hoel, eds., *Maximizing the Legacy of IPY in the Arctic: A scoping study for the Arctic Council*, 2009, 17-18, and discussion below.

Prepared Remarks

Thank you for the opportunity to speak here this morning. I've been asked to address existing and emerging issues involving science relevant agreements. Given that relatively few such binding agreements exist I will speak not only about them, but will also spend some time on non-binding standards and other norms. This approach is in keeping with our task under the 2004 Arctic Marine Strategic Plan, which encourages periodic review of "the status and adequacy of international/regional agreements and standards that have application in the Arctic marine environment."³

Under existing issues, I will highlight just two. First: unpredictable and irregular access to some parts of the Arctic Ocean for purposes of Marine Scientific Research, and, second, the lack of agreement on what constitutes Marine Scientific Research under the Law of the Sea Convention. I will also touch on an issue that is both existing and emerging: the ongoing Article 76 process of coastal states confirming their rights over large areas of the Arctic Ocean continental shelf. Finally, I will close with an emerging issue: how we might build on the non-binding standards mentioned above to come up with something that might resemble a "Code of Conduct" or "Code of Etiquette" for scientists and coastal states and that would help make access to coastal EEZs and continental shelves in the Arctic more predictable.

I.

First, to existing issues involving science relevant agreements:⁴

Section 3.6 of the Draft Phase I Report rightly spends most of its time on one science relevant agreement: Part XIII of the UN Convention on the Law of the Sea. Draft Report Section 3.6 also references two other agreements that are spelled out in more detail in the Documents Section 4.4 at p. 73 f.: the Convention for a North Pacific Marine Science Organization (PICES)

³ Arctic Ocean Review, draft AOR Phase I Report - version 13th of August 2010, 6.

⁴ This first section draws heavily on Betsy Baker and Hajo Eicken, Marine Research Access in the Arctic Ocean: Background for Potential Guidelines in a Changing Arctic, March 10, 2010, unpublished White Paper available at <http://www.iarc.uaf.edu/workshops/2009/4/> (click on "download whitepaper").

and the Convention of the International Council for the Exploration of the Sea (ICES), which covers the North Atlantic, and other waters.

Part XIII of the Law of the Sea Convention is the primary international agreement regulating the rights and duties of states regarding the conduct of Marine Scientific Research - or MSR - in each of the maritime zones. Each of the five Arctic Ocean coastal states now follows some variation of the rules set out in Part XIII of the LOS Convention. These rules require scientists to obtain coastal state permission before conducting MSR in its territorial sea, exclusive economic zone (EEZ) or on its continental shelf. Under “normal circumstances,” consent for access to the EEZ or shelf may not be unreasonably delayed or denied (Article 246) if the scientists seeking permission follow procedures established by the coastal state and otherwise comply with the requirements of Part XIII, e.g., that the research is for peaceful purposes and to increase scientific knowledge of the marine environment for the benefit of all mankind.

Part XIII begins with Article 238, which states that all States have the right to conduct MSR irrespective of their geographical location and subject to the rights and duties of other states. In the interest of time I will skip over states rights and duties in territorial waters, and move right to the EEZ and continental shelf rights of coastal states to grant or deny access for MSR.

Within or landward of their 200 nm exclusive economic zones (EEZ) coastal states may regulate MSR access to both the water column and to the continental shelf. Seaward of the EEZ all states have the high seas freedom, in keeping with the Convention and coastal state regulations, “to conduct marine scientific research *in the water column* beyond the limits of the exclusive economic zone” (Article 257, emphasis added). The water column beyond the EEZ, and, presumably, the sea ice there, is considered to be the high seas, and coastal states have no right to deny or grant MSR access permission there. But *beneath* that water column, on any continental shelf that a state legitimately claims seaward of the EEZ, coastal states may withhold consent for those parts of the shelf that they have designated in advance for actual or imminent resource exploitation or detailed exploratory operations (LOS Art. 246[6]). This provision offers no

practical hurdle to a state designating much or all of its continental shelf seaward of 200 nm as being part of this exploration/exploitation area and thus more restricted for MSR access. Finally, under Article 256 all states have the right to conduct MSR in “the Area,” which the Convention defines as “the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction,” (Article 1) i.e. not included or delineated as the continental shelf of the coastal state.

Arctic Ocean coastal state rights to regulate access to the continental shelf will become of more practical significance as they move toward conclusion of mapping their extended continental shelves under Article 76 of UNCLOS and confirm their rights over a large portion of the Arctic Ocean continental shelf.

As to unpredictability of access to all coastal state waters and continental shelves, in April 2009 the Intergovernmental Oceanographic Commission (IOC) Advisory Body of Experts on the Law of the Sea (ABE-LOS) published survey results regarding MSR permissions requested and granted by all coastal states in the four year period from 1998 to 2002.⁵ The results for the five Arctic Ocean littoral states (all waters, not just the Arctic Ocean) indicate that from 78% to 100% of requests are approved, depending on the country granting permission. To reiterate, the survey does not provide separate statistics for Arctic waters, but it does indicate what each Arctic coastal state does with respect to all of its waters combined. Denmark, for example, reported receiving 200 requests annually in that four year period and granting 95% of them. The Russian Federation reported approving 78% of all annual requests (106) and the other arctic coastal states reported granting approvals in 98 to 100% of all cases (Canada: 103 requests, 98% granted; Norway: 68 requests, 99% granted; United States: 70 requests, 100% granted).⁶

⁵ Elizabeth Tirpak, Excel File Analysis of Response to IOC Questionnaire No. 3 http://ioc-unesco.org/index.php?option=com_oe&task=viewDocumentRecord&docID=3571, April 2009; Elizabeth Tirpak, IOC QUESTIONNAIRE N°3, THE PRACTICES OF STATES IN THE FIELD OF MARINE SCIENTIFIC RESEARCH (MSR) AND TRANSFER OF MARINE TECHNOLOGY (TMT) http://ioc-unesco.org/index.php?option=com_oe&task=viewDocumentRecord&docID=3570 April, 2009; Elizabeth Tirpak, [Practice of IOC Member States in the Fields of Marine Scientific Research and Transfer of Marine Technology – An Analysis of Responses to ABE-LOS Questionnaire No. 3](#), January 2009

⁶ Source: Tirpak, Excel File Analysis, note 5 above.

The related problem of unreliable access to all areas of the Arctic Ocean has been raised in a number of recent documents and forums, if not discussed in detail. These include the 2009 scoping study for the Arctic Council, *Maximizing the Legacy of IPY in the Arctic*.⁷ This study was the subject of a joint Arctic Council/Antarctic Treaty Consultative Meeting workshop in June 2010, held in conjunction with the Oslo IPY conference. “Access to study areas and research infrastructure” was one of the four main themes of the scoping study. Section 3.3, which covers this theme, is relatively short, but its message is clear regarding access to marine and terrestrial areas alike: In some cases national access regulations “have been unnecessarily complicated and or unpredictable.”⁸ The scoping study points to problems with moving scientific instruments and samples across borders, and “enormously high fees ... for access permits and frequently changing regulations for filling in forms and customs regulations.”⁹

Let me turn briefly to the second existing issue involving science relevant agreements, which is how to define MSR. The LOS Convention does not define “Marine Scientific Research.” Several states, including the United States, take the position that, at a minimum, hydrographic surveys are excluded from the permission requirements of Part XIII (though other regulatory regimes may apply). This position is based on the fact that Article 21 of the Convention distinguishes between “marine scientific research and hydrographic surveys” when specifying matters for which a coastal state may adopt laws and regulations on innocent passage through its territorial sea.

Today I will simply highlight the fact that, as Hajo Eicken and I state in our background white paper on research access to the Arctic Ocean,¹⁰ “as sea ice diminishes and vessel traffic and industrial activities increase in the Arctic Ocean (PAME 2009), surveying and operational information needs will increase with them. Meeting such needs will require reliance on methods

⁷ Winfried Dallmann and Alf Håkon Hoel, eds., *Maximizing the Legacy of IPY in the Arctic: A scoping study for the Arctic Council*, 2009.

⁸ Dallmann and Hoel, id., 18.

⁹ Dallmann and Hoel, id., 18.

¹⁰ See note 4, above, and <http://www.iarc.uaf.edu/workshops/2009/4/> (click on "download whitepaper")

such as deployment of ice-tethered, autonomous sensor packages (Proshutinsky et al., 2005) for example that, in other oceans, may not be considered classic hydrography.”¹¹ The Arctic Ocean Review seems an appropriate forum to explore the different legal regimes that may apply to MSR and other kinds of “marine data collection” - a term coined by J. Ashley Roach¹² - in the Arctic. Future research could focus on whether activities that are directly relevant for or part of research campaigns - such as hydrographic surveys, environmental monitoring and assessment of marine pollution, collection of marine meteorological data and other routine ocean observations, as well as archeological and historical studies - are MSR.

II. Emerging issues involving science relevant agreements

Now let me turn to what is perhaps not so much an emerging *issue* as it is an emerging approach to addressing the existing issue of access: How non-binding standards and other norms might be used to improve reliability of access for MSR to the Arctic Ocean.

As we have just seen, a legally binding regime, Part XIII of the UN Convention on the Law of the Sea, already regulates the process for seeking and granting permission for access to the EEZ and continental shelf of Arctic Ocean coastal states for the purposes of Marine Scientific Research (MSR).¹³ All five Arctic Ocean littoral states follow the convention processes, but scientists still face access reliability problems.

A supplemental process, or non-binding agreement, might help the predictability problem. The science and diplomatic community could draft a politically acceptable non-binding document such as an MSR access “code of conduct” or “code of etiquette.” Participants could include the

¹¹ PAME/Protection of the Marine Environment Working Group of the Arctic Council, Arctic Marine Shipping Assessment (AMSA), 2009 Andrey Proshutinsky and others, “An array of ice-based observatories for Arctic studies”, *Eos, Trans. Am. Geophys. Un.*, 85: 484-485, 2005.

¹² J. Ashley Roach, “Marine Data Collection: Methods and the Law,” in: Freedom of seas, passage rights and the 1982 Law of the Sea Convention, Myron H. Nordquist, Tommy T.B. Koh, and John Norton Moore, eds. (Martinus Nijhoff 2009). The white paper mentioned at notes 4 and 10, above, provides more references on the question of defining MSR.

¹³ “The AOR is not about departing from or trying to rewrite the fundamental international legal framework, but is about considering supplemental legal arrangements or processes that may enhance the management of activities and implementation of respective legal and regulatory frameworks.” Arctic Ocean Review Expert Workshop: Context and Guidance for Presenters, unpublished, undated AOR document, August 2010, 3.

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Principles to which the Arctic Ocean coastal states, or their research institutions, have agreed formally, are expressed in a number of bilateral and multilateral contexts. These include state-to-state bilateral science and technology cooperation agreements and statements of multilateral research organizations such as ICES and PICES, the latter of which are outlined in part 4 of the AOR Draft Phase I Report.¹⁴ Other possible sources for common principles and practices¹⁵ include ministerial level agreements.¹⁶

One set of examples is found in Agreements on Science and Technology Cooperation between the United States and three of the other four arctic coastal states: the Russian Federation

¹⁴ See also, e.g., the recent MoU between Nordic polar research organizations, reported in the June 2010 (5th) issue of the European Polar Board newsletter, <http://www.esf.org/research-areas/polar-sciences/news.html>. One of the four areas of focus in the MoU is “3. Infrastructure Coordination and Access,” but it deals more with access to research stations: “The cooperation and aligning of observations between European and international research stations in the Arctic and Antarctic is becoming more and more essential in terms of high quality research, monitoring and cost effectiveness of access. The European Polar Framework MOU is the proper instrument for providing Europe with high standards variable geometry platforms and clusters of facilities for large scale observations and monitoring.”

¹⁵ The Code might also adopt or reference non-binding annual review processes such as having participants reaffirm their intent to be part of an organization’s work. See, e.g. International Arctic Buoy Programme Operational Principles, last revised in May 2007: 3. OBSERVATION PROGRAMME “3.1. Operational Area The operational area of the Programme will include the central Arctic Ocean and its marginal seas, excepting Exclusive Economic Zones where agreements of the Coastal States have not been obtained.”⁷ 6.1 Participants “On an annual basis, the Participants will review the membership to identify potential new Participants and to re-affirm the intent of existing Participants. Participants who chose not to re-affirm their participation will be deemed to have withdrawn.”

¹⁶ See, e.g., Memorandum of Understanding between the National Oceanic and Atmospheric Administration of the Department of Commerce of the United States of America and the Russian Academy of Sciences of the Russian Federation on Cooperation in the Area of the World Oceans and Polar Regions, Washington, D.C., December 5, 2003, and Memorandum of Understanding between the National Oceanic and Atmospheric Administration U.S. Department of Commerce United States of America and the Department of the Environment Canada For Collaboration on Weather, Climate and Other Earth Systems for the Enhancement of Health, Safety and Economic Prosperity, Ottawa, January 18, 2008: “While the Participants intend to respect these responsibilities, this MoU is not legally binding in either domestic or international law,” Preamble, 2, available at <http://www.weather.gov/iao/iaohom/IAOCanada.php>.

(1993),¹⁷ Norway (2005)¹⁸ and Denmark (2009). None of the agreements is specific to the Arctic, but each contains sufficiently similar provisions to suggest what might be acceptable in a supplemental MSR Code of Conduct.

The Russian Federation-United States agreement does not contain a separate section on “principles” but it does refer to cooperation being based on “shared responsibilities, contributions and benefits.”¹⁹ The two later agreements (Denmark-United States, and Norway-United States) each have a separate Section 3 specifying four principles, which they list - identically - as;

- 1) “Mutual benefit based on an overall balance of advantages,”
- 2) “Reciprocal opportunities to engage in cooperative activities,”
- 3) “Equitable and fair treatment for the participants,” and
- 4) “Timely exchange of information which may affect cooperative activities.”

This last category could conceivably include timely exchange of information about MSR permitting processes. That notion builds on the idea proposed in the IPY scoping study of providing a central database regarding permitting processes for Access to each of the arctic coastal state’s EEZs.²⁰

In addition, the U.S.-Russia agreement provides that parties “*shall facilitate* entry into and exit from its territory of appropriate personnel and equipment of the other party.” Article 9. Each party shall also “effectively implement travel to its relevant geographic areas,” and “facilitate duty free entry for necessary materials and equipment provided pursuant to this Agreement for use in joint activities.” *Id.* These are binding legal obligations.

The agreements between the United States and Norway, and between the United States and Denmark, specify that the parties are to treat requests for access “with diligence, taking into

¹⁷Agreement between the Government of the United States of America and the Government of the Russian Federation on Science and Technology Cooperation, Moscow, December 16, 1993, TIAS 12527.

¹⁸ Agreement on Science and Technology Cooperation between the Government of the United States of America and the Government of the Kingdom of Norway, Washington, D.C., December 9, 2005.

¹⁹ Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark for Scientific and Technological Cooperation, Copenhagen, September 15, 2009.

²⁰ See Dallman and Hoel, eds., *Maximizing the Legacy of IPY in the Arctic*, note 2 above, 19.

account the significance of these activities to the advancement of scientific knowledge.”²¹ It is on this point that one might build upon the basic message of the latest IPY, that knowledge of the Arctic is essential to understanding not only arctic change and polar change, but global change.

I would be glad to elaborate on what a code of conduct or access etiquette might look like in the question and answer session. For now, I will close by reminding us of what the Arctic Council IPY Legacy scoping study says about access to the Arctic for research:

“An important and highly valuable legacy of IPY could be to reconsider access impediments in all regions of the Arctic, building on achievements made during the IPY, and through inter-governmental consultations to improve the access situation for scientists in the whole Arctic on a long-term basis. This is a complicated, demanding, and politically complicated [sic] issue for which the forum and functions of the Arctic Council are uniquely suited.”²²

Thank you.

²¹ Norway, Article 6(d); Denmark, Article 6.4.

²² Dallman and Hoel, note 7 above, 19, § 3.2.1.