

# Center for Oceans Law & Policy

2014 Annual Conference: "Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries"  
Bergen, Norway, 26-27 June 2014

## Arctic Legal Issues and the UNCLOS Dispute Settlement Regime

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# Organization

1. UNCLOS Part XV Overview
2. Passage Issues and UNCLOS DSMs
3. Article 234 and UNCLOS DSMs
4. Installations and Structures and UNCLOS DSMs
5. Arctic Maritime Boundaries and UNCLOS DSMs
6. Conclusions

# PART 1

## UNCLOS Part XV - An Overview

# Importance of UNCLOS

- 1982 United Nations Convention on the Law of the Sea (UNCLOS)
- Universally accepted (except for USA)
- Parties must accept Provisions on Environment in Part XII and on Settlement of Disputes in Part XV
- Provisions of UNCLOS being interpreted in light of developing principles of international environmental law
- Principles and rules governing States are more clear and certain because they are set out in UNCLOS

# 2008 Ilulissat Declaration

- The law of the sea provides for important rights and obligations concerning . . . the protection of the marine environment, ice-covered areas, freedom on navigation, marine scientific research and other uses of the sea
- This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions
- Therefore, we see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean

# Structure of Part XV

- Section 1. General Provisions
- Section 2. Compulsory Procedures Entailing Binding Decisions
- Section 3. Limitations and Exceptions to the Applicability of Section 2

# Article 279. Peaceful Means

- States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2 (3) of the UN Charter
- To this end, parties to the shall seek a solution by the means indicated in Article 33(1) of the UN Charter :
  - (1) negotiation, (2) enquiry, (3) mediation, (4) conciliation,
  - (5) arbitration, (6) judicial settlement , or
  - (7) other peaceful means of their choice

# Invocation of Compulsory Procedures Entailing Binding Decisions in Section 2

Article 286. Application of procedures under this section

Subject to section 3 [Limitations and Exceptions]

any dispute concerning the interpretation or application of this Convention shall,

**where no settlement has been reached by recourse to section 1,**

be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.



# Choice of Procedure - Article 287

- A State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
  1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;
  2. INTERNATIONAL COURT OF JUSTICE (ICJ);
  3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;
  4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII

# “Default Procedure”

## Article 287 (5):

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to ARBITRATION in accordance with Annex VII, unless the parties otherwise agree.

# Article 298. Optional Exceptions to Applicability of Section 2

States parties have option to formally declare that they do not accept Section 2 for following categories of disputes:

- the interpretation or application of **articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles**
- disputes concerning military activities and disputes concerning law enforcement activities relating to rights and jurisdiction of coastal States over fishing and marine scientific research in the EEZ
- Disputes in respect of which the UN Security Council is exercising the functions assigned it by the UN Charter

# Dispute over whether a Court or Tribunal has Jurisdiction

## Article 288. Jurisdiction

- 1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
- 4. In the event of a dispute over whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

## PART 2

# Passage Issues and UNCLOS DSMs

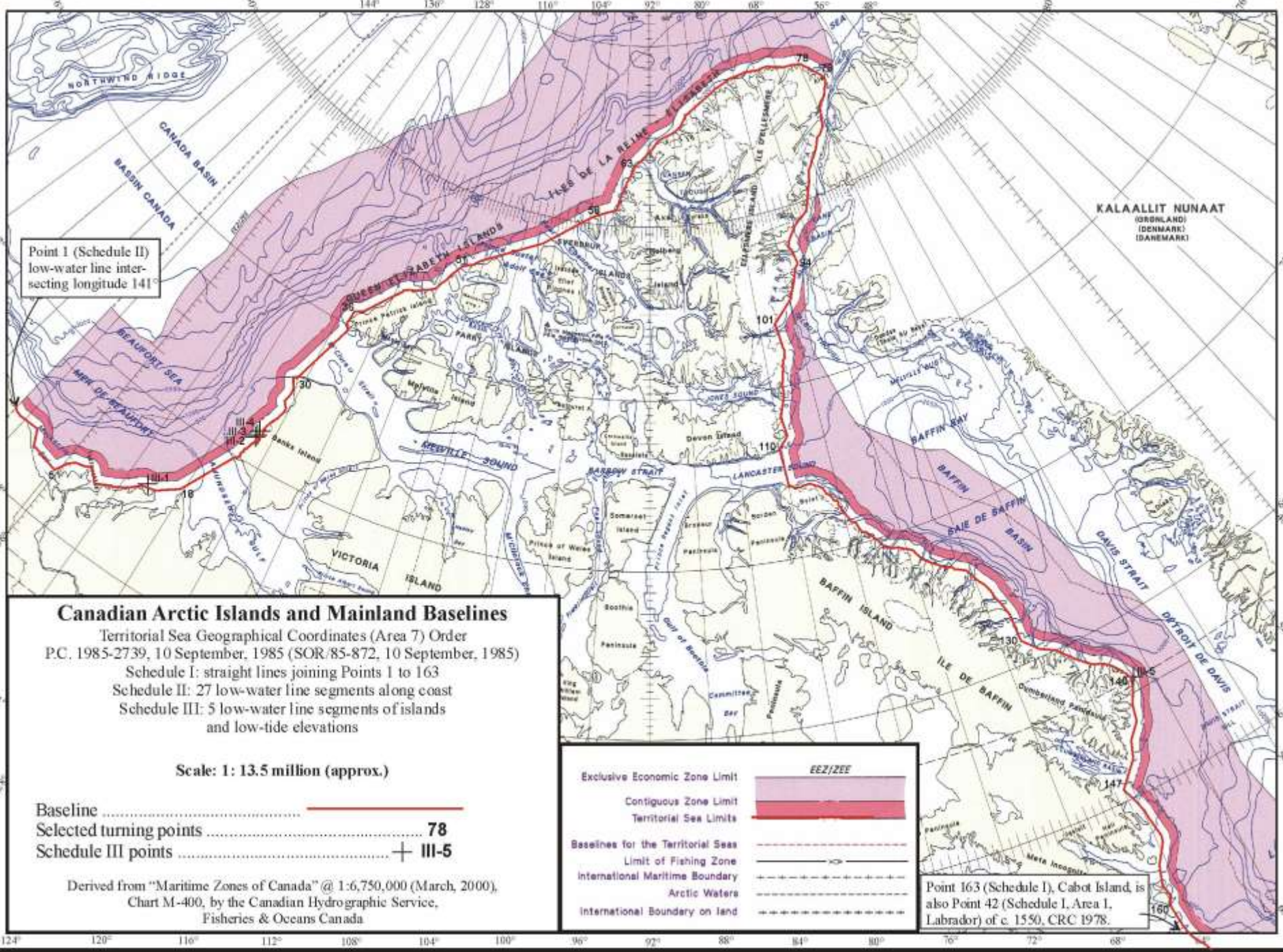
# Jurisdiction in Northwest Passage and Northern Sea Route

- United States has maintained that passage in Northwest Passage and Northern Sea Route are governed by UNCLOS Part III on **Straits Used for International Navigation**
- Canada and Russia claim that passage through the narrow channels on these routes is through “internal waters” with passage subject to the consent of the coastal State
- More States may accept US argument if passage through these routes becomes safe and reliable for large parts of the year because of melting ice

# Canada's Internal Waters

- In 1985 Canada drew straight baselines around the High Arctic Islands – it maintained that the waters landward of the baselines were internal waters as a result of historic usage
- In 1986 the US protested Canada's straight baselines on the ground that there is no basis in international law supporting Canada's claim
- The US position is that the Northwest Passage is a straight used for international navigation
- In 1986 the EU joined the US in objecting to Canada's straight baselines
- 1988 Arctic Cooperation Agreement side-stepped the issue





Point 1 (Schedule II)  
low-water line intersecting  
longitude 141°

**Canadian Arctic Islands and Mainland Baselines**

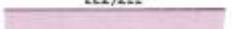



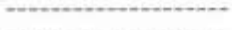


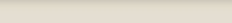
Territorial Sea Geographical Coordinates (Area 7) Order  
P.C. 1985-2739, 10 September, 1985 (SOR/85-872, 10 September, 1985)

- Schedule I: straight lines joining Points 1 to 163
- Schedule II: 27 low-water line segments along coast
- Schedule III: 5 low-water line segments of islands and low-tide elevations

Scale: 1: 13.5 million (approx.)

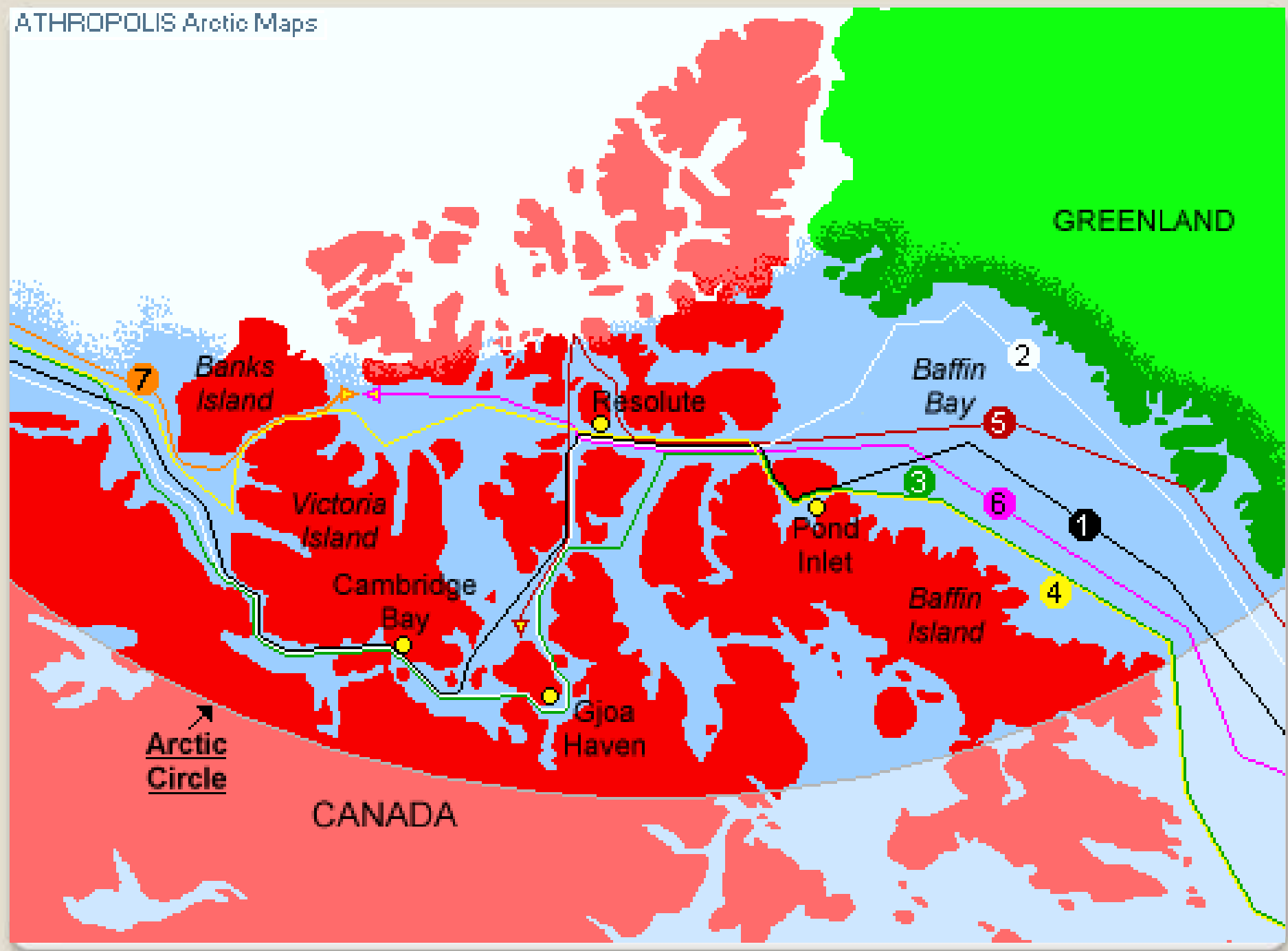
Baseline .....  
 Selected turning points ..... **78**  
 Schedule III points ..... **+ III-5**

Derived from "Maritime Zones of Canada" @ 1:6,750,000 (March, 2000),  
 Chart M-400, by the Canadian Hydrographic Service,  
 Fisheries & Oceans Canada

Exclusive Economic Zone Limit		<b>EEZ/ZEE</b>
Contiguous Zone Limit		
Territorial Sea Limits		
Baselines for the Territorial Seas		
Limit of Fishing Zone		
International Maritime Boundary		
Arctic Waters		
International Boundary on land		

Point 163 (Schedule I), Cabot Island, is  
 also Point 42 (Schedule I, Area 1,  
 Labrador) of c. 1550, CRC 1978.





GREENLAND

Banks Island

Resolute

Baffin Bay

Victoria Island

Pond Inlet

Cambridge Bay

Baffin Island

Gjoa Haven

Arctic Circle

CANADA

# Russian Waters - Northern Sea Route

- In 1964 the Soviet Union stated that the Northern Sea Route at some points goes through internal waters and territorial sea which historically belong to the Soviet Union, and that the straits are used only by ships of the Soviet Union, not for international navigation
- In 1965 the US responded by stating that there is no basis for claiming the four of the straits on historic grounds, and stated that four of the straits are Straits used for International Navigation between two parts of the high seas
- Issue of whether the offshore islands enclosed by the straight baselines are unlawful because they depart to an appreciable extent from the general direction of the coast

# Russian Arctic Straits



# Issue on Straits use for International Navigation

- The provisions on Transit Passage applies to straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ
- Even if the straits were not used regularly for international navigation earlier, they are increasingly being used for international navigation
- Issue: What is the “critical date” for determining whether a strait is used for international navigation?

# UNCLOS Part XV and Passage Regimes

- Any dispute on the interpretation or application of the UNCLOS provisions on **straight baselines** and **straits used for international navigation** is subject to the compulsory procedures entailing binding decisions in Section 2 of Part XV
- The only ground on which Canada and Russia could attempt to exclude the jurisdiction of a court or tribunal under Part XV would be to argue that the disputes are disputes “involving historic bays or titles” within their declarations under Article 298
- A dispute on whether the Court has jurisdiction would be decided by the Court or Tribunal, not by Canada or Russia

# PART 3

## Article 234 and UNCLOS DSMs

# Article 234. Ice-covered areas

- Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

# Article 234. Ice-covered areas – “Due Regard” Obligation

- Such laws and regulations shall have **due regard** to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.



# Significance of Article 234

- Arguably applies to both Territorial Sea and EEZ
- Coastal State can adopt and enforce laws on ship-source pollution that are more strict than MARPOL (and SOLAS?)
- Exception to general rule in EEZ [Article 211(5)] that can only give effect to generally accepted international rules and standards, unless obtain approval of IMO for specific areas [Article 211(6)]
- Exception to general rule in Territorial Sea that cannot adopt laws and regulations on *design, construction, manning or equipment* unless giving effect to generally accepted international rules and standards [Article 21(2)]

# Significance of Article 234

- Gives coastal State wider power to enforce the laws and regulations for violations in its EEZ
- General rules on enforcement of laws and regulations against vessels in its EEZ or territorial sea are set out in Article 220
- As a practical matter, it may be advantageous for coastal States to obtain approval from the IMO of their laws and regulations so that all vessels can be given notice by IMO circulars

# Article 234 and Dispute Settlement

- Subject to the compulsory procedures entailing binding decisions in section 2 of Part XV :
  1. Would fall within general rule in Article 286 and cannot be excluded by an Article 298 Declaration
  2. Article 297(1) expressly provides that a dispute concerning the interpretation or application of the convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction when it is alleged that a coastal State has acted in contravention of the provisions of the Convention in regard to rights of navigation

## PART 4

# Installations and Structures and UNCLOS DSMs

# Jurisdiction over Installations & Structures – Article 60

- Coastal States have exclusive jurisdiction over installations and structures in its internal waters and territorial sea
- Coastal States also have jurisdiction over installations and structures in their EEZ or on their continental shelf, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations
- The phrase “including” implies that the coastal States would also have jurisdiction to adopt laws and regulations providing for the security of installations and platforms

# Safety Zones – Article 60

- 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.
- 6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

# Breadth of Safety Zones – Article 60

- 5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards.

Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and **shall not exceed a distance of 500 metres around them**, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization.

Due notice shall be given of the extent of safety zones.

# Exclusion Zones or Security Zones?

- Do coastal States have the right to declare 500 m security zones or exclusion zones?
- Do coastal States have the right to arrest vessels that intentionally breach the exclusion zone around an installation or structure?
- Coastal States can argue that Article 60(4) gives them the right to take appropriate measures to ensure the safety of the installations and structures
- Will flag State of a Greenpeace vessel challenge the regulations of Norway or Russia?



## **PART 5**

# **Maritime Boundaries in the Arctic and UNCLOS DSM**

# Declarations on Boundary Disputes

- All States bordering Arctic are parties to UNCLOS except the United States
- Canada and Russia have opted out of Compulsory Procedures for disputes on maritime boundaries
- Norway and Denmark have in effect opted out of Compulsory Procedures unless the dispute is referred to the ICJ
- Iceland has in effect opted out of the compulsory procedures for disputes on overlapping continental shelf claims

# Article 298 – Non-binding Conciliation

**(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;**

# Article 298 – Non-binding Conciliation

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties **shall, by mutual consent**, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

# Outer Continental Shelf Boundaries near North Pole

- CLCS submissions of Canada, Denmark and Russia could overlap in the area of the Lomonosov and Alpha/Mendeleev Ridges
- Boundaries not subject to compulsory procedures in section 2 of Part XV because of Declarations of Canada and Russia under Article 298
- Would be subject to non-binding Conciliation under UNCLOS
- Boundary between Canada and Denmark could be taken to ICJ because both have filed Optional Clause Declarations

# IBRU Map of Outer Continental Shelf Claims



# Conclusion on UNCLOS and Maritime Boundaries

- UNCLOS Dispute Settlement System likely to play no role in delimitation of the maritime boundaries in the Arctic
- However, if nationalism prevents States from reaching a negotiated settlement, the provisions in Part XV on non-binding conciliation may assist the parties in moving from their historic position

# PART 6

# Conclusions



# Possible use of ITLOS DSM

- The DSMs in Part XV establish a mechanism for resolving legal disputes between States Parties on the interpretation or application of UNCLOS
- Given the current level of trust and cooperation among the Arctic States and members of the Arctic Council, it seems unlikely that any States will invoke the UNCLOS DS procedures
- However, some of the potential issues of interpretation involve fundamental national interests which could threaten important interests of other States – in such cases the UNCLOS DSM could play a useful role

# Thanks for your Attention !

Comments and Suggestions are Welcome

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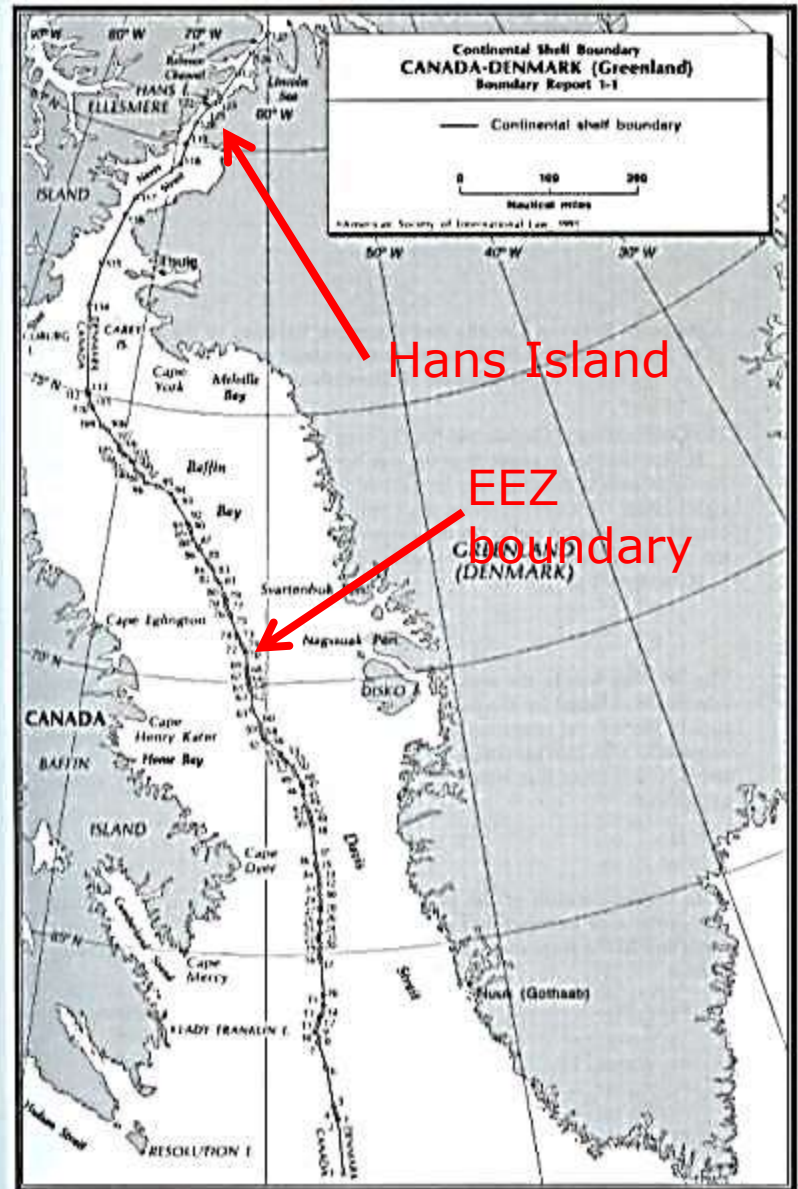
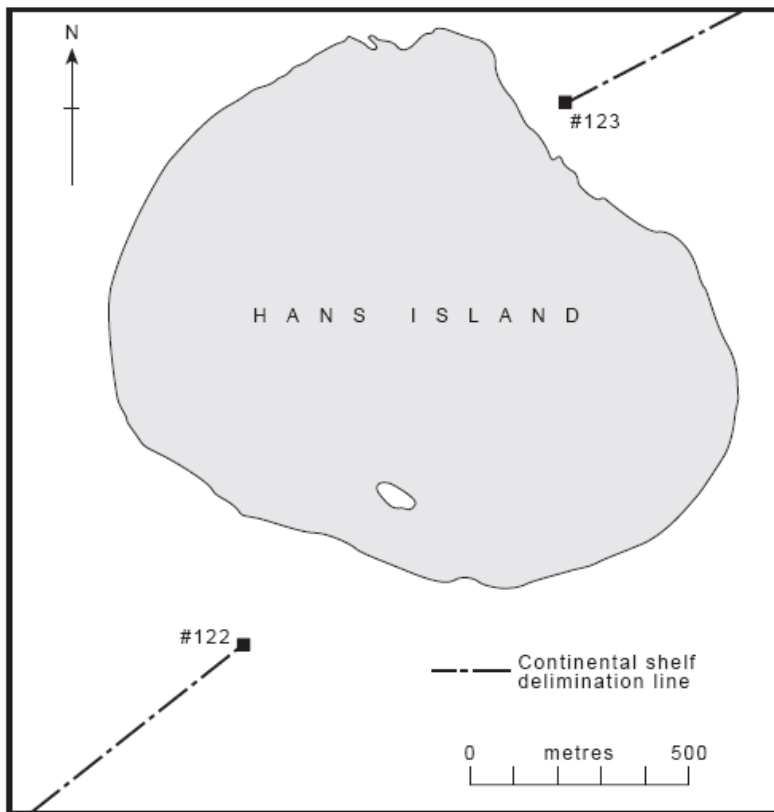
# Appendix

## Bilateral Maritime Boundaries in the Arctic

# Canada-Denmark

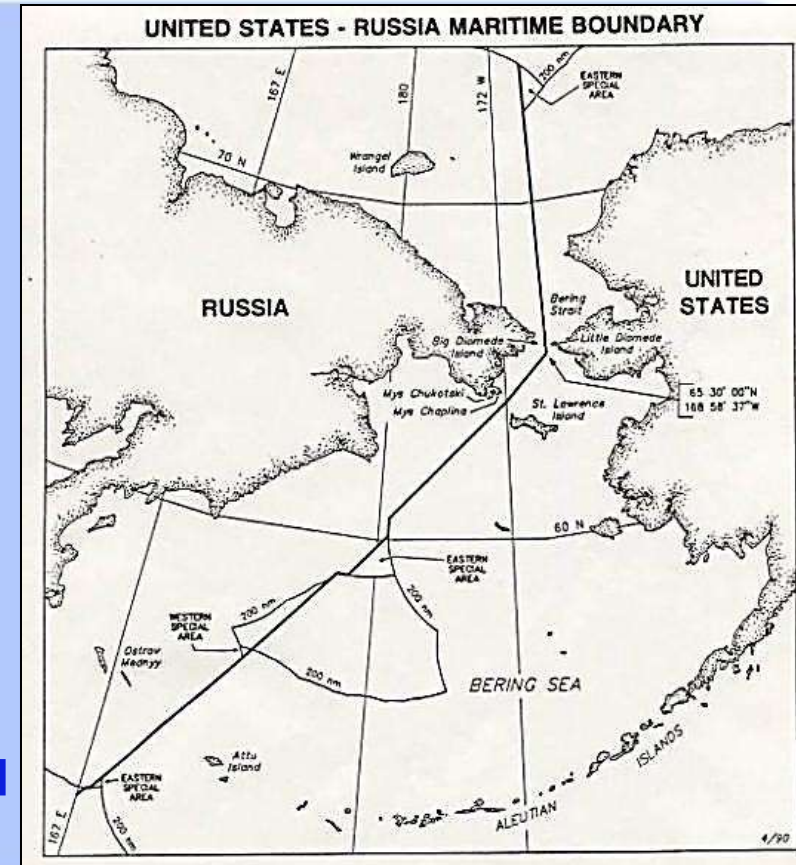
- 1973 Treaty deals with most of the boundary area between Canada (Ellesmere Island) and Denmark (Greenland)
- 2012 Tentative Agreement on the Lincoln Sea EEZ boundary, north of Ellesmere and Greenland
- **Unresolved boundary:** continental shelf boundary beyond 200 nm in the northern part of Lincoln Sea
- The compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS cannot apply because of Canada's declaration
- Could be non-binding Conciliation under Article 298
- Could also be referred to ICJ because both States have Optional Clause Declarations

# Canada - Denmark



# Russia – US

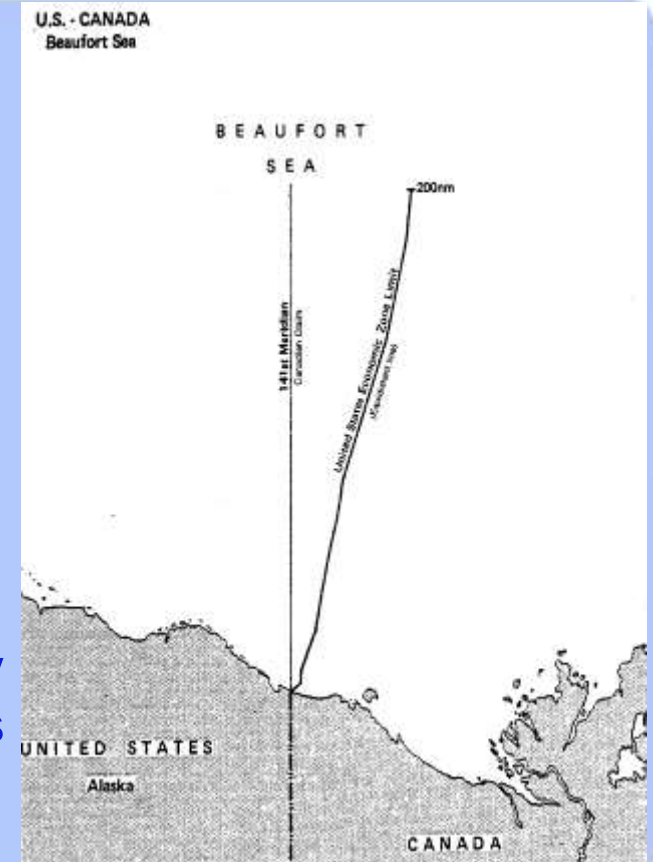
- No boundary dispute since the 1990 Bearing Sea Treaty, where both parties agreed on territorial sea, EEZ and CS boundaries that extends for 1,600 nm between Russia and Alaska (US)
- US has ratified the agreement, but Russia has not. However, both parties have provisionally applied the agreement since June 1990
- The agreement anticipated the possibility of both States having an extended continental shelf beyond 200nm, allowing the boundary to extend northwards





# Canada – US

- Have disagreed on location of boundary in the Beaufort Sea since 1976
- US boundary claim based on equidistance line and Canada boundary claim based on meridian line
- In dispute is pie-shaped sector of approximately 6,250 sq miles
- Dispute complicated further by claims to extended continental shelf beyond 200 nm
- UNCLOS not relevant because US not a party and Canada has excluded boundary disputes by Declaration under Article 298



# Norway – Denmark

- The ICJ decided the EEZ boundary between Jan Mayen (Norway) and Greenland (Denmark) in 1993
- In 2006 both countries agreed on an all-purpose maritime boundary between Greenland (Denmark) and Svalbard (Norway)

