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# PhD - EXPOSÉ

## **DISSERTATION TITLE:**

„Legal Framework of the Arctic Council“

## **DOCTORAL CANDIDATE:**

Mag. Ivan Leko (1401410)

## **SUPERVISOR:**

Univ.-Prof. i. R. Dr. Gerhard Hafner

## 1. Introduction

Arctic is a polar region and the northernmost part of Earth, consisting of Arctic Ocean and coastal parts of 8 sovereign states: United States (Alaska), Russia, Canada, Finland, Sweden, Norway, Denmark (Greenland) and Iceland. Arctic Region contains abundance of natural resources (gas and oil worth between \$12 trillion and \$25 trillion)<sup>1</sup> and is characterized by unique geographical shape and position. Current events such as global warming which causes melting of significant amounts of ice and thus enabling navigating, exploitation and easier access to once unapproachable areas, as well as increase in the demand for new reserves of oil, gas and minerals and omnipresent fear of depletion of the existing sources are putting a bigger spotlight on this area and once again raise numerous unresolved legal issues.

From the diplomatic and politico-military point of view, Arctic represents an area over which some of the most powerful countries have direct and profound interests. It is the closest connection between two greatest powers, United States and Russian Federation, with the long history of strained relations. The Arctic can easily be accessed and traversed with modern day vessels, especially submarines which when travelling submerged are hidden and protected by a thick layer of ice. If we consider the possibility of military posturing, military exercises, building bases or navigating in the Arctic the implications and strategic importance of this area are undoubtedly immense.

From the environmental perspective, such enhanced commercial, military and even touristic activity impose a great threat for the marine environment, unique animal species and indigenous peoples' livelihood if not carefully and minutely administered.

Since, there is no comprehensive legal instrument regulating above mentioned activities in Arctic, the pivotal role in this region is played by a unique forum, the Arctic Council.

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<sup>1</sup> Bird and others: Circum-Arctic resource appraisal, estimates of undiscovered oil and gas north of the Arctic Circle, Reston VA: United Nations Geological Survey, 2008.

## 2. Research Field

The number of consecutive events in the late 1980s has made the general public understand the importance of the comprehensive regional cooperation in Arctic through a competent and effective organization. In 1987, Mikhail Gorbachov, the President of the Russian Federation, in his famous Murmansk Speech<sup>2</sup>, gave the most significant impetus for the creation of such organization. In his speech, president Gorbachov stressed the necessity of examining: *“...the idea of cooperation between all people also from the standpoint of the situation in the northern part of this planet”*. This speech was shortly followed by two disastrous events which demonstrated the severity of damage the modern industry may cause to the environment today. Those were namely, Chernobyl disaster in 1986<sup>3</sup> and oil spill from the tanker Exxon Valdez outside the coastline of Alaska in 1989<sup>4</sup>. Those events triggered numerous proposals aimed at preventing such catastrophes in the Arctic Region, the most acceptable and uncontroversial of which proved to be the Finnish proposal for the circumpolar environmental cooperation<sup>5</sup>. This proposal led to the formation of the Arctic Environmental Protection Strategy (AEPS)<sup>6</sup>. AEPS is considered to be the Arctic Council's predecessor from which many organizational structures were taken over. In order to form a more effective and improved forum, on the basis of the proposal prepared by Canada, the Arctic Council was officially formed with the signing of the Ottawa Declaration on the Establishment of the Arctic Council<sup>7</sup>. In Article 1, Ottawa Declaration emphasizes that the Arctic Council is established as a:

*„...high level forum to: (a) provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic. (b) oversee and coordinate the programs established under the AEPS... (c) adopt terms of reference for, and oversee and coordinate a sustainable development program. (d) disseminate information, encourage education and promote interest in Arcticrelated issues.”*

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<sup>2</sup> Gorbachov's Murmansk Speech: [https://www.barentsinfo.fi/docs/Gorbachev\\_speech.pdf](https://www.barentsinfo.fi/docs/Gorbachev_speech.pdf)

<sup>3</sup> See: <http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx>

<sup>4</sup> See: [http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid\\_4231000/4231971.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid_4231000/4231971.stm)

<sup>5</sup> Graczyk, P.: Observers in the Arctic Council – Evolution and prospects, The Yearbook of Polar Law Online, Volume 3

<sup>6</sup> Rovaniemi Declaration, adopted June 14th 1991.

<sup>7</sup> Ottawa Declaration on the Establishment of the Arctic Council, 19 September 1996

Sole fact that the Arctic Council was established by a legally non-binding instrument (1996 Ottawa Declaration) outlines its unique background, but also causes numerous disputes over its legal personality. Many have questioned the capability of the Arctic Council to cope with modern day challenges, since it lacks full legal capacity. Lack of this legal capacity raises many other questions, such as the status of the Arctic Council civil servants, their immunities and privileges, ability of the Arctic Council to enter or conclude a treaty, contract etc.<sup>8</sup>

Nevertheless, the Arctic Council is still the most comprehensive Arctic forum which provides a platform for all the stakeholders to get together and discuss urgent issues. However, besides from its legal status, the Arctic Council faces some other shortcomings as well. These shortcomings are firstly and foremost linked to its limited participation. Only eight Arctic States (“Arctic Eight”) enjoy full rights, including the right to vote, and thus the right of creating the decisions within the Arctic Council. All other states and non-state entities may only apply for the Observer status. In order to obtain the Observer status, applicant countries have to meet the requirements enshrined in the Annex 2 of the Arctic Council Rules of Procedure.<sup>9</sup> Although the requirements laid down in the Rules of Procedure seem, at first glance, more or less precise and clearly defined, there is still some space for different interpretations. Since the acquisition of the Observer status requires the consensus among the “Arctic Eight”, it is often linked with bilateral political implications and non-legal reasons.<sup>10</sup> Probably the best example is Canada’s objection to European Union’s Observer status due to the ban on seal products imposed by EU in 2010<sup>11</sup>. Up until now, the EU hasn’t received the desired status. So far, twelve non-Arctic countries have obtained the Observer status: France, Germany, Poland, The Netherlands, United Kingdom, Spain, PR China, Italy, Japan, South Korea, Singapore and India.<sup>12</sup> With growing significance of Arctic and interest of third actors in this polar region it is expected that more states, as well as non-state entities, will apply for the Observer status in the near future. Furthermore, a steaming issue when it comes to Arctic is the position of the Indigenous Peoples’ Organizations. The Indigenous

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<sup>8</sup> Organization for Security and Co-operation in Europe (OSCE) has also encountered many obstacles of similar kind due to the lack of constituent document.

<sup>9</sup> Arctic Council Rules of Procedure, adopted September 17-18, 1998, as revised in 2013 Kiruna Ministerial Meeting

<sup>10</sup> Molennar, E. J.: Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea, The International Journal of Marine and Coastal Law, Volume 27, Issue 3

<sup>11</sup> [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/seal\\_hunting.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm)

<sup>12</sup> <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>

Peoples Organizations (IPOs) are awarded, more favourable, Permanent Participant status within the Council, which allows them to attend the meetings within the AC and to take part in discussions. However, indigenous peoples are still in a position inferior to the one of the Member States (“Arctic Eight”) as all relevant decisions only require consensus among Member States. Additional point is the fact that the number of Permanent Participants is limited as their total number must not exceed the number of the Member States<sup>13</sup>. Since the number of the Member States is firmly fixated at eight, it is obvious that some Indigenous Peoples’ Organizations will be unable to participate and left out of the main Arctic forum. Nevertheless, the status of IPOs within the Council is certainly not without any influence on the work of its structure. The question of the ability of the Permanent Participants to influence the decision-making process within the Arctic Council requires a deeper and more thorough examination, which transcends the conciseness of this exposé.

Above described membership structure opens the door for the debate on the impact of the AC decisions on the third parties, their rights and obligations, which haven’t participated in deliberations and the adoption of decisions within the Arctic Council, especially in light of the *pacta tertiis* principle. Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (*SAR Agreement*) and Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in Arctic (*MOPPR Agreement*), adopted under the auspices of the Arctic Council, once again started the debate over this principle, as the two agreements regulate activities whose consequences are very likely to transcend the national borders and have a severe impact on other, non-signatory states or the High Seas, *e.g.* marine pollution which occurs in the maritime region of one Arctic State may easily cause damage to the third parties.<sup>14</sup>

Besides its unique membership, further shortcomings are attributed to the Arctic Council’s mandate initially set up to deal with the environmental and developmental issues only, excluding military security which was at the moment necessary in order to obtain the acquiescence of the United States and the Russian Federation.<sup>15</sup> Bearing in mind current environmental changes in Arctic, which turn what was once called “a frozen desert” into a navigable and vibrant region, it will be interesting to see how much jurisdiction the Arctic

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<sup>13</sup> Declaration on the Establishment of the Arctic Council, Article 2.

<sup>14</sup> Takei, Y.: The Role of the Arctic Council from an International Law Perspective: Past, Present and Future

<sup>15</sup> Loukacheva, N.: Developments in the Arctic Council, The Yearbook of Polar Law Online

Council may embrace in the future and how this forum will adapt to the new emerging challenges of the politico-military nature? Furthermore, if the Council accepts the jurisdiction in such matters, does that mean that the Council can embrace any other area in the near future too?

Despite its shortcomings, a regional cooperation in the Arctic Region is very much needed in order to preserve the unique and fragile environment and provide an answer to the fundamental changes this region is undergoing in the last couple of decades. Furthermore, the UN Convention on the Law of the Sea (UNCLOS) often refers to the obligation of the regional cooperation in certain domains, most often in the domain of marine environmental protection<sup>16</sup> and conservation and management of the living resources<sup>17</sup>. Moreover, in reference to the regional cooperation one must highlight UNCLOS Art. 123, which reads:

*States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:*

*(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;*

*(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;*

*(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;*

*(d) to invite, as appropriate, other interested States or international organizations to cooperate.*

It isn't entirely clear whether the Arctic Ocean can be subsumed under the term „enclosed or semi-enclosed sea“. However, this article is nonetheless worth mentioning as it is visible from the list of activities enshrined in this article, in which domains UNCLOS requires the respective states to cooperate. This obligation to cooperate certainly applies to the Arctic Ocean regardless of its legal status (whether it is an enclosed or semi-enclosed sea, or not)

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<sup>16</sup> UN Convention on the Law of the Sea, Art. 207, Art. 208, Art. 210, Art. 212

<sup>17</sup> *Ibidem*, Art. 63

and this cooperation is most likely to happen in the Arctic Council or, at least, under its auspices. Finally, from the International Law point of view, it would be interesting to see to what extent can the Arctic Council address (resolve) the sea delimitation disputes in Arctic and enhance cooperation between Member States?

In my dissertation I will aim to give a thorough review of the legal framework (UNCLOS, AC decisions, conventions) which applies to the Arctic Council and to elaborate following research questions:

- 1. Does the Arctic Council have the necessary elements of an International Organization and what added value can the Council bring to resolving legal issues in Arctic?**
- 2. What is the mandate of the Arctic Council and could the Arctic Council deal with the issues initially not embedded in its mandate (politico-military issues)?**
- 3. What is the impact of the AC decisions on third parties bearing in mind its limited membership and special status of Observers and Permanent Participants? (*Pacta tertiis principle*)**

### 3. Preliminary table of contents

#### 1. Introduction

#### 2. General information about Arctic

- Definition of Arctic
- Current issues and disputes
- Strategic and economic importance

#### 3. Establishment of the Arctic Council

##### 3.1. Arctic Environmental Protection Strategy (AEPS)

AEPS is considered to be a predecessor of the current Arctic Council from which AC took over main organizational structures and principles.

##### 3.2. Ottawa Declaration

Ottawa Declaration is a document which established the Arctic Council in its current form.

##### 3.3. Legal personality of the Arctic Council

In this part I would examine the current legal status of the Arctic Council and to what extent the AC is and could be a full-fledged international organization. I would also tackle the issue of privileges and immunities of the Council, as well of its employees (civil servants) and, generally, the problems which arise if the Council is deprived from legal capacity.

#### 4. Membership

##### 4.1. Members („Arctic Eight“)

AC has eight full-fledged members whose rights are significantly higher than the others'.

##### 4.2. Permanent Participants

Permanent participant are indigenous people's organizations which are awarded certain rights in the Arctic Council. In this sub-chapter, I will address the issue of the indigenous peoples representation in the AC and whether the Indigenous Peoples Organizations (IPOs) are able to influence the decision-making process within the Council and if yes, to what extent?



#### **4.3. Observers**

All other entities (non-Arctic countries, NGOs and inter-governmental organizations) are only eligible to apply for the Observer status.

### **5. Organizational structure of the Arctic Council**

AC has numerous organs and organizational entities such as Task groups, Working groups, Senior Arctic Officials Committee. Here I intend to analyze their work, structure and their contribution to the Arctic legal framework.

### **6. Mandate of the Arctic Council**

Since the mandate of the AC is initially set up to deal with environmental and developmental issues only, in this chapter I would primarily focus on their current work and the its possibility to cope with the issues of politico-military nature, which were primarily excluded from its mandate.

### **7. Decision making process within the Arctic Council**

In this section I would examine the way the decisions are adopted within the Council and the influence of each of three groups (Members, Permanent Participants, Observers) on the decision making process.

### **8. Arctic Council and UNCLOS**

I would examine the provisions of UNCLOS which are applicable to the work and legal status of the AC, such as, but not limited to, provisions regarding the regional co-operation, enclosed and semi-enclosed seas, delineation of the sea areas and especially Article 234 of the UNCLOS (the Arctic Article).

### **9. Activities of the Arctic Council**

AC is engaged in numerous activities concerning different aspects of the Arctic governance. I would focus here on the two main conventions negotiated and adopted under the auspices of the AC, those are namely Search and Rescue Agreement (SAR) and Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic (MOPPR).

#### **9.1. Search and Rescue Agreement (SAR)**

#### **9.2. Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic (MOPPR)**

## **10. Relationship between EU and the Arctic Council**

This chapter would analyze EU's policy towards the Arctic Council and examine the ways of possible inclusion of the EU in the work of the AC. EU has repeatedly applied for the observer status within the Council, however due to political reasons it still hasn't obtained that status.

## **11. Relationship between the Arctic Council and other regional organizations**

There is a number of regional organizations which contribute with their work to ever growing need for legal regulation in Arctic (Barents Euro-Arctic Council, Nordic Council, Northern Forum etc.). Here, I intend to explore the current and potential co-operation and overlapping between those organizations and the Arctic Council.

## **12. Ability of the Arctic Council to resolve legal disputes in Arctic**

Could the Council resolve some of the disputes or at least serve as a forum which will facilitate dialogue between the Arctic stakeholders?

## **13. Pacta tertiis principle**

This section would focus on the effect the AC decisions and treaties negotiated under its auspices have on the third parties, as well as Arctic Council's ability to address the issues in which non-Arctic states have interests.

## **14. Conclusion**

#### 4. Timeline

So far I have already passed two mandatory exams: „**VO Juristische Methodenlehre**“ (2015 S) and „**KU System and wissenschaftliche Methode: Spinozas Ethik**“ (2015 W). I have also taken a number of courses in my chosen field of specialization: „KU Selected Issues of International Law“, „KU Special Legal issues of the Use of Outer Space Technology“ and „KU Human Rights II“. My desired research timeline is following:

<b>12/2016</b>	Public Presentation
<b>01/2017</b>	Concluding the Dissertation Agreement
<b>01/2016-03/2017</b>	Chapters I and II  Seminar: Indigenous Legal Studies – Der arktische Raum
<b>03/2017-09/2017</b>	Internship in the Office of the Legal Advisor at NATO  Chapters III and IV
<b>10/2017-12/2017</b>	Chapters V and VI
<b>01/2018-03/2018</b>	Chapters VII and VIII  One additional Seminar and Courses in the field of doctoral thesis
<b>04/2018-07/2018</b>	Chapters IX and X
<b>09/2018</b>	Chapters X, XI and XII
<b>12/2018</b>	Public Defense

## 5. Literature

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