Marine Pollution in the Arctic Region: What Future for Civil liability? - The need for a Comprehensive liability scheme

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CHAPTER 24

MARINE POLLUTION IN THE ARCTIC REGION: WHAT FUTURE FOR CIVIL LIABILITY? - THE NEED FOR A COMPREHENSIVE LIABILITY SCHEME

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RÉSUMÉ: *Dans l'Arctique, le réchauffement global et par conséquent la dégradation de la glace marine facilitent de nouvelles possibilités d'exploitation. De nouvelles routes navigables et un accès plus facile aux ressources naturelles induisent de nouvelles opportunités de profits économiques. En même temps, la protection de cet environnement fragile contre les effets néfastes des activités humaines en mer est indispensable car l'Arctique est aussi un agent régulateur du climat mondial. Les risques d'incidents entraînant une pollution dans cette région ne mettent pas uniquement en danger l'environnement lui-même, ils ont un impact sur les moyens d'existence de quelque quatre millions d'habitants.*

Bien que la pollution de l'environnement marin soit prévue par plusieurs conventions internationales, le règlement sur la responsabilité civile dans ce contexte est plutôt rare —en particulier sur les sujets au-delà de la pollution pétrolière causée directement par des navires—. L'idée initiale réside dans le fait que des règles de responsabilité civile peuvent avoir un effet préventif et contribuer à la protection de l'environnement marin. Cet article a pour but d'examiner les possibilités d'établir un cadre juridique spécifique de responsabilité civile pour les dommages consécutifs à la pollution de l'environnement marin dans l'Arctique. Les victimes potentielles, exposées elles aussi à ces risques, doivent avoir la possibilité d'obtenir une indemnisation au titre d'un même cadre juridique quel que soit leur pays de résidence.

Mots-clés: *pollution marine; région arctique; avenir; responsabilité civile; régime de responsabilité globale.*

ABSTRACT: *In the Arctic, global warming and the consequential decrease of sea ice facilitated new exploitation options. Additional shipping routes and easier access to natural resources mean economic benefits. At the same time, it is crucial to protect the fragile environment from detrimental hazards as it plays an important role as a regulator for the climate worldwide. Pollution incidents in the coherent marine region endanger not only the environment as such but also the livelihood of about four million people.*

While marine environmental pollution as such is addressed in many international conventions, civil liability in this regard is only scarcely regulated on international level —especially concerning issues other than vessel source oil pollution—.

Based on the idea that civil liability rules can have a preventive effect and thus contribute to the protection of the marine environment, this paper aims at examining the possibilities of establishing a comprehensive framework on civil liability for damage arising from marine pollution in the Arctic. Potential injured parties being exposed to the same risk shall also have the possibility to obtain compensation under the same set of rules, irrespectively of their country of residence.

Keywords: *marine pollution; arctic region, future, civil liability, comprehensive liability scheme.*

1. INTRODUCTION

The Arctic has throughout the years been particularly affected by climate change, warming two to three times faster than the global average[1]. In addition to that, human impact on the Arctic has significantly increased. The region is extremely vulnerable. The decrease of the sea ice provides manifold new opportunities: shipping routes, exploration and exploitation of natural resources, fisheries and tourism[2]. This may foster the economy, but at the same time it increases the risk of harming the fragile environment and consequentially causing damage to individuals and legal entities resident in the Arctic.

The Arctic consists of eight states, namely the USA, Canada, Russia, Iceland, Norway, Denmark, Sweden and Finland[3]. The first five of them are coastal states. As for Denmark, only Greenland and the Faroe Islands are situated in the Arctic and one must consider their status of autonomy. According to different reports, extensive Arctic continental shelves may be the world's largest unexplored area

[1] *https://arctic-council.org/index.php/en/our-work2/8-news-and-events/498-aemm-article-02*.

[2] Stephens, T., and Van der Zwáag, D. L. (2014), *Polar Oceans Governance in an Era of Environmental Change*, 5, 59, 60.

[3] *https://eeas.europa.eu/headquarters/headquarters-homepage/20956/arctic-short-introduction_en*.

of petroleum deposits[4]. An estimated 13% of the world's oil reserves and an estimated 30% of the gas reserves are supposed to be there[5].

Different types of pollution are threatening the Arctic. It has been stated that the Arctic serves as «a sink» for global pollutants despite being remote from both industrial and agricultural regions[6]. Vessel-source pollution, particularly oil pollution and the dumping of waste, is probably the biggest threat, be it from cargo ships or ships used for tourism. Oil pollution is also the type of contamination that has been most closely regulated on international level. Lately also the pollution of the Arctic with microplastics has caught public attention. In April 2018, researchers discovered record amounts of microplastics in Arctic sea ice. Some scientific models even predict a sixth garbage patch to be developing in the Barents Sea between Novaya Semlya, Franz Josef Land and Svalbard[7]. A potential threat in the future is pollution from hydrocarbon exploration and exploitation. The noxious substances in the ocean also accumulate in the food chain. This leads to the fact that indigenous people are among the most contaminated on earth[8].

As the Arctic Ocean is a large marine area with several adjacent states, one must also consider the problem of transboundary pollution. The currents in the ocean distribute spilled oil, waste and other debris to places far away from where the pollution was induced. Cases of transboundary pollution raise a number of questions, for instance concerning the country of jurisdiction, the applicable law and the remedies available to the injured parties[9].

This paper discusses the need for a comprehensive liability scheme for cases of damage arising from marine environmental pollution for the Arctic in order to grant the same level of legal protection for potential injured parties in the entire region.

The legal regulation of the consequences of marine pollution in the Arctic is particularly important also because of the general remoteness of the region. In case of a harmful event, it takes much longer to deploy pollution response infrastructure and due to the climatic conditions, the clean-up will also take much longer than in less remote areas as for instance the Baltic Sea or the Mediterranean Sea.

The structure of this contribution will be the following: After pointing out some generalities and challenges with regard to the adoption of a framework on civil liability for damage resulting from marine pollution in the Arctic, introduce

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[4] Bankes, N. (2016), «The Regime for Transboundary Hydrocarbon Deposits in the Maritime Delimitation Treaties and Other Related Agreements of Arctic Coastal States», *Ocean Development and International Law*, 47, 142.

[5] Hossain, K. (2016), «A new legal regime for the protection of Arctic marine biodiversity in the ABNJ?», *ArCticles*, 2/2016, 2.

[6] *http://sciencenordic.com/thousands-plastic-pieces-are-floating-towards-arctic*.

[7] *http://sciencenordic.com/thousands-plastic-pieces-are-floating-towards-arctic*.

[8] Zacharias, M., *Marine Policy*, 261.

[9] Faure, M. G., and Ying, S. (eds.) (2018), *China and international environmental liability: legal remedies for transboundary pollution,* 1.

a number of international principles and frameworks as well as EU law that could contain relevant ideas. In the following sections, policy makers that might play an important role for its establishment will be presented as well as options for its implementation.

2. CHALLENGES

On the road towards a comprehensive civil liability regime concerning damage arising from marine environmental pollution, one will face several challenges:

The Arctic consists of eight countries which also means eight different legal systems. Plus, the relationship between some of the countries is not free of conflicts. In the past, particularly the borders between some of the countries were disputed. For instance, Norway and Russia had for more than 30 years been arguing about their EEZs. In the border region between the two countries there are both fish stocks and natural resources. Canada and Denmark had a dispute concerning their continental shelves and Denmark and Iceland argued about the continental shelf and a fisheries zone[10]. Some boundary disputes are still going on between Arctic states. The United States and Canada keep arguing about the maritime boundary in the Beaufort Sea. As a compromise, neither state authorises hydrocarbon exploration in the area. Canada and Denmark still dispute the ownership of Hans Island between Northwest Greenland and Ellesmere Island[11]. These disputes could possibly affect negotiations on a regime on civil liability, should such negotiations take place.

A significant part of the Arctic Ocean consists of areas beyond national jurisdiction. The principle of the freedom of the high seas dates back to Roman Law according to which the sea was classified as common property. In the 20th century, the concept was implemented into the LOSC[12]. This means, that every State has the right to free access to the high seas and to the enjoyment of resources. According to Art. 87 of the LOSC Convention, the freedom of the high seas includes the freedom of navigation, the freedom of overflight, the freedom to lay submarine cables and pipelines, to construct artificial islands and other installations, the freedom of fishing and the freedom of scientific research. However, given the technical developments and the consequences that these developments have for the marine environment, the freedom of the high seas can no longer be granted unconditionally. All of the activities mentioned in Art. 87 may cause damage to the marine environment. The LOSC contains the obligation of State parties to protect and preserve the marine environment which can limit the above-mentioned freedoms. The need to further limit the freedom of the high seas has been acknowledged al-

[10] Rothwell, D.; Oude Elferink, A. G.; Scott, K. N., and Stephens, T. (eds.) (2015), *The Oxford Handbook of the Law of the Sea*, 729.

[11] *Ibid.,* 731.

[12] Young, M. (2016), «Then and Now: Reappraising Freedom of the Seas in Modern Law of the Sea Ocean», *Development and International Law*, 47, 165.

ready for the protection of marine biodiversity in ABNJ as the United Nations are working towards the adoption of a legally binding treaty by 2020[13]. A regime on civil liability for damage arising from marine pollution would also contribute to the protection of marine biodiversity.

Furthermore, there are colliding interests that need to be balanced. As mentioned above, the new possibilities generated by the decrease of the Arctic sea ice promise to be beneficiary to economy. Companies but also residents of the region are likely to have an interest in profiting from the new economic perspectives. The counterpart of the economic interests is the need for an adequate protection of the fragile environment.

3. REGULATORY FRAMEWORKS AND PRINCIPLES DEALING WITH MARINE ENVIRONMENTAL POLLUTION

Marine environmental pollution is addressed by several international conventions. The most relevant ones in relation to the topic of this article will be examined here. In addition, also the polluter pays principle plays an important role as it is cited by some of the frameworks.

3.1. Polluter pays principle

The polluter pays principle (PPP)[14] was originally an economic principle dealing with the internalisation of the costs of pollution[15]. Formulated in the early 1970s, it is today one of the pillars of EU environmental policy and implemented in Art. 191 (2) TFEU.

The formulation of the principle differs according to the respective language in which it is used. According to the English version «the polluter should pay», in other languages, «the polluter pays» and in German it is about the principle of causation.

The PPP was never precisely defined on EU level, and in international environmental law there are various definitions[16]. Although the principle is quoted in EU directives and international conventions, it is not further specified[17]. It is not

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[13] Wright, G.; Rochette, J.; Gjerde, K., and Seeger, I. (2018), «The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction», *IDDRI Study,* nº 8/18, August, *https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Etude/20180830-The%20long%20and%20winding%20road.pdf*.

[14] The polluter pays principle is presented in further detail in the contribution «Towards a Harmonised European Regime of Civil Liability for Damage arising from Marine Pollution», in Chapter XX of this volume.

[15] Cohendet, M.-A., *et al* (2016), *Droit de l'Environnement*, 197.

[16] De Sadeleer, N. (2012), *The Polluter Pays Principle in EU law - Bold Case Law and Poor Harmonization*, 407.

[17] Lindhout, P. E., and van den Broek, B. (2014), «The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice», *Utrecht Law Review*, 10, 46.

a liability rule but it has been taken as an argument in favour of a strict liability regime in legislative proposals of the EU Commission[18].

There are different definitions for the main terms «polluter» and «pollution». According to one definition, polluters are those who directly or indirectly damage the environment or those who create conditions leading to such damage[19]. They must bear the costs of the measures necessary to restore the environment. The ECJ defined polluters as those who contribute to the risk of pollution by means of the activity they engaged in[20]. And according to the OECD, polluters are people engaging in activities that contaminate the environment[21]. In the 1992 Rio Declaration the wording was that the polluter should «in principle» bear the cost of pollution[22]. But further on, also the Rio Declaration addresses the States regarding the creation of liability rules protecting the victims of pollution and does not contain specific rules by itself[23].

Given the fact that the polluter-pays principle has previously been used to justify liability rules, it could —provided that it will be further clarified— at least serve as a basis for liability rules.

3.2. International conventions

3.2.1. United Nations' Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (LOSC) is the overarching framework concerning the seas. At the same time, it is one of the most influential environmental agreements that have been concluded, counting more than 160 contracting parties[24]. A significant part of what had been customary law for most of the time has been codified in the convention[25].

In Art. 1 (4), pollution of the marine environment is defined as «the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, 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». This is an open concept suitable to include pollution from any kind of source[26].

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[18] De Sadeleer, N. (2002), *Environmental Principles - From Political Slogans to Legal Rules*, 30.

[19] *Ibid.,* 28.

[20] See ECJ Commune de Mesquer, case C-188/07; Mossoux, Y. (2012), «L'application du principe du pollueur- payeur à la gestion du risque environnemental et à la mutualisation des couts de la pollution», *Lex Electronica*, 17, 2.

[21] Schwartz, P. (2010), «The Polluter Pays Principle», in Fitzmaurice, M.; Ong, D. M., and Merkouris, P. (eds.), *Research Handbook on International Environmental Law*, 247.

[22] *Ibid.,* 243.

[23] Viñuales, J. E. (ed.) (2015), *The Rio Declaration on Environment and Development: A Commentary*, principle 13.

[24] Sands, P., and Peel, J. (2012), *Principles of International Environmental Law*, 350.

[25] Beurier, J.-P. (ed.) (2014), *Droits Maritimes*, 81.

[26] Rothwell, D., and Stephens, T. (2016), *The International Law of the Sea*, 370.

Further on, part XII of the convention deals with the protection and preservation of the marine environment. According to Art. 192, states are obliged to protect and to preserve the marine environment. Further on, Art. 194 obliges the contracting parties to prevent, reduce and control pollution of the marine environment from any source, and they are also obliged to cooperate on this matter and to elaborate international rules and standards[27]. The obligation to prevent, reduce and control pollution of the marine environment is elaborated in a more detailed way concerning different sources of pollution, including the obligation to adopt corresponding laws[28]. The prevailing approach nowadays is that pollution damaging the marine environment should be prohibited. Art. 235 refers to the State parties' responsibility to fulfil their international obligations regarding the protection and preservation of the marine environment and States that they shall be liable in accordance with international law. Furthermore, they must, according to the national legal systems, ensure the availability of compensation for damage caused by the pollution of the marine environment by individuals and legal entities.

However, liability for pollution damage is not regulated in detail in the convention. Individuals and legal entities are in Art. 235 referred to as polluters but not as potential injured parties. In general, the addressees of the framework are the State parties and not individuals or legal entities. The fact that people hardly play any role in the Convention also gave rise to criticism[29].

3.2.2. CLC Convention

The CLC Convention was adopted in 1969 after Torrey Canyon[30] disaster. At the same time, also the Convention on the IOPC Fund was adopted, which establishes a fund to pay compensation in cases where the amount available under the CLC regime is not sufficient. In general, such accidental oil spills make only 10% of the overall oil contamination per year. The vast majority of oil being spilled into the seas comes from the normal operation of the vessel like oil in bilge and ballast water or oil being discharged in the course of the cleaning of the tanks[31]. The framework applies to ships constructed or adapted for the carriage of oil in bulk as cargo[32]. It contains a compulsory insurance system which allows damages claims to be raised directly against the insurer[33].

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[27] See UNCLOS, Art. 197.

[28] See UNCLOS, Arts. 207-212.

[29] Papanicolopulu, I. (2012), «The Law of the Sea Convention: No Place for Persons?», *The International Journal of Marine and Coastal Law*, 27, 868.

[30] The Torrey Canyon, a Liberian oil tanker, broke in two off the coast of Cornwall in 1967, spilling more than 100,000 tons of crude oil into the sea and polluting both the British and the French coast. See Oil Spill, Encyclopaedia Britannica via *https://www.britannica.com/science/oil-spill#ref1085819*.

[31] Rothwell, D., and Stephens, T. (2016), *The International Law of the Sea*, 367.

[32] Soyer, B., and Trettenborn, A. (eds.) (2012), *Pollution at Sea: Law and Liability*, 28.

[33] Maes, F. (ed.) (2005), *Marine Resource Damage Assessment*, 59, 60.

According to Art. 3 of the CLC, the registered ship owner is liable for damage caused by the escape of oil[34]. Neither the operator of the ship nor the owner of the oil cargo can be held liable[35].

The convention applies to damage caused on the territory, the territorial sea and the EEZ —or 200 nautical miles from the territorial sea baselines in case a coastal State has not claimed any EEZ— of State parties. Pollution damage under the scope of the CLC regime means loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil[36]. The Convention as such does not cover pure economic loss, but under the scope of the IOPC Funds Executive it has become common practice to pay compensation for it[37].

The CLC Convention contains furthermore a cap to liability, linked to the tonnage of the respective ships. For the current 2000 Protocol, the caps have been raised as compared to the 1969 and 1992 version. The CLC/IOPC fund system has been criticised, as the fund refused to pay for environmental damage, even though it is not excluded under the CLC convention[38]. With the 1992 Protocol, liability was extended to ecological damage, however, it is limited to «reasonable costs». Particularly in this context, it is difficult or impossible to determine to which extent restoration costs are actually reasonable. Marine flora and fauna usually do not have a market price. In addition, depending on the kind of damage, an actual restoration might not even be possible. The repeated raise of the liability caps led to the question if liability should be capped at all. An argument brought forward in favour of abolishing liability caps is that it might lower the ship owners' incentives to take preventive measures as according to the economic analysis of law[39].

3.2.3. MARPOL

The MARPOL Convention contains a comprehensive set of rules and standards which aims at completely eliminating intentional pollution of the marine environment by oil and other harmful substances as well as the minimisation of accidental discharges of such substances[40].

MARPOL nowadays counts more than 150 contracting parties. The different types of pollution are regulated in the six annexes to the Convention.

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[34] Sands, P., and Peel, J. (2012), *Principles of International Environmental Law*, 746.

[35] Rothwell, D., and Stephens, T. (2016), *The International Law of the Sea*, 396.

[36] *Ibid.,* 396.

[37] Soyer, B., and Trettenborn, A. (eds.) (2012), *Pollution at Sea: Law and Liability*, 6.

[38] Faure, M., and Wang, H. (2003), «The International Regimes for the Compensation of Oil-Pollution Damage: Are they Effective?», *Review of European, Comparative and International Environmental Law*, 12, 246.

[39] *Ibid.,* 249.

[40] *http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx.*

The Convention implements a very wide notion of the terms «ship» «harmful substances» and «discharge». According to Art. 2 (2), harmful substance means «any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the present Convention». A ship is pursuant to Art. 2 (4) «a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms». Discharge is defined in Art. 2 (3) as «any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying». Discharge coming from dumping, exploration and exploitation of the seabed and legitimate scientific research is not included under the scope[41].

The wide definitions, particularly of the harmful substances, show that the convention wants to prevent not only environmental damage as such but also consequential damage. MARPOL furthermore provides for sanctions to be established in the national jurisdictions[42]. The sanctions established pursuant to MARPOL are of punitive character[43] and do not establish any civil liability regime.

3.2.4. HNS Convention

The HNS Convention was first adopted in 1996 by the IMO and the current version is the 2010 protocol. A corresponding convention concerning a compensation fund was also implemented. The convention is not in force yet as it requires minimum 12 ratifications.

In 2017, the EU Council adopted a decision on the ratification and accession of the Member States to the HNS convention with the exception of aspects concerning judicial cooperation in civil matters. Member States are authorised and encouraged to access the convention[44]. So far, a total of eight countries have ratified the HNS convention, five of them are EU Member States.

The HNS Convention refers to pollution caused in the course of the transport of hazardous and noxious substances by sea, that means while the substances are on the ship. It mostly follows the concept of the above presented CLC Convention. For the determination of hazardous and noxious substances, the HNS Convention refers to other conventions and frameworks, for instance MARPOL, the Interna-

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[41] Rothwell, D., and Stephens, T. (2016), *The International Law of the Sea*, 377.

[42] Kopela, S. (2011), «Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: The Erika Case», *RECIEL,* 20, 314.

[43] *Ibid.,* 316.

[44] Council Decision (EU) 2017/769 on the ratification and accession by Member States, in the interest of the European Union, to the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, with the exception of the aspects related to judicial cooperation in civil matters, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0769&from=EN*.

tional Maritime Dangerous Goods Code or the Code of Safe Practice for Dangerous Goods[45]. The ship owner will be strictly liable for any damage caused related to the carriage of hazardous and noxious substances.

In comparison with the CLC Convention, the HNS Convention has a wider understanding of the term «ship». According to its Art. 1.1, a ship is any seagoing vessel or any seaborne craft whatsoever.

The HNS Convention features a relatively wide definition of damage. It covers pollution damage caused to the environment per se, and also loss of life and bodily harm both on board and outside the ship, property damage outside the ship as well as economic loss resulting from environmental pollution, for example in the fisheries or tourism sectors. The damage must be a consequence of the hazardous and noxious character of the substance.

The convention does not explicitly provide for the recoverability of pure economic loss. According to the interpretation provided by the governing bodies of the IOPC Funds, claims for pure economic loss are admissible under certain conditions: there must be a sufficiently close link between the pollution and the loss[46].

In addition to the exoneration grounds provided under the scope of the CLC Convention, the ship owner is exempt from liability, if the shipper or any other person failed to furnish information concerning the hazardous and noxious properties of the substances transported and this led to the damage fully or in part or made the owner refrain from taking out liability insurance. Contributory negligence by an injured party is only taken into account in relation to that particular party but not in relation to other victims[47]. If more than one ship is involved in a pollution incident, the ship owners are jointly and severally liable.

3.2.5. OSPAR Convention

The OSPAR Convention on the Protection of the Marine Environment of the North-East Atlantic aims at preventing and eliminating pollution in order to protect marine ecosystems and human health[48]. It replaces the Oslo and Paris Conventions and covers all human activities that might adversely affect the marine environment of the North-East Atlantic, except fisheries[49]. The OSPAR Convention has 15 contracting parties, among them all of the 5 European Arctic States, *i. e.,* Denmark, Sweden, Finland, Iceland and Norway[50]. The framework attempts to regulate all sources of marine pollution, namely pollution from land-based sources, dumping

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[45] Soyer, B., and Trettenborn, A. (eds.) (2012), *Pollution at Sea: Law and Liability*, 26.

[46] *Ibid.,* 32.

[47] *Ibid.,* 34.

[48] *http://ec.europa.eu/environment/marine/international-cooperation/regional-sea-onventions/ospar/index_en.htm.*

[49] *https://www.ospar.org/convention.*

[50] *https://www.ospar.org/about.*

and incineration, and offshore sources. Pollution shall be eliminated, and the impaired marine environment shall be restored[51]. The term of pollution has almost the same definition as in the LOSC. According to Art. 2 of the Convention, contracting parties shall apply the polluter pays principle so that the polluter must bear the costs of pollution prevention, control and reduction measures.

In general, the convention refers to the contracting parties and not to private actors, so that no liability rules are established by the framework.

4. EU LAW

Although EU law is not directly applicable to Arctic marine waters, at least three instruments should be looked at: The already above-mentioned Environmental Liability Directive, the Offshore Safety Directive and the Directive on Ship Source pollution.

4.1. The Environmental Liability Directive

The Environmental Liability Directive was adopted in 2004 as a reaction to the oil tanker accidents of Erika and Prestige. Before the adoption of this directive, the position of the EU was that international conventions provide for better regulation of pollution incidents and therefore relied on the Member States to ratify these treaties. The EU changed its approach due to the impression that there was a lack of international monitoring and that the IMO had no actual auditing authority[52]. By its name, the directive suggests that it establishes a regime on environmental liability for the EU. Yet, a closer look at it reveals that it is in fact an administrative framework which focuses on the relationship between the polluter and the public authorities[53]. The polluter, or operator as in general under the scope of Art. 2(6) of the Environmental Liability Directive, is obliged to take certain preventive and remedial measures related to environmental damage and to bear the costs of these measures[54]. And the authorities are the ones responsible to ensure that the operators take or finance the necessary measures[55]. A claim for injured parties is explicitly excluded in Art. 3 of the Directive so that these claims depend on the respective national laws[56]. Individuals or legal entities are only entitled to submit requests to the competent authority to take actions. Furthermore, according to its

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[51] Sands, P., and Peel, J. (2012), *Principles of International Environmental Law*, 360-361.

[52] Noussia, K., «Environmental Pollution Liability and Insurance Law Ramifications in Light of the Deepwater Horizon Oil Spill», 149.

[53] Bergkamp, L., and Goldsmith, B. J. (2013), *The EU Environmental Liability Directive - A Commentary*, 37/38; Cooreman, B., *The Macondo Oil Spill: blessing in disguise for an environmental-friendly future of European waters? Environmental Liability for Offshore Oil Drilling in the EU*, 5.

[54] Soyer, B., and Trettenborn, A. (eds.) (2012), *Pollution at Sea: Law and Liability*, 162.

[55] Noussia, K., *Environmental Pollution Liability and Insurance Law Ramifications in Light of the Deepwater Horizon Oil Spill,* 149.

[56] Krämer, L. (2011), *EU Environmental Law*, 174.

Art. 4 (2), the directive does not apply to incidents to which for instance the CLC Convention is applicable. This provision is surprising considering the fact that the Environmental Liability Directive was adopted as there was considered to be a lack of monitoring in relation to the IMO frameworks.

Critics question the effectivity of the directive as it only establishes minimum harmonization. The Member States can either implement stricter rules or take advantage of their margin of discretion to give it less impact[57].

4.2. The Offshore Safety Directive

The Offshore Safety Directive was enacted in 2013 as a reaction on the Deepwater Horizon blowout[58]. With its entry into force, the scope of application of the Environmental Liability Directive was extended from coastal waters up to one nautical mile from the shore baseline to all EU marine waters except for the high seas[59]. The Offshore Safety Directive deals primarily with health and safety at offshore installations. It contains one provision concerning liability for environmental damage in Art. 7: «Without prejudice to the existing scope of liability relating to the prevention and remediation of environmental damage pursuant to Directive 2004/35/EC, Member States shall ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in that Directive, caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator». The Offshore Safety Directive therefore follows the administrative concept of the Environmental Liability Directive. Pursuant to Art. 4 (2) lit c of the Directive, when granting licenses, Member States shall ensure that the licensee is financially capable to «cover liabilities potentially deriving from the offshore oil and gas operations in question including liability for potential economic damages where such liability is provided for by national law». Just like under the scope of the Environmental Liability Directive, reference is made to the Member States' obligation and to national laws.

4.3. The Directive on Ship-Source Pollution

The Directive on Ship-Source Pollution[60] was first enacted in 2005 and amended in 2009[61], and according to its Art. 1, it implements international standards on

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[57] De Smedt, K. (2009), «Is Harmonization always effective? The Implementation of the Environmental Liability Directive», *European Energy and Environmental Law Review* 2009, 2; Bergkamp, L., and Goldsmith, B. J. (eds.) (2013), *The EU Environmental Liability Directive - A Commentary*, 16.

[58] Consideration 5 of the Offshore Safety Directive.

[59] See Environmental Liability Directive, Art. 2, nº 5 and Water Framework Directive, Art. 2, nº 7, *http://ec.europa.eu/environment/legal/liability/*.

[60] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements.

[61] Directive 2009/123/EC.

vessel-source pollution into EU law. Member States are free to enact stricter standards though. The Ship-Source Pollution Directive applies to any kind of ship, except war ships, irrespective of its flag. The territorial scope covers the Member States' territorial seas and EEZ and equivalent zones established in accordance with international law. In addition, it also applies to straits used for international navigation when a Member State has jurisdiction over it as well as to the high seas[62]. Any discharge performed intentionally, recklessly or negligently are considered infringements[63].

The Directive gave rise to criticism alleging that it was incompatible with MARPOL and the LOSC. As opposed to MARPOL, in the Directive on Ship-Source Pollution no distinction is made between operational and accidental discharges. Also, the group of potentially liable persons is much larger than under the scope of MARPOL, extending to owners, masters and even crew members, *i. e.,* basically everyone sharing some responsibility for the incident[64].

An argument for this approach is provided in consideration (7) stating that «neither the international regime for the civil liability and compensation of oil pollution nor that relating to pollution by other hazardous or noxious substances provides sufficient dissuasive effects to discourage the parties involved in the transport of hazardous cargoes by sea from engaging in substandard practices; the required dissuasive effects can only be achieved through the introduction of penalties applying to any person who causes or contributes to marine pollution». This approach is indeed criticisable as for instance crew members and other inferior persons mainly follow the orders of ship owner or the owner of the cargo.

In general, the sanctions established under this directive have a penal character and cannot be linked to civil liability.

5. RELEVANT POLICIES AND POLICY MAKERS

Different policies can influence negotiations with regard to the adoption of a civil liability framework for the Arctic. Three examples worth taking a closer look at are the EU Arctic Policy, the external dimension of EU law and the Arctic Council.

5.1. EU Arctic Policy

An important factor is the EU Arctic Policy. Adopted in April 2016, the policy shall serve as means of complying with the EU's duty to protect the Arctic environment and to foster ecosystem resilience.

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[62] See Art. 3 of Directive 2005/35/EC.

[63] Farmer, A. M. (ed.) *Manual of European Environmental Policy*, 4.

[64] Soyer, B., and Trettenborn, A. (eds.) *Pollution at Sea: Law and Liability,* 258-259.

In general, the EU engages in sustainable development of the Arctic environment. This means, among others, the fostering of green and blue economy including sustainable ocean governance. Three EU Member States, namely Denmark, Finland and Sweden are also Arctic Council Members. The Arctic countries Norway and Iceland are members of the European Economic Area[65]. The EU also imports a significant number of resources and goods from the Arctic region so that several EU laws and policies can have an effect upon the region and the people living there[66]. However, none of the EU Member States is an Arctic coastal State. The EU as such is an ad hoc observer in the Arctic Council[67].

Within the scope of the Arctic Policy, the EU commits to contribute to the protection of the environment in the Arctic. This includes the encouragement to respect the provisions of UNCLOS and the obligation to protect the Arctic marine environment[68]. Another point relevant for the perspectives to implement a comprehensive liability scheme is the cooperation with Member States as well as with OSPAR Convention stakeholders.

5.2. The external dimension of EU law

With regard to the idea of establishing a comprehensive civil liability scheme for the Arctic, one may ask the question if and to what extent one could apply EU standards and policies to the region.

In the European Union, there is a tradition of harmonising and unifying parts of law. To be considered, particularly in relation to the sea and the environment, are the Integrated Marine Policy, the Common Fisheries Policy, the Environmental Liability Directive and the Offshore Safety Directive.

Academics have been thoroughly discussing the external dimension of EU law and the rise of the EU as a global regulatory power. So far, the EU already successfully used market access as a tool to implement its often-demanding standards abroad[69]. The EU only rarely enacts genuine extraterritorial legislative acts. By contrast, it rather applies a concept called territorial extension.

In general, it is acknowledged that international law, EU law and private law have overlapping scopes. The external competence of the EU has for instance been recognised for the field of the Brussels Regulation already in 2006 in the course of the Lugano opinion delivered by the CJEU. The EU is also entitled to adopt external regulatory measures in order to foster the objectives of the internal market[70].

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[65] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN:2016:0021:FIN*.

[66] *https://ec.europa.eu/environment/efe/themes/climate-action/integrated-eu-policy-arctic_en*.

[67] Koivurova, T.; Molenaar, E. J., and VanderZwaag, D. L. (2008), «Canada, the EU, and Arctic Ocean governance: a tangled and shifting seascape and future directions», *Transnational Law and Policy*, 261.

[68] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN:2016:0021:FIN*.

[69] Scott, J. (2014), «Extraterritoriality and Territorial Extension in EU Law», *AmJCompL*, 62, 88.

[70] Micklitz, H.-W., and Cremona, M. (2016), *Private Law in the External Relations of the EU*, 3.

The EU's tendency to influence third countries through both unilateral regulatory action as well as by means of participation in regional, bilateral and multilateral agreements has been called the Brussels effect. Also in the field of environmental regulation, the EU has already achieved a strong and active position[71].

By either influencing the Member States that are Arctic Council Members or by directly using its position in the Arctic Council, the EU might be able to impose its standards in case of future negotiations on liability rules for the Arctic.

5.3. Arctic Council/PAME

When working towards a comprehensive legal framework concerning civil liability for damage arising from the pollution of the Arctic marine environment, the Arctic Council should play an important role. It was established in 1996 by a non-legally binding declaration. Its members are the eight Arctic States, six organisations of indigenous people as permanent participants as well as several observers. Among the observers are 12 non-Arctic countries, as for instance China, Singapore, India, Germany and France[72]. Even though the body has no competence to implement legal frameworks, it is an intergovernmental forum designed to promote cooperation, coordination and interaction between the Arctic States. For instance, in October 2018, the ministers of the environment of the Arctic States gathered in Rovaniemi, Finland, to explore common solutions for the Arctic environment and to talk about future cooperation[73]. Within the Arctic Council, the working group on Protection of the Arctic Marine Environment (PAME) deals with policy measures and other measures related to the conservation and sustainable use of the Arctic marine and coastal environment[74]. Pan-Arctic cooperation has only existed for a bit more than 30 years[75]. The PAME Working Group is even older than the Arctic Council itself as in 1991 an agreement on an Arctic Environmental Protection Strategy (AEPS) was concluded by the eight Arctic States, aiming at developing and implementing a common environmental strategy, initiating environmental cooperation in new fields, making necessary recommendations to protect the Arctic environment, improving existing environmental regimes and at assessing and reporting on progress on the actions agreed on. The PAME Working Group was one of four working groups under the scope of this agreement[76]. Its efforts are based on the concept of ecosystem-based man-

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[71] *Ibid.*, 5-6.

[72] Rothwell, D.; Oude Elferink, A. G.; Scott, K. N., and Stephens, T. (eds.) (2015), *The Oxford Handbook of the Law of the Sea*, 735.

[73] *https://arctic-council.org/index.php/en/our-work2/8-news-and-events/497-aemm-article-01*; *https://arctic-council.org/index.php/en/our-work2/8-news-and-events/498-aemm-article-02*.

[74] *https://www.pame.is/index.php/projects/arctic-marine-pollution*.

[75] Koivurova, T.; Molenaar, E. J., and VanderZwaag, D. L. (2008), «Canada, the EU, and Arctic Ocean governance: a tangled and shifting seascape and future directions», *Transnational Law and Policy*, 259.

[76] Pedersen, T. (2012), «Debates over the Role of the Arctic Council», *Ocean Development and International Law*, 43, 147.

agement. An ecosystem approach expert group was established already in 2007. In 1998, the Arctic Council Ministers adopted a regional programme of action for the protection of the Arctic Marine Environment from land-based Activities. The Arctic Marine Strategic Plan promotes a framework for the protection of the Arctic Marine and Coastal environment[77]. In 2008, the five Arctic coastal States held in the Ilulissat Declaration that the law of the sea provides sufficient governance for the Arctic and that a new comprehensive international framework was not necessary[78]. Given the way the environmental conditions have changed in the past 10 years —and not for the better— it is questionable whether the same decision would be taken today. In addition, a framework as proposed here would only regulate one set of legal questions. Even though the Arctic Council has no actual legislative competence, it might be a forum to collaborate towards the adoption of a civil liability regime.

6. IMPLEMENTATION OPTIONS

As regards implementation options, one can consider either hard law or soft law.

The most common form of hard law implementation would be the conclusion of a treaty between the eight Arctic States. This could for instance be done in the form of a regional seas agreement or through the establishment of a regional ocean management organisation in order to govern the areas beyond national jurisdiction. A first step in that direction could be the transformation of the Arctic Council into a treaty-based organisation[79]. In any case, the latter would be a useful measure in order to have a body that actually has regulatory competence.

In terms of soft law, one may consider the harmonisation of environmental and technical standards or integrated ocean planning initiatives for transboundary marine areas[80]. Another option is an agreement similar to OPOL[81] through which offshore companies have bound themselves to pay compensation in case of a pollution incident. Transferred to the Arctic, this could mean an agreement signed by commercial actors engaging in activities that are potentially hazardous to the marine environment.

Soft law measures could serve as a starting point for a bottom up approach. Contracting parties that fear losing their competences or even their sovereignty

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[77] *https://www.pame.is/index.php/projects/arctic-marine-pollution*.

[78] Rothwell, D.; Oude Elferink, A. G.; Scott, K. N., and Stephens, T. (eds.) (2015), *The Oxford Handbook of the Law of the Sea*, 737.

[79] Koivurova, T.; Molenaar, E. J., and VanderZwaag, D. L. (2008), «Canada, the EU, and Arctic Ocean governance: a tangled and shifting seascape and future directions», *Transnational Law and Policy*, 278.

[80] *Ibid.,* 277.

[81] *http://www.opol.org.uk/about.htm.*

would have the opportunity to see how these standards work in practice. If necessary, those non-binding instruments can be adapted in an easier way than binding agreements.

7. CONCLUSION

Given the necessity to protect the Arctic marine environment and also the Arctic residents from detrimental consequences of human activities at sea in the region, the adoption of a comprehensive regime on civil liability for damage arising from marine pollution in and for the Arctic is desirable.

The analysis of already existing international conventions shows that suitable provisions have already been implemented. Strict liability as seen in the CLC Convention or the HNS Convention is a must —otherwise the ship owners or other potentially liable parties would find ways to exonerate—.

One may consider placing liability also upon the operator of the ship, at least under certain conditions. For instance, if the operator failed to properly maintain the vessel or deliberately ignored instructions. The registered owner and the operator could be jointly and severally liable.

Essential terms like «pollution», «ship» or «harmful substance» must be defined in a wide scope, as for instance already seen under conventions like MARPOL or the LOSC, also in order to be prepared for possible new technical developments in terms of activities or substances. Like it is already common practice under the scope of the CLC/IOPC Fund regime, injured parties should be able to claim compensation for pure economic loss, provided that the loss is not too remote. Concerning cases of loss of earnings, one could possibly require proof that the claimant actually makes a living of fisheries or tourism and/or the compensation can be awarded for a limited time frame like 6 months or a year.

Some of the frameworks examined above have been enacted after a major pollution incident had happened. Given the vulnerability of the Arctic, one should consider working towards a framework on civil liability for damage arising from marine environmental pollution before there is an incident. With regard to the latest developments in terms of climate change and human activities impacting the marine environment we should not wait for too long to take appropriate measures.

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