

INTERNATIONAL LAW AND ARCTIC SHIPPING

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INTRODUCTION

Whilst the Arctic is often associated with being a hostile place for shipping, Arctic voyages of discovery are inextricably woven into the history of the Arctic and are especially associated with the major scientific expeditions of the Nineteenth and Twentieth Century.¹ Nevertheless, whilst Arctic shipping has a long history, there has been a tendency to continually underestimate its significance due to the hostility of the Arctic environment and a view that the ice-covered Arctic Ocean was

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¹ The history of the development of the Arctic, especially in North America, and the maritime dimension associated with Arctic expeditions and discovery is canvassed in SHELAGH D. GRANT, *POLAR IMPERATIVE: A HISTORY OF ARCTIC SOVEREIGNTY IN NORTH AMERICA* (2011).

not suitable for traditional surface navigation. This prevailing view of the Arctic and shipping has in recent decades been challenged on two grounds. The first is that modern technology has given ships a much greater capacity to be able to operate in polar oceans if they possess ice-strengthened hulls, or are accompanied by nuclear-powered icebreakers.² The second is that the previously impenetrable ice barrier of the Arctic Ocean is, due to the impacts of climate change, becoming thinner as a result of hard multi-year ice giving way in some parts of the Arctic to first-year ice, which is more prone to break-up during the summer, meaning that more open water is appearing across the Arctic.³

The effect of these developments has been to give greater attention to shipping throughout the Arctic, the potential for Arctic shipping to continue to grow especially as the Arctic Ocean becomes more ice free, and ultimately the legal regime for the regulation of Arctic shipping.⁴ While historically the Northwest Passage has since the 1970s been the focal point of analysis with respect to Arctic navigational rights and freedoms vis-à-vis Canada and the United States in the North American Arctic,⁵ the Bering Strait is also beginning to gain attention.⁶ The importance of the Bering Strait to Arctic navigation was highlighted by the Arctic Council in its Arctic Marine Shipping Assessment 2009 Report (AMSA Report).⁷ This Report, which sought for the first time to comprehensively assess the status of

² ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 40 (2009) [hereinafter ARCTIC COUNCIL].

³ These developments are generally outlined in Lawson W. Brigham, *The Fast-Changing Maritime Arctic*, 136 U.S. NAVAL INST. PROC. 54 (2010).

⁴ See generally Tessa Mendez, *Thin Ice, Shifting Geopolitics: The Legal Implications of Arctic Ice Melt*, 38 DENV. J. INT'L L. & POL'Y 527 (2010).

⁵ See generally Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3 (2007); Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331 (1993).

⁶ For discussion as to the increasing significance of the Bering Strait as an Arctic navigation route see generally Andrew Hartsig et al., *Arctic Bottleneck: Protecting the Bering Strait Region from Increased Vessel Traffic*, 18 OCEAN & COASTAL L.J. 35 (2012); Donald R. Rothwell, *International Straits and Trans-Arctic Navigation*, 43 OCEAN DEV. & INT'L L. 267 (2012).

⁷ ARCTIC COUNCIL, *supra* note 2 at 106-09.

Arctic shipping, gave particular attention to Arctic navigational routes and not only considered the Northwest Passage and Northeast Passage (Northern Sea Route),⁸ but also the Bering Strait, and in particular considered a number of regional future scenarios.⁹ In this respect not only did the AMSA Report highlight the navigational and strategic importance of the Bering Strait, but also the role of the US in its ongoing regulation and management.¹⁰

This focus in recent years upon Arctic shipping has also come at a time when Arctic governance has been the subject of much analysis as the Arctic Council has become more proactive in dealing with a range of Arctic issues and has begun to sponsor new Arctic agreements. During this period there has also been ongoing debate as to the adequacy of Arctic governance arrangements. Consideration has been given as to whether there is the need for an 'Arctic Treaty', not as a duplicate to the 1959 Antarctic Treaty,¹¹ but rather to provide a legal framework for the orderly development of a distinctive Arctic legal regime.¹² It can truly be said that over the last decade the Arctic has become 'globalized' as an issue area, and the governance debate is now between whether a regional response will be adequate or whether an internationalized response will be necessary.

This article will address some of these issues with a specific focus upon international law and Arctic shipping. To begin, some brief observations will be made regarding international law in the Arctic. Detailed consideration will then be given to Arctic shipping and the international legal frameworks that regulate its operations. Next, further consideration will be given to Arctic navigation and international law and the particular issues that this has raised, especially for the United States in the Northwest Passage and the Bering Strait. Concluding remarks will then be

⁸ *Id.* at 112-19.

⁹ *Id.* at 106-09.

¹⁰ ARCTIC COUNCIL, *supra* note 2, at 109.

¹¹ Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72.

¹² See generally David D. Caron, *Toward an Environmental Regime*, 24 OCEAN DEV. & INT'L L. 377, 385-87 (1993); Donald R. Rothwell, *The Arctic in International Affairs: Time for a New Regime?* 15 BROWN J. WORLD AFF. 241, 248-51 (2008); Donald R. Rothwell, *Polar Lessons for an Arctic Regime*, 29 COOPERATION & CONFLICT 55, 68-73 (1994).

made with an attempt to consider future issues for international law and Arctic shipping.

I. INTERNATIONAL LAW IN THE ARCTIC

The Arctic as a region is not exempt from the application of general international law, whether it be customary international law or treaty. In that respect, international law applies in the Arctic in the same manner as it does elsewhere around the world, including in the other polar region, Antarctica.¹³ Nevertheless, there has been something of a view that some elements of international law could not apply in the Arctic because the region was generally inaccessible and the Arctic Ocean in particular, was ice-covered, thereby making it distinctive from the world's other oceans to which the law of the sea generally applies.¹⁴ A further contrast was also drawn between the Arctic and Antarctica in that the southern polar region was the subject of its own distinctive regional treaty which had provided the foundation for the development of what has become known as the Antarctic Treaty System, which provides a distinctive regional legal regime for Antarctica whilst also interacting with the global international legal regime.¹⁵

However as the Arctic has become more accessible, there has been an acceptance that international law has just as much a role in the region as it does elsewhere, with the law of the sea in particular assuming significance given how the Arctic Ocean dominates the region.¹⁶ In this respect, it needs to be recalled that the international law of the sea has been through a process of ongoing development since the seventeenth century and over the

¹³ The author's discussion of this issue can be found outlined in more detail in DONALD R. ROTHWELL, *THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 155-61, 219-220 (1996).

¹⁴ See James Brown Scott, *Arctic Exploration and International Law*, 3 AM. J. INT'L L. 928, 939 (1909).

¹⁵ Davor Vidas, *Protecting the Polar Marine Environment: Interplay of Regulatory Frameworks*, in *PROTECTING THE POLAR MARINE ENVIRONMENT* 3, 6 (Davor Vidas ed., 2000).

¹⁶ MICHAEL BYERS, *INTERNATIONAL LAW AND THE ARCTIC*, 4-9 (2013).

past 50 years has been codified in the four Geneva Conventions of 1958,¹⁷ and then in the 1982 United Nations Convention on the Law of the Sea (LOSC).¹⁸ The LOSC, which entered into force in 1994, unquestionably creates a legal foundation for the regulation and management of the Arctic Ocean and its associated waters.¹⁹ With the exception of the United States, all of the Arctic littoral states are parties to the LOSC, and the US position is that it considers the LOSC to substantially reflect customary international law such that it adheres to its principal provisions.²⁰

The significance of the law of the sea for the Arctic is further reaffirmed by the May 2008 Ilulissat Declaration,²¹ which was issued by the five Arctic littoral states with interests over the Arctic Ocean: Canada, Denmark (Greenland), Norway, the Russian Federation, and the USA.²² The Declaration is prefaced

¹⁷ Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 606, 516 U.N.T.S. 206; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

¹⁸ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]; see also DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 1-20 (2010) (assessing the development of the modern law of the sea).

¹⁹ Louise Angélique de la Fayette, *Oceans Governance in the Arctic*, 23 INT'L J. MARINE & COASTAL L. 531, 532 (2008) (stating “[t]he . . . (LOSC) has established the international legal regime governing the division of ocean space, sovereign rights over ocean resources, protection of the marine environment and the conduct of activities in and under the Arctic Ocean.”) (footnote omitted).

²⁰ J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 639 (3rd ed. 2012).

(The Commander's Handbook on the Law of Naval Operations was developed to provide definitive guidance to U.S. operating forces. . . . It states that the [LOSC] codifies existing and emerging customary international law pertaining to navigation and overflight and, as such, is binding upon all U.S. forces operating in the maritime environment.)

²¹ The Ilulissat Declaration, 48 I.L.M. 382 (May 28, 2008) [hereinafter Ilulissat Declaration], available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

²² While Finland, Iceland, and Norway are also founding members of the Arctic Council, and as such partly comprise the “Arctic Eight,” alongside Canada, Denmark, Norway, the Russian Federation and the USA, none of these

by acknowledging that the Arctic Ocean is at the threshold of significant change. Reference is made to climate change, melting of the ice, potential impacts upon vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and potential exploitation of natural resources. The littoral Arctic States note that by virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean, they are “in a unique position to address these possibilities and challenges.”²³ The Declaration observes that “an extensive international legal framework applies to the Arctic Ocean . . . ,”²⁴ however no precise reference is made to any particular international instrument such as the LOSC. Nevertheless, the Declaration is very precise as to what it then has to say about the law of the sea, which is as follows:

[T]he law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.²⁵

Observing that

[t]his 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. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.²⁶

three states have coastlines washed by the Arctic Ocean proper, nor do they assert maritime claims into the central Arctic Ocean. BYERS, *supra* note 16, at 92-93.

²³ Ilulissat Declaration, *supra* note 21, para. 1.

²⁴ *Id.* para. 3.

²⁵ *Id.*

²⁶ *Id.* para. 4.

The Declaration goes on to identify the need for measures to protect and preserve the Arctic Ocean marine environment, safety of life at sea, and closer cooperation on these and related Arctic Ocean issues.²⁷

Other than the law of the sea, the Arctic is also subject to a host of other general and specific international law, and those that particularly deal with shipping are noted in more detail below. As such, the relevant international law dealing with sovereign title over territory applies to the terrestrial areas of the Arctic and indeed was pivotal in resolving disputes between Denmark and Norway over the status of Greenland.²⁸ Likewise, international human rights law also applies in the Arctic,²⁹ as does international environmental law including the 1946 International Convention for the Regulation of Whaling, which has specific relevance for many of the Arctic states.³⁰ In summary, the Arctic is subject to the same body of international law as that which applies globally though given the nature of the region the law of the sea has more particular relevance than may be the case elsewhere.

II. ARCTIC SHIPPING AND INTERNATIONAL LAW

The growth in Arctic shipping as outlined in the AMSA Report has increasingly shone the spotlight onto the legal regulatory framework for Arctic shipping. During the 1970s-1990s, the attention given to this issue was nearly exclusively focused on the particular legal regimes that governed navigation through the Northwest Passage, and specifically the differing views of Canada and the United States over what legal regime

²⁷ *Id.* paras. 5-6.

²⁸ Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

²⁹ BYERS, *supra* note 16, at 218, 238-40. There is a developing literature with respect to the specific human rights issues confronting the Inuit in the Arctic. See Gudmundur Alfredsson, *Arctic governance: Human Rights, Good Governance and Democracy*, 4 Y.B. POLAR L. 141-153 (2012); see also Jessie Hohmann, *Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 295, 297 (2009).

³⁰ International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74.

applied within those waters,³¹ and on the other hand the legal regulation by the USSR and Russian Federation of shipping through the Northern Sea Route.³² While the specific legal navigational regimes through those waters remain significant, recently increased attention has been given to broader issues associated with the legal regulation of Arctic shipping in the increasingly open waters of the Arctic Ocean.³³

In this respect it has been observed above that the LOSC creates the core legal framework for all activities associated with the Arctic maritime domain, and this certainly extends to include shipping. There are two central components to how the LOSC impacts upon the Arctic in this respect. The first is that the LOSC provides the basis for the assertion of the complete range of contemporary maritime zones commencing with the territorial sea (12 nautical miles),³⁴ contiguous zone (24 nautical miles),³⁵ exclusive economic zone (EEZ) (200 nautical miles),³⁶ and the continental shelf (200 nautical miles minimum with capacity for expansion to approximately 350 nautical miles).³⁷ Conterminous with the continental shelf beyond 200 nautical miles are the high seas, which also exist beyond the limits of the EEZ.³⁸ However, Article 58 of the LOSC notes that the freedoms of navigation

³¹ See, e.g., Donat Pharand, *The Northwest Passage in International Law*, 17 CAN. Y.B. INT'L L. 99, 99 (1979); Ted L. McDorman, *In the Wake of the Polar Sea Canadian Jurisdiction and the Northwest Passage*, 10 MARINE POL'Y 243, 243-44 (1986).

³² See generally R.D. BRUBAKER, *THE RUSSIAN ARCTIC STRAITS* (2005); ERIK FRANCKX, *MARITIME CLAIMS IN THE ARCTIC: CANADIAN AND RUSSIAN PERSPECTIVES* (1993) (discussing both of these issues).

³³ See generally ARCTIC COUNCIL, *supra* note 2; Aldo Chircop, *The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?*, 24 INT'L J. MARINE & COASTAL L. 355 (2009); E.J. Molenaar, *Arctic Marine Shipping: Overview of The International Legal Framework, Gaps, and Options*, 18 J. TRANSNAT'L. L. & POL'Y. 289 (2009) (discussing the legal regulations of Arctic shipping).

³⁴ LOSC, *supra* note 18, art. 3.

³⁵ *Id.* art. 33.

³⁶ *Id.* art. 57.

³⁷ *Id.* art. 76.

³⁸ *Id.* art. 86 which is the first article found in Part VII of the LOSC and which provides: "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State . . .".

and overflight referred to in Article 87 with respect to the high seas also apply within the EEZ.³⁹ These various maritime zones give Arctic coastal states sovereignty over their adjacent territorial sea, and in some cases sovereign rights mixed with specific jurisdiction over, for example, the protection and management of the marine environment.⁴⁰ The other significant dimension of the LOSC is that it provides for the recognition of navigational rights and freedoms for foreign shipping and this is particularly significant in the context of the right of innocent passage through the territorial sea,⁴¹ the right of transit passage through international straits,⁴² and the rights of high seas freedom of navigation over those areas of EEZ and continental shelf claimed by a coastal state subject to specific constraints that apply within those maritime areas.⁴³ The consequence of these dual sets of measures under the LOSC is that Arctic littoral states have been able to claim a range of maritime zones under which they have been able to enjoy certain rights and privileges, while at the same time the international community and other Arctic states have an assurance that navigational rights and freedoms can continue to be exercised throughout the Arctic, or that in some instances these rights can actually be enjoyed for the very first time as a result of the effects of climate change and the opening of the region to greater shipping opportunities.

The LOSC is not, however, a comprehensive legal framework for all shipping operations and is significantly supplemented by a separate body of international law dealing with ship-sourced marine pollution and another body of international maritime law that regulates a variety of aspects of

³⁹ *Id.* art. 58 (2) which provides: “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”

⁴⁰ *Id.* art. 234 (titled “Ice-covered areas” which gives to coastal states the capacity to adopt specific measures for the prevention, reduction and control of marine pollution from vessels in “ice-covered areas within the limits of the exclusive economic zone”); see also D.M. McRae & D.J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, 16 U. BRIT. COLUM. L. REV. 197 (1982) (discussing article 234).

⁴¹ LOSC, *supra* note 18, arts. 17-26.

⁴² *Id.* arts. 37-44.

⁴³ *Id.* arts. 58, 87.

shipping operations. The 1973 International Convention for the Prevention of Pollution from Ships (MARPOL),⁴⁴ as amended by its 1978 Protocol, provides the core legal framework regulating ship-sourced marine pollution globally. MARPOL places significant limitations on ships discharging oil and noxious substances at sea, and also regulates sewage from ships, garbage from ships, and ship-sourced air pollution.⁴⁵ The LOSC supplements these specific provisions with general mechanisms endorsing the MARPOL standards,⁴⁶ including acknowledging the rights of coastal states to enact laws and regulations with respect to marine pollution from foreign ships within the territorial sea and EEZ.⁴⁷ The 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended, is the current international legal instrument that regulates shipping operations at sea to ensure the safety of mariners.⁴⁸ SOLAS establishes a series of operational standards for all shipping to ensure safety of life at sea. A related instrument is the 1978 Convention on Standards of Training, Certification and Watchkeeping of Seafarers (STCW Convention) which is designed to ensure certification standards for crew at sea, which is also directed towards maintaining the safety of shipping.⁴⁹ In recognition of the unique maritime conditions that prevail in the polar regions, over the course of the past decade an initiative has also been underway in the International Maritime Organization (IMO) to develop a 'Polar Code' for shipping in polar waters that would encompass existing elements of the MARPOL, SOLAS and STCW, but also include specific provisions that reflect the additional challenges faced by polar shipping.⁵⁰ This initiative

⁴⁴ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 61 [hereinafter MARPOL].

⁴⁵ See *id.* annexes iv-vi.

⁴⁶ LOSC, *supra* note 18, art. 211.

⁴⁷ *Id.* arts. 21, 56(1)(b)(iii), 211.

⁴⁸ Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 277 [hereinafter SOLAS].

⁴⁹ Convention on Standards of Training, Certification and Watchkeeping for Seafarers, Dec. 1, 1978, 32 U.S.T. 5577, 1362 U.N.T.S. 2 [hereinafter STCW].

⁵⁰ Chircop, *supra* note 33, at 372-77. See also Andrea Scassola, *An International Polar Code of Navigation: Consequences and Opportunities for the Arctic*, 5 Y.B. POLAR L. (forthcoming 2013).

remains under development but there is an expectation that it will have a significant impact upon improving the overall quality of the regulation and management of Arctic shipping consistent with the existing international legal framework.⁵¹

In addition to these particular legal instruments, there remain a number of other maritime conventions that will also apply to aspects of Arctic shipping, including:

- 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs);⁵²
- 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention);⁵³
- 1990 Convention on Oil Pollution, Preparedness, Response and Cooperation (OPRC Convention).⁵⁴

Finally, it can be observed that the Arctic has in recent years witnessed the development of two new regional instruments, which have implications for shipping. In 2011, Arctic states concluded the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (Arctic SAR Agreement).⁵⁵ The Agreement, concluded within the framework of the LOSC, is also directly designed to give effect to obligations upon the Arctic Council states found in the 1979

⁵¹ Laura Boone, *International Regulation of Polar Shipping*, in *THE LAW OF THE SEA AND THE POLAR REGIONS: INTERACTIONS BETWEEN GLOBAL AND REGIONAL REGIMES* 193, 198-200 (Erik J. Molenaar, Alex G. Oude Elferink and Donald R. Rothwell eds., 2013).

⁵² Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREG].

⁵³ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 [hereinafter London Convention].

⁵⁴ *Id.* See also Molenaar, *supra* note 33, at 309-13 (assessing the significance of additional instruments for Arctic shipping).

⁵⁵ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011, available at <http://www.ifrc.org/docs/idrl/N813EN.pdf>.

Search and Rescue Convention,⁵⁶ and the 1944 Chicago Convention.⁵⁷ While similar agreements exist either bilaterally or regionally for search and rescue purposes, this Agreement is particularly notable because it is the first regional legally binding instrument of its type in the Arctic. In 2013, the Arctic states were also able to reach agreement on an Arctic Marine Oil Pollution, Preparedness, and Response Agreement,⁵⁸ which is designed to put in place more enhanced mechanisms to deal with marine environmental emergencies.

III. ARCTIC NAVIGATION AND INTERNATIONAL LAW

Within the framework of the LOSC, the most particular provisions of relevance as they relate to Arctic navigation are those that address the freedom of navigation for foreign flagged vessels as they pass through the territorial sea, international straits, the EEZ, and the high seas. Here the distinction under the law of the sea between foreign flagged vessels and vessels that are flagged to the littoral state is significant. Under national law, a littoral state can regulate as it pleases the movement of its own flagged vessels.⁵⁹ This can be undertaken not only to achieve navigational safety, but also to regulate the fishing, trading, and marine transportation activities those vessels may be engaged in and such measures can be designed to achieve certain environmental objectives if some waters are considered to be particularly environmentally sensitive.⁶⁰ With respect to foreign flagged vessels, however, the capacity of the littoral state to regulate the movement of such vessels in the territorial sea and waters that extend further out from the coastline is subject to the

⁵⁶ International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S. 11093, 1405 U.N.T.S. 97.

⁵⁷ Convention on International Civil Aviation, Nov. 7, 1944, 61 U.S.T. 1180, 15 U.N.T.S. 295.

⁵⁸ Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic, May 15, 2013, *available at* www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic.

⁵⁹ LOSC, *supra* note 18, arts. 91, 94.

⁶⁰ ARCTIC COUNCIL, *supra* note 2, at 51-53.

international law of the sea as reflected in the LOSC.⁶¹ The general principles that apply to the movement of such vessels are that they enjoy the freedom of navigation, subject to certain overarching constraints.

The principal legal navigational regime is that of innocent passage, which applies within the territorial sea. The right of innocent passage has a foundation in customary international law, the 1958 Convention on the Territorial Sea and Contiguous Zones, and is now provided for in the LOSC.⁶² Innocent passage provides for the freedom of navigation by foreign flagged vessels through the territorial sea of a coastal state provided that passage is continuous and expeditious and that the vessel does not engage in any activities that are prejudicial to the peace, good order, or security of the coastal state.⁶³ While the right of innocent passage is significant for international shipping when seeking access to a port facility, the enjoyment of navigational rights and freedoms through international straits is more critical to the exercise of the freedom of navigation and has particular significance in the Arctic.

Through the regime of innocent passage,⁶⁴ and later the regime of transit passage,⁶⁵ the law of the sea sought to accommodate the special circumstances of straits and their pivotal role as part of a maritime highway that connected adjoining oceans and high seas areas. The LOSC's regime of straits used for international navigation can be traced back to the International Court of Justice's 1949 decision in *Corfu Channel*.⁶⁶ In the absence of a multilateral convention on the law of the sea or specific treaty dealing with the Corfu Channel, which is a body of water that separates the island of Corfu from the mainland of Albania and Greece in the southern part of the Adriatic Sea, the court was required to determine the status of these waters before assessing which legal regime applied.⁶⁷ Here

⁶¹ LOSC, *supra* note 18, arts. 21, 42, 56, 58.

⁶² See ROTHWELL & STEPHENS, *supra* note 18, Ch. 10.

⁶³ LOSC, *supra* note 18, art. 19(1).

⁶⁴ Convention on the Territorial Sea and Contiguous Zone arts. 14-23, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 206.

⁶⁵ LOSC, *supra* note 18, arts. 17-32.

⁶⁶ Corfu Channel case (U.K. v. Albania), 1949 I.C.J. Reps 4, 4.

⁶⁷ *Id.* at 28-29.

the court sought to develop a legal test so as to classify a particular body of water that had the characteristics of a strait and which was also used by international shipping.⁶⁸ The court noted: “[i]n the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.”⁶⁹ The Court went on to observe that it was not “decisive” that the Corfu Channel was not a necessary route between two parts of the high seas, but only an alternative route of passage between the Aegean and Adriatic Seas. However, it noted that the Corfu Channel had nevertheless “been a useful route for international maritime traffic.”⁷⁰

The contemporary international law of the sea with respect to straits is found in Part III of the LOSC titled “Straits Used for International Navigation” and raises for consideration the characterisation of a strait used for international navigation.⁷¹ The phrase suggests both a geographical and functional element. The geographical element relates to a strait being a body of water which lies between two areas of land, either continental land masses,⁷² a continent and an island,⁷³ or two islands.⁷⁴ The functional element is clearly drawn from *Corfu Channel* where the ICJ placed emphasis on the strait being one that was “used for international navigation”⁷⁵ While there was no analysis in that case as to what volume of navigation through the strait would be required to meet the usage requirement, reference was made to the volume of navigation through the Strait between 1936-1937, which assisted the Court in determining that the Corfu Channel had been “a useful route for international

⁶⁸ *Id.* at 28.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ROTHWELL, *supra* note 13, at 237-39.

⁷² U.N. Office for Ocean Affairs and Law of the Sea, THE LAW OF THE SEA: BASELINES 50-51 (1989). An example is the Bering Strait separating continental Asia and North America.

⁷³ *Id.* The Dover Strait lies between the continent of Europe and an island comprising Great Britain.

⁷⁴ *Id.* The Cook Strait separates the North and South Island of New Zealand.

⁷⁵ *Corfu Channel*, 1949 I.C.J. at 28.

maritime traffic.”⁷⁶ Therefore, while this functional element remains a feature of the LOSC, it still remains unclear as to what level of international navigation is required for a strait to be appropriately classified as an ‘international strait’. Nevertheless, it is doubtful whether infrequent or irregular use of a strait would suffice to meet the functional criterion. Likewise, the strait must have been used by foreign flagged vessels and not only by through or cross-strait local vessel traffic. One matter in which the LOSC is silent is whether any distinction should be made between surface and sub-surface navigation of a strait. This has some particular relevance in the Arctic due to evidence of submarine navigation throughout the region, especially during the Cold War.⁷⁷ However as the LOSC does not seek to distinguish between various types of navigation there is nothing in principle that would bar sub-surface submarine navigation from also being taken into account in determining whether the strait was used for that purpose.

A. Northwest Passage⁷⁸

The Northwest Passage is a series of connected straits that weave through the islands that make up the Canadian Arctic Archipelago.⁷⁹ From the east, it allows shipping to pass from the North Atlantic up through Davis Strait through the archipelago and into the Beaufort Sea, which then provides access to the Chukchi Sea and the Bering Strait. While there are many potential navigation routes that in theory exist within the Canadian Arctic Archipelago, the reality is that, historically, due

⁷⁶ *Id.*

⁷⁷ See David W. Titley & Courtney C. St. John, *Arctic Security Considerations and the U.S. Navy’s Arctic Roadmap*, in *ARCTIC SECURITY IN AN AGE OF CLIMATE CHANGE* 267, 274-75 (James Kraska ed., 2011); Katarzyna Zysk, *Military Aspects of Russia’s Arctic Policy: Hard Power and Natural Resources*, in *ARCTIC SECURITY IN AN AGE OF CLIMATE CHANGE* 85, 91-94 (James Kraska ed., 2011). See generally W. Harriet Critchley, *Polar Deployment of Soviet Submarines*, 39 *INT’L J.* 828 (1984) (discussing incidents during the Cold War).

⁷⁸ The foundation of the analysis that follows is taken from ROTHWELL, *supra* note 13, at 191-200.

⁷⁹ BYERS, *supra* note 16, at 131.

to the presence of heavy ice and the shallow draught in some of the straits there have only been a handful of viable combinations of straits that allow for commercial shipping to pass through the Northwest Passage. Pharand has identified seven routes that have been used for transit of the Northwest Passage.⁸⁰

The status of the Northwest Passage as a shipping route had legally been relatively uncontroversial for much of the Twentieth century. This was primarily due to the lack of interest that had been shown by commercial navigation in the use of the Passage, and the challenges posed to such navigation by the ice conditions.⁸¹ While the US took an interest in the Northwest Passage during the early part of the Twentieth century, this was a lesser order issue compared to Arctic sovereignty more generally and ultimately the threat posed by the Soviet Union across the Arctic Ocean during the Cold War.⁸² This all changed in 1969 with the voyage of the US-flagged *SS Manhattan* from the Beaufort Sea through the Northwest Passage to the Davis Strait. The *Manhattan* was an icebreaking supertanker carrying a small quantity of oil that was intentionally sent through the Northwest Passage by its US owners to demonstrate that such a vessel was capable of year-round sailings between Alaska and the US east coast.⁸³ The voyage at that time was only the fifth recorded transit of the Northwest Passage, and the first since the end of World War II by a non-government vessel.⁸⁴

Despite the fact that there was a Canadian government official on board during the voyage, and that the *Manhattan* was accompanied by the Canadian Coast Guard vessel *J.A. Macdonald*,⁸⁵ the voyage raised multiple issues for the Canadian government which extended to not only the legal regulation of the voyage of a foreign flagged vessel through some parts of the

⁸⁰ Pharand, *supra* note 5, at 29-30; *see also* R.K. Headland, *Ten Decades of Transits of the Northwest Passage*, 33 POLAR GEOGRAPHY 1, 2, 11 (2010).

⁸¹ Rothwell, *supra* note 13, at 192.

⁸² GRANT, *supra* note 1, at 247-338.

⁸³ BYERS, *supra* note 16, at 134.

⁸⁴ *See* Pharand, *supra* note 4, at 31 (observing that the USCG ships *Storis*, *Spar* and *Bramble* (all icebreakers) each completed transits in 1957); *see also* T.C. Pullen, *What Price Canadian Sovereignty?*, 113 U.S. NAVAL INST. PROC. 66, 69-71 (1987) (discussing the voyage).

⁸⁵ Pullen, *supra* note 84, at 71.

Canadian territorial sea, but perhaps more significantly to the implications that the voyage had for the future development of the Northwest Passage as an international shipping route.⁸⁶ Ultimately it was the second proposed voyage of the *Manhattan*, scheduled to take place in 1970 and again accompanied by the *J.A. Macdonald*, that raised further public concerns about the status of the Northwest Passage and related fears about Canadian Arctic sovereignty which promoted a response from the Canadian government.⁸⁷ The United States was perceived, rightly or wrongly, as ignoring Canadian sovereignty by these voyages through 'Canadian waters' and public pressure grew for the Canadian government to reaffirm Canada's Arctic sovereignty and to ensure that any future voyages did not pose a threat to that sovereignty.⁸⁸ In the wake of the *Manhattan* voyage the Canadian government led by Prime Minister Pierre Trudeau adopted a number of measures including enactment of the *Arctic Waters Pollution Prevention Act*,⁸⁹ extension of the Canadian territorial sea from three to 12 nautical miles, and modification of Canada's acceptance of the compulsory jurisdiction of the International Court of Justice so as to place a bar on any attempt by the United States to challenge Canada's response before the court.⁹⁰

Canada's actions, which took place prior to the commencement of the Third United Nations Conference on the Law of the Sea, were not welcomed by the US. The Department of State asserted that "[i]nternational law provides no basis for these proposed unilateral extensions of jurisdiction[] on the high seas, and the [United States] can neither accept []or acquiesce in the assertion[s] of such jurisdiction."⁹¹ Particular concern was

⁸⁶ DONAT PHARAND, *THE LAW OF THE SEA OF THE ARCTIC WITH SPECIAL REFERENCE TO CANADA* 55-57 (1973).

⁸⁷ TED L. McDORMAN, *SALT WATER NEIGHBORS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA* 70-4 (2009)

⁸⁸ See Maxwell Cohen, *The Arctic and the National Interest*, 26 INT'L J. 52, 67-68 (1970).

⁸⁹ Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (Can.).

⁹⁰ Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice, Apr. 7, 1970, 9 I.L.M. 598, 598-99.

⁹¹ *Canadian Practice in International Law During 1970 as Reflected Mainly in Public Correspondence and Statements of the Department of*

raised as to the impact of these actions upon the freedom of navigation.⁹²

Further controversy arose over the status of the Northwest Passage between Canada and the US in 1985 when it was announced that the *USCG Polar Sea* would sail through the Passage from east to west as part of a repositioning of the vessel from Greenland to the US west coast.⁹³ At the time the US Embassy in Ottawa informed the Canadian Department of External Affairs on 21 May 1985 of the proposed voyage but did not seek permission for the voyage to take place.⁹⁴ It was observed in a *demarche* that “[t]he United States considers that this transit by the icebreaker *Polar Sea* will be an exercise of navigational rights and freedoms not requiring prior notification. The United States appreciates that Canada may not share this position.”⁹⁵

The US *demarche* was careful to state that an invitation to Canada for its officials to be “on-board participants” during the *Polar Sea* transit was not “inconsistent with its juridical position” and that Canadian “participation in the transit [would likewise] not . . . be inconsistent with its juridical position.”⁹⁶

Following a Canadian response on 11 June 1985 which made clear that the “waters of the Arctic Archipelago, including the Northwest Passage, are internal waters of Canada and fall within Canadian sovereignty,”⁹⁷ the US responded on 24 June 1985 by observing that it “does not share this view” and made clear that while it was pleased to invite Canadian participation in the transit, “it has not sought the permission of the Government of Canada, nor has it given notification of the fact of the transit.”⁹⁸ At the time the Canadian Minister for External Affairs, Joe

External Affairs, 9 CAN. Y.B. INT’L L. 276, 288 (J.A. Beesley & C.B. Bourne eds., 1971).

⁹² *Id.* at 287-88; see also Marian Nash, *Law of the Sea and International Waterways*, 2 CUMULATIVE DIGEST OF U.S. PRACTICE IN INT’L L. 1981-1988, 1728, 2042-44 (1994); ROACH & SMITH, *supra* note 20, at 319.

⁹³ BYERS, *supra* note 16, at 136.

⁹⁴ MCDORMAN, *supra* note 87, at 246-47.

⁹⁵ ROACH & SMITH, *supra* note 20, at 320.

⁹⁶ *Id.* at 321.

⁹⁷ *Id.* at 322.

⁹⁸ *Id.*; see also Nash, *supra* note 92, at 2044-49.

Clark, commented in the Canadian House of Commons that the voyage ““does not compromise in any way the sovereignty of Canada over our northern waters, or affect the quite legitimate differences of views that exist between Canada and the United States on that question.””⁹⁹ The *Polar Sea* completed its transit of the Northwest Passage between 1-11 August 1985.¹⁰⁰ However, in September 1985 and following a comprehensive review of Canadian Arctic Policy, Clark announced to the Canadian Parliament a series of six new initiatives that were designed to clarify Canada’s legal position with respect to the region.¹⁰¹ These initiatives included the declaration of straight baselines around the islands that make up the Canadian Arctic Archipelago, new legislation to enforce Canadian civil and criminal law in the waters enclosed within the baselines, and talks with the US on cooperation over Arctic waters.¹⁰²

Following the *Polar Sea* voyage, in 1988 Canada and the US concluded an Agreement on Arctic Cooperation.¹⁰³ The Agreement focuses on the shared interest of both countries in research conducted during icebreaker navigation off their Arctic coasts and commits both governments to facilitating such navigation and to share research information arising from such voyages. However, the Agreement also touches upon Northwest Passage issues and directly alludes to this when in Article 3 it provides “[t]he Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.”¹⁰⁴ In the wake of Canada’s 1985 baselines declaration, which enclosed the waters of the Northwest Passage within Canadian proclaimed baselines thereby making all of those waters internal waters,¹⁰⁵ any US

⁹⁹ 20 June 1985, PARL. DEB., H.C. (1985) 6043 (Can.).

¹⁰⁰ ROACH & SMITH, *supra* note 20, at 323-24.

¹⁰¹ 10 Sept. 1985, PARL. DEB., H.C. (1985) 6463 (Can.).

¹⁰² *Id.*

¹⁰³ Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, U.S.-Can., Jan. 11, 1988, 1852 U.N.T.S. 60. [hereinafter Agreement on Arctic Cooperation].

¹⁰⁴ *Id.*

¹⁰⁵ MCDORMAN, *supra* note 87, at 235 (“In announcing the baselines, Minister for Foreign Affairs Joe Clark stated that ‘these baselines define the

icebreaker navigation through the Northwest Passage would pass through Canadian internal waters and be caught by the apparent obligations to request Canadian consent.¹⁰⁶ However, as both Pharand and McDorman have separately noted the consent provision needs to be read in the context of how the 1988 Agreement was framed, around cooperation for the purposes of research and that as there is no right under international law for foreign vessels to conduct research within internal waters of another state, the consent provision became necessary so as to acknowledge Canada's core entitlement under international law.¹⁰⁷ Even if the US had maintained that any transit of the Northwest Passage by its Coast Guard icebreakers was in fact an exercise of transit passage through an international strait, permission would still have been required to conduct research because marine scientific research is not a right that is enjoyed by foreign flagged vessels in transit passage.¹⁰⁸ The 1988 Agreement further sought to maintain the essential position of both parties with respect to their prior interpretations of the law of the sea when in Article 4 it was provided that "[n]othing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties."¹⁰⁹ At a Press Conference involving Canadian Minister for External Affairs, Joe Clark, and the US Secretary of State, George Shultz, that followed the conclusion of the Agreement, it was apparent that both governments were of the view that their positions regarding sovereignty over the Northwest Passage, and particularly the US position as to whether consent was required

outer limit of Canada's historical internal waters.' Subsequent government statements have followed this position. The consequence is that the straight baselines delineate the Arctic waters that are historic internal waters, rather than the normal consequence of straight baselines, which is the creation of internal waters.").

¹⁰⁶ *Id.* at 237.

¹⁰⁷ *Id.* at 250; Pharand, *supra* note 4, at 39-40.

¹⁰⁸ LOSC, *supra* note 18, art. 40 (requiring foreign ships seek prior authorization to conduct marine scientific research during transit passage).

¹⁰⁹ Agreement on Arctic Cooperation, *supra* note 103, art. 4.

for transit by US military vessels, had not changed as a result of the Agreement.¹¹⁰

The first request by the US for an icebreaker transit conducted under the 1988 Agreement occurred in October 1988 when consent was sought for transit of the USCG *Polar Star*.¹¹¹ In a Note from the US Embassy in Ottawa the US expressly sought the consent of the Government of Canada for the transit during which it was made clear that marine scientific research would be conducted.¹¹² It was also made clear that the *Polar Star* would operate consistently with Canadian law, and a further offer was made that costs incurred from any discharge from the vessel would be the responsibility of the US in accordance with international law.¹¹³ Canadian consent was given for this transit, which was the first of five transits from 1988-2003.¹¹⁴

Through their reliance upon the mechanism of the 1988 Agreement, Canada and the US have effectively removed some of the public controversy that had been associated with the 1985 *Polar Sea* Northwest Passage transit and the Canadian government's response. However, formally the US government's official position on the Northwest Passage remains unchanged. A joint National Security Presidential Directive (NSPD)/Homeland Security Presidential Directive (HSPD) of January 9, 2009 titled "Arctic Region Policy"¹¹⁵ asserted that with respect to US National Security and Homeland Security Interests in the Arctic that "[f]reedom of the seas is a top national priority. The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits."¹¹⁶

¹¹⁰ ROACH & SMITH, *supra* note 20, at 324; *see also* Pharand, *supra* note 4, at 39-40; Nash, *supra* note 92, at 2049-52.

¹¹¹ ROACH & SMITH, *supra* note 20, at 325-26.

¹¹² *Id.* at 326.

¹¹³ *Id.*

¹¹⁴ Pharand, *supra* note 4, at 31-33 (those transits being by the USCGS *Polar Star* (1988, 1989, 1990) and USCGS *Healy* (2000, 2003)).

¹¹⁵ Memorandum on Arctic Region Policy, 45 WEEKLY COMP. PRES. DOC. 47 (Jan. 9, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/WCPD-2009-01-19/pdf/WCPD-2009-01-19-Pg47-2.pdf>.

¹¹⁶ *Id.* ¶ III.B.5, at 49.

More recently, the Obama Administration released the 2013 *National Strategy for the Arctic Region*,¹¹⁷ which focuses attention upon advancing US security interests in the Arctic, developing “Responsible Arctic Region Stewardship,” and strengthening international cooperation.¹¹⁸ The Strategy acknowledges the changing conditions in the Arctic, including that the Arctic Ocean is becoming more navigable, which is increasing interest in the Northwest Passage.¹¹⁹ Under the general heading of the advancing US security interests it acknowledges that the US will seek to:

Preserve Arctic Region Freedom of the Seas – The United States has a national interest in preserving all of the rights, freedoms and uses of the sea and airspace recognized under international law. We will enable prosperity and safe transit by developing and maintaining sea, under-sea, and air assets and necessary infrastructure. . . . Existing international law provides a comprehensive set of rules governing the rights, freedoms, and uses of the world’s oceans and airspace, including the Arctic. The law recognizes these rights, freedoms, and uses for commercial and military vessels and aircraft. . . . We will also encourage other nations to adhere to internationally accepted principles.¹²⁰

The Strategy goes on to identify “Guiding Principles” which are stated to include “international legal principles of freedom of navigation . . . and other uses of the sea and airspace related to these freedoms, unimpeded lawful commerce, and the peaceful resolution of disputes.”¹²¹

This analysis would suggest that the US position on the Northwest Passage remains unchanged. McDorman’s 2009 assessment of the situation therefore remains apt:

¹¹⁷ THE WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION (2013), available at http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

¹¹⁸ *Id.* at 7-10.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 6-7.

¹²¹ *Id.* at 10.

The 1988 Agreement, however, was a political fix and not a legal fix to accommodate Canada while not undermining the U.S. legal position. It is an important and instructive example of the cooperative approach that Canada and the United States frequently are able to pursue to circumvent international ocean law disputes.¹²²

One of the pivotal legal issues that arises in any analysis of the status of the Northwest Passage is whether it is possible to equate it with a single strait, or whether it is appropriate to characterize it as a series of interconnected straits. In this regard, the Northwest Passage could be considered unique as both customary international law and the LOSC has focused on the situation of a single strait, and not a series of straits that in sum comprise a navigational route from one area of the high seas/EEZ to another. Nevertheless it is not contested that the Northwest Passage meets the geographic requirement of a strait or a series of straits as reflected in decisions, such as the *Corfu Channel* case, in treaty law such as the LOSC or in customary international law.¹²³

The most significant requirement, and one that has been the principal point of contention between Canada and the US, is the functional requirement referred to in *Corfu Channel* that the strait actually be used for international navigation. Pharand's view has been that because of the low number of recorded transits of the strait it would not be possible to classify the Northwest Passage as a strait "used for international navigation".¹²⁴ This clearly raises issues as to the actual recorded number of transits that have taken place, whether distinctions should be made between historical figures and more contemporary assessments, and the percentage of transits

¹²² MCDORMAN, *supra* note 87, at 251.

¹²³ See Donat Pharand, *Sovereignty in the Arctic: The International Legal Context*, in SOVEREIGNTY AND SECURITY IN THE ARCTIC 145, 153-54 (Edgar J. Dosman ed., 1989); DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 157-58 (Cambridge Univ. Press 1988).

¹²⁴ PHARAND, *supra* note 86, at 202-14.

completed by non-Canadian flagged vessels.¹²⁵ Pharand identified 15 transits of the Northwest Passage by US flagged vessels between 1903-2005, of which only two were by non-government vessels – the *Manhattan* (1969) and an adventure yacht, the *Belvedere* (1983-1988).¹²⁶ More recent figures have indicated 18 transits of the Northwest Passage during the summer of 2010,¹²⁷ while Headland has identified 135 full transits of the Northwest Passage in the period 1903-2009.¹²⁸ Relying upon the actual use of the Northwest Passage since the first successful navigation, Pharand has maintained that the Passage is not an international strait.¹²⁹ He has argued that those who contend otherwise confuse potential use with actual use and that mere capacity is not what is required but rather actual use.¹³⁰ Nevertheless, two respected US scholars with close links to the US Department of State observed in 2012 that on the basis of the statistics on usage of the strait that “to deny, as Canada continues to do, that the Northwest Passage is not a strait used for international navigation . . . is simply not credible.”¹³¹ The US as recently as May 2013 has reasserted its position that it enjoys the freedom of navigation through the Northwest Passage.¹³² The disagreement between Canada and the US over the status of the Northwest Passage remains therefore a live issue. In recent decades both countries have reached an understanding regarding their respective positions, however as the Northwest Passage becomes increasingly ice free during the summer a point may

¹²⁵ From the time of the very first transit of the Passage in 1903-1906 by Amundsen until 2005, Pharand identified 69 foreign transits. Pharand, *supra* note 4, at 32-33.

¹²⁶ *Id.* at 31-33. The *Gjøa* was the first vessel to complete transit of the Northwest Passage between 1903-1906.

¹²⁷ ROACH & SMITH, *supra* note 20, at 478.

¹²⁸ See Headland, *supra* note 80, at 3-9.

¹²⁹ Donat Pharand, *Canada's Sovereignty over the Northwest Passage*, 10 MICH. J. INT'L L. 653, 669 (1989); PHARAND, *supra* note 86, at 225; Donat Pharand, *The Northwest Passage in International Law*, 17 CAN. Y.B. INT'L L. 99, 112-13 (1979).

¹³⁰ PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW, *supra* note 123, at 225; Pharand, *The Northwest Passage in International Law*, *supra* note 129, at 113.

¹³¹ ROACH & SMITH, *supra* note 20, at 478-79.

¹³² THE WHITE HOUSE, *supra* note 92, at 9.

eventually be reached where if the US wishes to assert its position regarding the freedom of navigation it may need to take a more robust position if it wishes to have its view upheld.

B. Bering Strait¹³³

The Bering Strait is perhaps the most strategically located of the current Arctic ‘choke points’ given its location at the northern limit of the Pacific Ocean, and the direct access that it provides between the Bering Sea and Chukchi Sea into the Arctic Ocean. Given the increase in Arctic shipping, especially along the Northern Sea Route, the Bering Strait’s significance to Arctic navigation will only continue to increase in the future, especially due to its proximity to major trading powers, such as China, Japan, and South Korea.¹³⁴ The Bering Strait will also be important if the Northwest Passage becomes a major Arctic navigation route because of the access that it provides to the Beaufort Sea for ships that are navigating west to east along the Northwest Passage en route to the US east coast and the Atlantic Ocean. The presence of six commercial ports within the Bering Strait region – three American and three Russian – located to the south of the Strait further emphasise the current and future commercial capability for shipping through the region.¹³⁵ The Bering Strait is also recognised by the US Department of Defense for its strategic importance, with a May 2011 Departmental publication acknowledging that “[a]n increase in maritime traffic between Asia and Europe, or Russia, could also raise the prominence of the Bering Strait as a strategic chokepoint and heighten the geostrategic importance of the Arctic region.”¹³⁶

¹³³ Rothwell, *supra* note 5 (discussing the Bering Strait).

¹³⁴ See U.S. COAST GUARD, ARCTIC STRATEGY 5 (2013) (citing a 118 percent increase in maritime transit through the Bering Strait from 2008-2012).

¹³⁵ ARCTIC COUNCIL, *supra* note 2, at 108 (identifying the specific US ports of Nome, Kotzebue and the DeLong Mountain Transportation System port that serves Red Dog Mine; and the Russian ports of Provideniya, Anadyr, and Egvekinot).

¹³⁶ U.S. DEP’T DEF., REPORT TO CONGRESS ON ARCTIC OPERATIONS AND THE NORTHWEST PASSAGE 9 (May 2011); *see also* U.S. COAST GUARD, *supra* note 134, at 13.

1. Geographic Features

The Bering Strait is bordered by Russia to the west and the United States (Alaska) to the east and is approximately 51 miles wide. The northern approach through the Chukchi Sea is relatively wide before it gradually narrows on approach to the strait, while the southern approach has the Aleutian Islands (United States) as a barrier to the east. High seas navigation through the central Bering Sea presents no difficulties until St. Lawrence Island (United States) is reached immediately to the south of the strait proper. St. Lawrence Island straddles the southern entrance to the Bering Strait forcing shipping to route to the east or to the west between the island and the Russian mainland. The distance between the southeast point of Cape Chukoski (Russia) and Northwest Cape on St. Lawrence Island is approximately 38 nm, while the Alaskan mainland is approximately 124nm at its closest point, allowing for navigation via a high sea corridor on either side of St. Lawrence Island before the Bering Strait is entered.

At the mid-point of the strait there are two islands - Big Diomedé (Russia) and Little Diomedé (United States) - effectively creating three navigational channels:

- Bering Strait – West: which lies between the Russian mainland and Big Diomedé Island approximately 22.5 miles wide;
- Bering Strait – East: which lies between the US mainland and Little Diomedé Island approximately 22.5 miles wide; and
- The Diomedé channel:¹³⁷ which is a 2.4 nm channel separating Big Diomedé and Little Diomedé Islands.¹³⁸

¹³⁷ There does not appear to be an official name for the body of water that separates the two islands, other than that the waters fall within the Bering Strait, accordingly for this article it is referred to as the ‘Diomedé channel’.

¹³⁸ ROACH & SMITH, *supra* note 20, at 479-80.

Bering Strait – East and Bering Strait – West are recognised by the US Navy as international straits for the purposes of the LOSC.¹³⁹

2. *Bering Strait Maritime Boundary*

The Bering Strait is the subject of a maritime boundary delimitation agreement between Russia and the United States, which extends in the south from the Bering Sea, through the Strait, into the Chukchi Sea. The 1990 Agreement between the United States of America and the Union of the Soviet Socialist Republics on the Maritime Boundary¹⁴⁰ has as its principal focus the delimitation of the respective EEZ and continental shelf areas within the region and at approximately 1600 nm in length is one of the longest maritime boundaries in the world.¹⁴¹ The 1990 Agreement mirrors some of the principal provisions embedded in the 1867 Convention ceding Alaska between Russia and the United States,¹⁴² the effect of which is that Articles 1 and 2 of the 1990 Agreement recognise the maritime boundary through the middle of the Bering Strait, and accordingly reflects the relative positions on either side of the boundary of Big Diomedé and Little Diomedé.¹⁴³

While the 1990 Agreement makes no express reference to navigational rights and freedoms in the Bering Strait, there is clear recognition that while the maritime boundary places limits upon the extent of coastal state jurisdiction,¹⁴⁴ in all other

¹³⁹ *Annotated Supplement to The Commanders Handbook on the Law of Naval Operations*, 73 INT'L LEGAL STUD. 205 (A.R. Thomas & James C. Duncan eds., 1999).

¹⁴⁰ Agreement on the Maritime Boundary, U.S.-U.S.S.R., Jun. 1, 1990, 29 I.L.M. 941 (1990) [hereinafter America-USSR Maritime Boundary].

¹⁴¹ INTERNATIONAL MARITIME BOUNDARIES 447 (Jonathan I. Charney & Lewis M. Alexander eds., vol. 1 1993).

¹⁴² Convention Ceding Alaska, U.S.-Russ., Mar. 30, 1867, 134 CONSOLIDATED TREATY SERIES 331 [hereinafter 1867 Convention].

¹⁴³ *Id.* art. 1-2. This part of the 1867 Convention also provided for the boundary between St. Lawrence Island and the Russian mainland, which passes through a midway point between the island and Cape Chukotski (Russia). Charney & Alexander, *supra* note 141, at 450-451.

¹⁴⁴ See Maritime Boundary Agreement, U.S.-U.S.S.R., art. 1, ¶ 2, June 1, 1990, 1990 U.S.T. LEXIS 234.

respects the boundary does “not affect or prejudice” the rights of either state “with respect to . . . the exercise of sovereignty, sovereign rights or jurisdiction with respect to the waters” of the area.¹⁴⁵ It is clear therefore that other than the delimitation of the maritime boundary through the Bering Strait, the 1990 Agreement has no direct impact upon the navigational regime, which applies within those waters. The 1990 Agreement has not been ratified by Russia, yet has been provisionally applied since 15 June 1990.¹⁴⁶

3. *The Bering Strait and the LOSC*

The Bering Strait meets all of the geographic requirements of a strait for the purposes of Part III of the LOSC in that it is a body of water that connects one part of the EEZ/High Seas (Bering Sea) with another part of the EEZ/High Sea (Chukchi Sea). That technically there may exist three geographic straits within the body of water known as the Bering Strait (Bering Strait – East; Bering Strait – West and the Diomedede channel) is irrelevant for the purposes of the LOSC, and there are many other international straits throughout the world which are formed by two opposite land masses within which they may be scattered small islands.¹⁴⁷ Whether the Bering Strait is one used for “international navigation” in the *Corfu Channel* sense may have been contestable in the past, but it would appear clear on the basis of current usage that the strait is certainly considered useful for international navigation. For example, the 2009 *AMSA Report* noted that “150 large commercial vessels pass through the Bering Strait during the July-October open water period, with transits of these vessels most frequent at the beginning (spring) and end of the period (autumn).”¹⁴⁸ While some caution needs to be exercised because of the usage of the strait by previously Soviet and currently Russian flagged shipping, it is clear that on current and future projections the strait will be used by many

¹⁴⁵ *Id.* art. 4.

¹⁴⁶ Charney & Alexander, *supra* note 141, at 452.

¹⁴⁷ Torres Strait (Australia/Papua New Guinea), and Singapore Strait (Singapore/Indonesia) are significant examples.

¹⁴⁸ ARCTIC COUNCIL, *supra* note 2, at 109.

ships, other than those which are Russian or US flagged.¹⁴⁹ On that basis, the Bering Strait would meet the requirements for an international strait under Part III of LOSC to which the regime of transit passage applies.¹⁵⁰

A somewhat unique feature of the Bering Strait is that international shipping has effectively two viable routes through the Strait: the “Russian route” to the west of the Diomed Islands and through the Russian territorial sea; and the “American route” to the east of the Diomed Islands and through the US territorial sea. The Diomed channel, at only 2.4 nm does not appear to be wide enough when compared to the alternate routes to be attractive to commercial shipping. There is also the dimension that the waters between the islands fall within the Russia/US maritime boundary with the effect that shipping would be subject to both Russian and US law at different times as they completed their transit.

In principle the existence of alternate American and Russian routes through the strait does not raise any significant international law issues given that the LOSC creates a set of standards which are equally applicable to each route and which are not dependent on the strait being a “one state” or “two state” strait.¹⁵¹ It does, however, highlight the fact that the United States has yet to become a party to the LOSC, and whilst US state practice has been to consistently adhere to the transit passage regime and effectively accept its status as part of customary international law,¹⁵² it still does raise the potential for

¹⁴⁹ *See id.*

¹⁵⁰ LOSC, *supra* note 18, pt. 3. The view is also endorsed by the *AMSA Report*, which states that “[t]he Bering Strait region is an international strait for navigation and a natural chokepoint for marine traffic in and out of the Arctic Ocean from the Pacific Ocean.” ARCTIC COUNCIL, *supra* note 2, at 109. For further discussion of maritime traffic in the Bering Strait see Hartsig, *supra* note 6, 46-47, 49-52.

¹⁵¹ LOSC, *supra* note 18, arts. 37-44.

¹⁵² *See* Proclamation No. 5928, 54 Fed. Reg. 777, 419 (Dec. 27, 1988) (“[I]n accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, with the territorial sea of the United States, . . . the ships and aircraft of all countries enjoy the right of transit passage through international straits.”). *See generally* ROACH & SMITH, *supra* note 20, at 271-275 (describing shipping lanes in the Arctic).

slight variations in state practice in the interpretation of transit passage on either side of the strait. It also raises the prospect of differing laws and regulations being applicable within either the Russian or US side of the strait, once again consistent with Article 42 of the LOSC, though such laws are to be non-discriminatory and to not deny, hamper or impair the right of passage.¹⁵³ Given the environmental sensitivity associated with all aspects of Arctic shipping, some consideration may in due course be given to the establishment of sea lanes and a traffic separation scheme through the Bering Strait so as facilitate “one way” north-south and south-north traffic on either side of the Diomedes Islands. Such measures would be consistent with Article 41 of the LOSC, but would require cooperation between Russia and the United States in referring such a proposal to the International Maritime Organization (IMO) for adoption.¹⁵⁴ The 2009 AMSA Report noted there were no vessel routing measures within the Bering Strait and few aids to navigation.¹⁵⁵ Given the significant potential of this strait for increased maritime traffic and the difficult navigational conditions, it would be anticipated that in due course such arrangements will be put in place.¹⁵⁶

4. *Recent Developments*

In 2012, the Alaska Legislature in a report into Alaska’s Northern Waters recommended that the US seek to work within the IMO for the establishment of a Bering Strait Vessel Traffic Separation Scheme in which it was commented that:

This remote, narrow, and hazardous international strait is located in an environmentally sensitive area with little or no search and rescue or maritime-disaster response capability within 800 miles.

¹⁵³ LOSC, *supra* note 18, art. 42 (2). LOSC article 42(2) provides: “Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.” *Id.*

¹⁵⁴ ROACH & SMITH, *supra* note 20, at 480.

¹⁵⁵ ARCTIC COUNCIL, *supra* note 2, at 109.

¹⁵⁶ *See generally* ARCTIC COUNCIL, *supra* note 2, at 109 (describing potential for Bering Sea shipping lanes).

Increased vessel traffic in the future will make this area particularly vulnerable to maritime disasters. It is only prudent that basic routing measures and vessel monitoring systems be put in place to reduce the risk of calamity in the Bering Strait.¹⁵⁷

In response to these developments and the increased attention given to maritime traffic in the Bering Strait, in 2010 the US Coast Guard commenced a “Port Access Route Study” in order to assess whether there was a need to create new vessel routing measures in the Bering Strait. While the area under review only encompasses US waters in the strait, the Coast Guard study does have the potential to facilitate appropriate bilateral arrangements with Russia if those are deemed appropriate.¹⁵⁸ In a further sign that the US and Russia are giving attention to their shared interests in the Bering Strait region, in 2012 it was announced that the two neighbours would commence negotiations towards the finalization of “Transboundary Area of Shared Beringian Heritage” that would link the National Parks in Alaska and Russia.¹⁵⁹

CONCLUDING REMARKS

In the past decade the Arctic has moved from the far recesses of international affairs to the mainstream. Debates have emerged as to the geopolitical importance of the region,¹⁶⁰ its governance,

¹⁵⁷ ALASKA STATE LEGISLATURE, FINDINGS AND RECOMMENDATIONS OF THE ALASKA NORTHERN WATERS TASK FORCE 15 (2012), available at housemajority.org/coms/anw/pdfs/27/NWTF_Full_Report_Color.pdf.

¹⁵⁸ Cf. Port Access Route Study: In the Bering Strait, 75 Fed. Reg. 215 (Nov. 8, 2010) (to be codified at 33 C.F.R. pt. 167). See also Hartsig, *supra* note 6, at 61-62.

¹⁵⁹ Office of the Spokesperson, *Fact Sheet U.S.-Russia Cooperation on Antarctica, Interregional Areas, and Beringia*, U.S. DEPARTMENT OF STATE (Sept. 8, 2012), <http://www.state.gov/r/pa/prs/pr/2012/09/197523.htm>.

¹⁶⁰ See generally Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 FOREIGN AFF. 63 (2008) (describing increasing importance of the Arctic).

and its economic future.¹⁶¹ The Arctic has also emerged as the yardstick against which climate change is increasingly measured. In that respect particular attention has been paid to the disappearance of the Arctic ice cap, and its impact for the central Arctic Ocean with respect to trans-Arctic shipping and coastal shipping.¹⁶² These developments have focused attention upon the legal regime in the Arctic, and especially that with respect to the maritime Arctic as this is where the region is seen as having immediate potential as new shipping routes are opened in response to regional and global trading demands. However, far from being unregulated the reality is that there already exists a significant body of international law dealing with Arctic shipping. The relevant international law, principally founded upon the international law of the sea, has not recently emerged, but rather has been developed over many centuries and as embodied in the LOSC represents the culmination of developed state practice, decisions of international courts, and prior treaties. The foundational law of the sea principles are supported by a number of parallel conventional regimes dealing with marine pollution, safety of life at sea, and shipping regulatory standards. Yet, this body of international law is not static, and remains under development through initiatives such as the proposed Polar Code.

With the LOSC at the centre of the Arctic shipping legal regime, two critical issues have emerged in recent years. The first is that whilst the United States has not formally adopted the LOSC by way of accession, it maintains the position that it adheres to the Convention and seeks to uphold its obligations whilst also enjoying its rights. In this respect the United States position vis-à-vis the Northwest Passage, where it asserts certain rights, and the Bering Strait, where it acknowledges its obligations, highlights the position faced by the United States with respect to the law of the sea and these pivotal Arctic shipping routes. The second is that by accepting the Arctic

¹⁶¹ *The Melting North*, THE ECONOMIST (SPECIAL REPORT: THE ARCTIC), June 16, 2012, available at <http://www.economist.com/node/21556798>.

¹⁶² See Andrew E. Kramer, *Polar Thaw Opens Shortcut for Russian Gas; New Shipping Lanes Ease Access to Chinese Market for Energy companies*, INTERNATIONAL HERALD TRIBUNE, July 9, 2013, at 14; Brigham, *supra* note 3.

Ocean is also subject to the same navigational rights and freedoms for shipping as other oceans, it follows that these are rights which can be enjoyed by the ships of all states. This means that states that have not traditionally had a strong Arctic presence will be able to enjoy navigational rights and freedoms throughout the Arctic. In particular, states such as China, Japan and South Korea will all be able to gain access to Arctic shipping routes and enjoy recognized freedoms of navigation. Ultimately, however, these are geopolitical issues. What can be confidently asserted is that the international law with respect to Arctic shipping is well developed and sufficiently robust to be able to withstand whatever testing times it may be facing.