PART IV

PROMOTING NORTH PACIFIC COOPERATION ON THE GOVERNANCE OF ARCTIC MARINE SHIPPING AND ENERGY RESOURCE DEVELOPMENT
6. Arctic Straits: The Bering Strait, Northwest Passage, and Northern Sea Route*

Michael Byers

INTRODUCTION

For decades, shipping through the Northwest Passage and the Northern Sea Route (NSR) was restricted to heavy icebreakers by the year-round presence of thick, hard “multi-year” sea ice. But climate change, which is advancing more quickly in the Arctic than anywhere else on Earth, is rapidly causing the ice to thin and recede. In September 2007, an unprecedented melting of Arctic sea ice took the lowest coverage that season to 1 million square kilometers below the previous record. For the first time, both the Northwest Passage and NSR were temporarily free of ice – and therefore open to non-icebreaking vessels. The record was shattered again in September 2012, when the area covered by Arctic sea ice plunged to just 3.41 million square kilometres, fully 49 percent below the 1979 to 2000 average.² Nor were 2007 and 2012 aberrations; the six lowest extents of Arctic sea ice on record all occurred in the six years from 2007 to 2012.²

It now seems possible that the Arctic could experience a complete, late season melt-out of sea ice within the next five to 10 years, and with it a permanent loss of multi-year ice. Indeed, imagery from the European Space Agency’s new Cryosat satellite shows that the multi-year ice is already gone from much of the Arctic Ocean and thinning rapidly wherever it remains.³ Before long, the waterways along northern Canada and Russia will resemble the Baltic Sea or Gulf of St. Lawrence, where ice-strengthened vessels and icebreaker-escorted convoys can operate safely throughout the year.

 Already, we are seeing a sharp upturn in Arctic shipping. During the

---

* This paper’s analysis has been further developed in Michael Byers, *International Law and the Arctic* (Cambridge University Press, 2013).

---

2013.12.16 4:10:32 PM
first century of navigation through the Northwest Passage, from 1906 to 2005, there were just 69 full voyages. Yet it took just five more years, from 2006 to 2010, for the next 69 full voyages to occur, with 18 taking place in both 2009 and 2010. The increase has continued, with 22 transits in 2011 and 30 transits in 2012.

Increased shipping brings with it environmental and security risks – such as oil spills, life-threatening accidents, smuggling, piracy and terrorism – that in such a large and remote region can only adequately be addressed by the nearest coastal state. Yet the extent of coastal state jurisdiction in the Northwest Passage and the NSR is contested, in both instances by the United States, which claims the chokepoints along both waterways constitute so-called “international straits” through which vessels from all countries may pass freely.

According to the International Court of Justice in the 1949 Corfu Channel Case, “the decisive criterion” for an international strait is “its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.” Foreign vessels sailing through an international strait necessarily pass within 12 nautical miles of one or more coastal states, but instead of the regular right of “innocent passage” through territorial waters, foreign vessels benefit from “transit passage.” This entitles them to pass through the strait without coastal state permission, while also freeing them from other constraints. For instance, foreign submarines may sail submerged through an international strait, something they are not allowed to do in regular territorial waters.

In contrast, both Canada and Russia maintain that the straits along their northern coastlines constitute “internal waters.” Internal waters are not territorial waters and there is no right whatsoever to access them without the permission of the coastal state. Internal waters arise in bays or along fragmented coastlines through the long-term acquiescence of other countries, and/or by the drawing of “straight baselines” between headlands in accordance with the judgment of the International Court of Justice in the 1951 Anglo-Norwegian Fisheries Case.

The disputes over the Northwest Passage and the NSR mattered little when only powerful icebreakers could pass through. But due to the melting ice and increasing volumes of commercial shipping, they already matter a great deal more. This paper explains the legal and politic dimensions of the disputes. It also considers the interests of the different disputant states as well as major shipping countries such as China, South Korea and Japan,
none of which have, as yet, taken a position on the legal issue. It concludes with a series of recommendations as to how the Northwest Passage and the NSR – and also the Bering Strait, through which all international shipping through these northern waterways will necessarily pass – could be transformed into safe, reliable and efficient shipping routes through cooperation between coastal and shipping states. Ideally, such cooperation would lead to treaties that recognize Russia and Canada’s internal waters claims, in return for assured access and significant investments in services and infrastructure.

BERING STRAIT

Severe storms and temperatures combined with fog, ice and the sheer remoteness of the region make the Bering Strait a challenging place for navigators. Yet the Bering Strait is becoming a critically important shipping route because it connects the Pacific Ocean to both the Northwest Passage and the NSR. The waterway has long been of considerable strategic interest to Russia and the U.S. At the narrowest point, only 44 miles separate the mainland coasts of the two countries, with less than three miles separating two islands in the middle of the strait: Russia’s Big Diomede and the U.S.’s Little Diomede.

Both Russia and the U.S. accept that the Bering Strait is an international strait through which foreign vessels may pass without their permission. The two coastal states already cooperate on the provision of search-and-rescue and aids to navigation, and are likely to increase that cooperation. According to a confidential U.S. diplomatic cable released by Wikileaks, the Russian Ministry of Foreign Affairs approached the U.S. Embassy in Moscow on April 17, 2009, “to request cooperation on a wide range of long-stalled Bering Strait initiatives, including nature protection, oil and gas exploration, and sea shipping and transport.”

In the same cable, the embassy discussed the often-contradictory public statements on Arctic policy made by different Russian officials, and provided the following advice to the State Department:

*The statements of the MFA (Ministry of Foreign Affairs) and President Medvedev indicate that moderates have focused on the Arctic as a zone of cooperation. Our continued support of the Arctic Council and bilateral...*
engagement on the Arctic (included in the proposed U.S.-Russia Action Plan), can help bolster the moderates and give incentives to the GOR (Government of Russia) to continue cooperation. Increased scientific cooperation, particularly on climate change, could increase trust and build confidence. Under the framework of either multilateral or bilateral cooperation, we can also offer to jointly develop navigation aids and port facilities, continue developing and sharing sea current and meteorological data, promote social development for indigenous peoples, and cooperate on emergency response and oil spill remediation – all tasks that Medvedev charged the GOR with in his September 17, 2008 remarks, but will be difficult to fulfil without outside expertise.\(^9\)

Exactly two years later, on the margins of a G8 meeting in Deauville, France, presidents Barack Obama and Dmitry Medvedev released a joint statement on cooperation in the Bering Strait region. The statement did not address shipping issues but instead focused on environmental cooperation, namely, “the expansion of interaction between the national agencies that are responsible for the specially protected natural territories/areas of both countries in the State of Alaska and the Chukotka Autonomous District.”\(^10\) However, given the record so far, additional cooperation in other areas may soon be forthcoming.

In 1990, the U.S. and the Soviet Union negotiated a 1,390 nautical mile single maritime boundary – one that delimits jurisdiction over both fish and seabed resources – in the Bering Strait, Bering Sea and Chuckhi Sea.\(^11\) The U.S. was quick to ratify the treaty, with the Senate giving its advice and consent in September 1991. However, the treaty attracted a great deal of opposition within the Soviet Union (which was then disintegrating) and, in 1995, the Russian Foreign Ministry informed the U.S. that it would not be submitted to the Duma (i.e. Russian parliament) for approval. Yet both the U.S. and Russia have agreed, by way of an exchange of notes, to treat the agreement as binding as per Article 25 of the 1969 Vienna Convention on the Law of Treaties.\(^12\)

Even if the boundary treaty were to unravel, the legal situation in the Bering Strait itself would remain unchanged. There is no disagreement as to the location of the boundary in the Bering Strait, where it passes through the narrow and shallow channel between Big Diomede and Little Diomede. As a result of those islands, and the fact that they are each less than 24 nautical miles from the coastline on their side, any foreign vessels wishing
to make the transit must pass through the territorial waters of either Russia or the U.S. And again, they are entitled to do so because the waterway is accepted, including by both coastal states, to be an international strait on both sides of the two Diomedes.

The prospect of greatly increased shipping through the Bering Strait should prompt greater bilateral cooperation, including on improved search-and-rescue, navigation aids, ports of refuge, and oil spill response. Such negotiations could potentially include some of the major shipping states, notably South Korea, Japan and China, with a view to securing support for better and faster infrastructure development. Indeed, multilateral cooperation on the Bering Strait could usefully be institutionalized in a “Bering Strait Council” or “North Pacific Council” which, over time, might expand its work to include fisheries management, environmental protection, security, and search-and-rescue cooperation in the Bering Strait, Bering Sea and surrounding waters.

Finally, Russia, the U.S., and ideally the major shipping countries should ask the International Maritime Organization (IMO) to endorse a mandatory ship registration scheme and mandatory shipping lanes in the Bering Strait. Such measures would protect the security and environmental interests of the coastal states while improving safety for foreign shipping. Similar IMO-endorsed measures exist in other international straits, including the Torres Strait between Australia and Papua New Guinea.

**NORTHERN SEA ROUTE**

The NSR is defined in the Soviet Union’s (now Russia’s) 1990 regulations as:

*The essential national transportational line of the USSR that is situated within its inland seas, territorial sea (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast and includes seaways suitable for leading ships in ice, the extreme points of which are limited in the west by the Western entrances to the Novaya Zemlya Straits and the meridian running north through Mys Zhelaniya, and in the east (in the Bering Strait) by the parallel 66° N and the meridian 168°58’37’ W.*

The NSR offers a reduction in distance and sailing time from Northern Europe to Northeast Asia of up to 40 percent compared to the traditional
routes through the Suez or Panama Canals.\textsuperscript{14} It is also the first circumpolar shipping route to open as the result of climate change, with the thick, hard multiyear sea ice having disappeared from the Russian side of the Arctic Ocean already.\textsuperscript{15} However, the viability of the NSR for international shipping is compromised by a dispute between Russia and the U.S. over the status of the Vil’kitskii, Shokal’skii, Dmitrii Laptev, and Sannikov straits. Moscow claims these straits constitute “internal waters” while Washington maintains they are “international straits.” Significantly, no other country has explicitly taken a side in the dispute, which dates from the early 1960s.\textsuperscript{16}

In 1963, the U.S. Coast Guard icebreaker \textit{Northwind} surveyed the Laptev Sea; the next summer, the USS \textit{Burton Island} did likewise in the East Siberian Sea. These voyages prompted the Soviet government to send an \textit{aide-memoire} to the U.S. Embassy in Moscow on July 21, 1964, clearly setting out the position that the straits joining these and other seas north of the Russian mainland are Russian internal waters:

\begin{quote}
The Northern seaway route is situated near the Arctic coast of the USSR. This route, quite distant from international seaways, has been used and is used only by ships belonging to the Soviet Union or chartered in the name of the Northern Seaways ... It should also be kept in mind that the northern seaway route at some points goes through Soviet territorial and internal waters. Specifically, this concerns all straits running west and east in the Karsky Sea. Inasmuch as they are overlapped twofold by Soviet territorial waters, as well as by the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern Siberian Seas and belong historically to the Soviet Union. Not one of these stated straits, as is known, serves for international navigation. Thus over the waters of these straits the statute for the protection of the state borders of the USSR fully applies, in accordance with which foreign military ships will pass through territorial seas and enter internal waters of the USSR after advance permission of the Government of the USSR....\textsuperscript{17}
\end{quote}

On June 22, 1965, the U.S. government responded with a diplomatic note that recast the Soviet internal waters claim in the language of “historic waters” and presented its own position – that the Russian straits are international straits – in a remarkably tautological manner:

\begin{quote}
So far as the Dmitry, Laptev and Sannikov Straits are concerned, the United
States is not aware of any basis for a claim to these waters on historic grounds even assuming that the doctrine of historic waters in international law can be applied to international straits.... While the United States is sympathetic with efforts which have been made by the Soviet Union in developing the Northern Seaway Route and appreciates the importance of this waterway to Soviet interests, nevertheless, it cannot admit that these factors have the effect of changing the status of the waters of the route under international law. With respect to the straits of the Karsky Sea described as overlapped by the Soviet territorial waters it must be pointed out that there is a right of innocent passage of all ships through straits used for international navigation between two parts of the high seas and that this right cannot be suspended. In the case of straits comprising high seas as well as territorial waters there is of course unlimited right of navigation in the high seas areas ... For the reasons indicated the United States must reaffirm its reservations of its rights and those of its nationals in the waters in question whose status it regards as dependent on the principle of international law and not decrees of the coastal state.\(^{18}\)

By re-characterizing the Soviet claim as one of historic waters, and asserting that the waterways are international straits because they are international straits, the U.S. sought to sidestep the awkward fact that the waterways were not used for international shipping – one of the two criteria for international straits set out by the International Court of Justice in the 1949 \textit{Corfu Channel Case}.\(^{19}\)

\section*{VIL’KITSKII INCIDENTS}

The Soviet-America dispute soon took on greater significance through what are sometimes referred to as the Vil’Kitskii Incidents. The Vil’Kitskii Straits are located between Bol’Shevik Island, located at the southern end of the Severnaia Zemlia archipelago, and the Taimyr Peninsula, which is the northermost portion of the Russian mainland. Their location at 78 degrees north latitude, just 740 nautical miles (1,370 km) from the North Pole, makes them the most important choke point on the NSR.

In the summer of 1965, the U.S. Coast Guard icebreaker \textit{Northwind} approached the Vil’Kitskii Straits from the west. Strong diplomatic pressure was applied by the Soviet Union; pressure that, according to one
The Arctic in World Affairs

Department of State spokesman, extended to a threat to “go all the way” if the American ship proceeded into the strait. The U.S. government responded by ordering the *Northwind* to turn around.

In the summer of 1967, the U.S. Coast Guard icebreakers *Edisto* and *East Wind* were dispatched to circumnavigate the Arctic Ocean. The plan – as communicated to the Soviet government – was for the vessels to sail north of Novaya Zemlya and Severnaya Zemlya “entirely in international waters.” But heavy ice conditions forced the ships to change course towards the Vil’kitskii Straits. A diplomatic note was sent to Moscow that was carefully worded so as not to constitute a request for permission: “This squadron will ... make a peaceful and innocent passage through the straits of Vil’kitskii, adhering to the centerline as closely as possible, and making no deviation or delay ...”

The Soviet Union responded with an aide-memoire the very same day – followed by an oral demarche four days later – reiterating that the straits were Soviet waters and that foreign vessels had to submit requests to enter 30 days in advance. The U.S. government aborted its plans of circumnavigation, while stating that it “strongly protests” the “unwarranted position that the proposed passage of the Edisto and *Eastwind* would be in violation by Soviet regulations, raising the possibility of action by the Soviet Government to detain the vessels or otherwise interfere with their movement.”

The Vil’ Kitskii Incidents are important from a legal perspective because, again, of the criteria for international straits set out by the International Court of Justice in the 1949 *Corfu Channel Case*, namely that the strait must connect two areas of high seas and “be used for international navigation.” The latter functional criterion has clearly not been met in the straits north of Russia. Indeed, as Rothwell explains, since the incidents in the 1960s “there has been little further attempt by the United States or any other state actively to assert a right of freedom of navigation for its ships through the Russian Arctic straits.”

**POST-SOVET ERA**

During a speech in Murmansk in October 1987, Russian President Mikhail Gorbachev said: “Across the Arctic runs the shortest sea route from Europe to the Far East, to the Pacific. I think that, depending on how the
normalization of international relations goes, we could open the Northern Sea Route to foreign ships under our icebreaker escort.” Two years later, the USSR earned its first foreign currency from the NSR when the Tiksi, a Soviet vessel, was chartered to carry goods from Germany to Japan. In 1991, the French-flagged Astrolabe became the first non-Soviet vessel to traverse the NSR.

During the 1990s, international interest in the NSR led to two major reports. The International Northern Sea Route Programme was a Norwegian, Japanese and Russian project that ran from 1993 to 1999 and focused on the viability of the waterway for international shipping. It concluded:

*A substantial increase in international commercial shipping is feasible – in economic, technological and environmental terms. The largest and most obvious cargo potential is found in the huge oil and gas reserves in the Russian Arctic – both onshore and offshore – where marine export towards western markets is likely to start up early in the new Century. As for transit traffic, INSROP’s survey of the main cargo-generating regions at the western and eastern ends of the NSR (NW Europe, NE Asia and the North American West Coast) identified a stable transit cargo potential, most notably for dry bulk.*

The Arctic Operational Platform, funded and organized by the European Commission between 2002 and 2006, was designed to help make the NSR an environmentally and economically viable option for transporting oil and gas from the Russian Arctic. It concluded that: “Oil and gas transportation by the Northern Sea Route is technologically possible and economically feasible.”

In September 2009, two German container ships successfully navigated the NSR from east to west on a voyage that began in Ulsan, South Korea, and ended in Rotterdam. In November 2010, Norilsk Nickel, Russia’s largest mining company, reported that one of its vessels had completed a round trip from Dudinka, in northwestern Russia, to Shanghai, China. The 11,320-mile trip took 41 days, compared to the 24,100 miles and 84 days that it would have taken by way of the Suez Canal. In June 2011, Bloomberg reported that Norilsk Nickel planned to invest USD 370 million in order to double Arctic shipments by 2016. Other businesses such as Novatek, a natural gas company, and Lukoil, Russia’s largest oil
company, also expect to save time and money by using the NSR.\textsuperscript{35}

**RUSSIA’S LEGAL POSITION**

As Rothwell observes, attempts to support the use of the NSR by foreigners have never meant that the USSR or Russia believed the straits should be opened to “unrestricted passage by international vessels.”\textsuperscript{36} Historical analyses of the Soviet/Russian legal position vary, with the most comprehensive one, by Erik Franckx, tracing an evolution from the “sector” theory to an “ice-is-land” theory to a claim based on historic title.\textsuperscript{37} However, as the quotation from the Russian *aide-memoire* of 1964 makes clear above, for nearly half a century the core claim has, in fact, been one of internal waters.\textsuperscript{38}

Following the establishment of straight baselines in the Pacific Ocean, the Sea of Okhotsk and the Bering Sea in 1984, the Soviet Union adopted similar lines along its northern coastline in 1985.\textsuperscript{39} Crucially, the island groups of Novaia Zemlia, Severnaia Zemlia, and the New Siberian Islands were all connected to the mainland by straight baselines, effectively creating legal barriers to foreign vessels wanting to sail from the Barents Sea to the Kara Sea to the Laptev Sea to the East Siberia Sea, or in the opposite direction. The baselines themselves vary in length from 29 nautical miles in the Kara Strait to 42 and 60 nautical miles in the Vil’Kitiskii Straits. Within these zones, through which vessels must sail while navigating the NSR, the permission of the Russian government is required – and with that, full compliance with Russian domestic law.\textsuperscript{40}

The International Court of Justice upheld the legality of straight baselines along fragmented coastlines and fringing islands in the 1951 *Anglo-Norwegian Fisheries Case*.\textsuperscript{41} Maritime areas within straight baselines constitute internal waters of the coastal state. It can, however, be questioned whether the islands joined by the Russian baselines fit the criterion of a “fragmented” coastline, since they protrude hundreds of miles northwards from the otherwise mostly east-west direction of the mainland coast.

Moreover, straight baselines do not terminate the right of transit passage where an international strait existed before they were drawn, and Franckx argues that this is the situation along the Russian coast – because the Soviet Union expressed the view that the straits were territorial seas when it opposed the proposed voyages of U.S. icebreakers in the 1960s.\textsuperscript{42}
But again, the quotation from the 1964 *aide-memoire* above shows that this was, in fact, not the case.\textsuperscript{43}

Although the U.S. protested Russia’s Arctic straight baselines after they were adopted in 1985, it is unclear whether the basis for the protest was the length of the baselines, or the fact that they purported to close off the NSR.\textsuperscript{44} Significantly, there is no evidence of protests from other countries.

The extensive rights involved in the internal waters claim have more recently been supplemented by the rights set out in Article 234 of the 1982 United Nations Convention on the Law of the Sea. Article 234 allows coastal states to exercise heightened regulatory powers over shipping in ice-covered areas for the prevention, reduction, and control of marine pollution – including in terms of vessel design, construction, and navigational practices – out to 200 nautical miles from shore.\textsuperscript{45} As Brubaker explains: “Article 234 has been indicated by the Soviet Union and Russia to be the basis of its domestic Arctic legislation, including the Regulations for Navigation on the Seaways of the Northern Sea Route (1990 Rules) and supporting legislation, which are applicable to all vessels.”\textsuperscript{46} Most of the applicable documents, including supplementary rules adopted in 1996, are available on the official website of the Russian Ministry of Transport.\textsuperscript{47}

These regulations require that permission for voyages be sought four months in advance, that the vessel and its master meet specific standards including having sufficient insurance coverage to cover possible pollution damage, that the vessel adhere to its assigned route, and that ships navigating the Vil’kitskii, Shokal’skii, Dmitrii Laptev, and Sannikov straits will be accompanied by “mandatory icebreaking pilotage.” In addition, vessels must have double hulls and meet designated standards of ice strengthening. They may also be inspected en route to ensure compliance with regulations.\textsuperscript{48}

Also in 1996, the Russian component of the International Sea Route Programme produced a *Guide to Navigating through the Northern Sea Route*.\textsuperscript{49} Although the more than 300 page guide is now out of date, it still provides a useful overview of geographical, hydro-meteorological and navigational conditions, including a list of aids to navigation and information on ice navigation practice, search-and-rescue and salvage assistance.
The Arctic in World Affairs

U.S. LEGAL POSITION

The U.S. position remains that the right of free navigation exists along the NSR through the high seas, including the Russian exclusive economic zone, and that within 12 nautical miles from shore the regime of transit passage applies because Russia’s Arctic straits are “international straits.” The U.S. issued diplomatic statements indicating its view that the straits are subject to free or transit passage in the 1960s and again in 1992 and 1994. The most recent of these statements came in January 2009, in a presidential directive issued by George W. Bush:

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. Preserving the rights and duties relating to navigation and overflight in the Arctic region supports our ability to exercise these rights throughout the world, including through strategic straits.

The Obama Administration, however, has been much more willing to cooperate with Russia, including in the Arctic. In these new circumstances Russia might wish to engage the U.S. in negotiations about the NSR. It could, for instance, provide assured access for responsible shipping companies and research vessels as part of an agreement that was explicitly “without legal prejudice” to the underlying dispute, in a manner similar to the 1988 Canada-U.S. Arctic Cooperation Treaty (as discussed below). Such an agreement could serve Russia’s interests by reducing the risk of other countries, such as China, challenging its internal waters claim, while the U.S. would benefit from resolving or at least calming the one dispute where it argues that an international strait exists in the complete absence of any non-consensual voyages. Finally, negotiations on the NSR could conceivably include the major shipping states and Canada also, whereupon the issue of the Northwest Passage could be addressed as well.

THE NORTHWEST PASSAGE

The Northwest Passage constitutes a number of different possible routes between the 19,000 islands of Canada’s Arctic Archipelago. The islands
Arctic Straits: The Bering Strait, Northwest Passage and Northern Sea Route have been incontestably Canadian since Britain transferred title over them in 1880, while the nearly impenetrable sea ice meant that the issue of ownership and control over the water was never even discussed. Only the acquisition of powerful icebreakers by the U.S., and more recently climate change, has brought the issue to the fore.

Canada claims the Northwest Passage constitutes “internal waters.” In December 1985, the Canadian government drew “straight baselines” around the Arctic islands. Again, under international law, straight baselines may be used to link the headlands of a fragmented coastline. Provided the lines are of a reasonable length, the straits and channels within them are subject to the full force of the coastal state’s domestic laws. Canada argues that its baselines are consolidated by historic usage, including the occupation of the sea ice by the Inuit, a largely maritime people.

During the negotiation of the 1993 Nunavut Land Claims Agreement, which created the Inuit governed territory of Nunavut, the Inuit explicitly sought to strengthen Canada’s legal position vis-à-vis the Northwest Passage. It was the Inuit negotiators who insisted on the inclusion of a paragraph that reads: “Canada’s sovereignty over the waters of the Arctic archipelago is supported by Inuit use and occupancy.” In the 1975 Western Sahara Case, the International Court of Justice affirmed that nomadic peoples are able to acquire and transfer sovereignty rights (albeit in a context involving land rather than ice-covered waters).

The U.S. insists the Northwest Passage is an “international strait,” which, again, is a waterway connecting two expanses of high seas and used for international navigation. The coastal state retains title to the waters but foreign vessels have a right of “transit passage,” much like walkers on a footpath through a British country estate. The U.S. also points out, correctly, that straight baselines cannot be used to close off an existing international strait. As a result, the crux of the dispute between Canada and the U.S. concerns the requirement that the strait be used for international navigation, including, especially, before the “critical date” of 1969 or – perhaps – 1985.

In the past century, only two vessels have passed through the Northwest Passage overtly without asking Canada’s permission: the SS Manhattan, an American owned-and-registered ice-strengthened supertanker, in 1969; and the USCGC Polar Sea, a Coast Guard icebreaker, in the summer of 1985. A number of Canadian authors argue that two transits are insufficient to fulfill the “used for international navigation” requirement set out by the
International Court of Justice in 1949, especially since the strait in question then – the Corfu Channel – was seeing thousands of foreign transits each year. American authors argue that the International Court of Justice did not specify a threshold, and also treated the functional criteria as subsidiary to the geographic one. Some authors in the employment of the U.S. Navy have gone so far as to argue that prospective use matters as much as actual use, although this argument is generally dismissed by non-American experts, including a number of non-Canadians, since it finds no support in the Corfu Channel Case.

The U.S. position has received some support from the European Commission, which in 1985 joined the State Department in protesting against Canada’s drawing of straight baselines around the Arctic islands. However, the focus of the European objection was the unusual length of several of the lines, rather than the adoption of the baselines as such, or the internal waters claim specifically. Contrary to a widespread assumption, no country apart from the U.S. has ever explicitly and specifically objected to Canada’s internal waters claim.

Nor has the dispute posed a problem for Canada and the U.S. in recent decades. In 1988, the two countries concluded a treaty in which the U.S. “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.” At the same time, the two countries agreed that “Nothing in this Agreement … nor any practice thereunder affects the respective positions of the Government of the United States and of Canada on the Law of the Sea in this or other maritime areas…” In other words, they explicitly agreed to disagree.

The 1988 Arctic Cooperation Agreement would have resolved the matter of the Northwest Passage indefinitely, but for the recent and dramatic effects of climate change. Now, with the sea ice melting and the prospect of numerous foreign vessels sailing through, the environmental protection and security interests of both Canada and the U.S. point in the direction of further negotiations.

Since September 2001, Washington has become concerned about the possibility of terrorists using the Northwest Passage to sneak into North America, or of rogue states transporting weapons of mass destruction via the continent’s longest, mostly unguarded coastline. Clearly, these challenges would best be addressed through a coastal state’s domestic criminal, customs and immigration laws, rather than the much looser
constraints of international law. It is difficult to see how it benefits the U.S. – or most other countries – to have foreign vessels shielded from reasonable regulations and scrutiny by maintaining that the passage is an international strait.

The U.S. Navy, however, is concerned that recognizing Canada’s claim could create a precedent for other waterways where the legal status is contested, such as the Strait of Hormuz. Yet the presence of sea ice and paucity of non-consensual foreign transits make it possible to legally distinguish the Northwest Passage from all other potential or existing international straits – apart, that is, from the Russian Arctic straits that are part of the NSR.

Access to the waterway is not really at issue, since Canada would never deny entry to an ally or, indeed, any reputable shipping company. As then Prime Minister Pierre Trudeau declared in 1969, “to close off those waters and to deny passage to all foreign vessels in the name of Canadian sovereignty ... would be as senseless as placing barriers across the entrances of Halifax and Vancouver harbours.”

In 2005, then U.S. Ambassador Paul Cellucci asked the State Department to reexamine the U.S.’s legal position concerning the Northwest Passage. After his term in Ottawa was over, Cellucci made his personal views clear: “It is in the security interests of the United States that it [the Passage] be under the control of Canada.” In 2008, the former envoy participated in a model negotiation between two teams of non-government experts that produced nine recommendations for Canada-U.S. cooperation and confidence building with respect to northern shipping.

Official policy, however, remains stuck in the pre-climate change, pre-9/11 era, when thick, hard sea ice could be relied upon to keep foreign vessels away, and concerns about a precedent that might negatively affect the U.S. Navy’s navigation interests elsewhere weighed heavier than threats from non-state actors and WMD. In January 2009, just before he left office, U.S. President George W. Bush signed a presidential directive that included a reaffirmation of Washington’s long-standing position that the Northwest Passage constitutes an international strait.

Now, every summer brings a heightened risk of a challenge to Canada’s position: most likely by a rogue cargo ship flying a flag of convenience and seeking to take a 4,000 mile short-cut without consideration for Canada’s claim or the changing interests of the U.S. In the circumstances, Ottawa and Washington should pursue every opportunity for cooperation and
confidence building, including updating and extending the 1998 treaty on U.S. Coast Guard icebreakers to address the security threats posed by commercial ships and other non-state actors – with the ultimate goal being U.S. acceptance of Canada’s internal waters claim, in return for a clear Canadian commitment to providing a safe and reliable route for international shipping. As with the 1988 treaty, any new agreement could state that it was “without legal prejudice” to the underlying legal dispute over the status of the Northwest Passage. Finally, such negotiations could conceivably include the major shipping states as well as Russia, in which case they could address the issue of the NSR as well.

ASSESSMENT OF LEGAL POSITIONS

The Vil’kitskii, Shokal’skii, Dmitrii Laptev, and Sannikov straits are almost certainly Russian internal waters, given the absence of any overt non-consensual voyages by foreign vessels and the fact that only one country has expressly opposed the Russian position. Brubaker agrees with this assessment, even though he presumes (but does not substantiate) the existence of at least some non-consensual voyages as well as protests of the Russian position by countries other than the U.S.\(^65\) Rothwell writes: “Given the relative infrequency of foreign-flagged vessels passing through these straits, which seems even less frequent when compared to similar voyages through the Northwest Passage, it would seem difficult to classify any of the major straits in the Northeast Passage as ‘international straits’.”\(^66\) For their part, Churchill and Lowe write:

\[A\text{ part from some of the individual straits making up the [Northeast] Passage being enclosed by straight baselines drawn in 1985, there are doubts as to whether the straits can be said to be “used for international navigation,” and thus attract a right of transit passage, in the light of the handful of sailings through the (often ice-bound) straits that have actually taken place.}\(^67\)

Cementing the Russian claim is the fact that the dispute’s “critical date” – the point when the differing positions became clear and subsequent attempts to bolster them became inconsequential to the legal analysis – was 1964 or 1965.\(^68\)
The status of the Northwest Passage is less clear. There have been two surface voyages where permission was not requested, even if Canada did give unsolicited permission in each case. At the same time, only the U.S. has expressly and specifically opposed Canada’s claim. And notwithstanding the unusual length of several of the Canadian baselines, the drawing of baselines around a coastal archipelago of 19,000 closely-knit islands is consistent with the purpose of such lines as articulated in the *Anglo-Norwegian Fisheries Case*.

The Northwest Passage dispute likely achieved its “critical date” in 1969 when the SS *Manhattan* sailed through, making that the only non-consensual voyage on the ledger of state practice for-and-against Canada’s claim. And one can question just how non-consensual the *Manhattan* voyage actually was, given that Canada gave its permission in advance and sent an icebreaker to help that, on 10 different occasions, freed the *Manhattan* from sea ice in which it would otherwise have remained stuck. Disregarding publications written by Canadian or U.S. officials, and discounting those written by Canadian or U.S. nationals, the picture arising from the literature is one of uncertainty. After engaging in a careful analysis of the “used for international navigation” requirement, Rothwell concludes that, “without further judicial guidance on the question of international straits it is extremely difficult to determine conclusively whether the Passage is or is not an international strait.”

**POSSIBILITIES FOR COOPERATION**

Canada considers the Northwest Passage to be internal waters and Russia takes the same view of its Arctic straits. The 1990 and 1996 Russian regulations are very similar to the provisions of the 1970 Canadian Arctic Waters Pollution Prevention Act and Canada’s now-mandatory ship registration scheme (NORDGREG), which reflects their common connection to Article 234 of UN Convention on the Law of the Sea.

Both countries also recognize that the thinning and melting of the sea ice poses environmental and security risks at the same time that it creates economic opportunities in the form of increased shipping and access to natural resources. Both take the view that their domestic laws provide the best bases for protecting and developing their northern coastlines. And both face a single, common source of opposition to their claims, namely...
The Arctic in World Affairs

the U.S. All of which raises the question: Why have Russia and Canada not bolstered their respective positions by recognizing each other’s legal positions?

Well, they have, on at least one occasion. In August 1985, as the U.S. Coast Guard icebreaker *Polar Sea* was sailing through the Northwest Passage, the press attaché at the Soviet Embassy in Ottawa expressed support for Canada’s claim: “Whether it is the Northwest Passage or the Northeast Passage doesn’t matter,” Evgeni Pozdnyakov said. “Our position is based on provisions of international law. The waters around islands belonging to a country are the internal waters of that country.” But that was as far as it went. There is no evidence of any subsequent statements of mutual support on the issue of Arctic straits as between Canada and Russia. The reason for the lack of sustained, explicit, mutual recognition probably lies in the fact that Canada and the USSR were on different sides of the Cold War. The U.S. position has always based on security concerns, namely a felt need for maximum navigation rights worldwide for the U.S. Navy. With Canadian and U.S. security linked through the North American Aerospace Defense Command (NORAD) and North Atlantic Treaty Organization (NATO), it was difficult enough for Canada to take an independent stance on the Northwest Passage issue without provoking Washington by taking the Soviet Union’s side in the NSR dispute.

But why did the Soviet Union not express support for Canada’s claim, and at a higher level than an embassy press attaché? One possible explanation is that Moscow decided not to disrupt the delicate balance that allowed Canada and the U.S. to “agree-to-disagree” on the legal status of the Northwest Passage. Had Moscow come out publicly in favor of the Canadian position, Washington might have decided that the Canadian stance could no longer be tolerated. Another explanation, however, is that Moscow was not concerned that any foreign country would physically challenge its claim by overtly sailing through the NSR. The risk of sparking off a nuclear conflict would be too high, and the only U.S. vessels capable of a surface voyage were lightly armed Coast Guard icebreakers that would be no match for the Northern Fleet. They would, in addition, be a very considerable distance from any friendly port or NATO search-and-rescue assets, in the event that a non-military problem of some kind ensued.

Today, the Cold War has been over for more than two decades and relations between Russia and the U.S. have markedly improved, including quite recently. The changed geopolitical climate has been noticed in Ottawa,
notwithstanding the occasional domestically motivated fear mongering about Russian bombers in international airspace. In November 2007, Canadian Prime Minister Stephen Harper and Russian then-prime minister Prime Minister Viktor Zubkov issued a Joint Statement on Canada-Russia Economic Cooperation. In January 2010, according to a U.S. cable released by Wikileaks, Stephen Harper told NATO Secretary General Anders Fogh Rasmussen that the alliance had no role to play in the Arctic because “there is no likelihood of Arctic states going to war.” Harper also commented: “Canada has a good working relationship with Russia with respect to the Arctic, and a NATO presence could backfire by exacerbating tensions.”

In February 2009, Alan Kessel, the senior lawyer in Canada’s Department of Foreign Affairs, met with his Russian counterpart, Roman Kolodkin, in Moscow. According to a Russian summary of the meeting:

> Both sides stated a high degree of similarity in their position on the issue of international shipping in the Northwest Passage (Canada) and the Northern Sea Route (Russia) – the existing limitations that are being applied to those areas are necessary to preserve the fragile maritime environment and are in sync with the rights that UNCLOS concedes to coastal states in ice-covered areas. Both sides agreed to have more detailed consultations on this topic, including the issue of rights to historical waters in the context of the existing disputes over their status with the U.S.

Now is the time to pursue this possibility, before the ice melts completely and one or another third state explicitly opposes Canada and/or Russia’s claim. The European Union came close to doing so in December 2009, with the Council of Ministers issuing a statement that referred to the right of transit passage in the Arctic. However, since the reference could have been included with just the Bering Strait in mind, it cannot be read as necessarily entailing opposition to either Canada or Russia’s internal waters claim.

Finally, it would greatly facilitate all of these negotiations if the International Maritime Organization’s “Guidelines on Arctic Shipping” were immediately made mandatory, as was originally intended. This would eliminate most of the distance between the relatively strict rules applied by Canada and Russia in the Northwest Passage and the NSR, and the still relatively loose standards of international law. It would also make
it easier for third countries to recognize Canada and Russia’s claims.

RECOMMENDATIONS

1. Russia and the U.S. should press forward with additional forms of cooperation in the Bering Strait, on matters such as shipping lanes, search-and-rescue, navigation aids, ports of refuge, and oil spill response. Such negotiations could usefully include major shipping states with a view to securing support for better and faster infrastructure development.

2. Multilateral cooperation on the Bering Strait could usefully be institutionalized in a “Bering Strait Council” or “North Pacific Council,” which over time might expand its work to include fisheries management, environmental protection, security, and search-and-rescue cooperation in the Bering Strait, Bering Sea and North Pacific region.

3. Russia and Canada should initiate negotiations with a view to publicly endorsing each other’s respective legal positions on the Northwest Passage and the NSR.

4. Canada should initiate negotiations with the U.S. with a view to securing recognition of its internal waters claim, in return for assured access and investments in infrastructure, search-and-rescue, policing, etc. The result of such negotiations could be a new “without legal prejudice” agreement that is similar to, and builds upon, the 1988 Canada-U.S. Arctic Cooperation Agreement.

5. Russia should initiate negotiations with the U.S. with a view to securing recognition of its internal waters claim, in return for assured access and investments in infrastructure, search-and-rescue, policing, etc. The result of such negotiations could be a “without legal prejudice” agreement similar to the 1988 Canada-U.S. Arctic Cooperation Agreement.

6. Such negotiations could also take place trilaterally, between Canada, Russia and the U.S., or even multilaterally by including major shipping states. And again, one possible outcome could be a “without legal prejudice” agreement.

7. Parallel to their negotiations with each other and third states, Canada and Russia should initiate negotiations with international shipping
companies with a view to securing private investments in new ports of refuge, navigation aids and other essential infrastructure.

8. Russia, Canada and the U.S. should ask the IMO to endorse mandatory ship registration schemes and shipping lanes in the Bering Strait, Northwest Passage, and Russian Arctic straits. If necessary, such endorsements could be made explicitly “without prejudice” to different legal positions concerning the status of the waterways.

9. The IMO’s “Guidelines on Arctic Shipping” should immediately be made mandatory, as was originally intended.

Notes


2. Ibid.


5. E-mails from John North, Marine Communications and Traffic Services, Canadian Coast Guard, Dec. 15, 2011 and Nov. 29, 2012 (on file with author). The post-2005 numbers do not include vessels under 300 tons, which are not required to register with Transport Canada before entering Arctic waters. Already, dozens of smaller vessels, mostly private yachts, sail the Northwest Passage each summer.


10. May 26, 2011. See: http://iipdigital.usembassy.gov/st/english/texttrans/2011/05/20110526082231su0.7241262.html#axzz1SOgSeoUE

http://www.state.gov/documents/organization/125431.pdf


19. See discussion, supra, at note 6.


21. Erik Franckx, Maritime Claims in the Arctic: Canadian and Russian Perspectives (Dordrecht: MartinusNijhoff, 1993) 148. Curiously, the U.S. State Department account of the incident is limited to a single sentence suggesting, incorrectly, that the vessel stayed the course: “The Northwind conducted its transit from July to September of 1965.” United States Responses to Excessive National Maritime Claims, (1992) 112 Limits in the Seas 72.


Arctic Straits: The Bering Strait, Northwest Passage and Northern Sea Route

Limits in the Seas 72.

26. See discussion, supra, at note 6.


30. See: http://www.fni.no/insrop/ (emphasis in original).

31. See: http://www.transport-research.info/web/projects/project_details.cfm?id=38216


35. Ibid.


37. For an overview, see: Erik Franckx, Maritime Claims in the Arctic: Canadian and Russian Perspectives (Dordrecht: MartinusNijhoff, 1993) 152-155.


42. E. Franckx, Maritime Claims in the Arctic: Canadian and Russian Perspectives (Dordrecht: MartinusNijhoff, 1993) 185-186.

44. E. Franckx, Maritime Claims in the Arctic: Canadian and Russian Perspectives (Dordrecht: MartinusNijhoff, 1993) 224, fn. 471.

45. Art. 234 reads: “Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of the ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.” Available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm


52. See discussion, supra, at note 7.


56. On the principle of “critical date,” see infra. note 68.

57. See, e.g.: James Kraska, “The Law of the Sea Convention and the Northwest
Arctic Straits: The Bering Strait, Northwest Passage and Northern Sea Route


60. Hansard, October 24, 1969, 39 (statement of Prime Minister Trudeau).


62. For details of the model negotiation, see Michael Byers, Who Owns the Arctic? (Vancouver/Toronto/Berkeley: D&M Publishers, 2009), Appendix II, 143.


64. For a detailed scenario, see: Byers, Who Owns the Arctic?, Appendix I.


on-arctic-u-s-believed-pm-all-bark-no-bite/ Also available at: http://wikileaks.fi/cable/2010/01/10OTTAWA21.html


74. European Council Conclusions on Arctic Issues, December 8, 2009, available at: http://ec.europa.eu/maritimeaffairs/pdf/arctic_council_conclusions_09_en.pdf (Paragraph 16 reads: “With respect to the gradual opening, in the years to come, of trans-Arctic routes for shipping and navigation, the Council reiterates the rights and obligations for flag, port and coastal states provided for in international law, including UNCLOS, in relation to freedom of navigation, the right of innocent passage and transit passage, and will monitor their observance.”)


Commentary: Russian Perspective

Alexander Vylegzhanin

The thematic Paper 6 by Professor Michael Byers of Canada is devoted to key political, legal and factual aspects of the governance of Arctic marine shipping, that is, to such large-scale objects of international law and policy as the Arctic Straits [the Bering Strait, Northwest Passage and Northern Sea Route (NSR)]. The paper is well documented and instructive; many international conventions, national legislation and other relevant sources of law are referenced. The paper as a whole represents a substantial intellectual contribution to teachings on Arctic law.

There are, however, several points in the paper that may be dwelled upon or specified, beginning with the legal meaning of the term “Arctic.” It is also possible to add some relevant issues and facts from a Russian perspective, especially the contemporary legislation on the Arctic zone.
Commentaries

LEGAL ISSUES AND POLITICAL PROBLEMS

According to prevailing definitions, the term “Arctic” means a part of the Earth around the North Pole, the southern boundary of which is the North Polar Circle (parallel 66º 33 min N). It may be a divine act of God that global environmental changes, including melting sea ice in the Arctic, occur in parallel with positive changes in the global political environment, with the end of Cold War and spreading of the principle of the rule of law (supremacy of law) in international relations. With new possibilities for marine shipping and other economic activity in the High North it is understandable that interests in the contemporary legal regime of the Arctic extend both from the Arctic states and non-Arctic states.¹

The Arctic, as noted, may “turn out to be a laboratory for a new international legal regime.”² The Ilulissat Declaration adopted by the Arctic coastal states on May 28, 2008, provides, however, that there is “no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.” Assessing the contemporary policy framework for the Arctic Ocean and relevant challenges for international law, different opinions are suggested by international lawyers. Even more complicated is the mosaic of political assessments of the potential growth of economic activities in the context of environmental security.³

The Ilulissat Declaration provides that “an extensive international legal framework applies to the Arctic Ocean.” In fact, the declaration does not provide for any new rules, but reflects the current state of the applicable contemporary international law, referring to relevant rights and obligations of the Arctic coastal states.

Arctic marine shipping is certainly a fundamental common interest of the Arctic and non-Arctic states in the High North, along with such common interests as protection and conservation of the Arctic fragile marine environment, including that in ice-covered areas. There is a huge potential area for more developed international cooperation – namely the Arctic high seas, that is, an area of the sea water column that is not
included in the exclusive economic zone (EEZ), in the territorial sea or in the internal waters of any Arctic coastal state.

The Arctic Straits, which are characterized in the paper from political and legal points of view, are not a part of the Arctic high seas. However, marine shipping via High North areas (and not through the NSR or the Northwest Passage, as shown by Russian geographers and economists, academician Granberg in particular) will be more attractive for ship owners when the central Arctic is free of ice and open to non-icebreaking vessels, even temporarily. And there still exists potential legal and technical obstacles to free and safe marine shipping through these high North Sea routes.

In order to bridge the differences in the legal views on an international governance framework for shipping in the high seas in the central Arctic, it is advisable first to reach a sort of international consensus on the legal qualification of ice and water areas in the Arctic beyond 200 miles (from the baselines) as high seas. Such a consensus is important: a number of authors still consider such areas not to be high seas, and according to the UN Charter (art. 38 of the Statute of ICJ), “the teachings of the most highly qualified publicists of the various nations” are “subsidiary means for determination of rules of law.”

Some contemporary Russian authors support the legal views of V. Lachtin, E. Korovin, Y. Dzhavad, A. Zhudro and some other Soviet authors, and such views are very rigid: “The Arctic Ocean is a hypothetic notion ... combination of hypothetic waters ... which are for the most part concealed by ice...there is no High Seas regime in the Arctic Ocean.” It is also noted that “Canada has occasionally expressed doubt as to the status of the Arctic Ocean as high seas, particularly the Beaufort Sea.”

A number of contemporary authors, including publicists from the Russian Federation, however, are of the opinion that there is a high sea area in the central Arctic beyond the 200-mile EEZ zones of the Arctic coastal states, despite the fact that most part of this area is covered with ice. It may be predicted that with melting sea ice in the North Polar area there may be more chances to reach a consensus on this issue both on the theoretical and practical levels.

It’s noted in the paper that according to International Northern Sea Programme the “largest and most obvious cargo potential is found in the huge oil and gas reserves in the Russian Arctic,” and that according to the Arctic Operational Platform, “oil and gas transportation by the Northern
Sea Route is technologically possible and economically feasible. There are still different obstacles and challenges for oil and gas development in the Arctic subsoil. It is the general consensus that the Arctic coastal states are responsible under international law for rational management of marine subsoil in areas under their sovereignty (in internal waters and territorial seas) and jurisdiction (continental shelf). Again, there is a common interest for Arctic and non-arctic states and relevant fundamental purposes, that is, political and legal stability, which is a necessity for investors and for international economic cooperation in general. Because of the relative proximity between the Russian Arctic and North Pacific, for example, there are good reasons for cooperation in the field of exploitation of oil and gas resources between Russia and the North Pacific Rim countries, using the technological and investment capabilities of the latter. To achieve such a fundamental purpose, the legal regulation of economic activities in the central Arctic Ocean seems to be differentiated. Global regulation of shipping, including transportation of extracted oil and gas products, and protection of the environment in the Arctic high seas is already in demand. Of special significance for proper interstate governance of economic activity in the Arctic Ocean (taking into account relevant environmental changes) are such environmental protection treaties as the United Nations Framework Convention on Climate Change, 1992 (Climate Convention, 1992); the Kyoto Protocol of 1997 to the Climate Convention of 1992; the Convention on Biological Diversity, 1992; the Convention on Long-range Trans-boundary Air Pollution, 1979; the Vienna Convention for the Protection of the Ozone Layer, 1985; and the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987. Also, a number of international shipping law instruments are applicable to navigation in the Arctic Ocean.

So, it was probably too categorical but not very precise to state that “the Arctic Region is currently not governed by any multilateral norms.” In addition to the universal multilateral norms mentioned above there are a number of regional multilateral norms, starting from the Agreement on the Conservation of Polar Bears of 1973. So, there are a number of multilateral treaties applicable to the Arctic Region that provide for relevant norms. Some of these multilateral conventions have entered into force for all five Arctic coastal states. Such multilateral instruments are already used by countries of the Arctic region for environmental measures and regulation of shipping.
However, at the moment such global legal instruments are still physically impractical to apply in many Arctic areas. A regional, bilateral and national *lex special* is needed for the “transition period” of the melting ice cap in the central Arctic Ocean. A successful bilateral model of management of trans-boundary hydrocarbon resources in Arctic will be described further, as an example.

Another important regional Arctic agreement is the recent document from the eight Arctic states that are members of the Arctic Council, the Agreement on Cooperation and Maritime Search and Rescue in the Arctic of 2011. The objective of the agreement is “to strengthen aeronautical and maritime search and rescue cooperation and coordination in the Arctic” (art. 2). It provides for the delimitations of the aeronautical and maritime search and rescue regions. It provides that such delimitation “is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction” (art. 3). Aeronautical and maritime search and rescue operations within each of the areas are conducted on the basis of the International Convention on Maritime Search and Rescue, 1979; the Chicago International Civil Aviation Convention, 1974; and the Agreement of the Eight Arctic States, 2011. Such a combination of regional and global applicable rules is an optimal legal model for the Arctic’s severe environmental peculiarities.

While there are delimited areas of responsibility for the parties under the agreement, it also provides for cooperation and coordination in the field of aeronautical and maritime search and rescue in the Arctic. For this purpose, the agreement provides for competent authorities of the parties and agencies formed according to national legislation that are responsible for aeronautical and maritime search and rescue. A list of relevant rescue coordination centers is also provided.

Another recent regional legal source, the Agreement on Cooperation on Marine Oil Pollution Preparedness and Responses in the Arctic of 2013, seems also to be an important legal instrument applicable to regulation of Arctic marine shipping.

In sum, the regional level of regulation of economic activities in the Arctic Ocean is linked with bilateral and national regulation. Optimal adaptation of the applicable rules of universal conventions to peculiar Arctic realities also takes place, mainly at the regional level. Today it is “fed” by the law documents created by relevant regional institutional structures, such as the Arctic Council, the Barents Euro-Arctic Council and others.
As correctly noted, one “useful approach in developing effective governance for a rapidly changing Arctic may be … to draw a clear distinction between the overlying water column and the sea floor. Ecologically and legally distinct from the sea floor, the overlying water column and the sea surface of the central Arctic can remain an undisputed international area.”\textsuperscript{11} For the Arctic high seas water column, the priority of global and regional regulation seems to be more appropriate. For the shallow Arctic sea floor, being legally the continental shelf of the five Arctic coastal states, the priority of regional, bilateral and national levels of regulation are more appropriate within contemporary legal and political environments.

**EXISTING GOVERNANCE TO OVERCOME OBSTACLES**

**Bering Strait**

It is correctly concluded in the paper that there are no major unresolved legal issues concerning the Bering Strait. The right of foreign vessels to transit the strait is accepted by both the coastal states, which are cooperating with each other to improve safety for their own and international shipping.

One remark, however, is obviously needed. It is noted in the paper that the agreement between the U.S. and the Union of Soviet Socialist Republics on the maritime boundary was signed on June 1, 1990. The agreement has not yet entered into force, neither on June 15, 1990 nor afterward as provided in Art. 7 (that is, upon ratifications by both parties). The State Duma (the Russian parliament) considered the issue of the agreement several times (in 1997 and 2002), and in each case the parliament’s majority had a negative attitude toward ratification of the agreement.\textsuperscript{12} However, long before such deliberations in the parliament both parties agreed by diplomatic notes to apply this agreement from June 15, 1990. So the legal basis of the contemporary binding nature of the agreement for the U.S. and Russia is not its ratification by both parties and not its entry into force (as provided in Art. 24 of the Vienna Convention on the Law of Treaties of 1969), but Art. 25 of this convention (“provisional application”).

It should be noted, however, that the negative attitude of the Russian parliament to the 1990 agreement was caused by the delimitation line as
provided in the agreement in the Bering Sea, and not in the Arctic Ocean, which was assessed as balanced and reasonable.

**Northern Sea Route and Northwest Passage**

The paper provides an excellent summary of the legal positions and relevant political actions of the two Arctic coastal states, Russia and Canada, on the one hand, and of disagreements with each of these states with the “persistent objector” to their arctic policy, the U.S.

The U.S. Presidential Directive of January 9, 2009 is correctly cited, where the Northwest Passage (along Canadian coasts) and “some straits” forming the NSR (along the coasts of Russia) are qualified as straits used for international navigation with a regime of transit passage. Neither Canada nor Russia provide for the legal status of waters along U.S. coasts in their national acts.

The recent “National Strategy for the Arctic Region” signed by the U.S. president on May 10, 2013, however, differs from the U.S. directive of 2009 in providing that “Existing international law provides a comprehensive set of rules governing the rights, freedoms, and uses of the world’s oceans… including the Arctic. The law recognizes these rights, freedoms, and uses…Within this framework, we shall further develop Arctic waterways management regimes, including traffic separation schemes, vessel tracking, and ship routing, in collaboration with partners.”

Additional legal information may be appropriate to show why it is of vital importance for Canada and Russia to preserve their respective national regulations through these seaways along their coasts, both from historical and legal points of view.

The NSR passes along the coast of Russia facing the Arctic Ocean. It is the shortest way between the northern Pacific and Atlantic. It is also the only route that connects all Arctic and sub-Arctic regions of Russia. The Russian Arctic lands have no main highways; instead, in winter, ice roads are built, many of which go out to NSR ports. The length of the NSR, depending on the itinerary chosen, is from 2,200 to 3,000 miles. Ports located along the NSR include Igarka, Dudinka, Dickson, Tiksi, and Pevec.

The Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, 1998, provides that “Navigation on the seaways of the Northern Sea Route, the historical developed national unified transport communication of the Russian Federation in
the Arctic, including through the Vilkitski, Shokalsky, Dmitry Laptev, and Sannikov straits, shall be carried out in accordance with this Federal Act, other federal laws, international treaties to which the Russian Federation is a party and the regulations on navigation on the watercourses of the Northern Sea Route approved by the Government of the Russian Federation and published in the Notices to Mariners” (art. 14). A federal act (adopted by the Russian parliament and signed by the president of the RF) is of higher legal value in Russian legislation than a governmental act.

According to the governmental act “Regulations for navigation on the seaways of the Northern Sea Route” of September 14, 1990, which are a part of contemporary Russian national legislation (henceforth “the regulations”), the NSR is also defined as a national transportation route situated within the internal waters, territorial sea or exclusive economic zone adjoining the northern coast of the country. The extreme points of the NSR are, in the west, “the western entrances to the Novaya Zemlya Island straits and the meridian running northward from Cape Zhelaniye” (on Novaya Zemlya Island), and in the east, the point at latitude 66° North and the longitude 168°58’37” West (in the Bering Strait). The “functional” NSR areas extend even further away to the west and east: they include areas covered with ice in the southeast part of the Barents Sea and in the northern part of the Bering Sea (Gulf of Anadyr).

During the soviet period (until 1991), the NSR served almost exclusively for national marine shipping under strict governmental control. Not surprisingly, Russia has a data bank of navigation through the NSR, including for carrying goods along the NSR during World War II. Now the situation is changing and more and more foreign vessels pass via the NSR.

According to the “Fundamentals of the State Policy of the Russian Federation in the Arctic for 2020 and further period” approved by the president of the RF in September 2008, the list of the “main national interests” of Russia in the Arctic includes “utilization of the Northern Sea Route as national integral transport communication of the Russian Federation in the Arctic” (para II, 4). The same legal qualification is supported in “The Strategy for Developing the Arctic Zone of the Russian Federation” approved by the president of the RF in February 2013.

The importance of the Northwest Passage for Canada is already shown in detail in the paper. The paper describes in detail the U.S.’s objections to Canada’s and Russia’s legal positions to qualifying as internal waters the Northwest Passage and the Russian Arctic Straits, which form part of
the NSR. These Russian and Canadian straits are within straight baselines according to Russian and Canadian legislation. According to the decisions of the Cabinet of Ministers of the USSR of February 7, 1984 and of January 15, 1985 on baselines along the coasts of the USSR, a limited number of straight baselines were indicated along the Russian Arctic coast. Consequently, the status of Karskiy Strait, Yugorsky Shar, Matochkin Shar and the Vil’kitsky, Shokal’sky, Krasnaya Armiya, Sannikov, and Dmitry Laptev straits was confirmed – they are again qualified as internal sea waters of Russia. However, the Cabinet of Ministers’ decisions were the first legal documents of the country that officially disavowed previous doctrinal Russian claims on the Kara, Laptev and East Siberian seas as “historic waters of the USSR.”

The right of a coastal state to draw straight baselines is provided by general customary international law and by special conventions, including UNCLOS 1982 (art. 7). The paper indicates a case of drawing baselines that depart quite significantly from the general direction of the coast. Indeed, art. 7 of UNCLOS provides one of the situations where the method of straight baselines is applicable: “in localities where the coastline is deeply indented and cut into.” But that is not the only situation where the drawing of straight baselines is possible, as noted by the International Court of Justice. The court also referred to historic title,\(^{16}\) and to a case where the method of straight baselines “had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bear witness to the fact that they did not consider it to be contrary to international law,”\(^{17}\) and to “certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.”\(^{18}\) The court also noted that the straight baseline method was followed by several states “not only in the case of well-defined bays, but also in cases of minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters.”\(^{19}\)

Moreover, independently of interpretation of the applicable international law and of the factual circumstances of how straight baselines along the Arctic coast are drawn and are provided in the national legislation of Canada and Russia, the key interest of the North Pacific Rim countries is of a different legal nature, that is, whether a coastal Arctic state is interested in international shipping along its coast and is cooperating to facilitate such safe shipping. And the answer is positive – both from Canada and contemporary Russia. In addition to what is noted in the paper about the
political will of Russia to open the NSR for foreign shipping subject to pilot age for safety reasons (1987), another legal step was recently taken in Russia in this direction. According to the order of the Federal Rates Service (a governmental body) of June 7, 2011, maximum rates on ice-breaker fleet services along the NSR are determined; the order provides further that in practice, rates for such services “can be at the maximum rate or lower.” This is the first flexible legal instrument of its kind in the history of the NSR, which means that the cost of the ice-breaker services for domestic and foreign ship owners might be much cheaper, since the state corporation Rosatom now has legal permission to provide ice-breaker services at low rates.

And last but not least, the important distinguishing feature of the NSR and Northwest Passage is that they are integral components of the respective legal positions of Russia and Canada as to the general issue of the status of the Arctic Ocean.

Status of the Arctic Ocean

International customary law applicable to the Arctic has been formed over the centuries at regional, bilateral and national levels. The continuous legal practice of Russia and Canada as Arctic states with the longest coastline in the Arctic region and the responses thereto (including tacit agreement or acquiescence) by other states (not only Arctic states, certainly) are the core of this customary law. In this context, important legal factors to be taken into account are: a) the legislative and treaty practice of Tsarist Russia, the USSR and the Russian Federation in the Arctic; b) the legislative and treaty practice of Canada in the Arctic; c) relevant legislative and treaty practice of other Arctic coastal states; and d) acquiescence or consent to such practices on behalf of the majority of states from the 15th to 20th centuries, and the absence of relevant “persistent objectors” during this period.20 Such legal factors are usually noted in assessing international customary law.

According to the Convention between Great Britain and Russia of 1825, the king of the United Kingdom of Great Britain and Ireland and the emperor of Russia agreed upon “the line of demarcation between the possessions” of the parties in America. Of contemporary legal interest are the provisions of the convention on the northern part of this demarcation line, the “Meridian Line of the 141st Degree, in its prolongation as far as the Frozen Ocean” (art. III of the 1825 convention). This was the first “sector boundary line” (or “Meridian Line”) in the Arctic ever established.
by a legal act. Years later another bilateral treaty used a sector line along a meridian in the direction of the North Pole. In accordance with the 1867 convention ceding Alaska of, the emperor of Russia agreed to cede to the U.S. “all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth...” Again, the northern part of the line delimitating U.S. and Russian possessions in the Arctic is described in the convention as the meridian line (sector line): “the meridian which passes midway between the islands of Krusenstern ... and the island of Ratmanoff ... and proceeds due North, without limitation, into the same Frozen Ocean” (art. I). In spite of this rather brave terminology (“without limitations”), no state protested against the 1867 convention. These sector (meridian) lines are certainly not contemporary state boundaries of Canada, the U.S., or Russia. Nor are they per se lines delimiting continental shelves of the three Arctic coastal states without the additional agreement of the relevant states, because in 1825 and 1867 there was no institute of continental shelf in international law. Still, the sector boundaries in the Arctic established by the 1825 UK-Russia Convention and by the 1867 USA-Russia Convention remain today in force as prima facie boundaries of national primary interests and responsibility of relevant states.21

As noted in academic writings and confirmed by documents, the Arctic legislation of Russia can be traced back to the Ukases (orders) of the Tsars of Russia of the 15th–16th centuries,22 the decree of the Russian Senate of 1821,23 and the Note issued by the Russian Ministry of Foreign Affairs in 1916,24 to mention but a few sources.25 The boundaries of the Russian Arctic sector were legally established in 1926 under national legislation,26 thus confirming the eastern boundary defined in the convention on the cession of Alaska concluded between the U.S. and Russia in 1867.27

The political will of Canada as it relates to the Arctic sector can also be traced back to the 1825 convention, since Canada is legally a party to it today. It was confirmed in 1907, and the two sector boundaries were again provided for according to Canadian legislation in 1925.28

According to Canadian and Russian legislation,29 an Arctic sector is formed by an Arctic state’s coast (bordering the Arctic Ocean) and two meridians of longitude drawn from the easternmost and westernmost points of such a coast to the North Pole. Within such a triangular sector, an Arctic state may regard as its territory all “islands and lands.” The term “islands”
Commentaries

also includes rocks. The term “lands,” according to some authors, includes submerged and ice-covered lands. Other authors reject such a broad interpretation, saying that the word “lands” in Canadian and Russian legislation also means “islands.” It is asserted that within such an Arctic sector, the Arctic coastal state has jurisdiction with regard to the protection of the fragile Arctic environment. A number of contemporary authors recognize that the limits of the Arctic sectors established by Canadian and Russian laws reflect, according to the customary legal order, the boundaries of primary interests of the Arctic coastal states for the rule of law in relevant areas of the Arctic Ocean through their national legislative approaches. As was correctly noted, “While sector claims were asserted for administrative convenience, they were also symbolic and allowed for a comparatively uncontested territorial division of parts of the Arctic.”

Strange as it may seem, it is the U.S. (the persistent objector of any claims in the Arctic based on “sector boundaries”), that is the most uncontested beneficiary of the two sector boundaries established by the Great Britain – Russia Convention of 1825 and by the U.S. – Russia Convention of 1867. In practical terms, no state would claim rights to any area of the prima facie U.S. continental shelf situated within the U.S. Arctic sector established by these two conventions. The size of the U.S. continental shelf may be diminished (in comparison to that already delimited by the two sector lines provided in conventions 1825 and 1867) if Canada and Russia delimit their arctic continental shelf according to Art. 83 of UNCLOS, or according to Art. 6 of the Convention on the Continental Shelf 1958, which provides for “the principle of equidistance.”

It is true that UNCLOS 1982 “shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea” (1958, art. 311(1) of UNCLOS 1982). But this rule is not applicable to the four groups of relations, that is, to relations of each of the four Arctic coastal states with the fifth, the U.S. (which is not a party to UNCLOS 1982 or to the UNCLOS Implementation Agreement of 1994).

As confirmed by a number of documents, UNCLOS provisions on the area (the ocean floor beyond the continental shelf as the “common heritage of mankind”) and on its boundaries are correctly not considered by the U.S. as a part of customary international law. In fact, the UNCLOS provisions on the area are not considered by many publicists as a part of customary international law either. These provisions are neither a part of a regional international legal regime of the Arctic Ocean, formed before UNCLOS
was adopted (for example, the Agreement on Polar Bears of 1975), nor a regional “soft law” environmental regime constructed after UNLOS by the Arctic Council.

The Message from the President of the United States transmitting the UN Convention on the Law of the Sea, with Annexes, 1982, and the Agreement Relating to the Implementation of Part XI of the Convention 1994, provides, in particular, that “The objections of the United States and other industrialized States to Part XI were that: it established a structure for administering the seabed mining regime that did not accord industrialized States influence in the regime commensurate with their interests; it incorporated economic principles inconsistent with free market philosophy; and its specific provisions created numerous problems from an economic and commercial policy perspective that would have impeded access by the United States and other industrialized countries to the resources of the deep seabed beyond national jurisdiction.” In this message the U.S. president states that the Implementation Agreement of 1994 “fundamentally changes the deep seabed mining regime of the Convention.” But the Senate did not react positively and did not give its consent to U.S. accession to the 1982 convention or to ratification of the agreement. As some U.S. legislators put it, “there was no reason to have signed this badly flawed treaty in the 1980s and even less justification today. In 1980, when it was clear that the United States and its allies would not sign the treaty, Congress enacted the Deep Seabed Hard Mineral Resources Act. This statute regulates the mining activities of U.S. citizens in the seabed beyond the jurisdiction of any country.” Also: “The benefits to the United States by ratifying the treaty as it stands now are, at best, minimal. The United States already has taken the position that all the other parts of the Law of the Sea Treaty represent customary international law and we act accordingly.”

Since the U.S. is not a party to UNCLOS, and since Part XI thereof (the Area) and Art. 76 (new limits of the continental shelf) are not rules of customary international law, the American Arctic continental shelf is in a way legally “unlimited”; it extends – according to the Convention on the Continental Shelf of 1958 – “to where the depth of the superjacent waters admits of the exploitation of the natural resources” of submarine areas. Therefore, a recent announcement by U.S. specialists that the U.S. continental shelf extends to more than 900 miles to the north of Alaska (without referring to relevant UNCLOS mechanisms) is in full accordance with art. 1 of the Convention on Continental Shelf, 1958, and
Commentaries

is consequently legitimate.

Arctic Trans-Boundary Hydrocarbon Resources (Public and Private Law Models)

Having noted the possibilities of existing governance to overcome obstacles, it is appropriate to provide a recent successful example, that is, the Norway-Russia model of management of trans-boundary hydrocarbon resources, its public and private law components.

The Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 2010 entered into force in 2011. According to the treaty, the parties have defined geodetic lines that constitute the delimitation line between maritime areas of Norway and Russia in the Barents Sea and the Arctic Ocean (art.1). Each party shall abide by this maritime delimitation line and shall not claim or exercise any sovereign rights or coastal state jurisdiction in maritime areas beyond this line (art.2).

If a hydrocarbon deposit extends across the delimitation line, the parties shall apply Annex II to the treaty – “Trans-boundary Hydrocarbon Deposits.” The term “hydrocarbon deposits” is not used in the UN Convention on the Law of the Sea of 1982 or in the Geneva Maritime Conventions of 1958. So this term, according to art. 31 of the Vienna Convention on the Law of Treaties, 1969, should be interpreted “as accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” That means, in particular, that Annex II to the Norway-Russia Treaty of 2010 is not applicable to all trans-boundary mineral resources; for example, to “hard” mineral resources, even in a case in which a deposit of such resources is crossed by the delimitation line provided by the treaty. If the existence of a hydrocarbon deposit on the continental shelf of one party is established and the other party is of the opinion that the said deposits extend to its continental shelf, the latter party may notify the former and submit the data on which it bases its opinion. So, according to the treaty, such a notification is a right, but not an obligation, of a party. If however such a right is realized, the obligation occurs to submit the relevant data.

So, according to the treaty, an opinion by either party as to the existence of a trans-boundary hydrocarbon deposit is of legal significance.
If such an opinion (supported by relevant data) is submitted, the parties are obliged to initiate discussions on the extent of the hydrocarbon deposit and the possibility for exploitation of the deposit as a unit. The party that initiates such a discussion is under obligation to “support its opinion with evidence from geophysical data and/or geological data, including any existing drilling data.” Both parties “shall make their best efforts to ensure that all relevant information is made available for the purpose of these discussions.”

The contribution of Russia in revealing such relevant information will be potentially bigger than that of Norway, bearing in mind the huge database on Arctic mineral resources accumulated by the former USSR. According to Professor A. A. Arbatov, for example, research by the USSR carried out in 1980 shows that the hydrocarbon province of Fedinskaya is assessed as having 3 billion tons of “calculated fuel.”38 And some of the hydrocarbon deposits in the province are crossed by the delimitation line provided by the treaty. On the other hand, Norway has a much better experience in the rational and ecologically sustainable management of trans-boundary hydrocarbon continental shelf deposits on the basis of international agreements. With such a balance of important contributions of the parties, performance of the treaty may be very promising and to the advantage of both parties.

According to the treaty, there are two levels of bilateral interaction in hydrocarbon resources management—intergovernmental and private law. In addition to what was mentioned above, an important intergovernmental obligation of any party is to reach a unitization agreement at the request of the other party in cases provided by the treaty. Such cases include: if the hydrocarbon deposit extends to the continental shelf of each of the parties and the deposit on the continental shelf of one party can be exploited wholly or in part from the continental shelf of the other party, or the exploitation of the hydrocarbon deposit on the continental shelf of one party would affect the possibility of exploitation of the hydrocarbon deposit on the continental shelf by the other party. Any party can exploit any hydrocarbon deposit that extends to the continental shelf of the other party only as provided for by the unitization agreement. This is an intergovernmental instrument to be agreed upon by the parties in the future, though its essential components are already defined by the parties in Annex II to the treaty.

Among such components are: a definition of trans-boundary
hydrocarbon deposits and their geographical, geophysical and geological characteristics; the obligation of the parties to individually grant all necessary authorizations required by their respective national laws for the development and operation of the trans-boundary hydrocarbon deposits; the obligation of the parties to establish a joint commission for consultations between the parties on issues pertaining to any planned or existing unitized hydrocarbon deposit; and the obligation of the parties to require the relevant legal persons holding rights to explore for and exploit hydrocarbons on each respective side of the delimitation line to enter into a joint operating agreement.

The latter represents a private law legal instrument for regulation of exploitation of the trans-boundary hydrocarbon deposits as a unit. The parties of the joint operating agreement are not Norway and Russia, but legal persons that have rights to explore and exploit hydrocarbons according to the national legislation of Norway and Russia. So these may be legal persons of third countries. Such an instrument should to be in accordance with the unitization agreement. A joint operating agreement is to be approved by both parties in order to be legally valid. The legal persons holding the rights to exploit a trans-boundary hydrocarbon deposit as a unit are to appoint a unit operator “as their joint agent” upon the request of the parties. Such an appointment of, and any change of, the unit operator is subject to prior approval by the parties.

Of special importance for bilateral interaction both on an intergovernmental (parties) and private law level (legal persons) are such components of the unitization agreement as the “obligation of the Parties to consult with each other with respect to applicable health, safety and environmental measures that are required by the national laws and regulations of each Party.” Since applicable national laws and regulations of the parties are different and the primary object of such national regulations is the same (trans-boundary hydrocarbon deposits as a unit), one may forecast that such consultations may not always be easy.

Questions may also arise as to the performance of other treaty provisions – the obligation of each party “to ensure inspection of hydrocarbon installations located on its continental shelf and hydrocarbon activities carried out thereon in relation to the exploitation of a trans-boundary deposit, the obligation of each Party to ensure inspectors of the other Party access on request to such installations, and to relevant metering systems on the continental shelf or in the territory of either Party.”
In sum, such a legal mechanism of management of trans-boundary hydrocarbon deposits in the Arctic Ocean may be taken into account for future possible legal models of management of such deposits in areas of future High North delimitation lines between the Russian Arctic continental shelf and those of the U.S., Canada and Denmark (Greenland).

Additional Agreements and Arrangements

There are a number of suggestions on how to improve Arctic governance. Proposals to improve arctic governance are often connected in concreto with the need to improve legal regulation of economic activities in the Arctic Ocean before its permanent ice cap melts, as was suggested in a number of research papers. “The expansion of economic activity under conditions of environmental change poses new challenges for the entire Arctic region and the world. Access to open water across the Arctic Ocean is awakening interest from the energy, shipping, fishing, and tourism industries. Each of these globally important commercial activities, if not properly regulated, poses risks that together will be multiplied in the confined Arctic Ocean. Due to rapidly changing conditions and to inadequate baseline data regarding the dynamics of Arctic marine ecosystems, many vulnerabilities and potential consequences of anthropogenic impacts are poorly understood or unknown.”

The paper provides a number of carefully worded recommendations to stimulate cooperation between the Arctic states and North Pacific Rim countries, aiming at concluding relevant agreements and arrangements. One of the recommendations is for Canada – Russia negotiations aimed at recognition of their legal positions on the Northwest Passage and NSR. It may be useful to add the idea of future harmonization of legal rules for passing through relevant Canadian and Russian Arctic Straits and simplification of such rules for foreign shipping. This is not an easy task, bearing in mind the different national legal systems of the two countries and different requirements for vessels navigating the NSR and the Northwest Passage. “Requirements for the design, equipment and supplies of vessels navigating the Northern Sea Route,” for example, provides for a number of mandatory conditions: “a double-bottom floor throughout the entire width of a vessel,” specific requirements relative to machinery plants, to systems and devices, communications equipment, emergency facilities, and so on. The Soviet Union possessed a huge and “ongoing” database on the Arctic
Ocean from 1980 to 1990, and that fact was recognized even at the level of foreign national legislation. According to the Arctic Research and Policy Act of 1984 (amended in 1990), “most Arctic rim countries, particularly the Soviet Union, possess Arctic technologies far more advanced than those currently available in the United States.” However, today the situation is different, and it is other Arctic states and North Pacific Rim countries that possess better Arctic technologies and financial resources for developing economic activities in the Arctic region. So cooperation between Russia and such states – especially in creating port-industry clusters along the NSR – is mutually beneficial.

Notes

1. The term “Arctic coastal states” usually means the group of five states bordering the Arctic Ocean, each having internal waters, territorial seas, exclusive economic zones and a continental shelf in the Arctic Ocean, i.e. Canada, Denmark (because of Greenland), Norway, Russia and the United States (because of Alaska). The term also means the group of eight states with territories that are crossed by the North Polar Circle; that is, in addition to the five states mentioned above, Finland, Iceland and Sweden. All these states are members of the Arctic Council.


9. Though agreed upon, the English, French and Russian languages of the agreement being “equally authentic,” the authentic Russian text is yet not available according to procedures provided by the federal law “On International Treaties of the Russian Federation.”


13. Problems of the Northern Sea Route. … p. 9-10

14. Par. 1.2. Regulations for navigation on the Sea ways of the Northern Sea Route.

15. Problems of the Northern Sea Route. … p. 10

16. I.C.J. Reports 1951. p. 130

17. Ibid. p. 139

18. Ibid. p. 133

19. Ibid. p. 130


21. It is notable that the International Law Commission (ILC), while considering in 1950 the concepts of continental shelf and regime of the high seas, observed:

“Dès 1916, l’idée du ‘plateau continental’, c’est-à-dire la prolongation sous-marine du territoire continental, apparaît de deux côtés différents, en Espagne et en Russie. En Espagne l’océanographe Odon de Buen insiste sur la nécessité d’un élargissement de la zone territoriale, de manière à y englober la totalité du plateau continental; il justifie son opinion en faisant remarquer que le plateau continental est la zone d’élection des principales espèces comestibles. Le 29 septembre de la même année le Gouvernement impérial russe émet une déclaration, notifiant aux autres gouvernements, qu’il considère comme faisant partie intégrante de l’Empire ‘les îles Henriette, Jeanette, Bennett, Herald et Ouyedinenie´, qui forment avec les îles Nouvelle-Sibérie, Wrangel et autres, situées près de la côte asiatique de l’Empire, une extension vers le


25. Durdenievskiy. “Problema pravovogo regime poliarnih oblastei” (“Problem of Legal Regime of Polar Regions”). Vestnik Moskovskogo gosudarstvennogo universiteta (Review of Moscow State University) 7 (1950); the western boundary of the Canadian Arctic sector is formed by the Convention of 1825 concluded between Russia (for Alaska) and Great Britain (for the Dominion of Canada) (Convention between Great Britain and Russia, [signed in St. Petersburg, 28 (16) February 1825]). The text of the convention does not say that this boundary extends to the North Pole, though it may be interpreted in this way: “dans son prolongement jusqu’à la Mer Glaciale.” These conventional words are stressed in the Russian translation of Hyde, International Law Chiefly as Interpreted and Applied by the United States (2nd edition, Little, Brown and Company, Boston, 1947); Russian translation: Mezhdunarodnoe pravo, kak ono ponimaetsja i primenyaetsja Soedinennymi Shtatami (Inostr. Lit. Moscov 1950) 60-61.

26. Postanovlenie Prezidiuma Centralnogo Ispolnitelnogo Komiteta SSSR (Decree of the Presidium of the Central Executive Committee of the USSR) of April 15, 1926, printed in Durdenievskiy (ed) Mezhdunarodnoe pravo (izbrannie dokumenti) (International Law [selected sources]) part 1 (Voennoe izdatelstvo Moskva 1955) (in Russian) 210; the boundary line provided by the Convention of 1867 (n 40) extends to the North “without limits”: “remont en ligne direct, sans limitation, vers le Nord jusqu’à ce qu’elle se perde dans la mer Glaciale” (Art. 1).

27. Convention Ceding Alaska between Russia and the United States (signed March 30, 1867, entered into force June 20, 1867) (1867) 134 CTS 332.


29. An Act, Respecting the Northwest Territories, 1906; The Northwest Territories Act, 1925. The latter provides for “territories,” “islands” and “possessions.” Relevant Russian legislation (Postanovlenie Prezidiuma Centralnogo Ispolnitelnogo Komiteta SSSR, 15.04.1926) uses similar wording.


Commentary: American Perspective
Jon M. Van Dyke

Michael Byers’ paper entitled “Arctic Straits: The Bering Strait, Northwest Passage and Northern Sea Route” provides a fine overview of the issues raised by the navigational opportunities in the Arctic created by climate change. This commentary addresses several of the issues he discusses from the United States’ perspective.

THE U.S.-RUSSIA MARITIME BOUNDARY

It may be somewhat optimistic to view the maritime boundary delimited in the 1990 U.S.-U.S.S.R as “for all intents and purposes, binding.” The 1,600-nautical-mile boundary between the U.S. and Russia is “the longest maritime boundary in the world,” extending from the Arctic through the Bering Sea to a point southwest of the farthest Aleutian Island. It was established by a treaty signed on June 1, 1990, and approved by the U.S. Senate on September 16, 1991, but has still not been ratified by Russia’s legislature. This boundary is based on the line drawn in the U.S.-Russia Convention of March 18/30, 1867, which contained a Maritime Boundary Agreement in its Article 2. The U.S. has viewed this line as establishing the maritime boundary between the two countries throughout its entire length. The result has been to give the U.S. substantially more maritime jurisdiction than it would have had utilizing an equidistant line and the equitable principles that govern maritime delimitation, and it also constitutes a claim to exercise jurisdiction over the continental shelf in areas where it extends beyond 200 nautical miles, in what is sometimes called the “doughnut hole” in the Bering Sea.

The reliance by the U.S. on a nineteenth-century treaty not designed to allocate ocean space is inconsistent with its approach toward other maritime boundaries, and is inconsistent with the equidistance approach, which it has sought to use in almost all of its other maritime delimitations. The U.S. endeavored to develop a consistent approach to its many maritime boundaries in 1976 by bringing together an inter-agency group chaired by the Department of State, with representatives from the departments of Defense, Justice, and Interior, the Federal Energy Agency, the Coast Guard,
and the National Oceanographic and Atmospheric Administration. This group decided that the U.S. should advocate using equidistant lines as the appropriate way to achieve equitable solutions in all regions except the Gulf of Maine, the northern sector of the boundary between Florida and the Bahamas, and the boundary between the U.S. and Russia in the Bering Sea and the Arctic.

In 2002, the Russian Duma approved a resolution stating that the 1990 treaty was “not balanced and called into doubt” Russia’s national interests. The resolution asserted that through this treaty the U.S. had acquired substantial maritime areas that should be within the exclusive economic zone (EEZ) and continental shelf of Russia in the Bering Strait and Bering Sea areas and that Russia had lost substantial amounts of revenues from fish harvested in these areas.

THE BERING STRAIT

With the beginning of regular navigation along the Northern Sea Route (NSR) and through the Northwest Passage, the U.S. will itself become a “strait state” with the challenges and responsibilities associated with this status. The Bering Strait certainly appears to be an Article 37 strait used for international navigation, but it is somewhat unique because it contains two separate straits, each within a single country—one strait between the Russian mainland and Russia’s Big Diomede Island and another strait between the Alaska mainland and the U.S.’ Little Diomede Island. Although the Law of the Sea Convention does not recognize any special regime for straits within a single country, in general, it does contain hints of such a regime, such as in the Messina-Strait Exception in Article 38(1), and the special regimes governing the Turkish and Danish Straits (and probably the Strait of Magellan), which are recognized in Article 35(c) of the convention. It may be, therefore, that a country can exercise greater control over a strait passing between two land areas it has sovereignty over, than with regard to a strait that passes through two separate countries.
WHAT CONTROLS CAN COASTAL STATES EXERCISE OVER VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS?

The rules recognized in the 1982 Convention do not allow a strait state to suspend transit passage through the strait (Article 44), but they do impose some restrictions on transit passage, such as: (1) transit passage must be solely for the purpose of continuous and expeditious transit [Article 38(2)]; (2) transiting ships must comply with generally accepted international regulations, procedures, and practices for safety at sea [Article 39(2)(a)] and for the prevention, reduction, and control of pollution from ships [Article 39(2)(b)]; and (3) ships exercising the right of transit passage must proceed without delay through the strait, must not engage in any research or fishing activities, and must refrain from any threat or use of force [Articles 39(1), 40, and 42(1)(c)].

Article 38(3) of the Law of the Sea Convention states explicitly that “any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention.” Any such “non-transit” activity, if undertaken in the territorial waters of a coastal state, would have to comply with the innocent-passage provisions of Articles 17-26 of the convention, and the activity could be prevented if “non-innocent.”

The Law of the Sea Convention allows countries bordering on straits to establish certain types of regulations:

1. Traffic separation schemes and other safety measures can be established under Articles 41 and 42(1)(a) of the Law of the Sea Convention, but Article 41(4) indicates that the International Maritime Organization (IMO) must approve a traffic separation scheme before it can be put into force.

2. Pollution control regulations can be adopted under Article 42(1)(b), which allows states bordering straits to adopt laws and regulations with respect to “the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait,” provided that such laws and regulations are not discriminatory, and do not “in their application have the practical effect of denying, hampering or impairing the right of transit
passage” [Article 42(2)], and have been duly publicized [Article 42(3)].

3. Fishing regulations can be adopted under Article 42(c) to prevent fishing.

4. Regulations can be adopted to control the loading, unloading, or transfer of any goods, any currency, or any person in contravention of the “customs, fiscal, immigration or sanitary laws and regulations” of the coastal state, under Article 42(d).

The regulations issued by straits states cannot discriminate against foreign ships nor can they have the effect of “hampering or impairing the right of transit passage” [Article 42(2)], and due publicity must be given to these regulations. Nonetheless, they can be promulgated, and foreign states whose flag vessels do not comply are responsible for “any loss or damage which results to States bordering straits” [Article 42(5)].

CAN SHIPS BE CHARGED FOR PASSING THROUGH STRAITS?

Article 26 is entitled “Charges Which May Be Levied Upon Foreign Ships,” and its paragraph 2 indicates that a coastal state can charge ships passing through its territorial sea “for specific services rendered to the ship.” Does this provision apply to a ship in the territorial sea of a country bordering on a strait while the ship is exercising its right to transit passage through the strait? No provision in Part III on “Straits Used for International Navigation” says explicitly that it does not apply, and application of Article 26(2) does not directly conflict with the purposes of Part III governing straits used for international navigation. Satya Nandan has sided with the straits states on this issue and has said that “there is nothing in the Convention which prohibits charges for similar services [similar to the “specific services rendered to the ship allowed under Article 26(2)] in straits which are part of the territorial sea.”

He has noted that the issue of compensation to strait states “has been festering for some time” and has explained that:

_**Straits States are legitimately concerned with the financial burdens they have to bear for establishing and managing traffic separation schemes, for**_
installing and maintaining navigational aids, and by the pollution they must endure, without receiving any corresponding benefits, since many ships transit straits en route to ports in other States.\textsuperscript{12}

Nandan has noted that this “matter remains unresolved” and that “a meaningful global solution would be difficult to achieve,” has suggested that the special circumstances of each strait need to be examined separately, and has recognized that “account also has to be taken of the sensitivity of the straits States to any diminution in the exercise of sovereignty over the strait.”\textsuperscript{13}

Article 43 calls for cooperation among strait states and those using the strait to establish navigational and safety aids and to control pollution. The first procedure to coordinate such activities was established in 2007 for the Malacca and Singapore straits. This process for coordination, called the Cooperative Mechanism,\textsuperscript{14} may provide a model for other regions. Funds have been contributed by a number of organizations and countries, including India and China, to support and replace aids to navigation, develop preparedness and response mechanisms, and undertake other important projects designed to promote safe shipping and protect the environment of the Malacca Strait region.\textsuperscript{15}

RUSSIAN AND CANADIAN CLAIMS THAT THE NORTHERN SEA PASSAGE AND NORTHWEST PASSAGE PASS THROUGH THEIR INTERNAL WATERS

In 1965, the U.S. challenged the Soviet Union’s claim that the Dmitry, Laptev, and Sannikov Straits were historic waters of the Soviet Union “even assuming that the doctrine of historic waters in international law can be applied to international straits.”\textsuperscript{16} The U.S. has also consistently challenged the straight baselines drawn by Canada in 1985 around Arctic islands that enclose the Northwest Passage.\textsuperscript{17} The U.S. has consistently taken the position that the transit passage regime applies to straits that can potentially be used for international transit, and that it is not necessary to establish that the strait has been so used historically.

Lewis M. Alexander has explained that the Soviet Union’s refusal in 1967 to allow two U.S. Coast Guard vessels to pass through the Vil’kitsky
Strait (between Severnaya Zemla and the Tamir Peninsula of the Siberian mainland) could have been (1) because the Soviets did not think this strait connected two parts of the high seas with one another (because they did not consider the waters of the Laptev Sea to be high seas) or (2) because the Soviets considered the U.S. Coast Guard vessels to be warships and then claimed that warships had to obtain prior consent before passing through the Soviet territorial sea. In any event, the U.S. does not appear to have made any attempt to pass through this strait since that incident.

The straight baseline claims of Russia and Canada in their Arctic regions are certainly unusual, but these regions are unusual, and perhaps require a special form of stewardship, as recognized in Article 234 of the Law of the Sea Convention. Canada’s enactment in 1970 of the Arctic Waters Pollution Prevention Act, which regulates shipping within 100 miles of Canada’s Arctic coast (enforced by refusing to allow noncomplying ships from entering Canadian ports), was an early environmental statute, widely viewed as appropriate at the time, and still viewed as sensible and necessary. Alexander wrote in 1986 that the Northern Sea Passage “presumably is open to commercial vessels of all nations during the few months of open navigation, but it requires the cooperation of the Soviet Union in terms of information on weather and ice conditions and, in times of emergency, of Soviet assistance in ice-breaking operations and other related actions.” Perhaps the U.S. will become somewhat more sympathetic to the challenges faced by strait states in protecting fragile ecosystems from ship-based pollution now that it is becoming a strait state itself, with regard to the Bering Strait.

**IS THE REGIME OF TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS NOW BINDING CUSTOMARY INTERNATIONAL LAW?**

The United States has not yet ratified the Law of the Sea Convention, but has argued vigorously that the regime of transit passage through international straits is now part of binding customary international law. On August 17, 1987, the U.S. said:

*The United States particularly rejects the assertions that the right of transit through straits used for international navigation, as articulated in the LOS*
Convention, are contractual rights and not codification of existing customs or established usage. The regime of transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention.  

Key straits states such as Turkey and Iran have also not ratified the convention and are less enthusiastic about the transit passage regime. Some countries have viewed transit passage as emanating directly from the Law of the Sea Convention, and thus not applicable to countries that are not contracting parties, and some commentators have suggested that the transit passage regime in the Law of the Sea Convention may not yet have been confirmed as customary international law because of “the attitude taken by a significant number of States which appear reluctant, either explicitly or implicitly, to accept the transit passage regime as a whole or some of its implications.” Some Greek scholars have argued, for instance, that Turkey would not be entitled to invoke the right of transit passage through the Aegean Sea (if Greece were to claim 12-mile territorial seas around its Aegean islands), because Turkey is not a contracting party to the Law of the Sea Convention.

Professor Scovazzi has explained that the convention does not adequately protect the “vital concern” of states bordering straits regarding the protection of their marine environment. In particular, the convention provides only limited authority to the bordering states to enforce their environmental regulations, it does not create an adequate liability regime, nor does it require the prior notification of transit of ultra-hazardous cargoes that would allow coastal states to protect their coastal populations and resources. These inadequacies have led a number of straits-bordering states to promulgate regulations that appear to go beyond what is permitted by the convention. Professor Scovazzi has concluded that “it is therefore possible to argue that the LOS Convention transit passage regime is still far from fully corresponding to present customary international law.”

THE DUTY TO COOPERATE IN SEMI-ENCLOSED SEAS

Article 123 says that countries bordering semi-enclosed seas “should cooperate
with each other in the exercise of their rights and the performance of their duties under this Convention.” More specifically, they are instructed to “endeavor, directly or through an appropriate regional organization (a) to coordinate the management, conservation, exploration, and exploitation of the living resources of the sea” and also to coordinate their activities “with respect to the protection and preservation of the marine environment.” Commentators disagree on whether the Arctic Sea should be characterized as a “semi-enclosed sea.” It is “surrounded by two or more States and connected to another sea or the ocean by a narrow outlet” as defined in Article 122 of the convention, but it is also substantially larger than other bodies that are viewed as “semi-enclosed.”

The countries bordering on and situated near the Arctic Sea have cooperated somewhat through the Arctic Council and its working group, Protection of the Arctic Marine Environment (PAME). The Arctic Council consists of Canada, Denmark (Greenland, Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, and the U.S., and indigenous groups participate in the Council as “Permanent Participants.” Some other countries have challenged the role of the Arctic Council, arguing that the Arctic should be managed globally.

The U.S. has, of course, cooperated with Canada in many respects regarding Arctic issues, and these two countries tend to try to overcome sovereignty disputes in order to promote management issues, as one would expect between countries that “are among the closest allies in the world.”

In any event, as exploitation of resources in this region increases, it will be necessary to establish and develop appropriate regional and international organizations to coordinate activities, promote cooperation, and manage the living and nonliving resources of the Arctic effectively.

Notes


3. Convention Concerning the Cession of Alaska (United States-Russia), March 30,
4. *International Maritime Boundaries*, supra note 1, at 449.

5. It is unclear exactly what authority is claimed under this 1990 treaty, because Article I(2) says that the parties claim authority “as far as permitted under international law.”

6. In the Beaufort Sea, Canada has rejected the equidistance approach supported by the United States and “claims a different boundary...based on its interpretation of the 1825 Treaty [of Saint Petersburg] between Russia and Great Britain.” Mark B. Feldman and David Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT’L L. 729, 750 (1981). That treaty says that the boundary between Alaska (then a Russian possession) and Canada (then a British possession) was at the 141 degree meridian of west longitude “in its prolongation as far as the Frozen Ocean.” Canada argues that this boundary covers the adjacent maritime areas, as well as the land areas, but the U.S. (emphasizing the use of the French word “jusqu’a” for “as far as the Frozen Ocean”) argues that the boundary covers the area “up to the ocean, not beyond, into, or under it. In the view of the U.S., the 1825 treaty did not establish a maritime boundary, but merely defined the boundary on land.” Robert W. Smith, United States-Canada Maritime Boundaries: A Study of Negotiations, Arbitration, and Management 4-3-17 (Conference on Marine Policy and the Korea Economy: Issues and Opportunities, Korea Maritime Institute and University of Rhode Island, Seoul, October 22-24, 1998). The U.S. has thus proposed using an equidistance approach because “there are no relevant prior agreements or ‘special circumstances.’” Id. The Beaufort Sea does not have any commercial fishing activity, but oil and gas potential exists, and both the U.S. and Canada have refrained from drilling in the disputed area.


10. Id.


12. Id. at 7.

13. Id. at 8.


22. The Turkish scholar Nihan Unlu lists the countries that “consider the regime of transit passage as an exclusive part of the UNCLOS” as Chile, Denmark, Egypt, Greece, Iran, Indonesia, Italy, Japan, South Korea, Malaysia, the Netherlands, Oman, and Spain. Id. at 75.


24. See, e.g., George P. Politakis, The Aegean Dispute in the 1990s: Naval Aspects
Commentaries

of the New Law of the Sea Convention, in Greece and the Law of the Sea 291, 303 (Theodore C. Kariotis ed. 1997) (similar to George P. Politakis, The Aegean Agenda: Greek National Interests and the New Law of the Sea Convention, 10 497 International Journal of Marine and Coastal Law 497 (1995)) (summarizing scholarly discussion that indicates that all aspects of the transit passage regime have not yet crystallized into customary international law), and Anastasia Strati, Greece and the Law of the Sea: A Greek Perspective, in The Aegean Sea After the Cold War 89, 94 (Aldo Chircop, Gerolymatos & Iatrides, eds., 2000) (“it is highly questionable whether the LOS Convention provisions on transit passage in all their detail reflect customary law, thereby entitling Turkey to benefit from them”).


26. Id. at 175-77.

27. Id. at 177-87 (providing examples from the Malacca Strait, the Canadian Arctic Straits, the Russian Arctic Straits, and the Turkish Straits).

28. Tullio Scovazzi, Management Regimes and Responsibility for International Straits, in 344 The Straits of Malacca: International Cooperation in Trade, Funding and Navigational Safety 344 (Maritime Institute of Malaysia, Kuala Lumpur: Pelanduk Publications, Hamzah Ahmad ed., 1997); see also Hamzah bin Ahmad, Global Funding for Navigation Safety and Environmental Protection, in The Straits of Malacca, id, at 125, 131 (“the concept of transit passage is relatively new and cannot be said to have acquired the status of customary international law”).

29. Lewis M. Alexander stated that “the Arctic Ocean is a major semi-enclosed sea with a very narrow connector to the Pacific Ocean via East and West Bering Straits, with the Northwest Atlantic through Kennedy and Robeson Channels and Nares Strait between Canada and Greenland; and with the Northeast Atlantic through the much broader Greenland and Norwegian Seas.” Alexander, supra note 18, at 311.

Commentary: Chinese Perspective

Peiqing Guo

**ARCTIC GOVERNANCE IN THE POST-NUUK ERA**

The Senior Arctic Officials (SAO) Report to Ministers published during the Seventh Ministerial Meeting of the Arctic Council in Nuuk, Greenland, set up “the criteria for admitting observers and role for their participation in the Arctic Council.” This report stipulates that those countries that want to be observers of the Arctic Council will have to meet very demanding requirements. These include recognition of the sovereignty, sovereign rights and jurisdiction of the Arctic countries. Their powers are very restricted and limited in contributing to the work of the council with scientific and financial resources. Ironically, it requires limitations on the financial contributions from observers to any given project, and these may not exceed the financing from the Arctic states!

Pointedly, the SAO report shows up the Arctic coastal states’ undisguised exclusion of non-Arctic countries. Arctic governance presents a feature of regionalization marked with backsliding. It can be called the Arctic collective version of the “Monroe Doctrine,” which proposes to carve up the Arctic “pie” within the countries bordering the Arctic Ocean.

The Arctic “collective Monroe Doctrine” originates from the Ilulissat Declaration of May 2008. The declaration’s central message is a preemptive one. It was designed to deter efforts by non-Arctic nations from interesting themselves in a domain that is conceived to be primarily the affair of the A-5. This concern was strengthened during the Nuuk, Greenland meeting.

From that time on, Arctic governance of these regions has become a tide carrying the main thinking around the Arctic. Why do the Arctic countries want to prevent non-Arctic lands from participating in Arctic affairs? Partly it is from a fear that the Arctic will be converted into the human family’s common heritage.

On a large scale, the Arctic border countries share some common interest in Arctic governance. Perhaps they hope to break up Arctic resources, including navigation recourses, from the public space, as in the other three oceans. Each of the Arctic countries tries its best to privatize Arctic resources even though there are conflicts among the five states. The
state of being semi-enclosed by five countries offers some convenience for their imagination of group privatization.

These words by Russian Foreign Minister Sergey Lavrov illustrated their concerns: “If given the green light early in the council, one hundred observers will require more and more rights, and then want to convert the Arctic into a heritage of humanity.” The source stressed that “Russia wants to avoid this situation” and that “most Arctic countries share Russia’s position.”

Perhaps we can think of what some see as obstructions by the Arctic states. To some extent, some Arctic countries’ judgment is correct. Their obstruction perhaps will hinder or slow down non-Arctic countries from benefiting from Arctic development in shipping and resources.

However, their demands will face the challenge of the internal defects hiding in their principles. According to the SAO report, non-Arctic states are required to recognize the Arctic states’ “sovereignty, sovereign rights and jurisdiction in the Arctic.” A definition of sovereignty means “the land area of a state, its internal waters and its territorial sea, including the airspace above those areas.” However, the problem is that they are not easily defined in this icy region called the Arctic, even by the Arctic coastal states. Some of these disputes have not been addressed at all among the Arctic states, for instance the disputes over maritime delimitations in the Beaufort Sea and the Bering Sea, both of which are abundant in oil. An example of this: There is a disagreement on the USA/USSR Maritime Boundary Agreement of 1990. The United States and Russia share about 15,000 square nautical miles of disputed area in the Bering Sea. What position will the Arctic coastal states require the observers to take on this issue related to sovereign rights and jurisdiction?

Under existing conditions, it is not feasible to ask a non-Arctic country to give clear recognition to “the Arctic states’ sovereignty, sovereign rights and jurisdiction in the Arctic” regardless of so many disputes in this territory, the EEZ, and the continental shelf.

New shipping routes and natural resource discoveries would eventually place the region at the center of world politics. Arctic governance is not only a regional issue, but an international one, let alone the central Arctic area consisting of an international seabed and high seas. There is no doubt that the management of the Arctic Ocean is inseparable from non-Arctic states’ participation. In addition, many issues, including black carbon, ozone depletion, greenhouse gases, mercury, persistent organic pollutants
(POPs) and long-range, trans-boundary air pollution dictate involvement by many non-Arctic states.

Actually, it is not realistic to obstruct non-Arctic states from Arctic governance. On the contrary, there is an implicit logic in the basic principles proposed and complied with by Arctic coastal states, that they acknowledge the non-Arctic states’ role in the regulation of the Arctic Ocean. The five Arctic states are committed to resolving territorial issues through the legal framework provided by UNCLOS. Both the Ilulissat Declaration and Nuuk Declaration admit to address disputes on the basis of UNCLOS. As the “constitution” of the law of the sea, UNCLOS empowers non-Arctic states with legitimate rights in the Arctic Ocean.

Arctic and non-Arctic states have to collaborate in the framework of the International Maritime Organization (IMO) to develop a new polar code for shipping, “strengthening global and regional efforts for the conservation and sustainable use of the Arctic marine environment.”

LEGAL ISSUES AND POLITICAL PROBLEMS IN THE ARCTIC PASSAGE

With the sea ice melting rapidly and with navigation guide development, we can say the technology of Arctic shipping has been resolved. Yet the biggest obstacles are shipping management rights, which involve political disputes and the laws of Arctic shipping. Summarizing the legitimate authority of Canada and Russia, we can conclude that it simply is about three aspects.

Sector Theory

This theory delineates a meridian line from the pole to the farthest extremity of the contiguous state’s land mass. All territory within that sector is purported to be under the sovereignty of the claimant state. It should be noted that this theory is not universally recognized as the sole basis for claiming territory in these regions.

Historical Title (Treaty Law and Customary Law)

UNCLOS does not define clearly the concept of “historic title.” However, based on the theory of customary law/unwritten law, the basic principles
can be drawn from a previous case judged by the International Court of Justice. This is the Fisheries Case between the UK and Norway, which happened in 1951. These basic principles are effective occupation for a long history, exclusive national jurisdictional rule, and acquiescence by interested foreign states. The last piece is a very important justification.

**Straight Baseline**

How do we define a straight baseline? This can also be found in the UK vs. Norway case. According to the ICJ judgment it can only be effective when it meets these requirements:

A. The archipelago itself must be united, and its configuration must be parallel with the general direction of the coast. For the Canadian Archipelago the general direction is east-west on the Robinson projection map, but in the Lambert conic project, a south-north landscape is shown. For three Russian islands in the Arctic the south-north direction is explicitly shown.

B. Islands must be in proximity to the land, that is to say, there must be a close link between land and sea.

C. Special economic interests evidenced by long usage.

D. Acquiescence to by the international community.

In short, the grounds of argument for either NSR or NWP privatization have faced many challenges from the international community. The reason is largely that their claim for internal water Arctic passage is due to customary law that needs stakeholders to reach a consensus instead of going one’s own way unilaterally. Russia and Canada have a long way to go in asking for acquiescence from international society.

**Canada’s and Russia’s Control over the Arctic Passage**

The regulation systems in the NSR and NWP are different. Canada has never historically denied navigation in the NWP, even though her management is getting stricter than before. Generally speaking, Russian management is stricter than Canadian domestic law and the related international law. Except for mandatory icebreaking and piloting in the four straits, Russian tariff policy has caused some controversy in the
The Arctic in World Affairs

Russia charges high tariffs for ice-breaking assistance to vessels on the NSR, which is from 118 to 2,576 Rubles/ton according to the cargo shipped. Basically, NSR tariff rates for assistance to vessels shipping liquid and bulk cargoes are from four to six times higher than those of the Suez Canal: liquid cargo, with 5.6:20.8; bulk cargo 4.5:27.8.

In recent years, the icebreaking fees, which have been increasing regularly, have also created a difficulty in the new conditions prevailing in the Russian economy. By early 1994, for instance, these fees had increased 1,376 times when compared to 1989. They are predicted to increase further in the near future.

In article 26 of UNCLOS, “Charges which may be levied upon foreign ships” stipulates that “1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea. 2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.” Although the charge is different depending on different situations, a nondiscrimination principle is recognized by the international community. “Without discrimination” currently covers only foreign ships and does not include Russian domestic vessels. According to this article, the charge is only for the shipping in “territorial seas,” but not above the continental shelf and EEZ.

Russia is planning to update the NSR to serve its energy projects and provide a shorter supply route to Asia; thus, the NSR can rival the Suez Canal. To achieve this goal, Russia has to address lots of relevant problems with the NSR, as of today, including outdated infrastructure and techniques on the Russian side, tariff rates and costs incurred that are too high, high risks (of delays, accidents, etc.) and insurance rates, and particularly unfavorable legal rules for foreign shipping companies.

EXPLORATION OF REGIMES OVER GOVERNANCE ON ARCTIC SHIPPING

Capitalizing on the Existing Regime

Many scholars believe and advocate that the existing international law, especially UNCLOS, and international organizations could serve well
for the Arctic issues, including shipping. Actually, this idea has a realistic foundation.

The major Arctic countries playing leading roles in Arctic governance have indicated many times that they wish to resolve disputes based on the UNCLOS. It is now up to us to think about the basic UNCLOS principles that can be used for Arctic shipping. They include three basic principles: favorable to traffic, beneficial to the marine environment and its protection, and good for sustainable development.

Russia and Canada claim to have authority to enforce their domestic laws under Article 234 of UNCLOS, allowing coastal states with ice-covered areas to be able to prescribe and enforce rules over those areas. The problem is that lots of definitions in that clause have not been defined. That is, lawyers disagree on virtually most of the words in the descriptions. For example, what is an ice-covered area? Is it ice-covered 200 days a year, 365 days a year? Can it just be ice-infested waters? Is it ice-covered if it just has big chunks and is still dangerous to transit? Other key words such as “nondiscriminatory,” “severe climatic conditions,” “exceptional hazards to navigation,” “major harm to or irreversible disturbance of the ecological balance,” and “best available scientific evidence,” have yet to be defined. The international community should work out more practical laws to facilitate ice shipping regulations.

The IMO is the most authoritative institution to regulate oceanic shipping. It is recognized by the international community, involving most countries worldwide. The latest development in Arctic shipping requires that new guidelines be established replacing the “Guidelines for Ships Operating in Arctic Ice-covered Waters” set up in 2002 by the IMO. The new guidelines being drafted by IMO will be mandatory.

**Exploration of New Regimes of Arctic Shipping—Montreux Mode**

Arctic coastal states are showing excessive concern with non-Arctic states’ intentions and interest in the Arctic. Some diplomats think of non-Arctic states participating as a zero-sum world, but not being mutually beneficial.

It is a fact that non-Arctic states have no territory in these regions, but this does not mean they have no legitimate interests in the Arctic region. Actually, the concept of “interest” has become a term with wider scope, that is, multi-element, or all-directional, and not merely related to territory, but including science, the environment and navigation, and so on.
Non-Arctic states’ interest in Arctic affairs could prove be a good opportunity for Arctic coastal states to voice their desire to foster cooperation in the region. Non-Arctic states are not wrong in seeking to play a constructive role in Arctic governance. On the contrary, they are what is right for Arctic governance if there can be unity of thought and relationships.

In this modern era of globalization, one-sided and isolated development at the sacrifice of others’ legitimate interests is neither realistic nor reasonable. The interests of different countries have been closely related without divisions. Cooperation is the most cost-effective method, and perhaps the best way to defend a country’s national interests. Non-Arctic states are constructive players in Arctic governance, especially in shipping, and will bring about a win-win situation. It will prove that Arctic coastal countries can gain benefits from non-Arctic states being involved in Arctic shipping regulations.

The fundamental prerequisite to deal with the relationship between Arctic coastal states and interested non-Arctic states may best be stated thusly: Let each of the Arctic states take into account the legitimate interests of non-Arctic states. Let each non-Arctic state acknowledge the legitimate concerns of Arctic coastal states. Both collaborate to improve dialogue, communications and cooperation.

The concerns of both Russia and Canada on the security and environmental protection of the Arctic passage should be taken into consideration by non-Arctic states. It is of no doubt that both countries enjoy primacy in shipping regulations. Their concerns about security, resources and environment should be respected by non-Arctic states, and their privilege will be respected by interested countries.

Based on the ideas here presented, the governance of the Arctic passage can be patterned after the mode of Montreux, which derives from the “Montreux Convention Regarding the Regime of the Turkish Straits.” This convention was held in 1936. It gave Turkey full control over the straits and guarantees the free passage of civilian vessels in peacetime. It severely restricts the passage of non-Turkish military vessels.

Providing Arctic shipping management chiefly by the countries along the passage, the interest of related non-Arctic states can thus be taken into full account. This would not be against the interests of Arctic and non-Arctic states. This compromise will address the dilemma annoying both sides and will benefit all.
North Pacific Cooperation in Institutionalizing Comprehensive Multilateral Norms and Regulations

Besides the Arctic countries, other Arctic stakeholders are from East Asia, primarily China, Japan and South Korea. Arctic governance has been connected with the North Pacific on a large scale. These connections are reflected in two respects: firstly, Arctic shipping mainly serves the economic areas of East Asia, Northern Europe and North America. With a growing Asia market, regional developments in container shipping keep rising. The major operations of Arctic shipping in the coming decades will be from Asian countries. Secondly, East Asian countries have been the biggest potential buyers for natural resources in the Arctic. The great earthquake a few months ago in Japan will slow down nuclear development. Consequently there will be a large increase in the consumption of fossil fuel in the world, part of which will maybe come from the Arctic.

The extreme environmental conditions and fragile ecosystem in the Arctic determine that conflict is harmful to the fundamental interests of interested countries. The price of any conflict simply cannot be afforded by any side. Arctic coastal nations have realized that cooperation is the best way to solve the Arctic’s security problems, and have been actively exploring ways to cooperate. However, lots of environmental problems inevitably involve many of the non-Arctic countries. Without cooperation by these many countries it is not going to be possible to address the Arctic issues.

So far as yet, there does not exist an authoritative international institution or world-wide international treaty regulating North Pacific cooperation. A potential North Pacific Rim Forum could include the three major Arctic countries Russia, the U.S. and Canada, and three major interested non-Arctic countries, all of which play key roles in today’s world. A North Pacific Rim Forum may shape collaboration to enhance economic cooperation and maritime safety in the Arctic and North Pacific.

North Pacific Cooperation in Establishing an Arctic Seaway Management Corporation

Neither Russia nor Canada wants to close the Arctic passage along their coastal areas, because both realize that it is not in their interest. How to maximize their interest in the Arctic passage is their common concern.
In this respect, the St. Lawrence Seaway Management Corporation offers us an excellent point of reference for Arctic passage governance. Scott Borgerson is the first to suggest the establishment of an Arctic Seaway Management Corporation to run Arctic shipping. Actually, this move is similar to the management pattern of the St. Lawrence Seaway. In 1959, the St. Lawrence Seaway joint treaty-based initiative between Canada and the U.S. was completed and inaugurated by President Dwight D. Eisenhower and Queen Elizabeth II.

Is it practicable to establish an “Arctic Seaway Management Corporation”? With global warming so evident in the world today, there may come a need for an age of large-scale resource extraction. The development and refinement of resources will consequently cause transportation lines to boom. It well may bring about the emergence of a new circumpolar super-economic belt-zone made up of Russia, North America and North Europe, which could enhance interdependence within Arctic coastal countries, as well as between Arctic coastal states and non-Arctic states.

However, up until now large areas of the Arctic region are lacking in infrastructure, and millions of square miles have not been adequately surveyed, so there is a lack of reliable charts/navigation data. Ideas and abilities to control pollution are very limited. This brings about great challenges for emergency response, search and rescue, and pollution response. The possibilities for oil spills, shipwrecks and smuggling, etc., compel the coastal nations to rely on coordination and cooperation with the international community. This would have to include the major user countries: China, Japan, and South Korea. With the support of non-Arctic countries, Arctic countries can establish a risk-shared contractual mechanism by dispersing the investment risk, and improve the general economic situation in the northern maritime region of Russia and Canada, and so all sides would benefit from it.

The greatest possible obstacle will be from Russia, which has made long-term operations in NSR infrastructure. In particular, its national strategy is to make a profit from the NSR. This brings much more uncertainty to the assumed Arctic seaway management corporation.

Building a North Pacific Security Conference

At present, the six countries mentioned above can start with low politics such as environmental protection, science research, search and rescue,
culture and fisheries. Then they could extend it to navigation cooperation, even security, and, as well, high politics. A potential North Pacific Security Conference could serve this purpose.

North Pacific security cooperation can compensate for the defects in current Arctic governance, that the Arctic Council is the center founded on the basis of the Arctic Environmental Protection Strategy, focusing on the environmental dimension, except military ones.  

While the Arctic Council has proven successful in serving as a forum for dialogue on soft-policy issues and as a body for coordinating research and knowledge-sharing, search and rescue, and environmental protection, with a number of initiatives already in place, its statute sets some limitations on its wider use, and a truly broad and all-encompassing Arctic cooperation is generally lacking. The principal reason is that cooperation has been hampered by historical mistrust between Russia and the four Arctic NATO members.

The introduction of non-Arctic countries into the Arctic could effectively lessen the strong military conflict color of the NATO-Russia relationship and improve the level of international cooperation.

Notes

2. A-5: The Ilulissat Declaration was prepared by five of the eight Arctic Council Countries, deemed by them to be the five Arctic coastal states, i.e., Canada, Denmark (based on Greenland and the Faroe Islands) Norway, Russia, and the United States.
5. WikiLeaks: A battle to “carve up” the Arctic http://english.aljazeera.net/indepth/features/2011/05/201151713273937174.html
ISSUES OF THE ARCTIC OCEAN FOR JAPAN

The Northern Sea Route

The first issue for the future of Japan’s policy concerning the Arctic Ocean is how to respond to the possibility of the opening of the Northern Sea Route (NSR), which is increasingly likely due to the melting of sea ice as a result of global warming and other factors.

More specifically, the possibility of shipping the natural resources of West Siberia to Asia using the NSR, or shortening the marine transportation route between Europe and Asia using the route, is discussed herein. The marine transport distance between Europe and Japan will be reduced to 60% of the current southward route, and this will also be reflected in fuel costs and transport time.

However, in order to take advantage of the NSR, there are technical challenges that will need to be addressed. In particular, there is the need to establish and implement a sea ice observation system using updated forecast technology, develop and implement a navigation support system that provides essential sea ice details, and develop high-performance, ice-capable merchant ships. With respect to the issue of the ships, there is the possibility to reevaluate the potential of nuclear-powered vessels for the Arctic. As a more fundamental issue, there is a critical need for charts, as...
the currently available ones are inadequate or nonexistent.

There is also a need to deal with regulations of the coastal state. In this regard, Russia has already enacted such rules as the Regulations for Navigation on the Seaways of the Northern Sea Route in 1990, the Regulations for Icebreakers and Pilot Guiding of Vessels through the Northern Sea Route in 1996, and the Requirements for the Design, Equipment, and Supplies of Vessels Navigating the Northern Sea Route.

Under these Russian regulations, permission for navigation within the NSR is conditioned on certain requirements concerning the vessel’s ice capabilities and the master’s experience in operating vessels in ice, such as requiring, in some circumstances, an experienced pilot. The regulations also require the submission of a request at least four months in advance, insurance against environmental damage, and the use of ice-breaker guidance and/or pilotage under direction from the Administration of the Northern Sea Route. Russia justifies these requirements on article 234 of the United Nations Convention on the Law of the Sea (UNCLOS) on ice-covered areas, claiming that extended coastal state jurisdiction may be exercised over ice-covered areas. However, since these requirements are not necessarily enforced on Russian vessels, questions have been raised with regard to the discriminatory character and reasonableness of the regulations.

These regulatory issues are not insurmountable obstacles for the shipping industry. Fees required by the regulations may be paid where economically feasible, and problems may be avoided by chartering ships of Russian nationality. However, there are still other technical problems such as aging of the Russian icebreaker fleet.

Also among the regulatory issues is the future of international regulation of global warming. Increased regulations for the shipping industry with regard to global warming will make the NSR all that more appealing, since the reduced distance will result in less emission of carbon dioxide. However, from the viewpoint of the shipbuilding industry and national industrial policy, there are alternative responses to the change in the regulatory environment. Whether to respond by building high-performance, ice-capable vessels, lightweight eco-ships built with thinner steel, or next-generation vessels fueled by LNG or fuel cells is a matter of strategic choices. The prospect of the NSR will not necessarily ensure more opportunities.

There is a business dimension to the issue as well. For example, there
is a problem concerning marine insurance policies. Since the NSR is outside the navigational limits set by the “trading warranty” provisions in commonly used marine insurance conditions, and is therefore uninsurable at the normal rates, insurance coverage is acquired on a case-by-case basis for an additional premium. However, this issue is likely to be solved by stabilization of expectations, if navigation in the NSR becomes routine, and the navigation conditions become established. The environment in which the cargo is transported presents a problem from a business perspective as well. From experience with the Trans-Siberian Railway, it has been pointed out that it is questionable whether the low temperatures of the NSR are suitable for transportation of goods such as precision machinery.

Resource Development

The second issue of interest for Japan’s future Arctic Ocean policy is the issue of resource development. As reserves of oil and natural gas in the Arctic have come to be recognized, states have looked to the Arctic Ocean with increasing geopolitical interest, which is linked to tensions in security relations in the area as well.

At the same time, there is also a movement towards delimitation of boundaries between the coastal states. For example, on September 15, 2010, Norway and Russia reached an agreement on maritime boundary delimitation between the two countries, and signed a treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. This treaty includes two annexes concerning fisheries and resource development. In connection with this development, with respect to the maritime areas around the archipelago of Svalbard, recent trends show that claims against Norway’s continental shelf and exclusive economic zone have become less common, and the center of the dispute has shifted to the rights of the state parties to the Svalbard Treaty to participate in resource exploration in the relevant maritime areas.

The issue of resource development is not only about new resource development in the Arctic Ocean. Production facilities in oil and natural gas fields that were developed during the Soviet era are increasingly becoming outdated and continued investment is required for Russia to maintain its current production capacity. Ensuring such continuous and stable investment is also a major issue. Outside the ice-covered areas of the Arctic
Ocean, ensuring stable investment for resources also involves maintaining stable relationships with the indigenous population of the area. The Shakhalin-2 project in which Japan participated was temporarily stopped due to concerns over environmental damage, and the project’s financial structure had to be modified. This development had its origins in the appeals to international financial institutions by indigenous organizations on environmental issues.

**Environmental Management**

Finally, the third issue of interest for Japan’s future Arctic Ocean policy is environmental management. Increased utilization of the Arctic waters, in the form of marine resource development, and the use of the NSR may have negative consequences for the fragile natural environment and ecosystem, and balance must be achieved between utilization and environmental conservation. How to respond to oil spills in ice-covered waters is an example of such a challenge. There are no established methods for removing spilled oil from ice-covered waters in cases of oil pollution casualties, and if the ecosystem is destroyed, it will take an enormously long time to recover compared with other areas. This area is a good candidate for international cooperation led by Japan.

**JAPANESE ARCTIC POLICY**

With respect to the Arctic, Japan has been continuously engaged in various activities. First of all, Japan has long experience in Arctic observation and research. The National Institute of Polar Research has established an extensive observation network for monitoring climate change in the Arctic region, and has conducted a number of international joint studies. The Japan Agency for Marine-Earth Science and Technology (JAMSTEC) has also been conducting research on the Arctic climate system, mainly based on research conducted by research vessels. Moreover, the Japan Aerospace Exploration Agency (JAXA), in cooperation with JAMSTEC, has been conducting an analysis of satellite data on the Arctic sea, atmosphere, land, and ice.

Research on the NSR has been led by the private sector. From 1993 to 1999, the Ship and Ocean Foundation of Japan, the Fridtj of Nansen
Institute (FNI) of Norway, and the Central Marine Research & Design Institute (CNIIMF) of Russia jointly pioneered research on the potential of the NSR as an international commercial shipping route, under the International Northern Sea Route Programme (INSROP). Also, from 2003 to 2006, studies with a focus on the Russian Far East and Asia were conducted under INSROP II, as an extension of the previous study.

With these kinds of academic and privately led activities in the background, there is increasing interest from the government as well. Japan participated in the Ottawa Conference in 1996 as an observer, and has applied for permanent observer status at the Artic Council, which was established at the conference. Japan’s interest in the increased potential use of the Arctic Ocean, and its position and role as a maritime and environmentally advanced nation were referred to as reasons for its application.

In these ways, Japan has been active in various activities related to the Arctic Ocean. However, these activities have not been well structured. For example, scientific observation and research is an indispensable factor in the management of the Arctic Ocean as a large-scale marine ecosystem. However, it is not clear whether the accumulated results of observation and research were properly utilized as input for governance of the Arctic Ocean. For example, article 234 of UNCLOS, on which the extension of coastal state jurisdiction over ice-covered areas is based, provides that the regulations of the coastal state “shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.” Under this provision, scientific evidence may serve a certain role in controlling regulation by coastal states. However, this kind of utilization does not seem to have taken place.

The issue of Russia’s regulatory powers over the NSR, for shipping companies, is an issue that could be managed according to economic principles. However, for Japan, whether to come to terms with Russia’s position, or to firmly maintain the principle of freedom of navigation along with the United States and, to a lesser extent, the EU, is a matter of policy choice. While studies on the NSR have progressed under privately led initiatives, these kinds of policy options have not yet been clearly discussed.

At the domestic level, in September 2010, the “Arctic Task Force” was established within the Ministry of Foreign Affairs of Japan in order to put in place a framework for cross-sectoral discussion within the ministry. In the future, it is hoped that these kinds of discussions would be held with more wide-ranging stakeholders involved.
Notes

3. In a case where these persons have no such experience, or when the master of the vessel requests so, the administration (Marine Operations Headquarters) may assign a state pilot to the vessel to assist in guiding her through the NSR.
5. http://www.fni.no/insrop/

Commentary: Korean Perspective

Keun-Gwan Lee

There has recently been a substantial increase in press coverage of the Northern Sea Route (NSR) that is opening for transit shipping due to the melting of Arctic ice caused by the changing climate and the increased warming of the Arctic region. Navigating the Arctic Sea route conjures up a romantic and heroic image of conquering the last frontiers of humanity. The allure of substantial economic benefits arising from, among others, the shortening of shipping distance and new demand for ice-breaking ships, has also added to the excitement. Will the NSR open a “brave new world” for the international community, in particular, the shipping and shipbuilding industries?

Amid the brouhaha around the opening of the NSR, there are some voices advising a healthy dose of skepticism about the route. Their biggest concern lies with the negative impact to be inflicted on the highly fragile Arctic environment by the use of the NSR. Some in the shipping industry call into question the commercial viability of the NSR. Even assuming, for the sake of argument, the commercial profitability of the route, the governance of Arctic matters, including the regulation of the NSR, is quite entangled and makes for tension and friction among the littoral and user states. Given these misgivings and entanglements, there is a need for a
clarion call for a balanced approach that can do justice to all the legitimate stakeholders and all the relevant circumstances attending the use of the NSR.

In this comment, I will briefly discuss the following: (1) obstacles to the use of the NSR; (2) the existing governance over the NSR with particular reference to the Arctic Council; and (3) suggestions for normative and institutional reconfigurations.

**OBSTACLES TO THE USE OF THE NSR**

The obstacles to a more active use of the NSR are many:

1. There are navigational hazards and environmental concerns that are reflected in Article 234 of the 1982 UNCLOS, which reads as follows:

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

   This article of UNCLOS was negotiated mainly by Canada, the Soviet Union (USSR) and the United States with the Arctic Sea in mind. The italicized part clearly describes the severe conditions of the Arctic and the danger arctic navigations can pose to the fragile environment.

2. The lack of knowledge and infrastructure is also a major obstacle. For instance, there is an acute shortage of reliable charts of the NSR. According to a U.S. expert on the issue, less than 10 percent of Arctic waters are charted to modern standards. Other indispensable infrastructures and services such as port facilities, navigational aids,
weather forecasting and search and rescue arrangements are in need of substantial improvement.

3. A comprehensive and clear legal framework is yet to be established. At the multilateral level, Article 234 of the UNCLOS is the most important provision. However, this provision is regarded as “probably the most ambiguous, if not controversial, clause in the entire treaty.” There is also a heated controversy over the international legal status of various straits along the Russian Arctic coasts. The U.S. argues that they are subject to the very liberal regime of transit passage under the 1982 UNCLOS, while Russia claims the status of internal waters for them.

4. Regulatory/governance entanglements over the Arctic region in general and the NSR in particular cause much confusion and ambiguity. Coastal states take unilateral measures such as the NORDREG (Northern Canada Vessel Traffic Services). Bilateral arrangements such as the 1988 U.S.-Canada Agreement on Arctic Cooperation are in place, too. The Arctic Council represents a regional approach to the issue. Multilateral/general approaches such as UNCLOS and International Maritime Organization (IMO) (for instance, the Polar Code) are in operation. The coexistence of various regulatory/governance arrangements at different levels is not a problem in itself. The problem is that these various arrangements are not well coordinated.

5. From the standpoint of the shipping industry, the crucial problem is uncertainty about the commercial viability of transit shipping through the NSR. Doubts have been expressed concerning the economic efficiency of the NSR against traditional ones such as the Suez and Panama canals in terms of convenience, predictability, depths, infrastructure, connectivity to rail and the realities of the Arctic. According to a person working for a major Japanese shipping company, it is doubtful that the NSR is more economical and useful at present.

Despite these obstacles, it is also a fact that the NSR has become a reality from the perspective of the connection with transport of oil and gas development in the Russian and Canadian Arctic regions. For example, a major Korean shipbuilding company, Samsung Heavy Industries, has already delivered three ice-breaking tankers to Russia. As far as destinational shipping is concerned, the use of the NSR is very much a reality that will assume an increasing importance in the future. Therefore, the question is not a dichotomous choice between use and non-use of the NSR, but an
environmentally sound and sustainable use of the route, taking into account all the legitimate concerns of the stakeholders.

THE EXISTING GOVERNANCE OVER THE NSR WITH PARTICULAR REFERENCE TO THE ARCTIC COUNCIL

I have already mentioned the regulatory/governance entanglements over the Arctic region in general and the use of the NSR in particular. In this section, let me focus on the regional mechanism for Arctic governance, that is, the Arctic Council.

The council is composed of eight member states (five Arctic coastal states plus Iceland, Finland and Sweden), six permanent participants representing Arctic indigenous peoples, six permanent observer states (France, the United Kingdom, the Netherlands, Spain, Germany, Poland) and five ad hoc observers (China, South Korea, Japan, Italy and the European Union). That the council is run in a closed way is shown by its persistent refusal to admit the five ad hoc observers as permanent observers. China has been the most outspoken in arguing for opening Arctic governance to non-Arctic actors. One Chinese expert called the 2008 Senior Arctic Officials Report “the Arctic collective version of the ‘Monroe Doctrine’.” Non-Arctic states led by China and India claim that the Arctic is a global common and thus should be accessible to all legitimate stakeholders. To use Latin expressions, the Arctic should be transformed from mare nostrum into a genuine mare communum.

The rationales for an inclusive approach to Arctic governance include, among others: (i) the Arctic as a global common; (ii) the need to avoid unnecessary frictions and misunderstandings; and (iii) the necessity to secure investments by user states. Now the question is which direction should be taken in redesigning the institutional design of Arctic governance. Many models can be benchmarked. In my opinion, one of the most promising models can be found in the polar opposite, that is, Antarctica. Since the adoption of the Antarctic Treaty in 1959, this region has witnessed the gradual buildup of an inclusive governance structure that is generally regarded as highly successful. The Antarctic regime is built around the 1959 treaty, supported by other treaties dealing with specific subject matter such as conservation of marine living resources, environmental
Commentaries

As regards Antarctic governance, the Antarctic Treaty Consultative Meeting constitutes its core. In stark contrast to the Arctic Council, this arrangement is open and inclusive. For instance, if a party acceding to the Antarctic Treaty “demonstrates its interest in Antarctica by conducting substantial research activity there such as the establishment of a scientific station or the dispatch of a scientific expedition,” it is qualified to be a member of the Consultative Meeting.

It is to be stressed that a more inclusive approach does not mean the “meltdown” of sovereignty, sovereign rights and jurisdiction of the Arctic states. It means more accommodation of non-Arctic stakeholders, thus avoiding unnecessary frictions and achieving an optimal utilization of the Arctic region. In light of examples such as the Antarctic regime, it is desirable for the Arctic and non-Arctic states to articulate a properly balanced mechanism for Arctic governance.

SUGGESTIONS FOR NORMATIVE AND INSTITUTIONAL RECONFIGURATIONS

In this section, let me make some suggestions to improve Arctic governance in normative and institutional terms.

1. Reconfiguring multilateral norms, in particular, UNCLOS:

The UNCLOS, often called “a constitution for the oceans,” has only one provision (i.e., Article 234) that directly regulates Arctic waters. When the convention was adopted in 1982, commercial use of the NSR was hardly on anybody’s mind. Given the “constitutional” importance of the convention, it would be best to put in place more detailed provisions relating to the Arctic waters in it. However, the Arctic states are very wary and critical of such a proposal. For instance, in the 2008 Ilulissat Declaration, they stated as follows:

“This framework [the law of the sea] 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.”
It is to be noted that the international community faces thorny law-of-the-sea issues that could not be envisaged in sufficient detail in the lead-up to the adoption of the UNCLOS in 1982. Sea level rise, the protection of underwater cultural heritage, the use of the NSR and principles of international environmental law (such as the precautionary principle and the polluter pays principle) are prime examples. This means the UNCLOS requires updating, at least in some parts.

Possible options for improving multilateral norms and regulations for Arctic governance would be as follows. First, the international community can adopt a separate multilateral treaty regulating Arctic matters. If one follows the example of the Antarctic Treaty, a general or framework treaty can be supplemented by specific protocols or conventions. Second, one could think of amending the 1982 UNCLOS itself. In this case, the procedures as provided for in Articles 312 and 313 can be utilized. This option is theoretically possible, but will be extremely difficult to act on. Given the highly interconnected nature of the UNCLOS regime, trying to amend a specific part of the convention will be like opening Pandora’s Box. Thirdly, one can take a more toned-down approach to the question by adopting a series of soft-law documents on the Arctic region.

2. Reconfiguring institutional arrangements:
Concerning this question, let me just suggest some guidelines that should inform future discussions on how to improve Arctic governance.

- First, the new institutional mechanism should reflect the character of the Arctic waters as *mare communum* where the leading role of the Arctic states should be recognized.
- Second, at the same time, various stakeholders, including user states and non-state actors (in particular, indigenous peoples and the industries concerned) should be represented.
- Third, given the sharp divide of opinions between Arctic and non-Arctic states, an incremental and gradual approach for the establishment of a more inclusive governance structure is to be preferred.
- Fourth, in light of the importance of expert knowledge about the Arctic region, the new institutional design should be conducive to the heightened role of the epistemic community composed of specialists on various fields of different nationalities.
Notes


4. For a detailed discussion of the question, see R. Douglas Brubaker, Russian Arctic Straits (Brill, 2004).


6. Information provided by Mr. C.H. Park, who is executive vice president and chief technical officer of the company.


10. Article 9(2) of the Antarctic Treaty.