

Governance of Arctic Shipping

*Balancing Rights and Interests of Arctic States
and User States*

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Conclusions on Challenges and Prospects for Enhanced Cooperation on the Governance of Arctic Shipping

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This concluding Chapter focuses on the challenges and prospects for enhanced cooperation on the governance of shipping in the Arctic. It first highlights some of the major findings in the previous Chapters. Then it examines the major challenges to enhanced cooperation on the governance of Arctic shipping and the feasibility of establishing mechanisms that will promote cooperation among all the major stakeholders on matters of common interest. The underlying premise of this Chapter is that shipping in the Arctic is likely to increase, and therefore it is in the interests of all stakeholders to enhance further the safety of navigation, the protection of the marine environment from the impacts of shipping, and protect the culture and way of life of Arctic indigenous peoples.

Major Conclusions from the Previous Chapters

With respect to the future of shipping in the Arctic, the following major conclusions can be drawn from the previous Chapters.

First, the extent and thickness of sea ice in the Arctic is likely to decrease, and as a result, shipping in the Arctic will grow in the future, at least on a seasonal basis for specific types of shipping.

Second, shipping in the Arctic will continue to face many challenges due to the remoteness of the region, the harsh climate, extended periods of darkness and significant shortcomings in the broader marine infrastructure, such as poor port facilities, and lack of accurate navigational charts, communications systems, aids to navigation and emergency response services.

Third, significant financial investments will be required by both the public sector and the private sector to improve the broader marine infrastructure.

Fourth, there is widespread concern among States, Arctic indigenous peoples and non-governmental organisations about the various threats posed by increased shipping to the marine environment.

Fifth, Arctic indigenous peoples are concerned about the impact of increased shipping on their culture and way of life.

With respect to the governance of shipping in the Arctic, key conclusions of the previous Chapters are set out below.

First, the IMO will continue to be the competent international organisation for the development and adoption of global rules and standards for maritime safety and the environmental impact of shipping within the framework of the United Nations Convention on the Law of the Sea (UNCLOS) and for facilitating their general acceptance and eventual implementation, including in the polar regions.

Second, adoption of the Polar Code by the International Maritime Organization (IMO) was a major achievement toward establishing common global rules and standards to enhance the safety of navigation and protect the marine environment from the impacts of shipping in the Arctic. In addition to keeping the Polar Code under review and amending it when necessary,¹ the IMO will also adopt instruments that are related to the Polar Code, consequential to it, or which complement it.²

Third, while Canada and Russia are likely to take steps to bring their national legislation into harmony with the Polar Code, they are also likely to take the position that they have the power under Article 234 of UNCLOS to continue to adopt national laws and regulations that are more stringent than the Polar Code when they determine that such laws and regulations are required to protect the Arctic marine environment from the impacts of shipping.

Fourth, if the Arctic becomes open for international navigation on a seasonal basis, user States and other stakeholders are likely to take the position that foreign ships in transit through the Arctic should be governed by international rules and standards adopted by the IMO and other competent international organisations, rather than the national laws and regulations of the coastal States.

Fifth, the Arctic Council is likely to continue to play an active and important role in the governance of shipping in the Arctic by examining particular issues

1 For instance, by making the Polar Code also applicable to non-SOLAS ships (Phase 2). At MSC 97, however, no decision was taken on the commencement of Phase 2, as this was perceived as being premature (MSC 97/22, at 74, para 21.10).

2 E.g., see Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, adopted 7 July 1978, as amended in 1995 and 2010, entered into force 28 April 1984, 1361 UNTS (STCW) and the Seafarers' Training, Certification and Watchkeeping (STCW Code), IMO Doc MSC 96/3/2, 4 November 2015, prepared for adoption by MSC 97 in accordance with the STCW and with an expected entry into force on 1 July 2018, specifically, MSC 97/22, at 13–14, paras 3.49–3.57, and other decisions made at MSC 97, including MSC 97/22, at 41–43, paras 8.27–8.32, at 50, paras 9.22–9.23, at 61, paras 16.6–16.7, and at 73–74, paras 21.7–21.8.

relating to maritime safety and the impacts of shipping on the marine environment and on the culture and way of life of the Arctic indigenous peoples.

Sixth, the Paris and Tokyo Memoranda of Understanding on Port State Control could become involved in ensuring that vessels engaged in Arctic shipping comply with the Polar Code.

Factors Supporting the Establishment of a Cooperative Mechanism for Arctic Shipping

There are several reasons why it may be feasible to begin discussions on developing one or more cooperative mechanisms in the Arctic similar to that for the Straits of Malacca and Singapore (SOMS).

First, the Arctic States are likely to see the economic advantages of opening up the Arctic to international shipping, if it can be done without posing a threat to their sovereignty or their security interests, and if they can be assured that Arctic shipping will follow the best international rules, standards and practices for safety of navigation and protection of the marine environment.

Second, the Arctic States recognise that they will likely require outside assistance to help fund the necessary improvements to the broader marine infrastructure.

Third, major user States such as China, Japan and South Korea have demonstrated that they have a serious interest in developing Arctic shipping, and that they have the technology and resources necessary to assist in improving the broader marine infrastructure and technology.

Fourth, Arctic indigenous peoples—whether through the Arctic Council or otherwise—will demand a voice in the process to ensure that their interests are taken into account.

Fifth, other stakeholders, such as non-governmental organisations (NGOs) representing the international shipping industry and national and international environmental NGOs, will want to have the opportunity to present their views and positions on the issues.

Any Cooperative Mechanism Must Be ‘Without Prejudice’ to Sensitive Issues

Any cooperative mechanism on shipping in and through the Arctic is unlikely to succeed if it requires any of the interested States to change their national position on sensitive issues of sovereignty or existing maritime disputes. Therefore, it must be clear that participation in a cooperative mechanism is

‘without prejudice’ to the position of the cooperating States on the following issues.

First, it is without prejudice to the position of any State on the legal status of Arctic waters.

Second, it is without prejudice to the issue of whether passage through Arctic waters is subject to the regime of transit passage through straits used for international navigation.

Third, it is without prejudice to the positions of the interested States on the geographical and substantive scope of the powers of coastal States under Article 234 of UNCLOS.

Fourth, it is without prejudice to the position of any interested State on any disputes concerning sovereignty claims, maritime boundaries, baselines, or submissions to the Commission on the Limits of the Continental Shelf.

Principles Governing Cooperative Mechanisms for Arctic Shipping

The cooperative mechanism in the Straits of Malacca and Singapore (SOMS Cooperative Mechanism) has several key features that have been responsible for its success.

First, it is consistent with UNCLOS and does not infringe on the primary role of the IMO in the establishment of global rules and standards governing international shipping.

Second, it recognises that the three littoral States bordering the SOMS have sovereignty over their waters in the straits and primary responsibility for the safety of navigation and the protection of the marine environment, and provides that any cooperative measures must be approved by the three littoral States.

Third, it recognises that user States and other stakeholders, such as industry and environmental NGOs, have an interest in the safety of navigation and the protection of the marine environment in the SOMS. It provides a forum where they can meet regularly with officials from the three littoral States to discuss issues relating to safety and ship-source pollution in the SOMS. In return, the user States and other stakeholders provide funds either to the general Aids to Navigation Fund or to support specific projects that will enhance maritime safety or environmental protection in the SOMS.

In many respects the situation in the Arctic is similar to that in the SOMS.

First, the Arctic States, especially Canada and Russia, jealously guard their sovereignty and jurisdiction and are wary of any arrangements that may infringe on their sovereignty and jurisdiction.

Second, the Arctic States are interested in enhancing navigation, but they lack the funding and resources required to enhance safety of navigation,

protection of the marine environment and improvement of the broader marine infrastructure.

Third, user States and other stakeholders have a genuine interest in enhancing safety and environmental protection in Arctic shipping, and they may be willing to provide financial and technical assistance if a mechanism is created that gives them a forum to discuss these issues with the coastal States.

There is, however, one critically important difference between shipping in the SOMS and in the Arctic. In the SOMS, the three littoral States have agreed to manage the two straits as a single unit and to make decisions on the basis of consensus. By contrast, in the Arctic, Russia is the sole major State bordering the Northern Sea Route and Canada is the sole major State bordering the Northwest Passage. Therefore, Russia and Canada are likely to take the position that no cooperative mechanism can be created for passage through these routes unless the mechanism recognises their sovereignty and jurisdiction and their primary responsibility for navigational safety and the marine environment.

This important difference means that it is unlikely that a single cooperative mechanism can be established which governs all shipping in the Arctic and which gives all the Arctic coastal States an equal voice. Instead, it may be more feasible to begin by exploring the prospect of establishing a cooperative mechanism for the Northern Sea Route. The mechanism would recognise the sovereignty and jurisdiction of Russia and its primary responsibility for the safety of navigation and the protection of the marine environment in the Northern Sea Route. At the same time, a forum could be established that would enable major user States and other stakeholders, including Arctic indigenous peoples and industry and environmental NGOs, to meet on a regular basis with officials from Russia to explore prospects for improving and developing the necessary broader marine infrastructure. If they had a voice in the planning of such infrastructure, user States may be willing to provide technical and financial assistance to strengthen the broader marine infrastructure in the Northern Sea Route or to encourage their companies to participate in public sector-private sector partnerships to make the necessary investments.

At the same time, discussions could also be expanded among officials from Russia, the United States, user States and other stakeholders in relation to the Bering Strait. Similar discussions could also be initiated with Canadian officials in relation to the Canadian Arctic.

Alternatively, discussions could be initiated between Canadian officials and user States and representatives of industry on the infrastructure required to enhance safe navigation and protect the marine environment in the Canadian

Arctic. Such discussions in Canada should include representatives of indigenous peoples and environmental organisations.

The first phase in such endeavours could consist of workshops convened by one or more of the relevant Arctic coastal States to exchange views among stakeholders, to examine the interests and concerns of all stakeholders, and to develop proposals for concrete cooperative projects. Such projects should above all be aimed at building confidence and experience among the participants. Examples could be aids to navigation, routing measures and nautical charting.

Consideration should be given to inviting the IMO to play a role in establishing cooperative mechanisms in the Arctic, given the important role it played in facilitating the establishment of the SOMS Cooperative Mechanism. The IMO may be willing to perform a similar role in facilitating the establishment of one or more cooperative mechanisms for Arctic shipping. If the IMO is given such a role, it may increase the chances that major user States and shipping organisations will be willing to be involved.

The SOMS Cooperative Mechanism is nevertheless an autonomous body, which has not been established under the auspices of an overarching inter-governmental organisation or body. This institutional choice may well be the most appropriate solution for the abovementioned cooperative mechanisms for Arctic shipping. However, a possible role for the Arctic Council in establishing cooperative mechanisms in the Arctic should also be considered. Given the extensive activities relating to Arctic shipping that have been and continue to be undertaken within the Arctic Council, with due regard to the primary role of the IMO in the establishment of rules and standards governing international shipping, it may also be possible and desirable to link such mechanisms in one way or another to the Arctic Council. As highlighted in Chapter 2 of this Volume, the last decade has seen the establishment of several new Arctic bodies that are not formally part of the Arctic Council. Some of these were established under legally binding instruments negotiated under the auspices of the Arctic Council, and others build on earlier work of the Arctic Council or even aim to implement and support such earlier work. This institutional diversity and flexibility reflects a willingness to consider tailor-made and innovative solutions that would be of crucial importance to cooperative mechanisms for Arctic shipping.