

## ***DRAFT***

Canada's position on Arctic Navigation: Would an EU Challenge be Acceptable?  
Armand de Mestral, Emeritus Professor, Jean Monnet Professor of Law, McGill University

### **ABSTRACT**

The Government of Canada has asserted the right to regulate navigation in the Arctic in a zone extending 200 nautical miles, based on the Arctic Waters Pollution Prevention Act. The Canada Shipping Act and implementing regulations. The powers vested in this legislation make no distinction between ships going to Arctic ports or to ships traversing the Northwest Passage. The international justification of these measures is found in the UN Law of the Sea Convention Article 234 and in other articles. Would the European Union be entitled to challenge this assertion of regulatory authority by Canada in the Northwest Passage? Should the EU take steps to challenge Canada? What issues would be raised by such a challenge?

### **NOTES FOR A PRESENTATION**

*Definition of the area of concern.*

Internal Waters. Territorial Waters, EEZ, Continental margin beyond 200 nm possibly including submarine ridges. Included in Canadian and Russian waters are straits not yet customarily used for international navigation lying in EEZ and internal waters.

Beyond EEZ much of the Arctic Ocean and seabed is part of the Common Heritage of Mankind according to the Third UN Convention on LOS.

Five of the eight Arctic states have coastlines within the Arctic Circle, Iceland is situated just outside the Arctic Circle. No EU Member state has a coastline in the Arctic Circle.

#### *I. General Legal position of Arctic Coastal States and EU*

The LOS Convention has been ratified by seven arctic states but not the USA (which regards many of the principles as declaratory of customary international law). The EU has signed in 1982 and subsequently deposited an instrument of confirmation. The great majority of EU Member States have also ratified the LOS Convention.

The LOS Convention provides common ground, arguably binding on all as treaty or custom. However there may be differences of interpretation and understanding of the law. There is as yet no certainty as to which areas of the seabed beyond 200nm are within the jurisdiction of six states (Finland and Sweden have no relevant coastlines). Thus the extent of the seabed which is part of the common heritage of mankind and subject to the jurisdiction of the International Seabed Authority has yet to be determined.

There is no disagreement as to the high seas status of waters beyond 200nm from land. There may be disagreement as to whether certain waters between islands are internal waters. There may also be disagreement as to whether the NW Passage and the Vilkitsky Strait are subject to the régime of transit passage. It is also possible that there is disagreement as to where and when LOS Convention art. 234 applies. Many areas of the Arctic Ocean within the EEZ of the coastal states are subject to the special legal regime for the protection of highly vulnerable areas under LOS art 211 (6) (7). Under the LOS Convention states also have duties to protect the environment and the living resources of the high seas beyond 200nm.

High Seas freedoms apply in the Arctic ocean. These include the freedoms of navigation and overflight and the right fish and to conduct marine scientific research in the water column, and on the seabed which forms part of the common heritage of mankind.

All states have duties to protect the environment of their EEZ and of the high seas in the Arctic under the LOS Convention Chapter XII.

The Members of the Arctic Council all have indigenous peoples living in the Arctic whose welfare must be a matter of special concern for them

### *Legal Interests of the EU*

The EU has ratified the LOS Convention and insofar as it is empowered to act in respect of matters covered by the LOS Convention it is bound. TFEU arts 3(2), 216-218, 352 may empower the EU to conclude treaties in certain situations. The extent to which the EU is legally empowered to act in respect of international navigation and shipping is by no means clear. The EU may be empowered to finance research beyond its borders, whether it is empowered to regulate such research is uncertain. The EU is empowered to represent the interests of its Member States beyond its borders in respect to fisheries conservation and regulation.

Navigation is a complex issue under EU law. The EU has a complex set of policies on marine pollution prevention within its EEZ. The EU has a considerable body of regulation dealing with standards for the registration of ships by its member states, the oversight of the activities of P & O Clubs, the oversight of standards of insurance by Member States. All these rules are made at the EU level and administered by Member States. The extent to which the EU can take over the international representation of the rights and duties of its member states is not fully clear but the SOLAS case of 2008 (Case C-45/07) suggests that the EU may well be able to represent Member State interests including on issues of legal principle and that once EU rules exist a Member State is precluded from seeking an opinion on such rules to the international standard making body the IMO.

Another question that raises complex questions of EU law is the extent to which articles of an international convention, such as the UNCLOS Convention art. 234, is binding in EU law and has to be followed by the EU. The foreign affairs power of the EU has undergone considerable expansion with the adoption of the Lisbon Treaty in 2009. Third states like Canada may not be required to accept or appreciate the consequences of these changes but it may be difficult to set them aside.

### *The Arctic Council*

Eight Arctic States (including two EU Member States) have established the Arctic Council. The EU is not a party or an observer to the Arctic Council.

“The Ottawa Declaration of 1996 formally established the Arctic Council as a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.

Member States of the Arctic Council are Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, and the United States of America.

In addition to the Member States, the Arctic Council has the category of Permanent Participants. This category is open equally to Arctic organizations of Indigenous peoples with a majority of Arctic Indigenous constituency representing:

- a single Indigenous people resident in more than one Arctic State; or
- more than one Arctic Indigenous people resident in a single Arctic State.

The category of Permanent Participation is created to provide for active participation of, and full consultation with, the Arctic Indigenous representatives within the Arctic Council. This principle applies to all meetings and activities of the Arctic Council.

The following organizations are Permanent Participants of the Arctic Council:

- Aleut International Association (AIA)
- Arctic Athabaskan Council (AAC)
- Gwich'in Council International (GCI)
- Inuit Circumpolar Council (ICC)
- Saami Council
- Russian Arctic Indigenous Peoples of the North (RAIPON)”

Arctic Council website: <http://arctic-council.org/article/about>

### *Advantages of Cooperation between the EU and Canada*

Much remains to be understood concerning the Arctic environment, its climate, ice conditions, weather patterns, water currents, its natural resources in the water column and on and in the seabed. Some of these matters are strictly within national jurisdiction and can only be studied with the consent of individual states but, insofar as many of these matters fall outside national jurisdiction there is much to be gained from international cooperation. High seas fisheries resources and straddling stocks can only be conserved if all interested states participate in their conservation. Similarly, it is essential that when and if there is international navigation in Arctic waters beyond national jurisdiction, that this navigation be undertaken by ships suitably built and equipped and manned for Arctic conditions. It is imperative that agreement be reached on international standards suitable for such ships to avoid the serious risks of pollution of the environment. In order to be certain that no Arctic state encourages resource exploration or exploitation of the

resources of the seabed under its jurisdiction that could lead to catastrophic accidents, it is important that information be shared and that there be agreement on best practices and that these best practices be strictly followed. It may well be necessary for Arctic states to agree on a moratorium on exploration and exploitation until safe practices are guaranteed. The precautionary principle may require abstention from many practices prevalent in southern waters.

Many of these objectives can only be achieved through international cooperation. In the case of shipping, the International Maritime Organisation has been studying a draft code of conduct for Arctic navigation. So far this is not designed as a binding document. Any assistance that the EU can give Canada, which chairs the IMO working group, would be welcomed. However, the EU is only an observer in the IMO and most EU members are normally more associated with shipping interests in the IMO rather than environmental. It has not been easy to obtain a satisfactory outcome in the IMO. Whether the EU can in fact put pressure on its member states to adopt a more responsible environmentally oriented policy in the IMO has yet to be determined, but any help the EU can deliver would be most welcome.

### *The legal issues relating to navigation in the Arctic*

Interest in Arctic navigation has increased in recent years with the gradual reduction of the extent and depth of seasonal and permanent ice cover in the Arctic. The possibility of a shorter sea route between Europe and Asia has caught the attention of the maritime world. Similarly there has been growing interest in the possibility of navigation in and out of the Arctic in relation to the extraction of the mineral resources to be found there.

### High Seas navigation

It is important to distinguish between navigation in Arctic waters beyond national jurisdiction and navigation passing through waters under the jurisdiction of arctic states – particularly Canada and Russia. For the present it is unlikely that there can be through navigation between Europe and Asia over and through the Arctic ocean. The ice cover is simply too great a barrier. But if the ice continues to melt and is absent for significant periods of the year the open ocean would provide the best

and safest route, far safer than the difficult and largely uncharted waters of coastal straits in either Canada or Russia. Regulation of shipping and setting appropriate standards for the design, manning, operation and equipment of ships using the high seas in the Arctic can only be done by the international community, in accordance with the LOS Convention. It is to be hoped that the IMO and the international insurance market will take their responsibilities very seriously. Not to do so can only lead to tragedy.

For the foreseeable future much of the high seas in the Arctic remain extraordinarily vulnerable. Under the LOS Convention states do have an obligation to protect the marine environment of the High Seas, but unfortunately there is no provision for the declaration of areas of the High Seas beyond 200 miles from land as “specially vulnerable areas”, as is the case within the EEZ under LOS art 211(6). This is most unfortunate as it not clear that the IMO and its member states will wish to adopt measures which are essentially measures of environmental protection applicable to the High Seas. The IMO throughout its history has shown itself far more concerned with the protection of shipping. Since the EU is required by its treaties to act on the basis of a “high standard of environmental protection” it may be hoped that the EU will take a different approach from the IMO. This can only be welcome.

Should the international community fail to protect the Arctic High Seas from irresponsible shipping would there be room for the coastal states of the Arctic Council to act unilaterally? Simply to raise the question is to invoke the many difficulties inherent in such a step. Sweden, Denmark and Finland see themselves as maritime states. The United States would also be likely to come down on the side of freedom of navigation. This leaves Canada, Russia, Iceland and Greenland a semi-autonomous territory of Denmark. Where would the EU stand? Almost certainly it would be with the maritime states in favour of freedom of navigation.

#### Navigation in waters under national jurisdiction

Navigation in waters under national jurisdiction raises many sensitive issues. States have special responsibilities in such areas and any potential difficulties raise a host of legal, technical, economic and political issues. It should be noted that Iceland and Norway have a long history of great sensitivity concerning their fisheries –

which to date have kept them from seeking to join the EU. Canada and Russia have even more sensitive issues to face, given their long-standing national positions on the status of the waters around their arctic islands and their legal position with respect to the Northern Sea Route and the North West Passage. (This presentation focuses particularly on Canada)

## II. *Canada's response to a challenge to its legal position on the North West Passage*

### Canadian Law

Navigation on Canada's arctic waters is governed by the *Arctic Waters Pollution Prevention Act and Regulations*, (AWPPA) the *Canada Shipping Act and Regulations*, including the *Northern Canada Vessel Traffic Services Zone Regulations* which formally establish the *Northern Canada Vessel Traffic Services (NORDREG)*. The AWPPA was adopted in 1972 in response to the passage through the NWP of the SS Manhattan, registered in the United States. This act applied originally in an area extending to 100nm from the coasts of Canada's arctic islands and mainland. As of 2009 it applies within 200nm of the same islands and mainland. The act creates a special regime of law applicable to the protection of the arctic marine environment. Ships are prohibited from sailing in the AWPPA zones unless they comply with Canadian standards promulgated in the AWPPA regulations governing their design, construction equipment and manning. The waters of the AWPPA are divided into eight zones, each presenting increasing hazards and difficulties for navigation and each requiring increasingly severe measures of pollution prevention. To sail in each zone, ships must be warranted as meeting the requisite standards set by Canadian law. Ships sailing in the AWPPA area are required to be specially insured against the damage that they may cause. The rate of insurance is higher than that set for other waters.

Canada encountered resistance from the international community and the marine insurance market immediately upon adoption of the AWPPA. Fortunately for Canada the insurance community quickly accepted that the standards set by Canadian law for navigation in each AWPPA zone were reasonable in light of the hazards faced by shipping. Today the insurance market requires insurance in accordance with Canadian standards.

The NORDREGs, which are designed to ensure that Canadian authorities are aware of all ships sailing in AWPPA zones, were also initially controversial. Canada originally adopted these regulations on a voluntary basis. But as of 2010 the NORDREGs are compulsory.

The result is that under Canadian law no ship can legally sail into the AWPPA waters without notifying Canadian authorities of its presence and without complying with Canadian law. This is true whether the ship is sailing into Canadian waters with a view to going to particular Canadian destinations; touring in AWPPA waters or passing through the NWP.

It should be noted that virtually all shipping falls into the first two categories and there is as yet no regular commercial passage through the NWP in either direction. In recent years there has been great increase in tourist shipping in and out of AWPPA waters.

In 1985, Canada issued straight baselines enclosing all the islands of the Canadian Arctic. These baselines often form the baseline of the AWPPA 200nm zone. These baselines totally enclose the NWP.

### Canada's Justification of its Actions in International Law

Initially the Government of Canada stated that it adopted the AWPPA on the basis of necessity, acting as steward of its arctic regions, there being no international rules applicable to the subject at the time. (There still are none internationally agreed).

Canada also maintained throughout the sessions of the Third UN Conference on the Law of the Sea (UNCLOS) that the NWP was not a strait customarily used for international navigation and that there is no customary right of passage. Subsequent to the adoption of the UNCLOS Convention in 1982 Canada has maintained that the right of transit passage through straits does not apply to the NWP.

Canada has also stressed that in many regions and throughout most of the year, the land and the water were one, because of ice cover, and and that indigenous peoples used both land and water in their daily lives.

The Government of Canada has also maintained that the waters of the Canadian arctic between the islands and between the islands and the mainland are internal waters. This position was reinforced by the promulgation of the baselines. Canada has not had to make formal legal argument in defense of its position on internal waters but it is probable that if it ever had to do so the basis would be in part international waters by virtue of historic claim and internal waters by virtue of being part of a coastal archipelago ( as argued in several publications by Professor Donat Pharand).

## UNCLOS Art 234

The essence of Canada's position is found in article 234 of the UNCLOS Convention:

### *Ice-covered areas*

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. 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.

It is possible that Canada might also advance arguments based on UNCLOS Convention art 211.6 for certain areas in and outside the AWPPA zones.

Article 234 was specifically negotiated at the LOS Conference by Canada to provide justification for its very special legal regime of law in the AWPPA zones. The article covers the whole of the 200 EEZ and is thus coterminous with the AWPPA zones as they now stand. It covers ice covered areas where particularly severe climatic conditions... and this corresponds with conditions currently prevailing in Arctic waters for most the year. It is designed to prevent major or

irreversible disturbance of the ecological balance. It allows the coastal state to unilaterally adopt non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels...The laws and regulations shall have due regard to navigation and be non-discriminatory but they can clearly be promulgated unilaterally and are not subject to any international approval process.

Article 233 makes it plain that 234 applies notwithstanding the “legal regime of straits used for international navigation...” This is a key provision which exempts the AWPPA zones from the legal regime of transit passage even if it does not clearly state that the NWP is not an international strait. The point is that the NWP may be an international strait but Canada maintains its broad powers over international shipping under 234.

It should be noted that since 1982 Canada has chosen to justify its legal regulation of shipping in AWPPA zones on Article 234, but reserves the right to advance other legal justifications if challenged.

Article 234 was negotiated between Canada, the USSR and the United States and approved at the highest levels of government before presentation to the full LOS Conference. Acceptance at the conference was enthusiastic on the part of coastal states but grudging on the part of maritime powers, a category which includes most EU Member states. These same maritime states have protested the adoption of the AWPPA in 1972. However all these states are now parties to the UNCLOS Convention and the EU has also concluded the convention. No reservations are permitted and none have been attempted by the EU or its Member States. Article 234 represents international law for over 150 states and the United States has indicated that it views the UNCLOS Convention as declaratory of customary law on most points, especially on the issue of transit passage through straits.

### *A Challenge by the EU?*

What might the EU challenge? Several hypotheses can be raised: 1) the right to send EU registered ships into the arctic to conduct marine scientific research; 2) the right to sail EU registered ships to a port in the Canadian Arctic; 3) the right to

sail EU registered ships in AWPPA zones; 4) the right to sail EU registered ships through AWPPA zones for the purpose of going to or coming from the Far East ; 5) the right to sail through the NWP; 6) a demand by the EU that it be involved in the setting of international standards governing the design, construction manning and equipment of ships sailing in arctic waters. 7) The EU may even demand that it be a member of the Arctic Council or at least insist that its representatives form part of the Swedish and Finnish delegations.

While the capacity of the EU to make rules governing navigation in arctic waters and its capacity to represent its Member States on such matters is by no means clear, it would be unwise to suggest that Canada could simply ignore or reject intervention by the EU. The EU has no comprehensive foreign affairs power, but its power to represent the interests of its Member States on any matter that is subject to common EU regulation has been steadily increasing. If a state chooses to delegate its authority to an international organization it is free to do so, even if that organization does not enjoy plenary power under international law equivalent to that of a state. The EU has shown extraordinary capacity to extend its reach and seems to be in the process of doing so in respect of maritime navigation. It now has its own Maritime Safety Organisation and is actively promoting the harmonization of rules governing navigation and many aspects of ship design and construction. Dealing with the EU at this point in time is somewhat like dealing with a hydra: there may be many heads to cut off.

1) The right to send EU registered ships into the arctic to conduct marine scientific research is recognised in the UNCLOS Convention. But the ships would require special authorisation to operate in the 200nm EEZ or to do research on the resources of the continental shelf or margin under national jurisdiction. Such ships would have to comply with Canadian law in the 200nm EEZ.

2) The right to sail EU registered ships to a port in the Canadian Arctic would be determined by Canadian law in the port in question. Canada's policy is to encourage navigation but subject to its laws.

3) The right to sail EU registered ships in AWPPA zones could only exist if such ships fully complied with Canadian law.;

4) The right to sail EU registered ships through AWPPA zones for the purpose of going to or coming from the Far East would have to be exercised in accordance with Canadian law.

5) The right to sail through the NWP as a matter of transit passage does not exist. If Canada chooses to encourage such navigation it has to do so on the basis of non-discrimination. All Canadian laws apply.

6) A demand by the EU that it be involved in the setting of international standards governing the design, construction manning and equipment of ships sailing in arctic waters might be welcome and acceptable with respect to the waters of the Arctic beyond Canada's EEZ if the EU did do in the spirit of setting a high standard of environmental protection as required by the TEU and the TFEU . Unfortunately the history of positions taken by EU maritime powers in the IMO and elsewhere suggests that the EU may be under pressure from Member States to protect maritime interests before protecting the environment.

7) The EU may even demand that it be a member of the Arctic Council or at least insist that its representatives form part of the Swedish and Finnish delegations. The first is a policy choice by Canada, the latter would be very difficult for Canada or other arctic powers to resist. Sweden and Finland could not refuse.

### *III. Special Problems posed by Indigenous Peoples*

It is by no means clear that the EU has much to contribute to the welfare of indigenous peoples of the Arctic. This is a central concern of the eight Members of the Arctic Council. The seal products ban has left a very bad impression among indigenous peoples of the Arctic and the EU shows no sensitivity to their concerns – the current limited exemption has done little to alleviate the harm done by the ban.

### *Conclusions*

The EU could play a constructive role in ensuring that future maritime navigation in arctic waters is regulated on the basis of a high standard of protection. If it does Canada would be advised to work with the EU. The EU should start by giving full

support to Canada for its pioneering efforts in protecting the waters of its AWPPA zones and seeking to promote the adoption of comparable standards throughout the Arctic. The EU can also play a constructive role in encouraging and funding basic research into the marine ecology of the Arctic.

Should the EU espouse the retrograde positions of its maritime power members it will place itself on a conflict course with Canada and will surely not be welcome on the Arctic Council.