REPORT

Fourth Sino-Canadian Exchange on the Arctic: Current and Emerging Legal, Political, Geopolitical and Historical Issues

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MEETING OBJECTIVES AND CONDUCT

The “Fourth Sino-Canadian Exchange on the Arctic”, held on 12 and 13 May 2017 in Quebec City, was hosted by the Faculté de droit of the Université Laval, in collaboration with the Groupe d’études et de recherche sur l’Asie contemporaine (Université Laval), the Faculty of Law of the University of Victoria and the Marine & Environmental Law Institute of the Schulich School of Law (Dalhousie University) and was made possible thanks to funding received from SSHRC.

For the fourth time, the Exchange brought together Canadian and Chinese scholars and practitioners interested in Arctic governance to engage in a multidisciplinary and multi-institutional dialogue during closed workshop sessions. It also included a public keynote presentation by Judge Zhiguo Gao of the International Tribunal of the Law of the Sea organized with the Ministère des Relations Internationales et de la Francophonie of the province of Quebec.

The purpose of the Fourth Exchange was to foster a better understanding among Canadian and Chinese participants of each country’s interests and activities in the Arctic, in particular as they relate to the governance of the Arctic Ocean. An additional aim of the Fourth Exchange was to add Russian perspectives to the discussion and to initiate trilateral exchanges.

Except for the public keynote address, participation was by invitation only. Approximately 35 people attended the Exchange, among them scholars and students, but also practitioners, including government officials and private-practice lawyers. The Exchange was convened under a modified Chatham House rule. Under this arrangement, participants are free to share information received during the Exchange, but cannot attribute specific remarks to individuals. The list of participants is part of the public record.

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GLOBAL AND REGIONAL ARCTIC POLICY AND GOVERNANCE

Geopolitics in the Arctic

After a brief summary of the history of international relations in the Arctic, the presentation discussed the Arctic as a strategic space between Eurasia and North America. From a geopolitical perspective, the main focus of geopolitics in the Arctic region is the relationship of cooperation between the US and Russia. Since the fall of the Soviet Union, Russia has been focusing more on its Siberian and Arctic exposure than on its participation in EU-centered cooperation forums. As for the American perspective, while the Arctic is not an area of major concern, there is some unease about Russian and Canadian presence in the region. China, for its part, seems to be looking to increase its presence in the Arctic, which has given rise to concerns that China represents a military threat in the region. Canada’s role in the Arctic remains relatively modest due to the Canada’s limited military and technological capacity. From the Canadian perspective, however, the Arctic presents opportunities for economic partnership, and Canada is generally of the view that inclusion of non Arctic States in Arctic cooperation would be beneficial to Arctic States. Finally, Canada remains acutely aware of the fragility of the region, with the recent fires in Fort McMurray in Alberta serving as the latest reminder.

During the discussion period, the complex relationship between China and Russia was noted and described as being simultaneously guided by a logic for collaboration and by a latent capacity for competition. On the one hand, the two countries collaborate on matters such as energy; on the other hand, however, Russia is likely to compete with China for influence in central Asia. One could thus speculate that the two form a “merge of convenience” that is influenced by underlying strategic tensions.

An Arctic Regional Seas Arrangement: Options and Prospects

The presentation focused on exploring the possibility of crafting and implementing a regional seas arrangement for the Arctic. The existing variety of tailor-made regional arrangements, such as those established under the auspices of the UNEP Regional Seas Programme, could provide guidance and inspiration for Arctic governance. As examples, notably cited was the relatively mature regime for the protection of the Mediterranean Sea, governed by the Barcelona Convention and its Protocols; the evolving soft law model that is currently in place for the Sargasso Sea; and the OSPAR Convention, which is governed by consensus but which allows for decision-making powers in terms of implementation. It was further highlighted that UNEP’s Regional Seas Programme lists the Arctic as a partner programme and the recently created Task Force on Arctic Marine Cooperation is examining the possibility of creating a regional seas arrangement for the region as a means of reinforcing cooperation. The presentation concluded by explicitly leaving open the question as to whether the current governance framework for the Arctic could one day evolve into one that is legally binding and thus more legitimate and effective.

During the discussion period, it was noted that the Arctic region could potentially encompass a large high seas area that would have to be excluded from any potential regional sea arrangement. It was noted that the central issue at hand is the creation of a body or a forum that would reinforce cooperation between the eight Arctic States. It was also mentioned that while some individual States show resistance to the idea of creating a regional seas arrangement for the Arctic, some individual actors do champion the idea.
Littoral states’ historic rights and statutory rights in the Arctic region

The presentation focused on historic rights and statutory rights in the Arctic region. It was noted that little literature exists on this topic and the presentation emphasized that historic evidence of human activities and practices that have been tolerated in a particular region can give rise to historic rights. Such practices or activities may be transboundary and can include fishing, hunting, free navigation, scientific research, safety and security patrolling, civil legal matters, and criminal law enforcement. It was presented that while historic rights are distinct from the notion of custom in international law, evidence of repetition or reoccurrence of the practices or activities in question would be required in order for them to be considered as historic rights. It was further noted that in the Arctic region, the harsh climate would need to be taken into account in the evaluation of claims for historic rights, in that, for example, the requirements for year-round human presence and the existence of formal governance structures could be made more flexible. The presentation continued analysis by focusing on the relationship between historic rights and statutory rights, especially those that derive from UNCLOS. It was mentioned that articles 15, 46 [sic], 51 and 58 of UNCLOS recognize historic rights. However, participants were reminded of the fact that article 298 of UNCLOS allows for States to exclude disputes involving historic titles from the jurisdiction of the applicable tribunal or court. The presentation concluded by stating that, historic rights should be honoured by all. An analogy used to illustrate this point: if on private property there is a site that is sacred for Indigenous peoples, it is only natural for the owner to have to tolerate the use of his or her land for traditional practices.

Emerging Interests of non-Arctic Countries in the Arctic: a Chinese Perspective

The presentation provided an overview of China’s interests in the Arctic. It was noted that China does not have a formal Arctic strategy but participates in Arctic affairs in several ways. China obtained permanent observer status in the Arctic Council in 2013 and has been increasing its spending on shipbuilding and Arctic-related scientific research. China has also increased its focus on bilateral diplomacy, notably with Iceland, Greenland and Finland, and is showing an increasing interest in the Arctic shipping industry. Going into the future, China is facing political, legal, economic, safety and environmental challenges with respect to its involvement in the Arctic. Indeed, several Arctic States are apprehensive at the prospect of China’s dominance in the region. Canada’s academic community, for example, is divided as to whether China’s increasing interest in the Arctic represents a threat or an economic opportunity for Canada. The presentation concluded by highlighting that China, as an expert in energy development that is seeking economic opportunities, is in a position to facilitate resource development in the Arctic and the lack of an official Chinese Arctic strategy highlights the importance of cooperation between China and both Arctic and non-Arctic States.

During the discussion period, it was noted that China is the fastest-growing investor in the Canadian energy market and that while most of the investments are in Alberta, it is possible that some of the focus will shift to the Arctic in the future.
Arctic Research at Université Laval – A Cross-Sectoral Vision

The presentation began with the work, priorities and future prospects of ArcticNet, an interdisciplinary Arctic-focused Network of Centres of Excellence headquartered at Université Laval. ArcticNet connects researchers specialized in natural, health and social sciences as well as stakeholders from the private sector, government and Indigenous communities. It focuses on studying the environmental and socio-economic impacts of climate change in the Arctic and is oriented towards producing results that would inform policy. Examples of projects include Integrated Regional Impact Studies (IRIS) and expeditions of the Amundsen research icebreaker. ArcticNet introduced innovative approaches to mobilizing the scientific community and created coherence in the research community in Canada. The talk was concluded by mentioning that the scientific community and the end-users of ArcticNet research are exploring how to continue ArcticNet after 2018 in the form of a pan-Canadian Arctic research network. The Institut nordique du Québec would be part of this new initiative.

During the discussion period, it was mentioned that ArcticNet has international partnerships notably with entities in France, Norway and Denmark. It was also mentioned that by 2020 or 2030, the thick multi-year ice in the Arctic may completely disappear, which will greatly facilitate navigation. Finally, it was noted that for the time being, mainly Canadian icebreakers operate in the Northwest Passage, but given China’s capacities and interest in research icebreakers, there could be opportunity for cooperation. The Chinese currently face legal, diplomatic and technical challenges with regard to the Northwest Passage and could benefit from cooperation with Canada, notably with regard to the expertise of Canadian coast guards.

Arctic Resources

Chinese Arctic Expedition

The presentation provided an overview of the Arctic-related priorities and activities of the Chinese government’s Arctic and Antarctic Department. It was mentioned that China is interested in the Arctic because of the economic potential that it represents and because of the fact that the impacts of climate change in this region will affect China. Arctic research in China began in the 1990s and since then China has sent six expeditions to the Arctic. A research station, called the Yellow River Station and established on Svalbard, was founded in 2004. The presentation concluded by discussing the future priorities of the Chinese Arctic and Antarctic Department, namely: conducting a basic oceanographic survey; exploring the relationship between the human and polar community and the growing impact of climate change; and crossing the Northwest Passage.

During the discussion period, it was mentioned that one department is currently experiencing difficulties in identifying the Canadian authority that is responsible for granting authorizations for routes through the Northwest Passage. It was also mentioned that the design of the new Chinese icebreaker has been completed and the process of selecting a company to build it is currently underway.


Bioprospecting in the Arctic Ocean

The presentation focused on the legal regime applicable to bioprospecting in the Arctic Ocean. The CBD (UNEP/CBD/COP/5/INF/7) defines bioprospecting as « the exploration of biodiversity for commercially valuable genetic and biochemical resources ». In the Arctic, extremophile microbes that thrive despite extreme temperatures and harsh light cycles have the potential to be developed into commercially viable products. Countries such as Sweden, Denmark and Iceland have already adopted laws on bioprospecting in the Arctic; Canada has yet to do so. The presentation noted that there are several issues with regard to the international legal regime that would apply to bioprospecting in the Arctic. First, it is unclear whether bioprospecting should be considered as marine scientific research or resource exploitation under UNCLOS; the objective of scientific research in the case of bioprospecting is often tied to the prospect of profit. Second, it is difficult to reconcile the objectives of the CBD with the law of the sea, as the latter focuses on exploitation and largely ignores or contradicts the law of biodiversity. Finally, it is unclear whether the freedom of the high seas or the regime of the common heritage of mankind should apply to bioprospecting in areas beyond national jurisdiction. Given these legal uncertainties, the Ad Hoc Open-ended Informal Working Group that studied the legal issues of marine biodiversity beyond areas of national jurisdiction under the auspices of the General Assembly of the United Nations concluded that an international legally binding instrument should be developed. The Preparatory Committee, established by the General Assembly, started its work in March 2016 and is supposed to report, by the end of 2017, to the General Assembly on its progress.

During the discussion period, it was highlighted that while it is true that analyzing Arctic microbial biodiversity is very costly, and the chances of developing commercially viable products is very small, successes can be very profitable and the prospects of such successes are currently driving investments.

ENVIRONMENTAL PROTECTION

Conservation of marine living resources in the high seas of the Arctic Ocean

Decreasing ice coverage and increasing water temperatures caused by climate change are creating fishing opportunities in the high seas of the Central Arctic Ocean (CAO), particularly in beyond Russia’s and the United States’ EEZs. In 2007, following a Joint Resolution of the US Senate and House of Representatives, the United States initiated international discussions with other Arctic coastal States with a view to negotiating an agreement for managing migratory and transboundary fish stocks in the Arctic. On July 16th, 2015, the five Arctic coastal States (US, Canada, Denmark, Norway and Russia) signed the Oslo Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, in which they notably declare that they will not authorize commercial fishing in the Arctic high seas unless one or more regional or subregional fisheries management organizations or arrangements established or to be established adopt relevant conservation and management measures in accordance with generally accepted international standards. In the ensuing broader negotiation process, two meetings have been held between the five Arctic coastal States as well as Iceland, China, Japan, South Korea, and the European Union, in December 2015 and April 2016 respectively, a third meeting being planned to take place in Iqaluit in July 2016. During these meetings, issues such as the role of scientific research in the management of possible CAO fisheries and conservation efforts, the role of existing mechanisms such as the North-East Atlantic Fisheries Commission (NEAFC) and the Joint Norwegian-Russian Fisheries Commission as well as legally binding nature of the proposed agreement were discussed. China remains open as
to the legal nature of the resulting international agreement, and values scientific research and consistency with international law. Potential cooperation between China and Canada could contribute to the advancement of scientific research, to regulate exploratory fishing and to the future governance of the Arctic Ocean.

During the discussion period, it was mentioned that in Canada, fishing opportunities tended to decrease as one moves further North and east towards Greenland.

Fisheries management in the CAO in the context of global governance

The current fisheries management model in the Central Arctic Ocean (CAO) can be said to be a form of “self-organized governance”. Freedom of fishing and navigation apply in areas beyond national jurisdiction in the Arctic, and the fish stocks situated in the CAO are common pool resources. No political or economic unit exists to regulate the fish stocks that will become increasingly available as the ice melts and water temperatures rise in the Arctic Ocean. Without a regulatory body overseeing fishing activities, these resources will quickly be at risk for depletion. Managing common pool resources in the CAO presents several challenges, such as the lack of clarity on the property rights to fish stocks, the lack of a binding treaty and a general unwillingness of the eight Arctic States to change the system, and the lack of clarity on applicable sanctions. Going forward, the management of fisheries in the CAO will be the result of a complex negotiating dynamic in which no State has a clear dominant position. This dynamic will be influenced by competition among the States involved and their simultaneous desire to synergize and reach consensus, in addition to concurrent developments of the existing order and generally accepted principles of CAO governance, such as environmental protection, resource management and international cooperation.

Governance of the Central Arctic Ocean: Cooperative Currents, Restless Sea

The presentation focused on the current state of governance of the Central Arctic Ocean (CAO). It was mentioned that the dynamic can be described as the simultaneous presence of “cooperative currents”, or the many instances of regional and global cooperation in relation to the CAO, and the “restless sea”, representing the ongoing political and institutional challenges with respect to CAO governance. As examples of global “cooperative currents”, the presentation notably cited UNCLOS, the 1995 United Nations agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks, the Polar Code, the NAVAREA's worldwide navigational warning service and various multilateral environmental agreements such as CITES, the Stockholm Convention on Persistent Organic Pollutants and the Minamata Convention on Mercury. As for regional “cooperative currents”, the presentation notably cited the Arctic Council’s 2013 Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response, the 2014 Arctic Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas, the Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean adopted by the five Arctic coastal States in July 2016 as well as the OSPAR Convention and the North East Atlantic Fisheries Commission. The presentation continued to highlight the “restless sea” aspects of CAO governance. With regard to the Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, many questions remain. For example, it is unclear how Indigenous peoples of the Arctic will be involved in the implementation of the interim measures mentioned in this Declaration, how the scientific cooperation program will be operationalized, how marine monitoring, control and surveillance measures will be put into practice, and, in the event that the final agreement on unregulated high seas fishing in the CAO takes on the form of a legally binding instrument, how it will be enforced. Questions also remain with regard to membership of any fisheries organizations that may be created and the sharing of fishing quotas. As for the future steps to be taken in international fora such as the International Maritime Organization (IMO) and the Arctic Council, the potential overlap between the scope and subject matter of the different relevant working
groups as well as overlap with existing international instruments will have to be addressed. The presentation concluded by highlighting that CAO governance remains an unfinished voyage, and that States are ahead of the fishing industry as the CAO is still covered with ice and void of fisheries.

During the discussion period, it was mentioned that for the moment, only exploratory fishing is possible in the CAO, and in the near future, intervention from action-oriented environmental groups should not be an issue. With regard to Indigenous rights, it was mentioned that while the five Arctic coastal States recognize Indigenous interests, they have not translated this recognition into clear legal rights in the CAO, and the issue remains more political than legal. It was noted, however, that Canada consulted its Arctic Indigenous peoples before making its submission to the Commission on the Limits of the Continental Shelf. Participants then discussed the fragmented nature of Arctic governance, and it was mentioned that the creation of a Regional Sea Programme or giving the Arctic Council legal basis in international law could provide more structure to Arctic affairs. With regard to exploratory fishing, it was mentioned that much of the existing data on fish migrations in the CAO has been based on scientific modelling and not on actual research, which creates uncertainties on matters such as migration timelines and predator behaviour. As for the future prospects of CAO fisheries governance, it was mentioned that the idea of establishing a fisheries management organization is met with hesitation due to budget concerns and due to the fact that the challenge remains largely prospective. With regard to the safety of fishing vessels operating in Northern regions, it was mentioned that the working conditions on such vessels tend to be poor and give rise to human rights concerns, and that fishing vessels are expressly excluded from the scope of the Polar Code and are not discussed within the Arctic Council, which may or may not change in the future. With respect to the Moratorium on Fishing the Beaufort Sea north of Alaska announced by the United States in 2009, it was mentioned that it remains in place, and that the US has not authorized any commercial fisheries in its federal waters. Finally, it was reiterated that the challenge of CAO fisheries governance remains largely prospective, as large-scale commercial fishing remains impossible in the CAO.

**PUBLIC KEYNOTE PRESENTATION**

**Experience Learned from the Arctic Council**

The presentation highlighted how the experience of regional cooperation under the auspices of the Arctic Council could prove to be valuable for the region of the South China Sea. After an overview of the history of international relations in the South China Sea (SCS), the presentation referred to two security cooperation forums in the region were: the Association of Southeast Asian Nations (ASEAN) and the Informal Workshop on Managing Potential Conflicts in the South China Sea. More specifically stressed was the ineffectiveness of these two forums when it comes to addressing increasing tensions in the South China Sea region. Forums within ASEAN are not well-adapted to SCS-focused discussions because from China’s perspective, it is not opportune to discuss SCS-specific issues with States that are not coastal States. Furthermore, the solutions developed within ASEAN have proven to be less effective as exclusion of legal proceeding is possible. As for the Informal Workshop on Managing Potential Conflicts in the South China Sea, this forum is limited in effectiveness due to its informal and non-governmental nature as well as the lack of steady official financial support. The presentation emphasized that the Workshop was receiving financial support from Canada until 2001.

In light of this situation, the presentation put forward the proposal to create a new forum for cooperation in the South China Sea that is based on the Arctic Council model and its salient features. Such a body, termed the “South
China Sea Council”, could be an intergovernmental forum composed of littoral States that would focus on building cooperation, especially in matters of environmental protection and sustainable development. Decisions would be made by consensus and the principle of non-interference in internal affairs would be upheld. Like the Arctic Council, the body would have several categories of participants. The presentation highlighted the similarities between the Arctic and the South China Sea: both are semi-closed areas with multiple coastal States that have overlapping claims and boundary delimitations. He mentioned that the SCS region is at an important crossroads, and the creation of a South China Sea Council is a proposal for the way forward. The presentation concluded by emphasizing Canada’s ability to assist with this proposal, both due to Canada’s experience as a member of the Arctic Council as well as its past involvement in the Informal Workshop on Managing Potential Conflicts in the South China Sea.

During the discussion period, it was mentioned that while there are similarities between the Arctic and the South China Sea, the two can be said to be quite different. More specifically, while the Arctic Council was formed to respond to a need for environmental collaboration outside of military concerns, military issues seem to be key in the South China Sea region. Indeed, it was mentioned that China’s increasing defense spending has been a cause for concern for other ASEAN countries. In response, it was specified that while differences between the two regions exist, the Arctic Council is a framework that has proven to be effective and could thus serve as a model for a confidence-building forum in the South China Sea region. It was underlined that China’s defense expenditures have been rising in response to the growing tensions in the region, and a forum such as the South China Sea Council could prove useful in addressing the root cause of the problem and ease tensions between the coastal States. Finally, a question was raised with regard to non-sovereignty issues such as navigation and fishing rights and how they would interact with a potential South China Sea Council governance framework. In response, it was mentioned that the issue of the legal status of water column areas could prove to be quite complex and perhaps a more practical approach could be to focus less on issues of sovereignty and legal status and more on determining which statutory and historical rights can be exercised in a particular case.

**LEGAL ISSUES OF ARCTIC NAVIGATION**

International Shipping Regulation in the Arctic: The Polar Code and Article 234 of the Law of the Sea Convention

The presentation focused on the relationship between the Polar Code and article 234 of UNCLOS. More specifically explored was the issue of which has precedence in case of conflicting provisions: the more recent, internationally developed Polar Code or the unilaterally determined rules adopted in conformity with article 234 of UNCLOS. It was highlighted that clarity on this issue is important, as international shipping companies want to avoid having to comply with differing international standards and are pressuring for harmonization. In addition, Canada and Russia, both of which have adopted legislation under article 234, have been advocating for a provision in the upcoming Polar Code regulations that preserve States’ right to enact and enforce such legislation. The presentation continued by discussing conflict provisions in the MARPOL and SOLAR conventions. The MARPOL convention, having anticipated the adoption of UNCLOS, specifically states that it will not interfere with States’ rights as acquired in conformity with the law of the sea. Furthermore, objections to Canada’s reservation to MARPOL were purely procedural in nature and did not contest Canada’s declaration of its right to unilaterally adopt measures for the prevention, reduction and control of marine pollution from vessels in Arctic waters. As
for the SOLAS convention, a recently introduced clause that safeguards States’ “rights under international law” has been understood to include rights under article 234 of UNCLOS. It is clear that the adoption of the Polar Code does not interfere with States’ right to enact legislation under article 234 and to enforce it against foreign vessels.

During the discussion period, it was mentioned that compliance with the new Polar Code requirements would be relatively widespread despite States’ limited capacity for enforcement. It was also discussed that companies generally have an interest in complying, as the sanctions for non-compliance can incur significant costs for their operations. On a side note, it was mentioned that the terms “passage”, “channel” and “route” did not have a specific legal meaning in English, so efforts to translate would have to focus on the context in which those terms are used. It was further mentioned that while national vessel construction standards could be imposed in internal waters, the enforcement of such standards in waters beyond national jurisdiction could prove to be problematic as the extent of coastal States’ jurisdiction in that regard under article 234 of UNCLOS is subject to debate. The interest of all States in having a commonality in their regulations in this regard was underlined.

**Shipping Companies: Business Plans for Arctic Shipping**

The presentation focused on the findings of a study that surveyed shipping companies in Asia, Europe and North America in order to get a sense of how these companies perceive the Arctic shipping market. Out of the 189 companies that participated in the survey, the vast majority indicated that they were not interested in developing or entering the Arctic shipping market. When asked to provide the reasons behind their lack of interest, the majority of the companies (101 out of the 130 who were not interested) cited the fact that Arctic shipping was not their « core business ». Others answered notably that they considered the enterprise to be too risky, too expensive or too uncertain. It was noted that the answers given were quite polarized; few companies seemed to be unsure of their future plans for operating in the Arctic. The presentation concluded that the Arctic shipping market is seen as a small, difficult and generally unattractive market by shipping companies, and most are hesitant not because of the potentially high costs but for reasons related to their business strategies.

During the discussion period, it was mentioned that only commercial shipping companies were surveyed and noted that while it is possible that some companies were not truthful in their answers, the answers can be said to be statistically reliable notably because they are in line with other data and with transport economics. It was also mentioned that while passenger shipping companies were not part of the sample, a different study found that there is an increase in interest among cruise ship operators, but generally in Greenland and not Canada or Russia and an increase in interest does not necessarily translate into a guaranteed increase in passenger shipping operations in the Arctic in the near future. Finally, participants discussed cabotage practices as they relate to shipping operations in the Canadian Arctic.

**Good Seamanship and Collision Avoidance in Polar Navigation: More Unfinished Business for Safety Regulation?**

The presentation focused on the existing international and regional rules on the movement of ships at sea and their relationship to navigation in polar waters. It was mentioned that many initiatives that aim to promote safety at sea exist, primarily under the auspices of the International Maritime Organization (IMO). The presentation cited many examples, such as chapter 14 of the SOLAS Convention, the amendments to four annexes of the MARPOL Convention, the IMO voluntary Guidelines for Voyage Planning for Passenger Ships in Remote Areas, the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, the International Ice Patrol, established after the sinking of the Titanic to give ships advanced notice of potential
dangers, and the new amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) that are set to enter into force on January 1st, 2018. It was noted that the numerous existing rules on the safety of navigation do not form a complete framework. The presentation continued by discussing the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs). Collisions at sea have indeed occurred in Arctic waters, for example in 2011, when sister ships Soyana and Mekhanik Brilin collided in the Northern Sea Route. It was further mentioned that the COLREGs rules were designed with the assumption that navigation will be occurring in open waters where there is vessel maneuverability and navigation is linear. The special conditions of navigation in polar waters were not taken into account. It is generally presumed that the COLREGs will apply to Arctic shipping and should be adapted to ice navigation, by, for example, considering the effects of openings in the ice and changing ice formation on the movements of vessels. The presentation cited several issues that would have to be considered in adapting the existing rules to navigation in polar waters, such as the increased standard of care that applies for proper look-out; the significant impact of ice conditions on the actions needed to avoid collision and on determining safe speeds; navigation in convoy formation; and finally, whether local or international rules would be more appropriate in regulating navigation in the polar regions. The presentation concluded by mentioning that international polar shipping regulations are still first generation and that it is likely that they will be the subject of ongoing work within the IMO in the upcoming years. For example, one could expect routeing measures to be adopted under chapter V of the SOLAS Convention and traffic separation schemes (TSS) to be adopted under the COLREGs.

During the discussion period, it was mentioned that there had been differences among States with regard to the type of training required for an ice navigator and whether the presence of an ice navigator on board should be mandatory. Russia has recently exempted certain classes of ships from having an ice pilot if the expertise is otherwise present on board.

**What keeps marine insurance companies up at night with regard to Arctic navigation?**

The presentation focused on the two major types of insurance that are available for expeditions in the Arctic. The first major type of insurance is Hull and Machinery insurance or “H&M”. This type of insurance covers the physical structure of the vessel and generally for a fixed premium offers coverage for a predetermined amount, provided that navigation occurs within defined navigational limits. For coverage outside of these navigational limits, usually in areas where ice is present, an additional premium would apply. The second major type of insurance available for Arctic expeditions is Protection & Indemnity insurance or “P&I”. This type of insurance covers third-party liability claims for incidents such as pollution or civil disputes. P&I is often provided via a self-insurance scheme, through a mutual where the insured form a “club” and the board directors are often the owners of the ships themselves. P&I insurance schemes are generally unlimited in scope, both in terms of claim types and navigational limits, with the exception of pollution-related costs. The liability within P&I schemes is spread out into different markets via insurance and reinsurance strategies. If supplemental costs are incurred within a given year, the insured are charged “supplemental calls” to cover these costs. Also, if one member navigates to an area that significantly increases risk, such as the Arctic, she or he may be required to make supplementary payments. Factors such as vessel suitability, ports of refuge, icebreaker availability, the charting of the navigation area and the presence of ice pilots are important for insurance companies that are assessing both H&M and P&I coverage. The presentation concluded by mentioning that monetizing the risks of navigation in the Arctic remains challenging, and that data collection and availability remain important for insurance companies.

During the discussion period, it was noted that for the moment, the number of claims presented under P&I insurance schemes have not been so numerous as to trigger frequent use of reinsurance; however, this may change.
in the future. It was also clarified that insurance companies consider and evaluate scientific research vessels in the same way and using the same variables as they do commercial vessels.

**CONTINENTAL SHELF ISSUES**

**Some Legal Aspects of the Continental Shelf Delimitation in the Arctic Ocean**

The presentation addressed some legal aspects of continental shelf delimitation in the Arctic Ocean. It was mentioned that establishing the outer limits of the Arctic coastal States’ continental shelves beyond 200 nautical miles is a process that is only beginning to develop and that is complex both scientifically and politically. In 2001, Russia was the first State to make a submission to the Commission on the Limits of the Continental Shelf (CLCS), a submission that Russia revised in 2015 to include claims to a larger area. In December 2014, Denmark made a submission to the CLCS that overlapped with the areas included in Russia’s 2001 and 2015 submissions. Canada, for its part, made a partial submission to the CLCS in 2013, and declared its intention to submit information on the limits of the continental shelf beyond 200 nautical miles in the Arctic Ocean “at a later date”. It was mentioned that once Canada submits this additional information, the number of areas subject to competing claims in the Arctic is bound to increase and the limits of the intersecting zones in the Arctic Ocean will take shape, forming the basis for negotiations. The role of the CLCS as an expert body whose function is to confirm or rebut the States’ assessment of their continental shelves was highlighted. The presentation concluded by reminding participants that the recommendations of the CLCS are not binding, and disagreement on the part of one coastal State might trigger new or revised submissions and has the potential to prolong the process. It was noted that States should avoid promoting confrontation and seek to resolve the issue through bilateral or multi-lateral negotiations.

During the discussion period, it was mentioned that article 83 of UNCLOS prevents the CLCS from definitively establishing the limits of the continental shelves of adjacent States, as the final decision is a political one that rests with the States themselves. Therefore, the fact that the United States has not ratified UNCLOS does not preclude it from entering into bilateral or multi-lateral agreements with adjacent Arctic States in order to definitively establish the outer limits of the States’ continental shelves in the Arctic Ocean.

**The Continental Shelf beyond 200 nm in the Arctic Ocean: What the Russian (2015) and Danish (2014) Submissions Tell Us**

The presentation began by responding to some points raised by the previous presentation. It was pointed out that in making submissions to the Commission on the Limits of the Continental Shelf (CLCS), there is an understanding among Arctic coastal States that once the CLCS determines the validity of the submitted claims, laborious political discussions on boundary delimitations will have to take place. It was further mentioned that discussions on boundary delimitations in the Arctic will not take place in the near future, as more pressing issues are bound to take precedence on the political agenda.

The presentation then turned focus to an analysis of the submissions made by Russia and by Denmark in 2015 and 2014, respectively. It was mentioned that with respect to the Lomonosov Ridge, both Russia and Denmark (and also Canada) have similar views on the geomorphological features of the ridge, and it will be surprising if the CLCS
does not confirm this aspect of the submissions in its recommendations. Both States are claiming that the Lomonosov Ridge is an extension of their continental shelf. The presentation mentioned that the Russian submission seems to reflect Russia’s more cooperative approach to Arctic affairs, as the area claimed by Russia did not extend all the way to the 200 nautical mile (nm) outer limit of the continental shelves of Canada, Denmark, on the contrary, did extend its claim all the way to the 200 nm limit of the areas that are under Russian and Canadian jurisdiction. It was also mentioned that parts of the CAO, such as the Gakkel Ridge, will be determined to be areas are beyond national jurisdiction and thus the mineral resources subject to the common heritage of mankind principle. The presentation was concluded with a brief discussion on the scientific research activities of Canada and the United States in the Arctic. It was mentioned that Canada’s additional submission on the limits of its continental shelf beyond 200 nm would probably take some time, as the analysis and interpretation of the newly collected data from Canada’s research expedition in the summer of 2016 could take years. It was also mentioned that the United States have finished their data gathering and mapping activities in the Arctic, and while the data has been released to the public domain, the interpretation of this data has not been made available to the public.

During the discussion period, the issue of potential overlap between continental shelf delimitations and Indigenous peoples’ boundaries was raised. More specifically, article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) notably states that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and that States shall give legal recognition and protection to these lands, territories and resources. It was mentioned that UNDRIP is not a treaty but a non-binding resolution of the General Assembly of the United Nations; therefore, in a narrow technical sense, there should be no overlap between UNDRIP and UNCLOS. It was also mentioned that in the view of the Chinese government, UNDRIP is a soft law instrument and the term “Indigenous peoples” is not clearly defined; therefore, invoking Indigenous rights under UNDRIP in the context of Arctic affairs or elsewhere could be an issue for China. From a broader perspective of Arctic governance, however, UNDRIP can be said to be very relevant, and the Canadian government is very aware of the issue and of the need to respect Indigenous peoples’ rights to their lands and resources.

In response to a question on the way in which the United States, as a non-Party to UNCLOS, may go about establishing the outer limits of its continental shelf, it was mentioned that the US might choose to make submissions to the CLCS, and the CLCS has the option of accepting to examine the submissions and to make recommendations. However it was mentioned that the US submission would have little priority in the work of the CLCS in such circumstances. Another option for the US would be to simply announce its formal position on the matter and to provide scientific data in support of its declaration. Finally, the US’ non-Party status does not prevent it from concluding bilateral and multi-lateral agreements with other States in respect of the delimitation of continental shelves in the Arctic Ocean and elsewhere.

Finally, participants further discussed the scientific and legal implications of the Lomonosov Ridge, and it was notably mentioned that the United States adheres to the views of Denmark, Russia and Canada regarding the geomorphological features of this ridge. It was also mentioned that it is difficult to make predictions as to the outcome of negotiations on the delimitation of the continental shelves beyond 200 nautical miles in the Arctic Ocean, notably because of the lack of precedent for such discussions.

The Future of Arctic Offshore Oil and Gas Exploration

The presentation focused on challenging the commonly accepted narrative of abundant energy resources that are waiting to be extracted from the Arctic. First, it was mentioned that it would be more helpful to speak not of “the Arctic” but of “several Arctics”. Generalized assumptions about the role of energy in the region are not useful in discussing and understanding developments in energy exploration and usage in the Arctic. Indeed, the US Geological Survey conducted in 2008 indicated that the potential resource deposits in the Arctic are not uniformly
distributed throughout the region and are situated mostly in Russia and only some in Canada. Second, the optimism surrounding Arctic energy resources are not based on current levels of commercial drilling but on potential and on geological probability. Such optimism is not new; ebbs and flows of the energy market were a common feature throughout the second half of the twentieth century. It was also noted that governments seem to be much more optimistic than oil companies are when it comes to energy extraction in the Arctic, as big players such as Shell have been relinquishing their leases and abandoning drilling operations in the region, citing a lack of competitiveness with their portfolio. Third, the energy security narrative is not helpful in understanding the role of energy in the Arctic region, as the concept of energy security was developed to accommodate a more European and American perspective and is historically contingent and particularly informed by the energy crisis of 2007/2008. Finally, it was mentioned that it is important to situate oil and gas activities in the Arctic within the larger context of world energy supply and demand, considering the differing spatial realities and the diverse nature of interests of both public and private actors. For example, in the Canadian context, the vast majority of energy resources are situated in Alberta, and in its 2015 review of Canadian energy policies, the International Energy Agency (IEA) recommended that Canada focus on diversifying its export markets and on furthering cooperation with countries such as the US, India and China.

During the discussion period, the necessity of considering the bigger picture when it comes to Canadian Arctic oil and gas resources was underlined. The growth market is in offshore and unconventional (shale gas and oil) activities and Canada is competing with countries that are well-established oil and gas producers. Furthermore, resource extraction in the Arctic would be challenging due to factors such as a short extraction season, burdensome contingency preparation, significant regulatory effort and industry’s relatively small scale of operations and considerable need for alternative capacity. Impacts on Indigenous communities and consultation and accommodation measures will also have to be considered by companies looking to extract oil and gas resources from the Canadian North.

**INDIGENOUS PEOPLES AND THE ARCTIC**

**Arctic Frontier, Arctic Homeland: Indigenous Peoples and the (Post) colonial Future of the Region**

The presentation began by providing a brief overview of the evolution of the rights of Indigenous peoples in Canada. Before the 1970s, development projects were carried out without the consultation of Indigenous peoples. In 1973, the Supreme Court of Canada in the *Calder* decision ruled that Indigenous peoples who hadn’t extinguished their land rights to the Crown may still claim them, which led the federal government to adopt land claim policies and negotiate modern treaties with Indigenous groups, including the Inuit. In 1982, section 35 was integrated into the Canadian constitution, and Indigenous rights now supersede Canadian law unless infringement meets a stringent justification test. The Labrador Inuit Land Claims Agreement is an example of a modern treaty applicable in the Canadian North, and, for instance, it requires that Canada consult the Indigenous group before accepting an international obligation that would infringe upon their rights. The second part of the presentation addressed governance arrangements for Indigenous peoples in the Arctic and the need to move beyond the narrow legal paradigm of consultation. It was noted that it would be best to move beyond a formalistic approach and think in terms of the relationship that Canada wants to build with Indigenous peoples based on the ideals of agency and
equality. It was emphasized that it is difficult to limit oneself to positive law when it comes to Indigenous issues, a broader approach that aims to transmit a legacy of justice would be preferable.

During the discussion period, it was specified that in the ILO 169 Convention, the terms “land” and “territory” are not defined, but generally “land” is a material term and “territory” is a political and jurisdictional reality. For the purposes of the Convention, ice in the Arctic could be considered as “territory”. It was also mentioned that Canada voted against UNDRIP in 2007 because the Harper government was of the view that some of the provisions on lands and resources violated Canadian constitutional law. Canada adhered to UNDRIP in 2010, but with reservations on provisions that addressed land, resources and the notion of “free, prior and informed consent”. Canada’s recent decision to remove these reservations and the current government’s political commitment to implement the UNDRIP in Canada raise uncertainty as to how these developments will materialize. In response to this comment, it was mentioned that the duty to consult in Canada has been problematic because the measures required for its implementation can evolve and the obligation has an “open-endedness” that creates uncertainty. Mining companies and other key industry players have been prioritizing and in fact going farther than the government in their efforts to consult and accommodate Indigenous communities. Lastly, it was mentioned that the best way to come to a better understanding of how Indigenous peoples conceptualize international boundaries is to engage in dialogue with them. Indigenous peoples do recognize territorial boundaries, but in a way that is different from that of Western or European societies. It was mentioned that a discussion focused on sharing and coexistence would be preferable to one that focuses on rights and sovereignty.

**Notion of Indigenous Peoples under International Law: Past, Present and Future**

The presentation focused on the notion of Indigenous peoples in international law and its application to the Chinese context. First, the presentation provided a literature overview of the emergence of the recognition of Indigenous peoples and their rights in international fora. Then, the presentation turned to the way these developments have been received in China. Before the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, the Chinese government declined to adopt an official position on the subject, citing the lack of a clear definition of the term “Indigenous peoples” as its main concern. In 2007, China voted in favour of UNDRIP. Going forward, it was mentioned that from the Chinese perspective, the notion of Indigenous peoples is not clearly defined, especially in terms of how Indigenous peoples differ from other ethnic minority groups in the context of Asia and its colonization history.

**REGIONAL AND NATIONAL SECURITY**

**NORAD, Maritime Warning and the Arctic**

The presentation began with the origins and mission suits of the North American Aerospace Defense Command (NORAD). NORAD is a bi-national (and not bilateral) combatant command that deals with the detection of and response to potential defence threats to Canada and the United States. The origins of the defence cooperation between these two States began with a statement made by President Franklin Roosevelt in 1938 during his acceptance speech for an honorary degree from Queen’s University in Kingston, Ontario. Roosevelt declared that the United States would not stand idly by if Canadian soil was ever threatened or invaded. In response, Prime
Minister William Lyon Mackenzie King expressed gratitude and promised that Canada would not be a weak link in the United States’ defence efforts. In August 1940, the two States created the Permanent Joint Board on Defence, which still meets today. It was mentioned that in the early days of Canada-US defence cooperation, it was challenging for Canada to find a balance between being a good ally and defending itself against unwanted help.

In 1957, in the context of the Cold War, NORAD was formed as a natural extension of the growing integration and execution of Canadian and American air defence plans. Nine months after the operational establishment of the command, on 12 May 1958, the two States announced they had formalized the cooperative air defence arrangements under what became known as the NORAD Agreement. NORAD initially had two missions, one for air warning and another for air control. In response to changing threats, NORAD has since evolved adding a maritime warning mission, when the NORAD agreement was signed in perpetuity in 2006. The Ebola crisis of 2014 is an example of NORAD’s evolution; NORAD fused intelligence from multiple sources to warn of ships coming from West Africa to North America that may have to be quarantined. It was noted that NORAD has few assets, as operations are carried out using national resources. When a threat is detected, NORAD communicates with the appropriate Canadian and/or US government department or departments via the military chain of command, to then coordinate the response. As for the Arctic, neither the US nor Canada wish to increase military involvement in the region but seek a more complete domain awareness picture. The Maritime Warning Mission, NORAD’s newest mission, which is maturing, could be instrumental in monitoring activity in the North American Arctic. Finally, it was mentioned that going forward, NORAD faces challenges both financially (for example upgrading the North Warning System) and in terms of priority on the political agenda.

During the discussion period, it was mentioned that in response to difficulties experienced by NORAD sharing and accepting information of a nature that could have law enforcement implications, a common lexicon has been developed in order to allow for the disclosure of relevant information without revealing identities and without prejudice to potential or actual litigation.

**Reconceptualizing Arctic Security: International and Domestic Dimensions**

The presentation focused on the notion of security as it applies in the Arctic region. It was highlighted that the term “security” often invokes an alarming picture of extreme positions that are inseparable from nuclear concerns and that focus on military defense and on the assertion of sovereignty. However, it was pointed out that in practice, the most common challenges that are faced in the Arctic involve coordination teams using the limited resources that they have to combat oil spills or helping to manage cruise ship activities. It was highlighted how this gives rise to a need for a broader definition of “security” that integrates economic, cultural and environmental concerns. Indeed, both Canadian and US foreign policies in relation to the Arctic have long focused on issues such as the rights of Indigenous peoples, environmental protection and climate change mitigation and not on issues of military security. It was mentioned that it is important to put discussions on military issues into perspective and ensure that they do not deflect attention from the real issues experienced in the Arctic community today.

During the discussion period, it was mentioned that while the Conservative government was in power in Canada, per capita financial transfers in the Arctic increased, but the payments have decreased since the new Liberal government came into power.

**The Russia-US-China Snow Triangle of Steel: the New Arctic Geopolitical Reality**

The presentation focused on the Arctic as a space of geopolitical competition between Russia, the United States and China. It was mentioned that the portrayal of the Arctic as a zone of peace and cooperation conceals the reality
that it is a major region of international security competition. The presentation illustrated the point by discussing the core strategic interests of Russia, the United States and China in the Arctic. It was mentioned that Russia’s core interests focus on nuclear stability and deterrence of nuclear proliferation as well as on stopping the anti-ballistic missile (ABM) defense system of the United States and on limiting NATO’s influence in the region. Indeed, Russia has been growing its military assertiveness in the Arctic by reactivating its Northern air bases and conducting military exercises. The United States, for its part, is looking to protect its territory and citizens notably by building ABMs and by supporting NATO. The US has also been deploying Alaska Aerospace defense forces and maintained its submarine forces in the Arctic despite a statement to the contrary to Congress. As for China, it was mentioned that in addition to matters such as the impacts of climate change, scientific research, international navigation and Arctic governance, China has shown an interest in naval operations. Furthermore, China sees the ABM of the United States as being directed against it, and is interested in displacing the dominance of the US in the Arctic. The presentation concluded by reiterating that there is a disconnect between the rhetoric of Arctic cooperation and the reality of core security requirements of Russia, the United States and China. While there is no immediate threat of a war in the Arctic, it is a region that is influenced by military considerations like any other, and while these considerations are generally hidden from public view, they should not be overlooked.

During the discussion period, it was noted that speaking of the “core interests” of a State may not reflect the inherent complexity of its internal politics, and that perhaps “core interests” of a State is more of a reference to that State’s “grand strategy”. The tension between cooperative and competitive conduct among Arctic States was also discussed. In particular, it was mentioned that both Stephen Harper and Vladimir Putin could be said to couple militant domestic messages with peace-focused rhetoric internationally as a political strategy to increase nationalist sentiment. This highlights the fact that competition does not necessarily entail conflict. Finally, it was mentioned that for some, the US’ approach to defence cooperation can be seen as problematic in that it fails to understand the core interests of other States and to take them into account when discussing solutions. Indeed, for some, the US’ approach to negotiations can be summarized as putting forward mandatory suggestions and rigidly defending them with no real desire to understand others’ point of view, which is not conducive to fostering mutual understanding and trust. Others challenged the presentation’s assertion that China is seeking dominance in the Arctic region, and highlighted China’s interest in furthering scientific cooperation and honouring international law as well as the presence and increasing involvement of other States in Arctic affairs.
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