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Polar territorial and maritime sovereignty in the twenty-first century

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Introduction

Polar sovereignty was a relatively dormant issue in the second half of the twentieth century. The disputes that had emerged in Antarctica over territorial claims, which at one point had made their way to the International Court of Justice,[1] had been effectively resolved with the adoption in 1959 of the Antarctic Treaty.[2] Article IV of the Treaty proved capable of suppressing sovereignty tensions between the seven Antarctic territorial claimants,[3] and also keeping in abeyance the interests of potential territorial claimants including the United States and the Soviet Union/Russian Federation.[4] In the Arctic, territorial claims had also been settled by the time of World War II and, while the Cold War introduced military and security tensions into the Arctic, none of these directly related to contested territorial sovereignty.[5]

Nevertheless, there remain on-going sovereignty tensions, which if not properly managed have the potential to erupt into significant international disputes with implications reaching well beyond Antarctica and the Arctic. While Article IV of the Antarctic Treaty set aside sovereignty

* With acknowledgement to James Crawford, who along with Ivan Shearer, supervised my University of Sydney PhD entitled 'The Polar Regions and the Development of International Law' (1995).

1 *Antarctica* cases *(UK* v. *Argentina*; *UK* v. *Chile)*, ICJ Pleadings (1956).

2 Antarctic Treaty (Washington, adopted 1 December 1959, entered in force 23 June 1961), 402 UNTS 71.

3 The seven claimant States are: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom.

4 David Day, *Antarctica: A Biography* (North Sydney: Random House/Knopf Australia, 2012), 434–91.

5 Shelagh D. Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Toronto: Douglas & McIntyre, 2010), 193–246.

issues for the duration of the Treaty, tensions have been raised over recent submissions to the Commission on the Limits of the Continental Shelf (CLCS) over Southern Ocean outer continental shelf claims and by Japan's refusal to acknowledge Australia's proclaimed Whale Sanctuary offshore Antarctica and the on-going conduct of its Southern Ocean 'scientific' whaling programme. Arctic outer continental shelf claims are also a source of tension, placing a spotlight upon the CLCS as it reviews claims and how Arctic States resolve overlapping maritime claims. The status of certain waters also remains in dispute, including the Northwest Passage where the United States questions Canadian sovereignty over those waters. Melting ice means that the Arctic Ocean is also becoming more accessible to shipping, raising issues with respect to the freedom of navigation being exercised by non-Arctic States such as China.[6] This chapter will review these issues and make observations as to how polar sovereignty may be understood in coming decades and, in doing so, will build upon some of James Crawford's analysis of these issues.[7]

Polar sovereignty

Polar sovereignty and the effective assertion of territorial title to polar lands have held a fascination for international lawyers for over a century. This has no doubt been driven by the relative contemporary exploration of polar lands, which resulted in both the North and South Pole being first reached early in the twentieth century, and also because of the challenges in effectively asserting sovereignty over polar lands. As a result, notwithstanding discovery of polar lands and the assertions of title that were often associated with those discoveries, claims over Antarctica or the Arctic represented classic examples of inchoate titles in need of perfection. That the *Eastern Greenland* case acknowledged the challenges associated with the effective assertion of title over polar lands[8] provided an additional legal basis for appreciating the distinctiveness of these issues.

[6] See e.g. Olya Gayazova, 'China's Rights in the Marine Arctic', *International Journal of Marine and Coastal Law*, 28 (2013), 61–95.

[7] Crawford's contributions to matters associated with polar sovereignty can be found in James Crawford and Donald Rothwell, 'Legal Issues Confronting Australia's Antarctica', *Australian Yearbook of International Law*, 13 (1992), 53–88; James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), 241–2.

[8] *Legal Status of Eastern Greenland (Norway* v. *Denmark)*, Judgment, 5 September 1933, PCIJ Series A/B, No. 53.

There are five recognised methods of acquiring sovereignty over territory: occupation, annexation, accretion, prescription and cession.[9] During early expeditions to the Arctic and Antarctic, various territorial claims were made, predominantly based upon acts of discovery, the raising of the flag and an act of proclamation.[10] However, as was held in the *Island of Palmas Arbitration*,[11] states whose basis of claim is discovery only have an inchoate title which must be perfected by later acts demonstrating an actual intent to exercise sovereignty over the discovered lands. This raised questions as to how traditional principles of territorial sovereignty could be applied in areas remote from the metropolitan power and where there was no immediate prospect of colonising those lands.

Throughout the twentieth century the effective exercise of sovereignty over polar lands was problematic given their relative inaccessibility and distance from metropolitan lands. Judge Huber in *Island of Palmas* recognised that differential standards may apply 'according to conditions of time and place', and also whether territory was inhabited or uninhabited.[12] However, it was in *Eastern Greenland* that the Permanent Court made express reference to the particular challenges associated with fulfilling the requirements of effective occupation in the polar regions, noting that:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[13]

While publicists have agreed that the strict standards applied to more temperate lands do not apply to the polar regions,[14] they have maintained that some of the traditional incidents of effective occupation must still

[9] See e.g. Ivan Anthony Shearer (ed.), *Starke's International Law*, 11th edn (London: Butterworths, 1994), 145; Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edn, 2 vols. (London: Longman, 1992), I, Parts II–IV, 679 (who substitute subjugation for annexation).

[10] In the case of Antarctica, see the discussion in Day, *Antarctica: A Biography*, 227–52.

[11] *The Netherlands* v. *United States of America* (4 April 1928), Reports of International Arbitral Awards, II, 829.

[12] *Ibid.*, 840. [13] *Legal Status of Eastern Greenland (Norway* v. *Denmark)*, 46.

[14] See e.g. F. M. Auburn, *Antarctic Law and Politics* (Canberra: Croom Helm, 1982), 13; Gillian D. Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986), 82; Philip C. Jessup and Howard J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (New York: Columbia University Press, 1959), 141.

be made out.[15] This opens for consideration whether different standards should be applied to the determination of polar territorial claims in the twenty-first century than was previously the case. Two factors immediately would appear relevant. The first is that the polar regions are now more accessible than was the case at the time they were first discovered and when the early cases were decided. While they cannot necessarily be equated with 'temperate lands', they can be reached with an ease that would have been unimaginable a century ago and as such are no longer as 'distant' as previously imagined. The second is that modern technology has rendered the polar regions capable of settlement in much the same fashion as other parts of the globe. In the Arctic, the Russian city of Murmansk is the biggest city north of the Arctic Circle with a population of over 330,000.[16] In Antarctica, the American base at McMurdo Sound has an austral winter population of up to 200 and a summer population of up to 1,100, while at the South Pole the American Amundsen/Scott base is also capable of accommodating 245 persons in summer.[17]

An unresolved aspect of polar sovereignty is the status of claims based upon the so-called 'sector theory' which is that States can assert a territorial claim along lines of latitude that run directly to the Pole, thereby effectively dividing up the region. A significant feature of Antarctic claims is that, with the exception of Norway, they are all based on a sector as all the claims commence at points along the Antarctic coast and converge along degrees of longitude at the geographic South Pole. The sector theory has also been influential in debates over Arctic territorial claims, where it was thought to have been based upon principles such as contiguity, 'hinterland' or the 'spheres of influence' doctrine.[18] In the Arctic, sector claims are based on the geographic proximity of the claimant State, and have from time to time been asserted as a basis of claim to Arctic lands by Canada and Russia. In Antarctica, only Argentina and Chile are sufficiently geographically proximate to be able to rely upon a form of sector

[15] See e.g. A. C. Castles, 'The International Status of the Australian Antarctic Territory' in Daniel Patrick O'Connell (ed.), *International Law in Australia* (Sydney: Law Book Company, 1966), 355.

[16] Charles Emmerson, *The Future History of the Arctic* (London: Vintage, 2010), 68.

[17] United States Antarctic Program, *United States Antarctic Program Participant Guide*, 2010–12 edn (US Antarctic Program, 2010), 72.

[18] Jennings and Watts, *Oppenheim's International Law*, I, Parts II–IV, 693; Daniel Patrick O'Connell, *International Law*, 2nd edn, 2 vols. (London: Stevens and Son, 1970), I, 449; Gustav Smedal, *Acquisition of Sovereignty over Polar Areas* (Oslo: I Kommisjon Hos Jacob Dybwad, 1931), 54–76; Oscar Svarlien, 'The Sector Principle in Law and Practice', *Polar Record*, 10 (1960), 248–63.

claim linked to contiguity or related bases of claim. Ultimately, sector theory has never been the subject of final determination by an international court or tribunal, has never been officially relied upon by claimant states to polar lands, and has been subject to widespread critique from commentators. Crawford has recently assessed the principle as one that 'remains a rough method of delimitation, and has not become a separate rule of law',[19] while Shaw characterises it as a 'political proposition'.[20] Crawford's further reservations extend to the observation that the sector principle inherits some of the defects of contiguity, that 'its application is a little absurd insofar as there is a claim to a narrow sliver of sovereignty stretching to the Pole' and that it cannot apply to areas of the high seas.[21] It can therefore be observed that while the standard international law principles associated with the assertion of sovereignty and the perfection of territorial title apply to polar lands, there has also been some recognition of the distinctive aspects of polar sovereignty. Whether those points of distinction, including particular theories that have been applied in the past to polar lands such as the sector theory, have much contemporary application is a matter for determination.

Antarctic sovereignty

In 1959, when the Antarctic Treaty was negotiated, sovereignty over the continent was unresolved. To that end, Article IV of the Antarctic Treaty is a remarkable provision which has proven itself capable of multiple interpretations and some evolution over the more than fifty years the Treaty has been in force.[22] Initially, the goal was to reach a settlement amongst the seven territorial claimants and the United States and Soviet Union so as to allow for the orderly management of Antarctic affairs and neutralise sovereignty from Antarctic discourse. This proved to be a major strength when the Antarctic Treaty became the focus of sustained criticism in the United Nations General Assembly during the 1980s. By being able to demonstrate that traditional notions of State sovereignty were not exercised in Antarctica, the Antarctic Treaty parties were able to successfully mount a diplomatic response, deflecting criticism of the Treaty and the

[19] Crawford, *Brownlie's Principles of Public International Law*, 241; see also Auburn, *Antarctic Law and Politics*, 31.

[20] Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), 535.

[21] Crawford, *Brownlie's Principles of Public International Law*, 241.

[22] See the discussion in Crawford and Rothwell, 'Legal Issues Confronting Australia's Antarctica', 79–82.

Antarctic Treaty System (ATS).[23] More recently, as some claimant States have sought to secure their positions with respect to maritime claims in the Southern Ocean, Article IV and its interpretation has once again become a live issue within the ATS.[24]

The issues concerning Antarctic sovereignty are highlighted by considering Australia's position. Australia has been a long-standing player in polar affairs, formally commencing with Sir Douglas Mawson's 1911–14 expedition which eventually paved the way for Australian interests in Antarctica to be formalised by way of the declaration of the Australian Antarctic Territory (AAT) in 1936.[25] Australia's polar interests have been predominantly realised through territorial claims to the AAT, and through its sub-Antarctic islands: Macquarie Island, Heard Island and McDonald Island. Those claims remain of considerable significance to Australia as was highlighted in 2012 when Australia proclaimed outer continental shelves offshore Heard Island and Macquarie Island, which extend deep into the Southern Ocean.[26] Nevertheless, Australian sovereignty over Antarctica is not positively recognised by many States and, with the exception of the reciprocal recognition accorded Antarctic claims between Australia, France, New Zealand and the United Kingdom, lingering doubts remain over whether Australia's claim to the AAT has been perfected.[27]

In the past decade, Australian sovereignty in Antarctica has been confronted with the challenges of Japanese whaling and outer continental shelf claims. Since the 1970s Australia has progressively adopted a pro-conservation position towards whales, and these developments have been reflected in Australian law. The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) creates an Australian Whale Sanctuary, which applies offshore the Australian continent, offshore territories and the AAT. Whaling within the Australian Whale Sanctuary is prohibited and the Act applies to all persons and vessels,[28] giving no consideration to possible Antarctic Treaty constraints on the application of

[23] See discussion in Richard Woolcott, *The Hot Seat: Reflections on Diplomacy from Stalin's Death to the Bali Bombings* (New South Wales: Harper Collins, 2003), 209–18.

[24] Donald R. Rothwell, 'Sovereignty and the Antarctic Treaty', *Polar Record*, 46 (2010), 17–20.

[25] Australian Antarctic Territory Acceptance Act 1933 (Australia).

[26] Seas and Submerged Lands (Limits of Continental Shelf) Proclamation 2012 (Australia), Federal Register of Legislative Instruments F2012L01081 (24 May 2012).

[27] The most thorough contemporary analysis can be found in Triggs, *International Law and Australian Sovereignty in Antarctica*; see also Crawford and Rothwell, 'Legal Issues Confronting Australia's Antarctica', 59–61.

[28] Environment Protection and Biodiversity Conservation Act 1999 (Australia), s. 229.

Australian law to foreign nationals.[29] Notwithstanding Japan's conduct of whaling operations within the Australian Whale Sanctuary, no Australian government agency has to date sought to enforce the prohibition on whaling. In 2004 a non-governmental organisation, Humane Society International (HSI), contested this view and commenced proceedings in the Australian courts, arguing that Japanese whaling activity was contrary to the EPBC Act. In a series of proceedings before the Federal Court from 2004–8,[30] declaratory and injunctive relief was sought concerning whaling alleged to have been carried out by Kyodo Senpaku Kaisha, a corporation holding a licence from the Japanese government to conduct 'special permit' whaling in the Southern Ocean. Following a series of legal proceedings in 2008,[31] the Federal Court of Australia delivered its final judgment in the matter.[32] Satisfied that a 'significant number of whales were taken inside the Australian Whale Sanctuary',[33] the Court concluded that Kyodo had contravened a number of relevant provisions of the EPBC Act in relation to both minke whales and fin whales, and issued orders that Kyodo be restrained from engaging in any such further acts.[34] HSI arranged for the Federal Court's judgment to be served upon Kyodo in Japan in late January 2008.[35] These orders have not deterred Kyodo from continuing with its whaling programme and there have been continual infringements of the Australian Whale Sanctuary since 2008.[36]

What may be perceived as Australian reticence over the active enforcement of Australian law in the case of whaling can be contrasted with the more active assertion of Australian sovereignty over its Southern Ocean continental shelf. In 2004 Australia made its CLCS submission of data with respect to an outer continental shelf in the Southern Ocean, and

[29] As to the issues arising regarding the enforcement of Australian law offshore the AAT see Crawford and Rothwell, 'Legal Issues Confronting Australia's Antarctica', 78–85.

[30] Commencing with *Humane Society International, Inc.* v. *Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510.

[31] See discussion in Tim Stephens and Donald Rothwell, 'Japanese Whaling in Antarctica: *Humane Society International, Inc.* v. *Kyodo Senpaku Kaisha Ltd*', *Review of European Community and International Environmental Law*, 16 (2007), 243–6.

[32] *Humane Society International, Inc.* v. *Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

[33] *Ibid.*, para. 39. [34] *Ibid.*, para. 55.

[35] Peter Alford, 'Aussie Judgment Served on Whalers', *The Australian* (Sydney), 24 January 2008, 7.

[36] In 2012 vessels from the Japanese whaling fleet entered the Australian Whale Sanctuary offshore Macquarie Island which brought about a response from the Australian government; see Nicola Roxon MP, 'Japanese Whaling Vessels Nearing Macquarie Island', Attorney-General for Australia Media Release, 25 February 2012, available at www.attorneygeneral.gov.au/Media-releases/.

more generally offshore the Australian continent and territories.[37] This process, made consistently with mechanisms provided for under Article 76 of the 1982 United Nations Convention on the Law of the Sea (LOSC),[38] asserted a potential Australian Southern Ocean outer continental shelf claim offshore the AAT, Heard and McDonald Islands, and Macquarie Island. However, mindful of the fact that the Commission does not consider continental shelf claims with respect to disputed territory, Australia requested the CLCS 'not to take any action for the time being' with respect to the continental shelf appurtenant to Antarctica.[39] Nevertheless, Australia's submission generated responses from eight states, of which six made direct observations regarding a claimed outer continental shelf off the AAT coast.[40] Japan, for example, indicated in its communication to the United Nations Secretary-General that it 'does not recognize any State's right of or claims to territorial sovereignty in Antarctica'.[41] Because Australia was the first State to go before the CLCS with data associated with continental shelf claims offshore Antarctica, some reaction could have been anticipated,[42] and to that end Australia paved the way for other Antarctic claimants in their CLCS dealings. Likewise, Australia was also the first State to assert an outer continental shelf in the Southern Ocean. In May 2012 Australia formally proclaimed adjusted outer limits of the Australian continental shelf, which in the case of both the Heard and McDonald Islands, and Macquarie Island, at their southern limit terminate within the Antarctic Treaty area.[43]

[37] For analysis see Andrew Serdy, 'Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf', *Ocean Development and International Law*, 36 (2005), 201–17.

[38] United Nations Convention on the Law of the Sea (Montego Bay, adopted 10 December 1982, entered into force 10 November 1994), 1833 UNTS 397.

[39] 'Note from the Permanent Mission of Australia to the Secretary-General of the United Nations Accompanying the Lodgement of Australia's Submission', Note 89/2004 (November 2004) available at www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm.

[40] The States that directly commented on this matter were Germany, India, Japan, the Netherlands, Russian Federation and USA.

[41] The Permanent Mission of Japan to the United Nations (SC/05/039) (19 January 2005) available at www.un.org/depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_jap.pdf.

[42] See discussion in Alan D. Hemmings and Tim Stephens, 'The Extended Continental Shelves of Sub-Antarctic Islands: Implications for Antarctic Governance', *Polar Record*, 46 (2010), 312–27.

[43] See above n. 26.

Arctic sovereignty

Arctic territorial sovereignty has been less contentious than in Antarctica, superficially because there has been less disputed territory. Following the period of intense discovery of Arctic lands in the late nineteenth and early twentieth century, which included the 'race for the Pole', Arctic territorial disputes were settled in a relatively orderly fashion, including by reference to the Permanent Court of International Justice (PCIJ). At present, the only territorial dispute is that between Canada and Denmark over Hans Island, which is a very small island that straddles Nares Strait between Greenland and Ellesmere Island.[44] There have, nevertheless, been sovereignty tensions in the Arctic, especially as discussed below between Canada and the United States over the characterisation of the Northwest Passage as either internal waters or an international strait.

The dawn of the twenty-first century has seen a significant shift in the debate over Arctic sovereignty and this has been due to a number of factors. The first is the effects of the melting of the sea ice of the Arctic Ocean. In recent years the effect of the melt has been dramatic, with significant tracts of open water appearing in parts of the Arctic Ocean and a shifting ice pattern becoming discernible.[45] The permanent disappearance of Arctic sea ice throughout much of the region during the summer months has resource access implications. Previously inaccessible areas of the Arctic Ocean will potentially become accessible for various forms of resource exploitation, ranging from the non-living resources of the sea-bed, to fish stocks and other living resources of the water column. With increased resource exploitation, there is the potential for demands for greater foreign access by States which may not traditionally have had an interest in the region. This may especially be the case with respect to Arctic fisheries and that area of Arctic high seas beyond the limits of coastal State jurisdiction. It follows that this will in turn raise issues of increased navigational interest in Arctic waters, not only with respect to navigation

[44] Christopher Stevenson, 'Hans Off! The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution', *Boston College International and Comparative Law Review*, 30 (2007), 263–75.

[45] The first time that consistent reports emerged of the Northwest Passage being ice-free was 2007, which coincided with a then record minimum sea ice extent being recorded for Arctic sea ice. See John Roach, 'Arctic Melt Opens Northwest Passage', *National Geographic News*, 17 September 2007, available at http://news.nationalgeographoc.com/news/pf/38614724.html.

within the Arctic but by members of the international community eager to gain access to new shipping routes between the North Pacific and North Atlantic. A second factor is the rising tension associated with outer continental shelf claims, which will potentially converge in the central Arctic Ocean, resulting in the need for resolution of additional maritime boundaries to settle overlapping claims.[46]

The combination of climate change and the potential for at least a partially ice-free Arctic Ocean, combined with an acknowledgement of continental shelf rights in an area that is becoming more accessible to a range of maritime activities, has generated considerable political interest, with accompanying legal and policy implications.[47] One particular dimension of this renewed interest in the Arctic has been the attention given to Arctic shipping in general, and navigational issues in particular.[48] Two Arctic shipping routes have traditionally attracted attention. The first – the so-called Northern Sea Route[49] – runs along Russia's northern coast primarily within coastal waters. As there has been little dispute over Russia's capacity to control navigation within these waters consistent with the law of the sea, the Northern Sea Route has rarely been the subject of controversy. This has not been the case with respect to the Northwest Passage. A variety of interconnected sea routes which pass between the islands that make up the Canadian Arctic Archipelago, the status of the Northwest Passage has been the subject of on-going dispute between Canada and the US ever since the voyage of the SS *Manhattan* in 1969. In response to the *Manhattan* voyage, which attempted to demonstrate the capacity of a supertanker to shuttle between the Alaskan oil fields and the United States's eastern seaboard, Canada adopted the Arctic Waters Pollution Prevention Act, placing significant constraints on the passage of vessels through its Arctic waters on environmental grounds. Canada took further steps in the 1980s to bolster its control of its Arctic waters through the declaration of straight baselines around the outer

[46] See e.g. Timo Koivurova, 'The Actions of Arctic States Respecting the Continental Shelf: A Reflective Essay', *Ocean Development and International Law*, 42 (2011), 211–26.

[47] See e.g. James Kraska (ed.), *Arctic Security in an Age of Climate Change* (Cambridge University Press, 2011); Scott G. Borgerson, 'Arctic Meltdown: The Economic and Security Implications of Global Warming', *Foreign Affairs*, 87 (2008), 63–77.

[48] See e.g. Aldo Chircop, 'The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?', *International Journal of Marine and Coastal Law*, 24 (2009), 355–80; E. J. Molenaar, 'Arctic Marine Shipping: Overview of the International Legal Framework, Gaps, and Options', *Journal of Transnational Law and Policy*, 18 (2009), 289–325.

[49] Also referred to as the Northeast Passage.

limits of its Arctic islands with the effect that all vessels passing through the Northwest Passage would be within Canadian internal waters. The significance of Canada's initiatives has been to convert waters that may at one time have been a part of the territorial sea or exclusive economic zone, within which certain navigational rights existed for foreign ships, into waters over which Canada has complete sovereignty and the capacity to regulate all shipping – including the right to deny entry to foreign vessels.[50] Canada's position with respect to navigation through the Northwest Passage has been tolerated, though subject to protest by the United States. It has not been tested, however, before any international court or tribunal, and while Canada's position finds some support in Article 234 of the LOSC granting to coastal States a capacity to adopt additional environmental measures for ice-covered waters,[51] this does not provide a foundation for Canada's baselines interpretation or the constraints which have been placed on navigation. This remains a dormant legal issue which has the potential to erupt directly as a result of climate change and the new opportunities for safe and efficient navigation through the Northwest Passage.

A significant increase in Arctic shipping has the potential to stoke new sovereignty tensions. The 2009 Arctic Maritime Shipping Assessment (AMSA) Report[52] highlighted the potential for an increase in not only destinational Arctic shipping, but also trans-Arctic shipping via shipping routes that cross the Arctic Ocean from a point of entry to a point of exit. Such shipping routes may operate via the Northern Sea Route or Northwest Passage, or through the Central Arctic Ocean, with the effect that the Bering Strait (where the Russian Federation and United States are the littoral states) would become a pivotal route for access or egress to the Arctic.[53] A trans-Arctic shipping route through the Bering Strait, across the Arctic Ocean and then via the Fram and Greenland Straits to Iceland, is almost 5,000 miles shorter than using the Panama Canal between Hamburg and Yokohama. Polar class vessels, capable of operating

[50] See Donat Pharad, *Canada's Arctic Waters in International Law* (Cambridge University Press, 1988).

[51] Ted L. McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (Oxford University Press, 2009), 93–5.

[52] Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* (Arctic Council, 2009) (AMSA Report).

[53] Donald R. Rothwell, 'International Straits and Trans-Arctic Navigation', *Ocean Development and International Law*, 43 (2012), 267–82.

in a substantially ice-reduced Arctic, are on order and are being built in order to take advantage of these opportunities.[54]

In the case of the Arctic, much of the Arctic Ocean remains beyond the limits of existing 200-nautical-mile continental shelf claims, including the seabed at the North Pole. A great deal of the Arctic Ocean is potentially susceptible to an outer continental shelf claim by the Arctic Ocean littoral states, which include Canada, Denmark (Greenland), Norway, the Russian Federation and the United States. The potential of these claims to raise sovereignty hackles was famously highlighted in August 2007 by the planting of a Russian flag by a mini-submarine on the Arctic Ocean seabed at the North Pole.[55] More substantively, the growing number of claims before the CLCS by Arctic States, including Canada's anticipated claim, plus the uncertainty as to the position of the United States and its claims offshore Alaska, has contributed to not only a growing media fascination with Arctic sovereignty but parallel consideration of Arctic legal issues and governance that was absent for much of the twentieth century.[56] Russia was the first Arctic State to make its CLCS submission in 2001, which has since been followed by Norway, and Denmark. A Canadian claim is anticipated in 2013 while the position of the United States is uncertain as it has yet to become a party to the LOSC.

Contemporary challenges

The contemporary issues confronting the polar regions ultimately reflect the phenomenon of globalisation. A century ago Antarctica and the Arctic were literally the last places on earth subject to exploration, and even

[54] Chircop, 'The Growth of International Shipping in the Arctic', 356–7.

[55] C. J. Chivers, 'Russia Plants Underwater Flag at North Pole', *New York Times*, 2 August 2007, available at www.nytimes.com/2007/08/02/world/europe/02cnd-artic.html?module=Search&mabReward=relbias%3; T. Parfitt, 'Russian plants flag on North Pole seabed', *The Guardian*, 2 August 2007, available at www.guardian.co.uk/world/2007/aug/02/russia.arctic.

[56] See e.g. 'Special Report: The Arctic', *The Economist*, 16–22 June 2012. Some of the recent literature relevant includes Tessa Mendez, 'Thin Ice, Shifting Geopolitics: The Legal Implications of Arctic Ice Melt', *Denver Journal of International Law and Policy*, 38 (2010), 527–47; Tavis Potts and Clive Schofield, 'An Arctic Scramble? Opportunities and Threats in the (Formerly) Frozen North', *International Journal of Marine and Coastal Law*, 23 (2008), 151–76; Louise A. de La Fayette, 'Oceans Governance in the Arctic', *International Journal of Marine and Coastal Law*, 23 (2008), 531–66.

after the Poles were conquered it was not really until the advent of reliable polar air transportation that comprehensive mapping of polar lands was completed in the 1950s. In the twenty-first century another type of exploration is taking place as the polar seabed is mapped to support CLCS submissions. The consequence has been that as a result of the dual effects of climate change and the contemporary law of the sea polar sovereignty has again come into the public and political spotlight.

International law does provide a framework for the resolution of these issues, a fact the five Arctic littoral States recognised in May 2008 when they issued the Ilulissat Declaration. The Declaration affirms the capacity of the law of the sea to provide 'important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea'.[57] In a direct reference to resolution of Arctic maritime boundaries, the Declaration also stated that 'We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.'[58] The law of the sea is therefore central to how polar maritime sovereignty is to be determined and ultimately exercised, within which the CLCS will play a pivotal part.

The CLCS operates under a mandate based upon Article 76 and Annex II of the LOSC, and its Rules of Procedure make clear that it will not become engaged in political or legal disputes. To date, the CLCS has sought to strictly maintain its role as a scientific and technical body, and as such the Commission has sought to neatly side-step claims which have been asserted offshore disputed territories, or which may result in overlapping claims between two or more states. In the Southern Ocean, both Australia and New Zealand indicated their desire for the CLCS to set aside for the time being potential outer continental shelf claims that could be asserted offshore their Antarctic territories. An alternative approach was taken by Argentina whose 2009 CLCS submission claimed an outer continental shelf offshore its Antarctic territories and adjacent islands.[59] While Argentina has notified the CLCS as to the

[57] See the Ilulissat Declaration, available at www.arcticgovernance.org/the-ilulissat-declaration.4872424.html.

[58] *Ibid.*

[59] Outer Limits of the Continental Shelf: Argentine Submission (Executive Summary) (21 April 2009), available at www.un.org/depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf.

existence of disputes with the United Kingdom with respect to the Falkland Islands, South Georgia and the South Sandwich Islands, no such indication was made in the case of its claim over continental Antarctica, or whether there existed constraints upon Argentina's capacity to assert such a claim under the Antarctic Treaty.[60] Argentina's CLCS submission, which remains queued for the time being with no immediate prospect of consideration by the Commission in the near future, has been the subject of diplomatic communications made via the United Nations Secretary-General to the Commission from six Antarctic Treaty parties.[61]

The position in the Arctic is also complex, not because of issues regarding territorial sovereignty but because the configuration of the Arctic Ocean is such that the continental shelf claims will predominantly converge in the Central Arctic Ocean, necessitating the resolution of maritime boundaries between the littoral states whose claims overlap. On current projections, this would potentially involve the resolution of boundaries between Denmark (Greenland) and Canada, Canada and the United States, the United States and Russia, Russia and Norway, and Norway and Denmark (Greenland).[62] The CLCS is therefore set to become an important forum for resolving some of the controversies over Arctic seabed claims, and this may prove to be a catalyst for forcing the US to reassess its position towards the LOSC. Because there is to date so little State practice with respect to outer continental shelf claims under the LOSC, it cannot be said – unlike the general position with respect to 200-nautical-mile continental shelf claims – to be reflective of customary international law. There could be no basis for the United States asserting a unilateral claim to an outer continental shelf without having first acceded to the Convention and having made a submission before the CLCS. This is not to suggest that the United States would have to sit on the sidelines indefinitely whilst other Arctic states assert claims to the Arctic Ocean. One option may be

[60] *Ibid.*, 8–9; Argentina refers to these islands as Islas Malvinas, Georgias del Sur and Sandwich del Sur.

[61] See e.g. Permanent Mission of Japan to the United Nations (SC/09/390) (19 November 2009) available at www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/jpn_re_arg_2009. Other States to have lodged communications on this matter were the United Kingdom, United States, the Russian Federation, India and the Netherlands.

[62] Alex G. Oude Elferink, 'The Outer Continental Shelf in the Arctic: The Application of Article 76 of the LOS Convention in a Regional Context' in Alex G. Oude Elferink and Donald R. Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (The Hague, New York: Martinus Nijhoff, 2001), 149.

for the United States to collaborate in submitting a joint CLCS Arctic claim. There is certainly precedent for the CLCS considering such claims, but in each instance the relevant claimant States have been parties to the LOSC and this may prove to be a hurdle for the United States adopting such a strategy. For this reason the United States may be forced in the very near future to accede to the LOSC.

Concluding remarks

Polar territorial and maritime sovereignty is significantly advanced in the twenty-first century compared to when it was first contemplated one hundred years ago. However, notwithstanding the developments in international law including the specific recognition of particular issues associated with polar sovereignty in the *Eastern Greenland* case and the Antarctic Treaty, and the manner in which maritime sovereignty can be claimed and exercised under the LOSC, there remain tensions over polar sovereignty which show no sign of abating. The stewardship of polar lands has been a dominant theme in political discourse and has been responsible for some remarkable diplomatic about-turns with respect to mining in the Arctic and Antarctica.[63] However, as climate change continues its onward march and the polar regions become more accessible, polar stewardship will be further challenged and in its place polar sovereignty will inevitably assume even greater significance. In the Arctic this will raise particular issues for indigenous peoples whose culture and livelihoods will be threatened by climate change and by new visitors challenging indigenous notions of sovereignty.[64] The polar regions are therefore rapidly approaching a crossroads where decisions will need to be made as to whether to continue the status quo which has served regional legal governance relatively well in recent decades, whether more traditional notions of State sovereignty are (re)applied or in the Arctic there is a significant rethinking of what is meant by sovereignty so as to encompass the views of indigenous peoples who have been the

[63] See e.g. Andrew Jackson and Peter Boyce, 'Mining and "World Park Antarctica", 1982–1991' in Marcus Haward and Tom Griffiths (eds.), *Australia and the Antarctic Treaty System: 50 Years of Influence* (Sydney: University of New South Wales Press, 2011), 300–19.

[64] See, generally, James Crawford, 'The Rights of Peoples: Some Conclusions' in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon, 1988), 159–75.

custodians of the region for centuries. Whatever the outcomes, international law will be tested by these developments and innovative solutions may be needed to ensure Antarctica and the Arctic remain areas of relative international peace and harmony where protection of the environment is a fundamental principle.