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### China's role in the changing governance of Arctic shipping

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# China's Role in the Changing Governance of Arctic Shipping

*Nengye Liu\**

## Abstract

This paper explores the role that China could play in the development of an effective international legal system for the governance of Arctic shipping. The first part describes the current international legal regime applicable to shipping activities in the Arctic. The second assesses China's relations with the United Nations Convention on the Law of the Sea (UNCLOS), the International Maritime Organization (IMO) and the Arctic Council. China's potential contribution to the governance of Arctic shipping is addressed in the final part.

## Keywords

China – Arctic – Shipping

## Introduction

The Arctic is changing. The changes in Arctic sea ice cover over the past decades have led to a great reduction in multi-year ice in the Arctic Ocean. It is projected that the Arctic Ocean will be virtually ice-free in summer within 30 years with multi-year ice persisting mainly between islands in the Canadian

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Arctic Archipelago and in the narrow straits between Canada and Greenland.<sup>1</sup> With the retreat of Arctic sea ice, economic activities in the Arctic such as shipping, fisheries, offshore drilling for oil and gas as well as exploration and exploitation of living and non-living marine genetic resources are all expected to increase. For example, during summer 2012, 46 ships sailed the Northern Sea Route (NSR)<sup>2</sup> carrying more than one million tons of cargo, a 53 per cent increase in cargo volume from 2011.<sup>3</sup> Moreover, the main focus of recent experimental voyages in the NSR has been the linking of the Russian Arctic to markets in China and Southeast Asia during the summer navigation season (roughly July to October).<sup>4</sup>

To date, 90 percent of China's exports and imports are carried by maritime transport.<sup>5</sup> As of 1 January 2013, Chinese ownership of vessels was ranked 3rd in the world. Chinese ship-owners control 11.78 percent of the total world Deadweight tonnage.<sup>6</sup> China is the world's leading export nation and an important importer of goods and raw materials. It is also an important origin and destination of international maritime trade.<sup>7</sup> Therefore, it is not surprising that the first Chinese cargo ship reached Europe via the NSR in the summer of 2013.<sup>8</sup>

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1 Eamer, Joan, Garry Donaldson, Anthony Gaston, Ksenia Kosobokova, Kári F. Lárusson, Igor Melnikov, Jim Reist, Evan Richardson, Lindsay Staples, and Cecilie von Quillfeldt. "Life Linked to Ice: A guide to sea-ice-associated biodiversity in this time of rapid change." *CAFF Assessment Series* No. 10. Conservation of Arctic Flora and Fauna, Iceland, 2013, 12.

2 The NSR is defined in Russian Federation law as a set of marine routes from Kara Gate (south of Novaya Zemlya) in the west of the Bering Strait in the east. Several of the routes are along the coast, making use of the main straits through the islands of the Russian Arctic; other potential routes run north of the islands groups. See Arctic Council Arctic Marine Shipping Assessment 2009 Report, 23.

3 PAME, The Arctic Ocean Review Project, Final Report, (Phase II 2011–2013), Kiruna May 2013. Protection of the Arctic Marine Environment, Akureyri: PAME Secretariat, (2013), 27.

4 *Ibid.*

5 Ministry of Transport & Legislative Affairs Office of State Council, P.R. China. *The Legislative Interpretation of 2009 Regulation on the Prevention and Control of Marine Pollution from Vessels*. Beijing: China Communications Press, 2010, 1 (in Chinese).

6 United Nations Conference on Trade and Development Review of Maritime Transport 2013, UNCTAD/RMT/2013, 43.

7 *Ibid.*, at 351.

8 The COSCO-owned vessel "Yong Sheng," weighing 19,000 tons, has become the first Chinese commercial vessel to tackle the tough Northern Sea Route, having set sail from the Chinese port of Dalian to Rotterdam. See Staalesen, Atle. "First container ship on Northern Sea Route." *Barentsobserver*, Aug 21, 2013, <http://barentsobserver.com/en/arctic/2013/08/first-container-ship-northern-sea-route-21-08>, (accessed July 16, 2014)

This paper explores the role that China could play in the development of an effective international legal system for the governance of Arctic shipping. The first part describes the current international legal regime applicable to shipping activities in the Arctic. The second assesses China's relations with the United Nations Convention on the Law of the Sea (UNCLOS), the International Maritime Organization (IMO) and the Arctic Council. China's potential contribution to the governance of Arctic shipping is addressed in the final part.

## 1 Current Legal Framework of Arctic Shipping

The current governance framework for Arctic shipping consists of a mixture of global, regional, bilateral and national/domestic regimes. This structure entails the engagement of various state and non-state actors that operate on different levels and pursue different interests. How and in what ways this multilevel nexus influences the development of Arctic shipping, both in geopolitical and legal perspectives, will have important implications for the next several decades.<sup>9</sup>

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>10</sup> has established an extensive jurisdictional framework to balance the interests of flag and coastal states for the regulation of shipping. Under the auspices of the International Maritime Organization (IMO), a series of international conventions and instruments have been adopted to regulate shipping, i.a.: International Convention on the Prevention of Pollution from Vessels (MARPOL);<sup>11</sup> International Convention on the Safety of Life at Sea (SOLAS);<sup>12</sup> International Convention on the Control of Harmful Anti-Fouling Systems on Ships (Anti-fouling Convention);<sup>13</sup> International Convention for the Control

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9 Chen, Linling, et al. "Shipping in the Arctic Water: The interaction of sea ice, ship technology, climate change, economy and other operational conditions." Report from the 2013 Nansen-NVP interdisciplinary PhD and Post-doc summer school, Longyearbyen, Svalbard, August 18–26, 2013, 9.

10 United Nations Convention on the Law of the Sea, *International Legal Materials*, 21 (1982): 1261–1354.

11 International Conference on Marine Pollution: International Convention for the Prevention of Pollution from Ships, *International Legal Materials*, 12 (1973): 1319–1444.

12 Inter-Governmental Maritime Consultative Organization: International Convention for the Safety of Life at Sea, 1974, *International Legal Materials*, 14 (1975): 959–978.

13 International Conference on the Control of Harmful Anti-Fouling Systems for Ships, AFS/CONF/26, 18 Oct 2001, Agenda item 8.

and Management of Ships' Ballast Water and Sediments (BWM Convention);<sup>14</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC);<sup>15</sup> and civil liability conventions. The global regulatory regime is also applicable to the Arctic Ocean. However, UNCLOS Art. 234 (ice-covered areas),<sup>16</sup> includes a significant exception extending coastal state jurisdiction in ice-covered areas. The IMO has also been discussing the adoption of a mandatory International Code (of Safety) for Ships operating in Polar Waters (Polar Code) since 1991. To date only voluntary Guidelines for ships operating in Arctic waters have been adopted in 2002 (IMO 2002)<sup>17</sup> and updated to include all polar waters in 2009 (IMO 2009).<sup>18</sup>

The Arctic Council (the Council) has an important role in the governance of Arctic Shipping. The Council has sponsored numerous scientific studies that have been instrumental in alerting the world to the trans-boundary pollution and climate change challenges facing the Arctic, such as the publication of Arctic Marine Shipping Assessment 2009 Report and Arctic Climate Impact Assessment 2005.<sup>19</sup> Moreover, at the 2011 Nuuk Ministerial Meeting, the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic was adopted.<sup>20</sup> The Agreement on Cooperation on Marine Oil

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14 International Convention on Ballast Water Management for Ships, BWM/CONF/36, 16 Feb 2004, Agenda item 8. It has not entered into force yet, which is a regulatory gap for prevention of invasive species from ballast water of the Arctic regime.

15 International Maritime Organization: International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990, and Final Act of the Conference, *International Legal Materials*, 30 (1991): 733–761.

16 It reads: "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

17 International Maritime Organization, MSC/Circ. 506 on Guidelines for Ships Operating in Arctic Ice-Covered Waters.

18 International Maritime Organization, Resolution A. 1024 (26) on Guidelines for Ships Operating in Polar Waters, Adopted December 2, 2009.

19 Koivurova, Timo, and David VanderZwaag, "The Arctic Council at 10 Years: Retrospect and Prospects." *University of British Columbia Law Review* 40 (2007): 121–192.

20 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, *International Legal Materials*, 50 (2011): 119, entered into force on 19 Jan 2013.

Pollution, Preparedness and Response in the Arctic was adopted during the 2013 Kiruna Ministerial Meeting.

## 2 China and the Governance of Arctic Shipping

### A *China and the UNCLOS*

The People's Republic of China was founded in 1949. Two factors appear to have played an important role in the development of Chinese practice on the law of the sea. The first is the periodic international tensions, regarding the delimitation of China's maritime boundaries. The 1958 crisis over the offshore islands, Jin Men and Ma Zu (Quemoy and Matsu), which occasioned a major formal declaration by the Government, the "Declaration on China's Territorial Sea."<sup>21</sup> The second factor concerns China's determination to exploit the oceans and their resources. This has taken the form of centrally planned and directed activities for developing ocean fisheries and transportation.<sup>22</sup>

After its return to the United Nations in late 1971, China participated in the work of the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the limits of National Jurisdiction. China later participated in all the negotiations at the Third United Nations Conference on the Law of the Sea III (UNCLOS III).<sup>23</sup>

The two most significant physical features of China's geography, the length of its coastline and the size of its continental shelf, led China to adopt a position favouring extensive coastal state jurisdiction. For example, China supported the position of the majority of developing countries that claimed a 200-mile Exclusive Economic Zone (EEZ).<sup>24</sup> The Chinese delegate at the conference stated the position that each state has the right to formulate its environmental policy and take all necessary measures to protect its marine environment and prevent pollution in the sea areas under its national

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21 The 1958 Declaration provides that: 1) the breadth of China's territorial sea shall be 12 nautical miles. This breadth applied to territories of China, including Taiwan and its surrounding islands, and the islands in the South China Sea; 2) the straight base line method was adopted for establishing the territorial sea limit; 3) Bohai Bay and Qiongzhou Strait were Chinese internal waters; 4) no foreign military vessels or aircraft may enter China's territorial sea and the air space there above without prior permission. Declaration on Territorial Sea of P.R. China, *State Council Gazette*, Issue No. 27, Serial No. 154, (Sept 27, 1958): 575. (in Chinese).

22 Cheng, T. "Communist China and the Law of the Sea." *American Journal of International Law* 63 (1969): 47.

23 Gao, Zhiguo. "China and the LOS Convention." *Marine Policy* 15 (1991): 199.

24 *Ibid.*, at 204.

jurisdiction.<sup>25</sup> The Chinese government had not anticipated the later growth of a booming Chinese shipping industry and that China might become a major shipping power in the years that followed. Moreover, at the beginning of the UNCLOS III, China was Mao's China and the notorious Cultural Revolution (1966–1976) was on-going. Diplomacy at the time was aimed at attacking the hegemony of the two superpowers – the Soviet Union and the USA. This policy guided the Chinese delegation at UNCLOS III. It was only after 1978 that the situation in China gradually improved and the diplomacy was carried out in a more pragmatic manner.<sup>26</sup>

In general terms, China is supportive of the UNCLOS. China signed the UNCLOS on 10 December 1982. The Marine Environment Protection Law of P.R. China (1982 MEPL) and the Regulation on the Prevention of Vessel-Source Pollution (1983 Regulation) were adopted in the early 1980s, after the formulation of the UNCLOS. In 1996, China ratified the UNCLOS. The MEPL was subsequently amended to harmonize Chinese law with the entry into force of the UNCLOS. China is however not completely satisfied with all the provisions of the UNCLOS, especially those provisions regarding the definition of the continental shelf and the principle of the delimitation of the EEZ and continental shelf between opposite and adjacent States.<sup>27</sup>

The negotiation of Art. 234 was concluded primarily by three northern states, Canada, the United States and the Soviet Union.<sup>28</sup> There are different views regarding conditions for the application of Art. 234, such as what is the meaning of the word 'where' (where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation), is it spatial or temporal?<sup>29</sup> China's position on Art. 234 of the UNCLOS during the negotiations of the Convention remains unclear.

## B *China and the IMO*

China adopted its open door policy in 1978. This was followed by 30 years of rapid development, which led to exponential growth in the shipping industry.

25 Zou, Keyuan. "Implementing Marine Environmental Protection Law in China: Progress, Problems and Prospects." *Marine Policy* 23 (1999): 209.

26 Ibid., at 210.

27 Zou, Keyuan. "China's Exclusive Economic Zone and Continental Shelf: Developments, Problems, and Prospects." *Marine Policy* 25 (2001): 72.

28 Nandan, Satya, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 A Commentary*. Dordrecht: Martinus Nijhoff, 1991, 393.

29 Bartenstein, Kristin. "The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" *Ocean Development and International Law* 42 (2011): 28–30.

This industry plays a vital role for the Chinese economy. For example, China Ocean Shipping (Group) Company (COSCO), China's largest shipping company, owns and controls over 800 modern merchant and 56 million dead weight tonnage (dwt). COSCO's shipping lines cover over 1,600 ports in more than 160 countries and regions worldwide. Its fleet size is the largest in China and the second largest in the world. COSCO has the largest dry bulk fleet in the world. Its container fleet size is ranked fifth in the world. COSCO has Asia's No.1 'semi-submersible ships', heavy lift ships for loading of super large and heavy cargos, 300,000-ton Very Large Crude Carrier (VLCC), and professional automobile ships.<sup>30</sup>

China has also emerged as the world's largest shipbuilder, and expanded its dry bulk shipbuilding capacity by a factor of six between 2008 and 2010.<sup>31</sup> Furthermore, China is now one of the world's biggest suppliers of seafarers.<sup>32</sup>

China has been a member of the Council of the IMO since 1976 and was elected as a category (a) member in 1989. This category includes the 10 countries with the largest interest in providing international shipping services. It is fair to say that shipping interests play a very important role for China's action within the IMO.

There is a Maritime Section affiliated with the Chinese embassy to the UK. This is the only case in China's foreign affairs system. Three to four diplomats are working in the Maritime Section of the embassy, and act concurrently as Chinese permanent representatives to the IMO. These diplomats play a facilitating role. Their responsibilities include attending IMO meetings and reporting to the Chinese government. Chinese delegations to most of IMO meetings are sent from Beijing. The delegations consist of staff from the maritime sector, such as the Ministry of Transport, the Maritime Safety Administration (MSA), State-owned shipping companies, e.g., COSCO, the China Classification Society (CCS) and Dalian Maritime University. In negotiations such as those that concern the reduction of emissions from shipping, there are also diplomats from the Ministry of Foreign Affairs. These diplomats coordinate the delegation to

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30 Fleet of COSCO, [www.cosco.com/en/fleet/index.jsp?leftnav=/1/3](http://www.cosco.com/en/fleet/index.jsp?leftnav=/1/3).

31 United Nations Conference on Trade and Development Review of Maritime Transport 2011, UNCTAD/RMT/2011; see also, Ministry of Transport & Legislative Affairs Office of State Council, P. R. China, *supra* note 5, at 146–147.

32 Seafarer supply covers two different employment groups: officers and ratings. China ranks first in the world with 90.295 ratings and a share of 12.1 per cent. For supplying officers, China comes second in the world with 51.511 officers, see UNCTAD Review of Maritime Transport 2011, *supra* note 31; see also, Ministry of Transport & Legislative Affairs Office of State Council, P. R. China, *supra* note 5, at 158–159.



ensure negotiations in the IMO are in line with China's policy in the climate change negotiations.

Within the IMO, China still behaves like a developing country. It seems that China has been working hard to catch up with the development of IMO conventions instead of actively taking initiatives. Chinese delegates attend most IMO meetings, but are normally quiet and not that active. China submitted a total of 88 proposals to different Committees and Sub-Committees of the IMO from 2000 to 2009. It ranks only 9th among 10 category (a) countries of the Council of the IMO in terms of the number of proposals submitted. In the same period, Japan submitted 640 proposals, the UK submitted 627, the US submitted 567 and Norway submitted 450.<sup>33</sup> China has however become more active in recent years. In 2001, China only submitted 3 proposals to the IMO. In contrast it made 22 proposals in 2008.<sup>34</sup>

China is generally supportive of conventions that were adopted under the auspices of the IMO. In 1983, China ratified MARPOL and its Annex I and II. Many of the provisions and standards from MARPOL were incorporated into China's 1982 MEPL and the 1983 Regulation. China has also ratified: MARPOL Annex III (in 1994), Annex IV and VI (in 2006), Annex V (in 1988); and SOLAS (in 1994). Most recently, China ratified the Anti-Fouling Convention in 2011. This entered into force for China from 17 June 2011.<sup>35</sup> The Chinese government accepted the voluntary audit of IMO in 2009. The IMO not only audited China's implementation capacity, but also tested China's capacity of maritime management, services and effectiveness. The Chinese government believes that the IMO Audit Scheme is good for China to make further improvements on maritime administration.

China is not yet a party to the BWM Convention. China does however actively participate in the Globallast program as one of six pilot countries (with Iran, India, Ukraine, South Africa and Brazil). The program is co-organized by the IMO, the Global Environment Facility (GEF) and the United Nations Development Program (UNDP). This program assists less-industrialized countries to prepare for the implementation of the BWM Convention.<sup>36</sup>

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33 Sun, Dabin. (Chinese representative to the IMO, Maritime Section of Chinese Embassy in the UK), "Statistics and Analysis about Proposals submitted by IMO Category A Council Members." *China Maritime Safety* 8 (2010): 69. (in Chinese)

34 Ibid., at 70.

35 Announcement of the Ministry of Transport & Legislative Affairs Office of State Council, P. R. China, No. 22, *The Entry into Force of the IMO Anti-Fouling Convention in P. R. China*, April 22, 2011 (in Chinese).

36 The Globallast Program. [globallast.imo.org/index.asp?page=gef\\_interw\\_project.htm&menu=true](http://globallast.imo.org/index.asp?page=gef_interw_project.htm&menu=true) (accessed 1 February 2014).

In addition, the MSA has been a member of the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU) since 1994.

However, as discussed above, China is behaving like a developing country within the IMO and traditionally not pro-active in the development of IMO conventions. China normally ratifies IMO conventions after their entry into force. These IMO conventions are then implemented domestically through national legislation. Chinese action can be seen as a reaction to the development of international law. China's capacity to influence IMO negotiations is still developing. Economic concerns also contribute to the issue. For example, in 2008 when the Anti-Fouling Convention entered into force, the Chinese painting industry just started the DDT project to replace TBT. It took 3 years for the DDT painting products made by Chinese companies to be ready for the market. This is one reason why China only adopted the Anti-Fouling Convention in 2011.

Moreover, China only recognizes IMO conventions and subsequent amendments that China has ratified. Therefore, non-binding IMO resolutions and guidelines in general are not applicable in China.

As mentioned above, the IMO has been discussing the adoption of a mandatory Polar Code since 1991. The progress is quite slow. The target completion date for the IMO was originally 2012. It was, however, postponed to 2014. The delay is mainly due to two issues that are in lack of an agreement. The first issue is ice-strengthening standards and requirements for Polar class ships. There are different sets of ice strengthening standards (e.g. Finnish/Swedish and Russian ice classes) that would need to be harmonized. There are also different views about under which ice conditions which ice-strengthening requirements are needed, in particular whether ships sailing in areas with less than 10% (young) ice need ice-strengthening. The second issue is about additional environmental protection requirements for shipping activities in the Polar Regions.<sup>37</sup> There is strong pressure from the environmental NGOs to apply maximum level of environmental protection to Arctic shipping activities.<sup>38</sup> Since shipping interests play a very important role for China's action within the IMO, it is not surprising that China is strongly opposed to the proposal of applying additional environmental protection requirements for Arctic shipping.

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37 Interview with EU/EMSA representative to the IMO, 28 March 2013.

38 See comments and response to IMO Polar Hazard Identification Workshop draft output by Clean Shipping Coalition, Friends of the Earth International, International Fund for Animal Welfare, in: Polar Code Hazard Identification Workshop Report, 29–36, 24 November 2011, DE 56/INF.3, Annex 3, IMO.

### C *China and the Arctic Council*

The Arctic Council is not intended to be an international organization.<sup>39</sup> It is, however, an important forum for discussion and cooperation among the eight Arctic States (United States, Canada, Russia, Norway, Sweden, Denmark, Finland and Iceland) and non-Arctic states. As a non-Arctic state, China, together with Japan, South Korea, India, Singapore and Italy, were accepted as observers in the Kiruna Ministerial Meeting of the Arctic Council in May 2013. This is not permanent since observer status continues for as long as consensus exists among Ministers of Arctic states.<sup>40</sup> Nevertheless, once observer status has been granted, Observers shall be invited to meetings and other activities of the Arctic Council unless Senior Arctic Officials (SAOs) decide otherwise. In meetings of the Arctic Council's subsidiary bodies to which Observers have been invited to participate, Observers may, at the discretion of the Chair, make statements after Arctic States and Permanent Participants, present written statements, submit relevant documents and provide views on the issues under discussion. Observers may also submit written statements at Ministerial meetings.<sup>41</sup> Furthermore, Observers may propose projects through an Arctic State or a Permanent Participant.<sup>42</sup> The current observer status gives Observers an opportunity to follow the vast majority of the Council's work and enables participation in projects and activities undertaken by its subsidiary bodies. Nonetheless, Arctic states have left themselves notable discretion in determining the activity of Observers.<sup>43</sup>

On the one hand, the observer status offers China an opportunity to further influence discussions and decision-making processes within the Arctic Council. By welcoming China, India, Italy, Japan, the Republic of Korea and Singapore as new Observer States in the Eighth Ministerial Meeting,<sup>44</sup> it is

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39 Molenaar, Erik Jaap. "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea." *International Journal of Marine and Coastal Law* 27 (2012): 569.

40 Arctic Council Rules of Procedure as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, September 17–18, 1998, Part V: Other Matters.

41 Ibid.

42 Ibid.

43 Graczyk, Piotr, and Timo Koivurova. "A New Era in the Arctic Council's External Relations? Broader Consequences of the Nuuk Observer Rules for Arctic Governance." *Polar Record* 50(3) (June 2014): 225–236.

44 Arctic Council Secretariat, *Kiruna Declaration*, Kiruna, Sweden, (May 15, 2013), 6.

anticipated that the Arctic Council will play a more important role in the future Arctic governance. The Arctic Council could possibly act as a catalyst for governance actions and/or take initiatives for the development of international and regional legal regimes on Arctic shipping.<sup>45</sup> On the other hand, China's accession to the Council affirms that China has decided to embrace rather than fundamentally challenge the current regime in the Arctic. In the determination by the Arctic Council of the general suitability of an applicant for observer status the Arctic Council will, inter alia, take into account the extent to which observers: 1) recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic; 2) recognize that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean.<sup>46</sup>

### 3 Prospects

China is facing the dilemma that energy from Africa and the Persian Gulf is passing through waters dominated by strategic competitors (the USA and India) threatened by piracy, or bottle-necked at the Strait of Malacca. Diversification of sea routes for communication, energy and trade is therefore of interest to China.<sup>47</sup> China, as a non-Arctic state, has extensive rights and responsibilities in the marine Arctic under the UNCLOS. For example, high-seas freedom for Chinese vessels is in theory (after melting of sea ice) applicable to a part of the Arctic, which could only be limited by the general rules of international law, treaties to which flag states are parties and the obligation of due regard for the interests of other users of the high seas.<sup>48</sup> Meanwhile, China is also required to act as a responsible flag state to protect the Arctic marine environment.

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45 Liu, Nengye. "The European Union's Potential Contribution to Enhanced Governance of Arctic Shipping." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73 (2013): 716.

46 Arctic Council Rules of Procedure, *supra* note 40, Annex 2, Criteria for admitting observers.

47 Xing, Li, and Rasmus Gjedso Bertelsen. "The Drivers of Chinese Arctic Interests: Political Stability and Energy and Transportation Security." *Arctic Yearbook* 2 (2013): 9.

48 Gayazova, Olya. "China's Rights in the Marine Arctic." *International Journal of Marine and Coastal Law* 28(1) (2013): 64.

### A *China as a Flag State*

In the author's opinion, a mandatory Polar Code adopted by the IMO is of interest for China in the coming era of Arctic shipping. Shipping is an activity with intensive communications between different states and individuals and is regulated by international conventions. Although China has no intention to challenge sovereignty or sovereign rights of Arctic coastal states,<sup>49</sup> it will however be a significant challenge for Chinese vessels to face unilateral construction, design, equipment and manning (CDEM) standards of coastal states (particularly Russia and Canada) when Arctic shipping becomes commercially viable in the future.

Globally, China is a responsible flag state. In 2010, the detention rate of Chinese flagged ships in the Asia-Pacific region was only 1.18%.<sup>50</sup> Chinese flags are on the white lists published by the secretariat of the Tokyo MOU and Paris MOU.<sup>51</sup> However, one concern for the effective flag state control is that 57.2% of Chinese owned vessels operate under foreign flags, such as Hong Kong and Panama.<sup>52</sup> One example is Hebei Ocean Shipping Group (HOSCO), which is the fourth largest shipping company in China. It manages 30 seagoing vessels. Only one vessel flies the Chinese flag. The remainder is under the Hong Kong flag.<sup>53</sup> The 'Hebei Spirit', responsible for the most serious marine pollution accident in the history of South Korea in 2007, was also managed by the HOSCO and registered in Hong Kong.

It is a strange phenomenon for a developing country like China to have such a large number of vessels sailing under foreign flags. As the Chinese government does not accept the flag of the Republic of China (Taiwan),<sup>54</sup> Chinese vessels sailing across the Taiwan Strait used to be encouraged to fly flags of convenience rather than the Chinese flag.<sup>55</sup> The reason for this stems from the concern that Taiwan may correspondingly refuse to recognize the Chinese flag. Nevertheless, the main reason for Chinese vessels using foreign flags is

49 The first Chinese cargo ship "Yong Sheng" submitted an application to Russia's Northern Sea Route Administration and got an approval before its first trans-Arctic voyage.

50 The Tokyo MOU on Port State Control in the Asia-Pacific Region, *Annual Report*, (2010): 24.

51 *Ibid.*, at 32; The Paris MOU on Port State Control, *Annual Report*, (2010): 33.

52 *See*, UNCTAD Review of Maritime Transport 2011, *supra* note 31.

53 Head of Ship Management Department of HOSCO), interview with author, 3 Nov 2011.

54 China considers Taiwan as a province under China's jurisdiction. Therefore, anything that relates to the sovereignty of Taiwan is not acceptable to the Chinese government.

55 Ministry of Transport & Legislative Affairs Office of State Council, P. R. China. *Circular for the Implementation of Rules on Navigation across the Taiwan Strait*, No. 941, 1996, (in Chinese).

tax avoidance. Currently, a vessel built abroad would be treated as a commodity imported into the Chinese market if it were to be registered in China. The ship-owner would therefore have to pay customs and Value Added Tax (VAT) at 27.53% of the vessel's value. This is a heavy burden for ship-owners. In contrast, ship-owners can claim tax refunds from the Chinese Tax Department for vessels built in China but registered in a foreign country. This is due to the fact that the vessel has been exported to another country. Furthermore, a vessel under the Chinese flag will be subject to other forms of taxation, such as personal income tax, port construction tax and business tax. Other deterrents to flying the Chinese flag include: 1) vessels must be certified by the China Classification Society (CCS); 2) the captain of the vessel must be a Chinese citizen; and 3) if the vessel wants to hire foreign seafarers, the recruitment must be approved by China Maritime Safety Administration (MSA).<sup>56</sup> All these requirements greatly limit the freedom of ship-owners in a competitive shipping market.

The BWM Convention will enter into force 12 months after the ratification of 30 states representing at least 35 per cent gross tonnage of the world's merchant shipping.<sup>57</sup> As of 7 November 2013, 38 states have ratified the convention. The combined merchant fleets of countries that have ratified the BWM Convention constitute approximately 30.38 per cent of the gross tonnage of the world's merchant fleet.<sup>58</sup> China has not yet ratified the BWM Convention. If China ratifies the BWM Convention (8.91+30.38=39.29 per cent), it will immediately meet the criteria (35 per cent) for entry into force. This is an opportunity for China to show its willingness to protect global marine environment. At the same time, China will help fill a regulatory gap in the governance of Arctic shipping.

## B *China as a Port State*

In the future, major ports in northern China, such as Dalian, Tianjin, Qingdao or even Shanghai may become important for trans-Arctic shipping. Therefore, port state jurisdiction could be a tool for China to regulate Arctic shipping. The 2010 Annual Report of the Tokyo MOU indicates that the inspection rate of port state control carried out by Chinese maritime authorities is 33 per cent,

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56 Art. 7, Regulation on Ship Registry of P. R. China, Decree of the State Council of the P. R. China (No. 155), *State Council Gazette* 14(763) (July 14, 1994): 549–559. (in Chinese)

57 International Convention on Ballast Water Management for Ships, *supra* note 14, Art. 18 (1).

58 International Maritime Organization, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions, as at 7 Nov 2013.

with a detention rate of 10.26 per cent.<sup>59</sup> China's rate of detention is almost two times higher than the regional average.<sup>60</sup> On the one hand, detention rates show the capacity of the maritime authorities to rectify defects of vessels. For example, in 2008 the detention rate of Tianjin MSA was the highest among all Asian Pacific ports under the Tokyo MOU. This was considered effective port state control by the MSA Headquarters.<sup>61</sup> On the other hand, competition for achieving high detention rates might cause extra economic burdens for the shipping industry if vessels are detained indiscriminately by MSA.<sup>62</sup>

Russia is also a member of the Tokyo MOU. A further question arises as to the possibility for China to use the Tokyo MOU to not only exchange Arctic shipping information with Russia, but also ensure uniform port state control practice in the Asia-Pacific region.

#### 4 Conclusions

China's interest in Arctic shipping is obvious. China has not however actively engaged with the governance of Arctic shipping. China's position on the interpretation of Art. 234 of the UNCLOS is not clear. The proposal to add an environmental chapter in the Polar Code is opposed by China. Despite this China succeeded in its application for observer status in the Arctic Council. This might be a sign that China will be more active in influencing decision-making processes within the Arctic Council.

It is suggested that China should promote the adoption of a mandatory Polar Code within the IMO. This will help Chinese vessels avoid unilateral CDEM standards imposed by coastal states in the future. Moreover, as a shipping power, China's ratification of the BWM Convention will directly contribute to the entry into force of the BWM Convention and fill a regulatory gap in the Arctic regime. Furthermore, port state control could be a tool for China to regulate trans-Arctic shipping in the era of commercial Arctic shipping.

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59 The Tokyo MOU 2010 Annual Report, *supra* note 50, at 24.

60 *Ibid.*, at 22.

61 Chi, Zhou, Huang Shuxing, Liu Pei, and Zhao Haijun "Highlights of Port State Control Practice in China." *China Maritime Safety*, 6 (2011): 20 (in Chinese).

62 There were examples mentioned by people from the HOSCO during the Interview.