CHAPTER 11

The Modern Case Law on the Powers and Responsibilities of Flag States: Navigating Canada’s Arctic Waters

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Abstract

This chapter has two principal goals. First, it assesses the powers and responsibilities of flag States in light of the current jurisprudence, and, second it considers the implications of this case law for flag State powers and responsibilities within an Arctic context, especially in light of the adoption of the Polar Code. The recent case law confirms the plenary and exclusive nature of flag State jurisdiction but it also emphasizes the due diligence obligation of flag States to enforce relevant laws and standards with respect to such matters as the safety of navigation, protection of the environment, or fisheries. These standards include the so-called rules of reference or gaïrs (generally accepted international rules and standards) including the Polar Code.

Keywords


1 Introduction

This chapter has two principal goals. First, it assesses the powers and responsibilities of flag States in light of the growing jurisprudence of the International Tribunal for the Law of the Sea and arbitral tribunals established under Annex VII of the United Nations Convention on the Law of the Sea (LOSC) on the interpretation of the relevant provisions of that convention.1 Second, the chapter considers the implications of this case law for flag State powers and responsibilities within an Arctic context, especially in light of the adoption of the

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International Code for Ships Operating in Polar Waters (Polar Code) by the International Maritime Organization (IMO). This volume is largely concerned with Canada’s position as an Arctic coastal State, but it is also important to consider the rules pertaining to flag States insofar as such rules might impose limits on the powers of a coastal State to prescribe or enforce rules with respect to foreign vessels, while, at the same time, allowing a coastal State to seek the assistance of the flag State in ensuring that its ships observe the lawful rules of the coastal State with respect to navigation and protection of the marine environment.

Much of the literature on flag State jurisdiction emphasizes the plenary and exclusive nature of the flag State’s jurisdiction (or power) over vessels flying its flag. While many of the recent decisions canvassed here confirm this interpretation (for example, M/V ‘Norstar’ and Arctic Sunrise), other decisions emphasize the due diligence responsibilities of the flag State to enforce relevant laws with respect to such matters as the safety of navigation, protection of the environment, or fisheries. These decisions include the International Tribunal for the Law of the Sea (ITLOS) Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion) and the South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China). The laws at issue include both the laws of a coastal State that are opposable against foreign flagged vessels as well as the so-called rules of reference incorporated into the norm structure of the LOSC, either by a general renvoi or by reference to the rules adopted by a relevant international organization, most frequently in this context, the IMO. The Polar Code is one such rule of

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4 M/V ‘Norstar’ (Panama v. Italy), Judgment, 10 April 2019, ITLOS Reports 2018–2019, 10.

5 Arctic Sunrise Arbitration (Netherlands v. Russia), Award, 14 August 2015, Permanent Court of Arbitration (PCA), Case No. 2014-02.

6 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4 [SRFC Advisory Opinion].


reference, and it principally falls to flag States to adopt and enforce the terms of the Polar Code. Canada has chosen to implement the Polar Code (with some modifications) through adoption of the *Arctic Shipping Safety and Pollution Prevention Regulations* (ASSPPR). The Regulations apply not only to Canadian flagged vessels navigating in polar waters, but also to foreign vessels navigating in a Canadian Shipping Safety Control Zone. In sum, the Regulations rely on Canada’s position as both a flag State and coastal State.

Part I begins with a review of the basic rules with respect to flag State powers, the immunity of foreign flagged vessels, and freedom of navigation before turning to examine the responsibilities and duties of flag States, including those responsibilities arising from the duty of due regard and from any relevant rules of reference.

Part II considers the implications of these rules and the interpretive case law for implementation of the Polar Code and Canada’s ASSPPR.

2 Part I: Flag State Powers, Immunities and Responsibilities

2.1 *The Basic Rules with Respect to Flag State Powers, the Immunity of Foreign Flagged Vessels, and Freedom of Navigation*

It is up to each State to establish the terms and conditions on which it will grant nationality to a ship or different categories of ship. While there must be “a genuine link between the State and ship,” the existence of such a link is not a condition precedent to the grant of nationality; rather the requirement of a genuine link supports the need “to secure more effective implementation of the duties of the flag State.”

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11 *M/V Saiga* (No 2) (n 10), para 83; *M/V Virginia G*’ Case (*Panama* v. *Guinea-Bissau*), Judgment, 14 April 2014, *ITLOS Reports 2014*, 4, paras 111–113, esp para 113: In the view of the Tribunal, once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of “genuine link.” See Barnes (n 3), pp. 308–309.
Article 87 of the LOSC confirms that the high seas are open to all States and that all States may exercise, *inter alia*, the freedom of navigation and other “internationally lawful uses of the sea related to that freedom”\(^{12}\) such as the right to protest at sea.\(^{13}\) These freedoms extend to the exclusive economic zone (EEZ) by virtue of Article 58(1).\(^{14}\) The freedoms are subject to “the obligation of due regard in [their] exercise.”\(^{15}\) In its decision in *MV Norstar*, the ITLOS confirmed the link between the freedom of navigation articulated in Article 87 and the “exclusive jurisdiction” (better expressed as an immunity) of the flag State proclaimed by Article 92.\(^{16}\) Without such an immunity from the jurisdiction of other States “(f)reedom of navigation would be illusory.”\(^{17}\) The exclusive jurisdiction of the flag State for its ships on the high seas (and in the EEZs of coastal States by virtue of Article 58(2))\(^{18}\) is paramount except as “expressly provided for in international treaties or in this Convention,”\(^{19}\) and foreign flagged vessels need only comply with the laws and regulations of the coastal State to the extent that those laws are adopted by the coastal State in accordance with the provisions of the LOSC and other relevant rules of international law.\(^{20}\)

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\(^{12}\) *Arctic Sunrise* (n 5), para 226.

\(^{13}\) Id., para 227. But while these freedoms may be extensive, they evidently do not extend to engaging in those activities over which a coastal State has exclusive decision-making and regulatory power (e.g., the construction, operation and use of artificial islands and installations, *LOSC* (n 1), Article 60). See also *South China Sea Arbitration* (n 7), paras 1031–1038.

\(^{14}\) *MV Norstar* (n 4), paras 214, 220; *Enrica Lexie* (n 10), para 464.

\(^{15}\) *MV Norstar* (n 4), para 214; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, 21 April 2022, International Court of Justice, para 161.


\(^{17}\) *MV Norstar* (n 4), para 216; see also *Enrica Lexie* (n 10), generally paras 463–505, 521–536.

\(^{18}\) *Enrica Lexie* (n 10), para 533; *Arctic Sunrise (Merits)* (n 5), para 231.

\(^{19}\) *LOSC* (n 1), Article 92(1).

\(^{20}\) Id., *LOSC* (n 1), Article 58(3); *M/V Saiga* (No 2) (n 10), paras 131–136. In that case, the coastal State (Guinea) breached the LOSC when it purported to apply and enforce its customs laws against the M/V Saiga within its EEZ.
The immunity associated with the freedom of navigation will self-evidently be violated by “any physical or material interference” with navigation. The freedom may also be violated by “any act which subjects activities of a foreign ship on the high seas [or a coastal State’s EEZ] to the jurisdiction of States other than the flag State.” This includes not only “the exercise of [another State’s] enforcement jurisdiction on the high seas ... but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.” In the case of the MV Norstar this latter meant that the application by Italy of its criminal and customs law to the MV Norstar’s bunkering activities on the high seas constituted a breach of Panama’s freedom of navigation.

The Annex VII tribunal in Enrica Lexie elaborated on the test for determining whether or not the immunity associated with the freedom of navigation had been violated. It observed that under international law “the exercise of jurisdiction by a State entails an element of prescribing laws, rules or regulations over conduct, or applying or enforcing such laws, rules or regulations over persons or property” and “additionally ... the exercise of jurisdiction over a foreign ship on the high seas, unless justified by the Convention or other international treaties, is generally agreed to constitute a breach of freedom of navigation.”

But on the facts of that incident the tribunal concluded that Italy had not discharged the burden on it of establishing that “the Indian Coast Guard,
‘interdicting’ and ‘escorting’ the Enrica Lexie, exercised enforcement jurisdiction.”

Indeed, the evidence showed that the captain of the Enrica Lexie voluntarily agreed to the suggestion of the Indian authorities that they proceed to port to clear up what had happened in the incident between the Enrica Lexie and the St Antony. On the other hand, it was equally clear to the tribunal that the actions of the marines on board the Enrica Lexie prevented the St Antony (the Indian fishing vessel involved in the incident) from navigating its intended course amounted to a breach of both the freedom of navigation under Article 87(1)(a), and also a breach of the more specific right of navigation articulated in Article 90.

The Arctic Sunrise award also offers an example of coastal State interference with the exercise of the freedom of navigation within the EEZ. While the Annex VII tribunal was at pains to examine all possible legal bases that might have been available to Russia to justify the measures that it took within its EEZ in boarding, investigating, inspecting, arresting, seizing and detaining the Arctic Sunrise without the consent of the Netherlands as the flag State, the tribunal concluded that none of these possible grounds were available to Russia. Accordingly, the Russian Federation was in breach of Articles 56(2), 58(1), 58(2), 87(1)(a) and 92(1) of the LOSC.

There is no freedom of navigation in either a coastal State’s territorial sea or within its internal waters, although there is a right of innocent passage through the territorial sea of a coastal State as well as those internal waters that are enclosed as internal waters as the result of a coastal State establishing drawing straight baselines.

Indian coastguard vessels subsequently accompanied the Enrica Lexie to an anchorage in Indian territorial waters where the vessel was boarded.

Id., para 535.

Id., para 480.

Id., paras 1037, 1041–1043. Article 87 of the LOSC references freedom of navigation among several other freedoms. Article 90 simply provides in its entirety that “[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”

These possible grounds included: right of visit on suspicion of piracy (Article 110); violation of coastal State laws pertaining to installations; terrorist offences; the right of a coastal State to enforce laws pertaining to non-renewable resources; enforcement jurisdiction pertaining to protection of the marine environment; and dangerous manoeuvering.

Arctic Sunrise (n 5), para 401C and also referencing the proceedings (arrest, detention and judicial proceedings) taken against the captain and crew of the Arctic Sunrise.

LOSC (n 1), Article 17.

Id., Article 8(2). It is important to note that while Canada drew straight baselines around the Arctic Archipelago in 1985, it takes the position that these baselines simply served to define “the outer limits of Canada’s historic internal waters.” Parliament of Canada, House of Commons Debates, 33rd Parliament, First Session, Vol 5, 10 September 1985 at 6463.
the same degree of immunity from the jurisdiction of the coastal State within the coastal State’s territorial sea or inland waters. In that case it was clear that at some point India did exercise jurisdiction over the *Enrica Lexie* and its crew, but the tribunal found that this did not happen while the *Enrica Lexie* was within India’s EEZ. Thus, there was no interference by India with the freedom of navigation of Italy/*Enrica Lexie*.

Finally, the freedom of navigation on the high seas or within a coastal State’s EEZ does not afford a foreign flagged vessel a right to leave the port of a coastal State (which it voluntarily entered) to “gain access to the high seas notwithstanding its detention in the context of legal proceedings against it.”

### 2.2 The Responsibilities/Duties of the Flag State

In addition to the above decisions emphasizing freedom of navigation and immunity from the jurisdiction of other States, several decisions and advisory opinions emphasize the responsibilities of the flag State with respect to the provisions of the LOSC dealing with the exploitation of marine living resources and the protection of the marine environment. Some of these decisions also explore the implications of the duty of due regard as applied to the responsibilities of the flag State (explored in more detail in the next section). These decisions dealing with the duties of the flag State are of particular interest to coastal States insofar as a coastal State may be able to use them to engage the flag State in more effective enforcement of valid coastal State rules dealing with marine living resources and environmental protection.

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per Joe Clarke, Minister for Foreign Affairs. Consequently, Canada takes the view that Article 8(2) is inapplicable insofar as this was not a case of “enclosing waters as internal waters areas which had not previously been considered as such.” For the straight baselines order see Territorial Sea Geographical Coordinates (Area 7) Order, sOR/85-872. For more detailed expositions of Canada’s position see Suzanne Lalonde, “Increased Traffic through Canadian Arctic Waters: Canada’s State of Readiness,” *Revue Juridique Thémis* 38 (2004): 49–124 and Bartenstein (n 9), pp. 346–347. See also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award on Preliminary Objections, 21 February 2020, *PCA*, Case No. 2017-06 [*Coastal State Rights*] noting that it goes too far to suggest that a dispute pertaining to internal waters could not concern the interpretation or application of the Convention (para 294). Rather, the question must be whether the particular conduct complained of raises questions as to the interpretation or application of the Convention (para 296).

*M/V ‘Louisa’ (St Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, 28 May 2013, *ITLOS Reports 2013*, 4, para 109. ITLOS ultimately concluded that it lacked jurisdiction since the applicant was unable to show the necessary nexus between the facts and any provision of the LOSC.
The first such case is the 2015 ITLOS *SRFC Advisory Opinion*. Three of the four questions put to the ITLOS dealt with the responsibilities of the flag State. Only the fourth question dealt with the responsibilities of the coastal State.

The first question addressed the obligations of the flag State if its flagged vessels are conducting illegal, unreported and unregulated (IUU) fishing activities within the EEZ of another State. The second question addressed the potential liability of the flag State for those activities. And the third question was largely concerned with the responsibility of an international organization, such as the European Union, and its Member States for potential IUU activities of vessels flagged to individual Member States.\(^35\) This chapter focuses on the first two questions since they raise more general issues of flag State responsibility.

With respect to the first question, ITLOS emphasized that while the coastal State may have the primary responsibility for taking the necessary measures to prevent, deter, and eliminate IUU fishing within its EEZ, this does not release other States (i.e., flag States) from their obligations.\(^36\) And, since the LOSC does not expressly address the issue of IUU fishing, the question must be examined “in light of general and specific obligations of flag States under the Convention for the conservation and management of marine living resources.”\(^37\) Under the heading of general obligations, the ITLOS listed Articles 91, 92 and 94 as well as Articles 192 and 193 of the LOSC.\(^38\) The tribunal’s comments on Article 94 are especially significant.

In general terms Article 94, headed ‘Duties of the flag State,’ requires the flag State to effectively exercise its jurisdiction and control over ships flying its flag in “administrative, technical and social matters.” The subsequent paragraphs of the article give more specific examples of what is required of a flag State in terms of assuming jurisdiction under its domestic law. But, in the view of the ITLOS, these examples are indicative of and not exhaustive of what might be embraced by the term “administrative, technical and social matters.”\(^39\) This

\(^{35}\) *SRFC Advisory Opinion* (n 6), para 2.
\(^{36}\) Id., paras 106, 108.
\(^{37}\) Id., para 110.
\(^{38}\) Id., para 111.
\(^{39}\) Id., para 117. See also Separate Opinion of Judge Paik, paras 8–10, observing that while Article 94 is perhaps principally concerned with safety at sea, the duties of the flag State are not confined to such matters. He went on to comment on the evolutive character of Article 94 as follows:

> Over time, however, flag State jurisdiction and control have evolved to cope with new issues, reflecting the changing needs of society and the new demands of the time. In interpreting article 94 of the Convention, it is important to take into account this evolving, open-ended context of the duties of the flag State.

Judge Paik returns to this theme at paras 24–27.
allowed the ITLOS to conclude that “as far as fishing activities are concerned, the flag State ... must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the conservation and management of marine living resources.” Furthermore, and drawing upon the language of Article 94(6), the ITLOS emphasized that should another State observe and report the absence of proper jurisdiction and control, the flag State would be obliged to investigate and, if appropriate, take any action necessary to remedy the situation, and inform the reporting State as to the action taken.

As for Articles 192 and 193, these provisions impose obligations on all States to protect and preserve the marine environment, including the conservation of marine living resources. And for ITLOS this imposes on the flag State “an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State” for its EEZ. However, as the International Court of Justice has observed in its decision on Alleged Violations of Sovereign Rights, the obligation to ensure compliance by its flag vessels does not afford a flag State the “jurisdiction to enforce conservation standards on fishing vessels of other States” in the EEZ.

The more specific provisions of Articles 58(3) (due regard) and 62(4) not only supported the conclusion of the ITLOS but also supported the duty of flag States “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.” And all of these obligations “to ensure” are due diligence obligations of conduct on the part

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40 SRFC Advisory Opinion (n 6), para 119.
41 Id., paras 116, 118, 119.
42 Id., para 120.
43 Id. The ITLOS explains this in terms of its previous observation (para 120) to the effect that such coastal State laws “constitute an integral element in the protection and preservation of the marine environment.” In this somewhat enigmatic passage (para 120) the ITLOS observes as follows:
One of the goals of the Convention, as stated in its preamble, is to establish “a legal order for the seas and oceans which...will promote” inter alia “the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”. Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone. (emphasis added)
44 Alleged Violations of Sovereign Rights (n 15), para 95.
45 SRFC Advisory Opinion (n 6), para 124.
of the flag State.\textsuperscript{46} As for the content of the due diligence obligation to effectively exercise jurisdiction and control over its flag vessels, the ITLOS observed that while

the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.\textsuperscript{47}

The flag State also has a duty to cooperate with respect to allegations of IUU fishing as it does with respect to the prevention of pollution.\textsuperscript{48}

The Annex VII tribunal in the South China Sea Arbitration endorsed these observations noting that insofar as Article 62(4) imposes the obligation to observe the laws and regulations of the coastal State,\textsuperscript{49} it must follow that “anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.”\textsuperscript{50}

The responses to the first question also informed the ITLOS’s response to the second question.\textsuperscript{51} The responsibility of the flag State would be engaged if it failed to take all necessary and appropriate measures to ensure that vessels flying its flag do not conduct IUU activities, whether as a repeated pattern of


\textsuperscript{47} SRFC Advisory Opinion (n 6), para 138.

\textsuperscript{48} Id., para 140 and referencing MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, para 82. See also South China Sea Arbitration (n 7), para 946, referencing both Article 197 (cooperation on a global or regional basis) and Article 123 (cooperation of States bordering enclosed or semi-enclosed seas).

\textsuperscript{49} South China Sea Arbitration (n 7), para 740.

\textsuperscript{50} Id., para 744.

\textsuperscript{51} ITLOS reframed the liability question as a question of State responsibility. SRFC Advisory Opinion (n 6), para 145.
behaviour or not.\textsuperscript{52} While in some cases it may be difficult to assess whether the flag State has done all that it can, especially with respect to covert activities of its flagged vessels,\textsuperscript{53} that was not the case on the facts of the \textit{South China Sea Arbitration}. For in that case the record showed close coordination between Chinese government vessels and Chinese flagged fishing vessels. Indeed, the evidence supported “an inference that China’s fishing vessels are not simply escorted and protected, but organized and coordinated by the Government.”\textsuperscript{54} Certainly, “the officers aboard the Chinese Government vessels in question were fully aware of the actions being taken by Chinese fishermen and were in a position to halt them had they chosen to do so.”\textsuperscript{55} This constituted a breach of the flag State’s obligation of due regard.\textsuperscript{56}

The \textit{South China Sea Arbitration} award also elaborated on the obligations of States under Part XII of the LOSC. As the arbitral tribunal noted, these obligations “apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it.”\textsuperscript{57} Furthermore it is clear that these provisions can be operationalized without the support of a due regard requirement.

Relying to a significant degree on the obligation under Article 194(5) to protect and preserve fragile ecosystems,\textsuperscript{58} the arbitral tribunal concluded that “where a State is aware that vessels flying its flag are engaged in the harvest of species recognized internationally as being threatened with extinction or are inflicting significant damage on rare or fragile ecosystems or the habitat of depleted, threatened, or endangered species, its obligations under the Convention include a duty to adopt rules and measures to prevent such acts and to maintain a level of vigilance in enforcing those rules and measures.”\textsuperscript{59} The tribunal considered that China was well aware of the activities of its nationals

\textsuperscript{52} Id., para 150. ITLOS confines itself to IUU activities within the EEZ of the SRFC Member States, but in principle these observations are applicable more generally. See also Judge Paik’s separate opinion characterizing many of these obligations as obligations of customary international law not just as obligations arising under the LOSC.

\textsuperscript{53} \textit{South China Sea Arbitration} (n 7), para 754.

\textsuperscript{54} Id., para 755.

\textsuperscript{55} Id.

\textsuperscript{56} Id., para 756.

\textsuperscript{57} Id., para 940. See also \textit{SRFC Advisory Opinion} (n 6), para 120, and, with respect to the internal waters of a State, \textit{Coastal State Rights} (n 33), para 295.

\textsuperscript{58} But also informed by the corpus of international environmental law including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973 (in force 1 July 1975), 993 \textit{UNTS} 243; see also \textit{South China Sea Arbitration} (n 7), para 956.

\textsuperscript{59} \textit{South China Sea Arbitration} (n 7), para 961.
in harvesting endangered species and inflicting damage on rare or fragile ecosystems and, as such, had breached its obligations as a flag State under Articles 192 and 194(5) of the LOSC.60 The same was also true of China’s construction activities on various reefs in the Spratly Islands, including dredging activities.61 And China was also in breach of its obligation under Article 206 to conduct an environmental impact assessment with respect to these activities, which were under its jurisdiction or control, insofar as they might cause substantial pollution or significant harm to the marine environment.62

2.3 The Duty of Due Regard (of the Flag State)

In exercising the freedom of navigation in the high seas, all flag States owe a duty of due regard for the “interests” of other States exercising their parallel freedoms, as well as any rights under the Convention with respect to activities in the Area.63 A similar rule applies within the EEZ of a coastal State.64 Presumably, this entails a due diligence obligation on the part of the flag State to ensure that its vessels observe this duty of due regard.

The majority and dissenting members of the Annex VII tribunal in Enrica Lexie reached very different conclusions as to the content of the due regard obligation of the flag State (Italy) as it pertained to the exercise of the freedom of navigation by the Enrica Lexie within what was, in that case, India’s EEZ. India took the position in its counterclaim that Italy had violated India’s sovereign rights within its EEZ insofar as the Enrica Lexie impeded the St Antony in the exercise of its right to fish.65 The majority rejected that characterization on the basis that the actions of the marines on board the Enrica Lexie “were not directed at undermining or interfering with India’s sovereign rights”66 but were instead directed at a perceived act of piracy.67 More specifically with respect to the obligation of due regard, the majority observed that Article 58 referentially applied to the EEZ all of the high seas provisions of the LOSC relating to the repression of piracy, with the result that the “repression of piracy by States in

60 Id., para 964.
61 Id., para 983.
62 Id., para 993.
63 LOSC (n 1), Article 87(2).
64 Id., Article 58(3).
65 Enrica Lexie (n 10), para 947.
66 Id., para 953.
67 Id., paras 954, 955, referencing India’s obligation “to have due regard to the rights and duties of other States and the applicability of Article 110 of the Convention.” It is difficult to appreciate the relevance of the reference to Article 110 which deals with the right of visit of a warship.
the [EEZ] is not only sanctioned by the Convention," but is a “a duty incumbent on all States.” For the majority, it followed from this premise that the conduct of the Italian marines on board the Enrica Lexie simply could not have been a breach of the duty of due regard. It is difficult to support this reasoning since there is nothing in the text of Article 110 dealing with the duty to cooperate in the repression of piracy (Article 100) that allows a flag State to ignore its due regard obligations.

Both of these conclusions of the majority (no interference with India's sovereign rights—the right to fish of the St Antony—and no breach of the duty of due regard) triggered a vigorous joint dissent from Dr PS Rao and Judge Robinson. With respect to the majority’s first conclusion, the dissent observed that the intent of the marines should be irrelevant to the question of whether or not there was an interference with India's sovereign rights. And as to the second conclusion, the joint dissenters were of the opinion that Italy must also be in breach of its duty of due regard. Due regard required respect for India's sovereign rights to exploit the fishery resources of its EEZ, and in this case the marines had alternatives to opening fire on the St Antony killing two members of its crew. Rao and Robinson put it this way:

In the instant case, the right for which Italy must have due regard is India's sovereign rights to exploit the living resources (fisheries) in its exclusive economic zone. Italy has a corresponding obligation to respect that right. The conduct of the Marines in firing shots at the "St. Antony", resulting in the death of the two Indian fishermen was a breach of that obligation. This obligation exists notwithstanding that the Marines did not intend to harm India's enjoyment of its right to exploit the living resources in its exclusive economic zone. That is so because a State's international responsibility for wrongful conduct ... is engaged independently of whether it intended to cause harm.

... The nature of India's right is such that Italy is not relieved of its obligation to respect and have due regard for that right on the ground that the Marines perceived that there was a threat of a collision and pirate attack.

68 Id., para 979.
69 Id., paras 980, 981.
70 Enrica Lexie (n 10), Joint Dissenting Opinion, paras 7–9.
71 Id., paras 17–19.
One of the factors identified in the *Chagos Marine Protected Area Arbitration* award for determining the extent of the regard required by the Convention is the “availability of alternative approaches”. It was certainly open to the Marines to take some action other than firing at a miniscule vessel, leading to the death of the two Indian fishermen. ... This provides another basis for concluding that the obligation to have due regard to India’s rights was breached by Italy.\(^{72}\)

In this case the dissent seems more persuasive with respect to the content of the due regard obligation of the flag State in these particular factual circumstances.

### 2.4 Rules of Reference and Flag State Responsibilities

Rules of reference incorporating into the LOSC both general and specific norms of international law are found throughout the text of the Convention.\(^ {73}\) While such rules most commonly take the form of a reference to generally accepted international rules and standards (or GAIRS),\(^ {74}\) they may also take the form of a more general *renvoi* to “other rules of international law.”\(^ {75}\)

The *South China Sea Arbitration* is an important decision as to how rules of reference may inform and elaborate upon flag State obligations arising under different provisions of the LOSC. One of the Philippines’ submissions in this arbitration was that China had breached its obligations under Articles 21 and 94 of the Convention insofar as it operated its enforcement vessels in a manner inconsistent with the provisions of the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (*COLREGS*).\(^ {76}\) *COLREGS* entered into force in 1977 and at the time of the arbitration counted 156 contracting parties representing more than 98 per cent of world tonnage.\(^ {77}\)

Both China and Philippines were parties to *COLREGS* although the Philippines did not join until *after* the events complained of. Nevertheless, the tribunal concluded that the *COLREGS* was applicable as between the parties as a result of Article 94 of the LOSC. As discussed above, while paragraph 1 of

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\(^{72}\) Id.

\(^{73}\) See especially van Reenen (n 8).

\(^{74}\) E.g., *LOSCH* (n 1), Article 21(2). It is generally understood that a rule can be generally accepted (a contextual question of fact) even if such a rule could not be considered as a rule of customary law. See, e.g., Nguyen (n 8), pp. 423–424.

\(^{75}\) E.g., *LOSCH* (n 1), Article 2(3), as discussed in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paras 499–536.


\(^{77}\) *South China Sea Arbitration* (n 7), para 1081.
Article 94 creates the general obligation for a flag State to exercise effective jurisdiction and control over its vessels, this obligation is further particularized in the subsequent paragraphs. Specifically, paragraph 3 requires flag States to take such measures as are necessary to ensure safety at sea with regard to, *inter alia*, “(c) the use of signals, the maintenance of communications and the prevention of collisions.” Further to that, paragraph (5) requires flag States “to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance” in giving effect to, *inter alia*, the measures required by paragraph 3(c). Given the status of the COLREGS as a widely adopted multilateral convention concerning maritime safety, this language served to incorporate the COLREGS into the Convention such that a violation of the COLREGS “constitutes a violation of the Convention itself.”78 This important conclusion not only serves to particularize the substantive obligations of the flag State; it also confirms the jurisdiction of a Part XV tribunal with respect to the interpretation and application of the COLREGS.79 Armed with this premise, the tribunal was readily able to conclude that China had repeatedly violated the Rules of the COLREGS and that this was “not suggestive of occasional negligence in failing to adhere to the COLREGS, but rather point to a conscious disregard of what the regulations require.”80

2.5 Conclusion to Part I

This part of the chapter has examined how recent case law has elaborated on flag State powers and the immunity of foreign flagged vessels. It has also examined how the case law has elaborated on flag State responsibilities. These responsibilities include the due diligence obligations of the flag State to have its vessels observe the laws of the coastal State insofar as the applicability of those laws is provided for by the LOSC, as well as due regard obligations and other obligations referentially incorporated into the text of the LOSC by rules of reference. While only one of these decisions, the *Arctic Sunrise* award, is an Arctic case, all of the decisions canvassed here are relevant to the relationship between coastal States and flag States within Arctic waters.

78 Id., para 1083.
79 Thus, while the jurisdiction of a Part XV tribunal is prima facie limited to “a dispute concerning the interpretation or application of this Convention” (LOSC (n 1), Article 288(1)), the content of “this Convention” expands through the process of referential incorporation.
80 *South China Sea Arbitration* (n 7), para 1105. It is not entirely clear why the tribunal considers that it needed to rule out mere negligence. All of the instances referenced here involved Chinese State vessels and thus there was no need to assess whether China acted with due diligence to ensure that its non-State flagged vessels adhered to the COLREGS as a pre-condition for China’s State responsibility.
Part II of the Chapter considers the implications of these general rules and interpretive case law for the implementation of the Polar Code and Canada’s ASSPPR.

3 Part 2: Flag State Powers and Responsibilities and the Polar Code

As discussed elsewhere in this volume, the Polar Code entered into force in January 2017. The Code was developed to “supplement instruments in order to increase the safety of ships’ operation and mitigate the impact on the people and environment in the remote, vulnerable, and potentially harsh polar waters.” The Code takes the form of amendments to the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL). Part I of the Code

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81 See Bartenstein in this volume.
83 Polar Code (n 2), Preamble, para 1.
85 2 November 1973 (in force 2 October 1983), 1340 UNTS 184 (as amended); Amendments to MARPOL Annexes I, II, IV and V, IMO Resolution MEPC.265(68) (15 May 2015, effective 1 January 2017). Jensen (n 82), p. 63, describes the options, referring to the advantages offered by IMO’s tacit amendment procedures for obtaining speedy entry into force. Jensen (pp. 71–75) also suggests that the provisions of the Code incorporated in SOLAS and MARPOL will also have normative effect as generally accepted international rules and standards (GAIRS) for the purposes of relevant provisions of the LOSC.
prescribes a series of safety measures, and Part II of the Code deals with pollution prevention measures.

This part begins by examining the implications of the Polar Code for flag States and then turns to examine Canada’s implementing regulations.

3.1 Flag State Responsibilities

As Bartenstein has summarized, “(m)ost of the safety provisions relate to construction, design, manning and equipment.”86 These provisions, along with additional provisions related to voyage planning, represent the minimum standards to be applied by flag States.87 A flag State owes a due diligence obligation to ensure that these provisions are implemented as part of its domestic law, either through transformation in a dualist State (as noted in the introduction Canada adopted the ASSPPR for this purpose), or through direct application in a monist State (such as Russia).88 This duty follows from the provisions of Article 94 of the LOSC and the jurisprudence discussed above. Furthermore, since the provisions of the Polar Code have been adopted by the IMO, they must also represent “generally accepted international regulations, procedures and practices.” A flag State has a due diligence responsibility to ensure that its domestic measures “conform” to the requirements of the Polar Code.89 A flag State also has a due diligence obligation “to take any steps which may be necessary to secure” their observance.90

Much the same can be said for the mandatory pollution prevention provisions of the Polar Code dealing with the discharge of oil or oily mixtures, noxious liquid substances, sewage, and garbage and associated operational requirements (and, in the case of oil, structural requirements).91 These provisions must constitute GAIRS, and, as such, Article 211(2) of the LOSC requires flag States to adopt “laws and regulations for the prevention, reduction and control of pollution of the marine environment” from its flagged

86 Bartenstein (n 9), p. 337.
87 Id., 340.
88 See Bartenstein and Lalonde (n 9), pp. 146–150.
89 LOSC (n 1), Article 94(5). Bartenstein (n 9), p. 341, however, notes that this view may not be universally shared insofar as the Code’s “goal-based approach provides States with a wide discretion as to the requirements they prescribe” and as such “does not ensure the level of uniformity that makes GAIRS acceptable.” Bartenstein attributes this position to Tore Henriksen, “Protecting Polar Environments: Coherency in Regulating Arctic Shipping,” in Research Handbook on International Marine Environmental Law, ed., Rosemary Rayfuse (Cheltenham: Edward Elgar, 2015).
90 LOSC (n 1), Article 94(5); SRFC Advisory Opinion (n 6).
91 Polar Code (n 2), Part II-A, Pollution Prevention Measures.
vessels, with at least “the same effect” as those of GAIRS. This is a due diligence obligation, and, as above, must extend to the measures necessary to secure their observance.

3.2 Canada’s ASSPPR

As noted in the introduction, Canada has chosen to implement its responsibilities under the Polar Code through the adoption of the ASSPPR. Part 1 of the Regulations deals with safety measures and Part 2 deals with pollution prevention measures. Both purport to apply to “Canadian vessels navigating in polar waters and foreign vessels navigating in a shipping safety control zone.” The Shipping Safety Control Zones divide Canada’s Arctic waters as defined by the Arctic Waters Pollution Prevention Act (AWPPA) into “16 subareas in accordance with usually prevailing ice conditions.” Insofar as the Regulations are directed at Canadian vessels operating within polar waters at either pole, it matters not whether the Regulations go beyond the prescriptions of the Polar Code. But, to the extent that the Regulations aspire to apply to foreign flagged vessels operating within Canadian Arctic waters, it is important to interrogate the extent to which they go beyond the Code. To the extent that they go beyond the Code, they cannot be GAIRS and must be justified under some other authority of a coastal State under the LOSC.

Bartenstein concludes that three elements of the Regulations go beyond the safety requirements of the Code, while several aspects of the waste deposit rules in the Regulations are more stringent than those prescribed by the Code. The additional safety provisions prescribed by the Regulations relate to “navigation periods, mandatory message transmission, and the presence on

92 LOSC (n 1), Article 211(2).
93 Id., Article 94(5); South China Sea Arbitration (n 7), para 1082.
94 The regulations are adopted pursuant to the Canada Shipping Act, 2001, SC 2001, c 26 and the Arctic Waters Pollution Prevention Act, RSC 1985, c A-12 [AWPPA].
95 ASSPPR (n 9), ss 7, 13. Neither Part applies (s 3) to government vessels and vessels owned or operated by a foreign State when they are being used only in government non-commercial services.
96 AWPPA (n 94). “Arctic waters means the internal waters of Canada and the waters of the territorial sea of Canada and the exclusive economic zone of Canada, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the exclusive economic zone; however, where the international boundary between Canada and Greenland is less than 200 nautical miles from the baselines of the territorial sea of Canada, the international boundary shall be substituted for that outer limit.”
97 Bartenstein (n 9), p. 337.
98 Id., 344.
board of an ice-navigator.” The increased stringency of the waste deposit rules arises because of the zero-discharge regime of the AWPPA.

The Regulations purport to apply to all of Canada’s Arctic waters. These waters include not only the waters within the Arctic Archipelago that Canada regards as its historic internal waters, but also its 12 nautical mile territorial sea and its Arctic EEZ. The LOSC allows a coastal State to prescribe both vessel safety and pollution control rules for vessels exercising a right of innocent passage within its territorial sea, but such laws must not relate to “the design, construction, manning or equipment of foreign ships” unless they are giving effect to GAIRS. Furthermore, such laws may not “impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.” Similarly, within the EEZ, foreign flagged vessels may exercise freedom of navigation and a coastal State may only prescribe additional pollution prevention measures that might affect freedom of navigation with the approval of the IMO.

These restrictions on coastal State authority with respect to the territorial sea and the EEZ lead Bartenstein (writing about the additional safety provisions of the Regulations) to conclude that the navigation rules of the LOSC “do not provide a [legal] basis for the additional non-GAIRS provisions in the ASSPPR.” Bartenstein expresses similar reservations with respect to the additional pollution prevention provisions of the Regulations.

In each case these conclusions lead Bartenstein to explore whether the additional requirements of the Regulations can be justified on the basis of Article 234 of the LOSC. This well-known provision authorizes a coastal State to adopt and enforce

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99 Id., 339 and with a more detailed exposition at 340.
100 Id., 344.
101 See (n 31) re historic internal waters.
102 LOSC (n 1), Article 21(1)(a) and (f).
103 Id., Articles 24(1), 17, 211(4).
104 Id., Articles 58, 87.
105 Id., Articles 56(1)(b)(iii) and (2), 58(2), 211.
106 Bartenstein (n 9), p. 141.
107 Id., 145 noting that, for the territorial sea, the structural requirements for noxious liquid substances represent non-GAIRS construction, design, manning and equipment measures and, with respect to the EEZ, “[s]ince the additional ASSPPR provisions are not GAIRS, their compatibility with the EEZ regime is also not straightforward.”
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.

While there are some threshold questions as to the applicability of Article 234 (e.g., does it apply to the territorial sea as well as the EEZ), Bartenstein's main conclusion is that Canada can rely on Article 234 to justify both the additional safety and pollution prevention provisions of the Regulations. While Article 234 does not refer to safety-based rules, Bartenstein concludes that safety rules can be justified under Article 234 insofar as the Code itself acknowledges the relationship between the additional safety measures and protection of the environment. Article 234 does require “due regard” for navigation, but, in Bartenstein’s view, this must be read in light of the environmental purpose of the article, and thus, even construction, design, manning and equipment measures might be permissible “as long as they do not prevent international navigation.”

In summary, Canada, as a flag State, has a due diligence obligation to adopt and enforce the safety and pollution control provisions of the Polar Code with respect to its flag vessels. Canada may elect to adopt more stringent measures with respect to its flag vessels than those contained in the Code. In
its position as a coastal State, Canada may apply more stringent rules within its internal waters as a manifestation of its sovereignty over those waters. With respect to its territorial sea and EEZ, however, the general rule is that the coastal State may not hamper the right of innocent passage or freedom of navigation and is therefore usually only in a position to apply GAIRS rules. As a coastal State, Canada is entitled to insist that foreign flagged vessels comply with the provisions of the Polar Code and its domestic laws implementing the Code. However, to the extent that its domestic laws go beyond the GAIRS provisions of the Code, those incremental requirements would not be opposable against foreign flagged vessels unless they could be supported by some other provision of the LOSC. There is good reason to conclude that Canada can rely on Article 234 to support the incremental requirements that it has included in its ASSPPR.

Other flag States have a due diligence obligation to ensure that their vessels comply with the Polar Code as a reflection of GAIRS. They also have a due diligence obligation to have their vessels comply with the requirements of Canada’s ASSPPR when navigating in Canada’s internal waters. Finally, they have the same due diligence obligation with respect to any incremental requirements of the ASSPPR to the extent that those Regulations are consistent with the LOSC as outlined above, specifically including Article 234. To the extent that they are not consistent with the LOSC, including Article 234, foreign flagged vessels are entitled to immunity from those incremental provisions when navigating in Canada’s territorial sea or EEZ to the extent of that inconsistency.114

4 Conclusion

Part 1 of this chapter engaged with the recent case law dealing with the powers, immunities and responsibilities of flag States under the terms of the LOSC, including GAIRS, that is to say, the provisions of other instruments that are referentially incorporated within the LOSC’s normative framework. This case law has confirmed traditional interpretations of the freedom of navigation and associated immunities, but has also offered an expanded interpretation of those freedoms to include, for example, the right of protest on the high seas and within the EEZ of a coastal State. Perhaps more significant is the way in which the case law has expanded upon the obligations of flag States. While

114 M/V ‘Norstar’ (n 4).
the case law has declined to interpret the need for a genuine link between the flag State and a vessel as a precondition for asserting the entitlements of the LOSC, it has expanded upon the due diligence obligations of flag States with respect to the provisions of the LOSC, any relevant GAIRS, as well as the laws of the coastal State to the extent that they are properly opposable against foreign flagged vessels. These provisions include not only provisions concerned with safety and navigation, but also provisions designed to protect the environment.

Part 2 of this chapter addressed the implications of this case law for shipping and navigation in Canada’s Arctic, especially in light of the adoption of the Polar Code by the IMO and Canada’s implementing regulations. The Polar Code is concerned with both safety measures and pollution control measures. It is an example of a GAIRS and, as such (and as established by Part 1 of this chapter), a flag State has a due diligence obligation to adopt, apply and enforce these new rules with respect to any of its vessels navigating in the waters covered by the Code, including Canada's Arctic waters. Canada as a flag State has implemented the contents of the Code with the adoption of the ASSPPR, but it has also included incremental provisions that it applies not only to its flagged vessels but also to foreign flagged vessels—whether navigating within Canada’s internal waters or within its Arctic territorial seas and its Arctic EEZ. The case law surveyed in Part 1 suggests that a foreign flag State and its vessels ordinarily might have a good claim to immunity from the application of these incremental rules on the grounds that they go beyond GAIRS and interfere with the freedom of navigation. However, the literature suggests that such incremental rules might be opposable to foreign flagged vessels on the basis of Article 234. If that is the case, and to the extent to which that is the case, there is no immunity from the application of such rules, and a State of a registry of a foreign flagged vessel has a due diligence obligation to ensure that its vessels observe these incremental requirements.

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